

No. 24-764

IN THE

Supreme Court of the United States

HARRIS BRUMFIELD, TRUSTEE FOR ASCENT
TRUST,

Petitioner,

v.

IBG LLC, INTERACTIVE BROKERS LLC,

Respondents.

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

**REPLY BRIEF IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI**

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TABLE OF CONTENTS

	Page
ARGUMENT	1
I. THE COURT SHOULD GRANT REVIEW REGARDING TT'S RULE 60(b)(3) MOTION.....	1
A. The Circuits Are Split on Whether Rule 60(b)(3) Requires Diligence.....	1
B. The Text of Rule 60(b) Resolves the Circuit Split.....	3
C. This Court Has the Authority to Correct Manifest Errors in the Lower Courts' Opinions on Fraud	4
II. THE COURT SHOULD GRANT REVIEW ON 35 U.S.C. § 101	6
A. IBG Misses TT's Argument and Fails to Even Mention, Let Alone Address, <i>Schein</i>	6
B. This Case Is a Prime Vehicle Because It Highlights the Subjectivity of the <i>Alice/Mayo</i> Test.....	9
III. THE COURT SHOULD EXERCISE ITS SUPERVISORY POWER.....	10
A. The Federal Circuit Has So Far Departed from Rule 56 That Review Is Warranted.....	10

B. The Federal Circuit's Pattern of Ruling on Unaddressed Issues Must Be Corrected.....	11
CONCLUSION.....	12

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Alice Corp. Pty. v. CLS Bank Int’l</i> , 573 U.S. 208 (2014).....	7, 8, 9
<i>Bilski v. Kappos</i> , 561 U.S. 593 (2010).....	8
<i>Berry v. Dillon</i> , 291 F. App’x 792 (9th Cir. 2008)	1, 2
<i>Cap Exp., LLC v. Zinus, Inc.</i> , 996 F.3d 1332 (Fed. Cir. 2021).....	1
<i>City & Cnty. of San Francisco, Calif. v. Sheehan</i> , 575 U.S. 600 (2015)	4
<i>Diamond v. Diehr</i> , 450 U.S. 175 (1981).....	7
<i>Finjan, Inc. v. Juniper Networks, Inc.</i> , No. 17-cv-05659, 2019 WL 2238545 (N.D. Cal. May 22, 2019)	4
<i>Funk Bros. Seed Co. v. Kalo Inoculant Co.</i> , 333 U.S. 127 (1948).....	8
<i>Gottschalk v. Benson</i> , 409 U.S. 63 (1972).....	8

<i>Henry Schein, Inc. v. Archer & White Sales, Inc.</i> , 586 U.S. 63 (2019).....	6, 7, 8
<i>Hormel v. Helvering</i> , 312 U.S. 552 (1941).....	12
<i>IBG LLC v. Trading Techs. Int’l, Inc.</i> , 757 F. App’x 1004 (Fed. Cir. 2019).....	9
<i>Kamen v. Kemper Fin. Servs., Inc.</i> , 500 U.S. 90 (1991).....	12
<i>Singleton v. Wulff</i> , 428 U.S. 106 (1976).....	11
<i>Taylor v. Riojas</i> , 592 U.S. 7 (2020).....	4
<i>Tolan v. Cotton</i> , 572 U.S. 650 (2014).....	11
<i>Zygo Corp. v. Wyko Corp.</i> , 79 F.3d 1563 (Fed. Cir. 1996).....	10
Statutes	
35 U.S.C. § 101.....	6, 7, 8, 9, 10
35 U.S.C. § 102.....	7, 8
35 U.S.C. § 103.....	7, 8
Rules	
Fed. R. Civ. P. 56.....	10, 11

Fed. R. Civ. P. 60.....	3
Fed. R. Civ. P. 60(b)(2).....	3
Fed. R. Civ. P. 60(b)(3).....	1, 2, 3, 4

Other Authorities

C. Graham Gerst & Lily Parker, <i>Section 101 on Trial: Understanding How Eligibility Issues Have Fared Before Juries</i> , IP Watchdog (Jan. 31, 2022, 3:15 PM), https://www.ipwatchdog.com/2022/01/31/section-101-trial-understanding-eligibility-issues-fared-juries	10
Giles S. Rich, <i>Principles of Patentability</i> , 14 FED. CIR. B.J. 135 (2005).....	7
Matthew G. Sipe, <i>Patent Law 101: I Know It When I See It</i> , 37 HARV. J.L. & TECH. 447 (2024)	9
11 Mary Kay Kane, <i>Federal Practice and Procedure</i> § 2851 (3d ed. 2024)	3

ARGUMENT**I. THE COURT SHOULD GRANT REVIEW REGARDING TT'S RULE 60(b)(3) MOTION****A. The Circuits Are Split on Whether Rule 60(b)(3) Requires Diligence**

IBG's argument that there is no circuit split on whether Rule 60(b)(3) requires diligence in discovering fraud is undercut by the Federal Circuit's *Cap* case, which details the split. *Compare* Opp'n 12, with *Cap Exp., LLC v. Zinus, Inc.*, 996 F.3d 1332, 1339 & n.11 (Fed. Cir. 2021). In *Cap*, the court explained that the "Ninth Circuit has held that 'Federal Rule of Civil Procedure 60(b)(3) require[s] that fraud ... not be discoverable by due diligence before or during the proceedings.'" *Cap*, 996 F.3d at 1338-39 (alterations in original) (quoting *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004)). Far from dictum (Opp'n 14), or only involving "at most two circuits," (Opp'n 12), every circuit is implicated in the split, with most of the circuits not requiring diligence in accordance with TT's approach and the Rule's text. *Cap*, 996 F.3d at 1339 & n.11. The Ninth Circuit and the Federal Circuit (that purportedly applied Seventh Circuit law) graft on a diligence requirement. *Id.*; (Pet. App. 56a-57a ("TT had ample reason and opportunity before trial to uncover the now-asserted problems with IBG's evidence")); *Berry v. Dillon*, 291 F. App'x 792, 795 (9th Cir. 2008) (holding Rule 60(b)(3) is not available where the alleged "fraud" is discoverable by diligence before or during the proceedings).

As the circuit split clearly exists, IBG argues that it does not matter because at least one of the cases

arose in the context of the Federal Arbitration Act (FAA). (Opp'n 14.) This ignores that the Ninth and Federal Circuits, along with the lower courts, continue to graft on diligence to Rule 60(b)(3) cases—even in non-FAA cases. *Berry*, 291 F. App'x at 795.

This case is the perfect vehicle to resolve this circuit split because the lower courts denied TT's motion after improperly requiring diligence. (Pet. App. 69a-70a.) Yet IBG argues that the lower courts never ruled on the diligence question, contending that one would search “the opinions below in vain for any suggestion that Rule 60(b)(3) requires parties to exercise reasonable diligence in uncovering *fraud*.” (Opp'n 12.) But in the Rule 60(b)(3) analysis, the lower courts denied TT's Rule 60(b)(3) motion based on findings of TT's lack of diligence in uncovering the alleged fraud. (Pet. App. 68a-69a, 75a-76a.) Indeed, even IBG previously admitted that the denial of TT's motion was based on diligence: “[t]he district court did not abuse its discretion in ***denying TT's Rule 60(b) motion based on TT's own failures to inquire and investigate the facts and data***.” (Red Br. at 53 (emphasis added).) IBG's Federal Circuit brief heavily relied on the *Rutledge* case to support the propriety of the district court's grafting of diligence onto Rule 60(b)(3). *Id.* at 53-54 (quoting *Rutledge* for the proposition that “Rule 60(b) motions cannot be used to present evidence that with ***due diligence*** could have been introduced before judgment” (emphasis added)). The Federal Circuit relied on this same *Rutledge* quote in its decision to require diligence, causing the root of the opinion's error, and furthering the circuit split. (Pet. App. 57a.) Thus, a lack of

diligence was central to the holding, and not dicta as asserted by IBG.

B. The Text of Rule 60(b) Resolves the Circuit Split

IBG does not dispute that comparing the text of Rule 60(b)(3) with Rule 60(b)(2) resolves the split. (Pet. 22-23.) Rule 60(b)(2) requires a showing of “reasonable diligence” in obtaining relief, whereas Rule 60(b)(3) includes no such requirement. Fed. R. Civ. P. 60(b). As the drafters knew how to graft on a diligence requirement, this absence dictates that Rule 60(b)(3) has no such requirement. (Pet. 22 (citing *Cardoza-Fonseca*.)

Confronted with the plain language of Rule 60(b)(3) and the circuit split, IBG advocates a new argument never raised below—that Rule 60(b)’s language that a court may grant relief on “just terms”—permits a court to graft on a diligence requirement to Rule 60(b)(3). (Opp’n 17.) This new argument was never presented in either lower court and is forfeited.

Regardless, this argument is baseless. The “just terms” language in Rule 60 refers to the equitable discretion granted to courts to balance the finality of judgments with the need to do justice. *See* 11 Mary Kay Kane, *Federal Practice and Procedure* § 2851 (3d ed. 2024). This language does not permit courts to add requirements not set forth in the rules. Tellingly, IBG cites no caselaw that supports its construction.

C. This Court Has the Authority to Correct Manifest Errors in the Lower Courts' Opinions on Fraud

IBG's argument that if this Court decides to resolve the Rule 60(b)(3) circuit split, it cannot also address the merits of fraud also fails. (Opp'n 10-12, 33.) This Court has the authority to resolve the merits too. *Taylor v. Riojas*, 592 U.S. 7, 9-10 (2020) (deciding specific factual issues); *City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 620 (2015) (Scalia, J., dissenting in part) (“[W]e often also grant certiorari on attendant questions that are not independently ‘certworthy,’ but that are sufficiently connected to the ultimate disposition of the case that the efficient administration of justice supports their consideration.”).

IBG's citations to the district court's findings of no fraud are all intertwined with the finding that TT was not diligent. (See Opp'n 16); *Finjan, Inc. v. Juniper Networks, Inc.*, No. 17-cv-05659, 2019 WL 2238545, at *2 (N.D. Cal. May 22, 2019) (addressing both merits of fraud and diligence together because the issues “significantly overlap”).¹

This Court should address the merits of fraud because, under the correct interpretation of Rule 60(b)(3) (not requiring TT to “diligently” uncover IBG's misconduct), IBG's massive fraud is abundantly clear. (Pet. 6-9, 16-21.)

¹ Nor is there any support for the notion that TT sat on its rights. Prior to trial, TT believed IBG was not capturing all trades, and the court denied TT's motion for the raw data. (CAFC App. 135569-135572; CAFC App. 93237 n.2.)

One need look no further than Mr. Galik, IBG's CEO, and one of IBG's two corporate representatives in this case, to see glaring evidence of IBG's massive corporate fraud. (Pet. 6-9, 16-21.) IBG's damages model was based on multiplying an asserted reasonable royalty rate times the number of trades directly resulting from users clicking along BookTrader's static price axis to submit orders to the exchange. (Pet. 17; Pet. App. 5a-8a, 23a.) In accordance with this damages model, Mr. Galik testified in detail at trial that IBG tracked orders and trades in TWS by what tools submit the orders to the exchange. (CAFC App. 101354-101356 (citing CAFC App. 133373); CAFC App. 101373.) IBG selected Mr. Galik to testify about the stats reports due to his expertise, as Mr. Galik previously served as Senior VP of Software Development from 2003–2014, was responsible for TWS starting in 2000, and worked on it to this date ("The work never stopped."). (CAFC App. 101329.) But after trial, IBG was forced to admit that it is tracking orders and trades by what tools originate (i.e., start) the orders, and not any other way. (Pet. 17-18.) Mr. Galik and IBG had a responsibility in this regard, both in integrity and competence. Combining this with what is known about Accumulate/Distribute constitutes massive corporate fraud. (Pet. 6-9, 16-21.)

The district court, in determining no fraud and abusing its discretion, egregiously relied on Mr. Stetsenko's² testimony and a sentence from Mr. Brumfield's second declaration to conclude that since

² Mr. Stetsenko is the engineering manager responsible for customer facing applications at IBG and he reports directly to Mr. Galik. (CAFC App. 101692-101693).

BookTrader is in the first category of tools, for orders submitted through BookTrader, the originating tool and the submitting tool are necessarily the same:

- The district court ignored Accumulate/Distribute with respect to its findings regarding fraud, conflating issues and citing it to support a lack of diligence.
- The district court misread Mr. Brumfield’s sentence, took it out of context, and used it to support no fraud, all while ignoring TT’s explicitly different explanation of that sentence in TT’s reply brief. This explanation includes the statement, “[t]hese facts have been confirmed by Mr. Brumfield, as set forth in his declaration.” The court inexcusably found that Mr. Brumfield “acknowledges this fact in his declaration.”

(Pet. 6-9, 16-21; CAFC App. 36-37, 39-40, 103484-103485; Blue Br. 61-62.)

This Court should review.

II. THE COURT SHOULD GRANT REVIEW ON 35 U.S.C. § 101

A. IBG Misses TT’s Argument and Fails to Even Mention, Let Alone Address, *Schein*

The crux of TT’s Petition is that courts cannot add exceptions onto a statute’s plain text, such as § 101. IBG does not address this argument. TT cited *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 70 (2019), which states that courts cannot “engraft

[their] own exceptions onto the statutory text.” *Schein*, 586 U.S. at 70; (Pet. 32.) IBG also ignores *Schein*.

IBG’s failure to do so on both fronts is not surprising when one compares the text of the statute with the exceptions as defined in the *Alice/Mayo* test. This comparison shows how far afield the jurisprudence has deviated from the § 101 text.

For example, courts have now read into § 101 the subjective “inventive concept” requirement, which is nowhere in the § 101 text. It was intentionally removed by Congress in the 1952 Patent Act. *Compare* Opp’n 23, *with* Giles S. Rich, *Principles of Patentability*, 14 FED. CIR. B.J. 135, 145 (2005) (“Nowhere in the entire act is there any reference to a requirement of ‘invention’ and the drafters did this deliberately in an effort to free the law and lawyers from bondage to that old and meaningless term.”). IBG does not dispute that the “inventive concept” question is nowhere in the text of § 101. Nor does IBG dispute that reading this requirement into the statute conflicts with the legislative history.

As another example, courts now look to see if claims are “well-understood, routine, [or] conventional.” *Alice Corp. Pty. v. CLS Bank Int’l*, 573 U.S. 208, 225 (2014) (internal quotations omitted). However, § 101 says nothing about whether claims are “conventional” or “well-understood” at the time of the invention. These are questions regarding prior art reserved under § 103 for obviousness or § 102 for anticipation. *Diamond v. Diehr*, 450 U.S. 175, 190 (1981) (citing 1952 Act’s legislative history and finding “[t]he question . . . of whether a particular invention is novel

is wholly apart from whether the invention falls into a category of statutory subject matter.” (internal quotations omitted). Here, IBG argues that there is “nothing incongruous” between Section 101 and Sections 102-103. (Opp’n 23.) But they are incongruous—the text of § 101 says nothing about the prior art, as §§ 102-103 already address this.

This Court has never before considered whether it is proper to graft exceptions as defined by *Alice/Mayo* into § 101. IBG’s caselaw is all distinguishable on this issue. For instance, *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127 (1948) issued before the Patent Act of 1952 was even enacted and *Alice/Mayo* were decided. (Opp’n 23.) *Gottschalk v. Benson*, which relied on *Funk*, never evaluated this question. 409 U.S. 63, 67 (1972). And *Bilski* issued in 2010, years before *Alice/Mayo*. *Bilski v. Kappos*, 561 U.S. 593 (2010). Likewise, the AIA, passed in 2011, also predated the *Alice/Mayo* tests so cannot be viewed as ratifying the test.

Had this Court ever engaged in statutory construction (especially after *Alice/Mayo*), it would have realized that the judicial exceptions and limitations deviate significantly from the statute. Far from a “fact-bound argument,” (Opp’n 26), TT’s Petition is based on the legal proposition set forth in *Schein* that it is improper to engraft exceptions onto § 101’s text.

B. This Case Is a Prime Vehicle Because It Highlights the Subjectivity of the *Alice/Mayo* Test

This case is a perfect vehicle to review § 101 because it highlights the subjectivity and confusion surrounding the judicially created tests. Here, the Federal Circuit in 2019 found that TT's claims recited a technological improvement. *IBG LLC v. Trading Techs. Int'l, Inc. (IBG I)*, 757 F. App'x 1004, 1007 (Fed. Cir. 2019). However, a different panel found that the same claims are not a technological improvement and instead, an abstract idea. (Pet. App. 27a.)

Confronted with this, IBG falsely and repeatedly claims that *IBG I* involved different patents. (Opp'n 4 (IBG representing that the patents in *IBG I* involved "different (though related) patents"); Opp'n 27 (IBG stating that courts are not bound by decisions "involving 'different claims'").) Both *IBG I* and the present case involved the same patent claims. The only difference was the panel of judges in each case. *IBG I*, 757 F. App'x at 1006; (Pet. App. 2a.)

This case highlights that § 101 reform is urgently needed. As this case shows, one has a better chance of predicting the outcome of the case by knowing the panel of judges versus the facts. Matthew G. Sipe, *Patent Law 101: I Know It When I See It*, 37 HARV. J.L. & TECH. 447 (2024) ("[D]ata indicates that which judges are assigned to a panel bears an especially strong relationship to whether the subject matter will be found eligible [P]anels with a majority of § 101-strict judges are roughly twice as likely to find a given patent ineligible compared to panels with a majority of § 101-lenient judges.").

Finally, contrary to IBG's argument, if this Court reviews § 101 and reverses, such ruling *would* change the substantive damages arguments at a future trial. (Opp'n 21.) This is because the addition of these two invalidated patents would gut IBG's key damages theory, which was adopted by the jury, because it would remove IBG's "noninfringing alternatives" argument, which was central to IBG's damages theory. *Zygo Corp. v. Wyko Corp.*, 79 F.3d 1563, 1571-72 (Fed. Cir. 1996).

This Court should address this question.

III. THE COURT SHOULD EXERCISE ITS SUPERVISORY POWER

A. The Federal Circuit Has So Far Departed from Rule 56 That Review Is Warranted

IBG agrees it is improper for courts to resolve factual disputes under § 101 at summary judgment. (Opp'n 29.) Yet IBG argues that this Court need not review this issue because it is a "fact-bound challenge." *Id.* IBG is wrong. As TT previously explained, the Federal Circuit's pattern of departing from Rule 56 is not case-specific. It is a global issue affecting cases across the industry. (Pet. 37-38 (collecting cases)); C. Graham Gerst & Lily Parker, *Section 101 on Trial: Understanding How Eligibility Issues Have Fared Before Juries*, IP Watchdog (Jan. 31, 2022, 3:15 PM), <https://www.ipwatchdog.com/2022/01/31/section-101-trial-understanding-eligibility-issues-fared-juries> (finding only four cases allowed eligibility to reach juries). As IBG's caselaw

recognizes, this Court has the power to review such issues and has done so in the past. *Tolan v. Cotton*, 572 U.S. 650, 659-60 (2014) (granting certiorari where “the opinion below reflect[ed] a clear misapprehension of summary judgment standards” and “the court should have acknowledged and credited [petitioner]’s evidence”).

IBG next argues that there was no error in this case because the courts below properly applied Rule 56. (Opp’n 29.) But IBG’s cites ignore TT’s materially disputed facts, including those pertaining to inventive concept. (*Compare* Pet. App. 85a n.1, 103a-104a, 25a, *with* CAFC App. 66492-67335.) IBG also ignores TT’s mass of evidence, which spanned over 800 pages. (CAFC App. 66492-67335). This Court should review this troubling practice.

B. The Federal Circuit’s Pattern of Ruling on Unaddressed Issues Must Be Corrected

IBG does not dispute that the Federal Circuit decided an issue that neither party raised on appeal nor was passed upon below. (Opp’n 30-32.) IBG also does not dispute that the Federal Circuit has a pattern of issuing such sua sponte decisions. *Id.* Instead, IBG argues that this Court should not grant review because the Federal Circuit has the discretion to render such decisions. *Id.* IBG misunderstands the law.

While courts have discretion to consider issues sua sponte, “[i]t is the *general rule*, of course, that a federal appellate court does not consider an issue not passed upon below.” *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (emphasis added). IBG’s own authorities

acknowledge this. *Hormel v. Helvering*, 312 U.S. 552, 556-57 (1941) (finding, “[o]rdinarily an appellate court does not give consideration to issues not raised below”); *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 100 n.5 (1991). Ruling on the issue without first giving TT the ability to address it deprived TT of the opportunity to be heard. And the same is true of the multiple other cases TT cited. (Pet. 39-40.) Even IBG *agreed* that the issue should have been remanded. (Red Br. at 50 n.10.) This Court should grant review to correct this pattern of improper sua sponte decisions.³

CONCLUSION

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

³ IBG argues that the Federal Circuit affirmed this issue on an alternative ground so certiorari should be denied. (Opp’n 33.) But this alternative ground was *part* of the sua sponte decision. For the same reasons, it should be reviewed.

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