OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: IZUMI SEIMITSU KOGYO KABUSHIKI KAISHA,

Petititioners v. U.S. PHILIPS CORPORATION, ET AL.

CASE NO: No. 92-1123

PLACE: Washington, D.C.

DATE: Tuesday, October 12, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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IZUMI SEIMITSU KOGYO KABUSHIKI :
KAISHA, :
Petitioners :
v. : No. 92-1123
U.S. PHILIPS CORPORATION, :
ET AL. :

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Washington, D.C.

Tuesday, October 12, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

HERBERT H. MINTZ, ESQ., Washington, D.C.; on behalf of the Petitioner.

GARRARD R. BEENEY, ESQ., New York, N.Y.; on behalf of the Respondents.

THOMAS G. HUNGAR, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 92-1123, Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corporation, et al. Mr. Mintz.

ORAL ARGUMENT OF HERBERT H. MINTZ

ON BEHALF OF THE PETITIONER

MR. MINTZ: Mr. Chief Justice and may it please the Court:

This case is about an issue of Federal common law, whether the important interests of overall fairness, finality of judgments, and judicial efficiency are best served by the practice of routinely vacating the trial court judgment when the parties settle on appeal, which is the practice in the Federal circuit and applied below in this case, or by a general rule denying vacatur on settlement and preserving the potential preclusive effects of the trial court judgment.

Petitioner urges the court to reject the Federal circuit practice and adopt a rule under which vacatur is not granted solely on the basis of settlement for three principal reasons:

1) Vacatur on settlement is inconsistent with the Court's adoption of nonmutual collateral estoppel,

which strikes the balance between fairness, finality, and efficiency in favor of finality when there has been a full and fair opportunity to litigate an issue; and

2) Although defended as achieving judicial efficiency, vacatur following voluntary settlement achieves only a false economy, because the cases in which vacatur is most important are precisely the cases in which there's most likely to be costlier future litigation, and finally,

3) Vacatur empowers a party who has lost on a claim after a full and fair trial to simply buy out the adverse judgment, defeat the policy's underlying collateral estoppel, and then unfairly force parties, such as Izumi and Sears in this particular matter, to defend claims which already had been rejected.

QUESTION: Mr. Mintz, as a preliminary matter, your client attempted to intervene in the court of appeals.

MR. MINTZ: That is correct.

QUESTION: And that motion was denied.

MR. MINTZ: That is correct.

QUESTION: And you didn't raise that as a question on certiorari.

MR. MINTZ: We did not have in our petition for certiorari a separate question directed to the matter of

intervention.

QUESTION: Nor has your client moved for intervention in this Court.

MR. MINTZ: In -- not in a separate motion. We did, of course, raise these issues and discuss them in the petition, and discuss the intervention.

QUESTION: Do you plan to discuss with us today whether this Court has jurisdiction in light of those deficiencies?

MR. MINTZ: I would be glad to address that, certainly, Your Honor.

QUESTION: Thank you.

MR. MINTZ: Perhaps the background facts would lead, in fact, into both the issue of intervention and set forth the background for the issue on the merits, and I think if we look at the -- one particular claim, Philips basic -- Respondent Philips' insistence on continuing with a trade dress claim, I think we can see in what way the issue of -- or the approach of vacatur on settlement on appeal is deficient, and essentially what --

QUESTION: The question Justice O'Connor is raising was, where is your party status? You weren't a party in the district court. You weren't allowed to intervene, so you had no party status in the court of appeals. What gives you party status in this Court?

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MR. MINTZ: Well, we believe that we fairly raised in the petition for cert the issue of the Federal circuit's denial of intervention.

QUESTION: So your point is that it was an abuse of discretion to deny you intervention, is that --

MR. MINTZ: Yes.

QUESTION: Is that --

MR. MINTZ: Yes.

QUESTION: Do you also agree that if it wasn't an abuse of discretion, that's the end of the case here?

MR. MINTZ: I think if we -- if the Court does not find that the Federal circuit abused its discretion in denying the motion to intervene, we would not prevail at this level. I --

QUESTION: Why is that? If we could take your petition as being impliedly a petition to reverse the lower court for abuse of discretion, why couldn't we accept it as impliedly a motion to intervene here, and even if they didn't abuse their discretion in denying it, we would still be free to grant it, wouldn't we?

MR. MINTZ: Yes, I believe you are.

QUESTION: So why should we impliedly take it to be the one rather than impliedly take it to be the other? I mean, I don't --

MR. MINTZ: Well, I --

QUESTION: Or either.

MR. MINTZ: I would say -- we certainly, in our petition, intended to present the issue of the error of the Federal circuit in not allowing us to intervene, and to present to the Court what we thought was the principal question, which is whether or not the practice of vacating is an -- the way the Federal circuit does it is an appropriate practice.

The Federal circuit itself, while denying the motion to intervene, in fact when on and addressed the practice that it was following, and then I think categorically made clear that its practice is to automatically vacate when the parties settle all claims, and all the parties to the appeal.

Now, I believe there is at least one case that I'm aware of, the Donaldson case, where it did seem to me that the Court denied standing, I believe at this -- at the Court, and yet went on and did resolve the merits, the underlying merits of the issue.

QUESTION: What is the standard that we follow in determining whether we should permit intervention either here or, assuming we're reviewing the ruling of the circuit court? Is it by looking at Rule 24?

MR. MINTZ: Rule 24 certainly applies to -- applies in spirit to the Federal circuit decision as far

as intervention goes.

QUESTION: The spirit of Rule 24 I'm not sure moves me very far in your direction.

(Laughter.)

QUESTION: Even Sears could not have intervened in the Florida action, as I understand it, and you're --

MR. MINTZ: Well, I think --

QUESTION: -- in a sense removed even further from Sears. An indemnitor cannot intervene on behalf of an indemnitee. It's not the rule.

MR. MINTZ: The basis for intervention in the Federal circuit, if I may address that, is more than just that Izumi was an indemnitor for Windmere, the party on the claim -- on the appeal.

Izumi is both -- was an indemnitor, funded the defense of the trade dress claim which is principally at issue and, in addition, Izumi's significant interest includes the effect of vacatur --

QUESTION: Well, it was so significant you didn't move to intervene in the Florida action.

MR. MINTZ: Well, the Florida -- at the time of the Florida action, the merits of the -- Izumi itself was sufficiently represented in, as far as the merits of the underlying claim which was being defended.

The only time that it became important or

significant for Izumi to intervene was at the Federal circuit on the motion to vacate proceedings, and Izumi sought to intervene in those proceedings virtually instantaneously with the filing of the motion to vacate.

QUESTION: Mr. Mintz, you're raising this very question in the Seventh Circuit. Indeed, that -- the interlocutory appeal has been stayed pending this Court's consideration. You do have party status in the Northern District of Illinois action, as I understand it. Izumi has party status along with Sears.

MR. MINTZ: Izumi is a party on the patent infringement claims. I don't believe Izumi is a party on the --

QUESTION: Well, who is raising the issue --

MR. MINTZ: -- trade dress --

QUESTION: -- in the Seventh -- who is raising the issue in the Seventh Circuit of the effect of the vacatur in the Federal circuit?

MR. MINTZ: Sears moved for summary judgment in the Seventh Circuit, and the Seventh -- in the district court in Illinois, and the district court granted summary judgment on the basis of collateral estoppel in view of the district court judgment in Florida.

QUESTION: And then when the district court undid that ruling, who took the interlocutory appeal?

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MR. MINTZ: I believe it's Sears that is on the appeal.

QUESTION: So you're not appealing in the Seventh Circuit? Izumi is not appealing in the Seventh Circuit, is not party to that interlocutory appeal?

MR. MINTZ: Your Honor, I'm not certain whether Izumi is on the Federal circuit appeal and the Seventh Circuit.

QUESTION: If it is, isn't that the proper forum in which to raise this question?

MR. MINTZ: Oh, I think the -- the question of the --

QUESTION: Of the --

MR. MINTZ: -- vacatur?

QUESTION: Yes.

MR. MINTZ: No, actually the issue in the -- the issue before the Federal circuit is whether a judgment having already been vacated can nevertheless be the basis for collateral estoppel. I think that's a very different question, and in fact the district court held no, the -- a judgment that has been vacated cannot be --

QUESTION: And you're not raising the question, or Sears isn't raising the question that it was improper to vacate it? Because after all, this is an attribute of a Federal judgment. The answer can't ultimately be

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different in one circuit than in the other. So you're not raising, or Sears is not raising in the Seventh Circuit the propriety of the vacatur?

MR. MINTZ: Well, that appeal actually goes to the Federal circuit as well because of the patent infringement claim, and I don't believe --

QUESTION: But I thought during the Seventh Circuit on that interlocutory --

MR. MINTZ: Not in the Seventh Circuit Court of Appeals. In the Federal --

QUESTION: And my question to you is, couldn't you raise in the Seventh Circuit the very question that you are now raising here, and if you are a party, and you expressed some doubt whether you were or not, to that interlocutory appeal, then you would not have the threshold problem that you have at the moment.

MR. MINTZ: But I think at that point the -- going up to the Federal Circuit the law of the case is that the judgment has been vacated and we're dealing with the very, very same practice, which is that in the case where the motion to vacate was brought because of settlement, the Federal circuit vacated based on this practice.

QUESTION: I understand "law of the case." You weren't a party. You weren't a party in the Federal

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circuit. That's what gives you your present problem. But if you weren't a party, you would not be bound by what they decided.

MR. MINTZ: But the Federal circuit itself, in terms of -- in this case, in the Florida case, having vacated the judgment of the Florida district court, I don't believe that is -- that in itself would be an issue in the case that came out of the Northern District of Illinois, in which what had previously been a summary judgment dismissing this trade dress claim was reinstated by the District court in Illinois when the Federal circuit vacated the very judgment that was underlying it. I don't think that on that appeal the issue would be whether the Federal circuit should or should not have vacated the judgment in the Florida case.

QUESTION: So you're saying you don't think you could raise this question in the Seventh Circuit.

MR. MINTZ: In the Federal circuit, on the appeal --

QUESTION: In the Seventh Circuit. Aren't you in the Seventh Circuit?

MR. MINTZ: No. The appeal in -- the interlocutory appeal is to the Federal circuit. It comes out of the Northern District of Illinois.

QUESTION: And the interlocutory appeal is to

the Seventh Circuit?

MR. MINTZ: No, to the Federal circuit.

QUESTION: The Federal circuit, not the Seventh Circuit?

MR. MINTZ: Yes, Your Honor. So it's the same court that had already vacated the Florida judgment.

QUESTION: So basically it's your position that if intervention isn't allowed somewhere there'll be nobody to challenge the vacatur, because the parties, of course, had stipulated to it.

MR. MINTZ: That's exactly right, and that is part of the -- I think of the problem of this kind of rule in the Federal circuit and -- coupled with their refusal to allow intervention by the one party that is most affected by the vacatur, because in this case the agreement between Windmere and Philips to vacate the -- to join in a motion to vacate the judgment followed a settlement of a trade dress claim on which Philips had lost and an antitrust claim on which Philips had lost.

Certainly the trade dress claim is the kind of claim that is subject to a possible preclusive effect.

QUESTION: Couldn't it conceivably be challenged? I mean, you agreed readily with the Chief Justice that if we don't allow the challenge here nobody can challenge it.

I understand why you would agree readily, but why wouldn't you be able to challenge it in the later proceeding by simply alleging that the vacatur was invalid, and that therefore there is collateral estoppel effect? Why wouldn't that be a conceivable manner of challenging it?

It was contrary to law, therefore invalid, therefore the effect of the judgment continues.

MR. MINTZ: Well, the --

QUESTION: I mean, suppose, you know, a district judge just takes it on himself for no reason at all to, you know, erase his judgment. He just proclaims, I'm vacating my judgment. Surely that's not effective, if it's contrary to law, and in a later proceeding you'd be able to say it's null and void. Why couldn't you do that in the Illinois case?

QUESTION: You are a party on the interlocutory appeal. It says Izumi and Sears, petition for permission to -- for the 1292 --

MR. MINTZ: Thank you, Your Honor.

QUESTION: So you could raise -- even though it's the Federal circuit, you could raise the very same question that you're raising here in the Federal circuit, only this time you'd have party status.

MR. MINTZ: Well, I don't believe that the

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validity of the vacatur was raised in the Illinois district court case.

In other words, the Illinois district court case proceeded on the basis that here was the Federal circuit vacating the judgment, the judgment is now vacated, but nonetheless, in these circumstances the collateral estoppel should apply, and I don't believe that the attack was that it was an invalid -- in effect an abuse of discretion by the Federal circuit to have actually vacated that judgment, and I don't -- I think the proceeding before the Federal circuit then on the interlocutory appeal, on the argument which the Federal circuit already addressed in this case that vacatur is not appropriate in the settlement situation is really not a practical -- it's not going to be a practical route to any change in that result.

QUESTION: The only way you could get relief would be to ultimately get this Court to grant certiorari. certainly the district court in the Northern District of Illinois where the appeal lies from its judgment to the Federal circuit isn't going to decide that the Federal circuit authorized something that's contrary to law, and presumably the Federal circuit is not going to change its mind, either.

MR. MINTZ: Yes, that's the assumption that I

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would make, but I believe that the case as it stands now, I think presents to the Court the really precise issue of the fundamental problem with a practice that -- where an appellate court will automatically in essence vacate when the parties to the appeal settle and they settle all the claims on appeal, and the problem with this basic rule is that it does in effect vitiate the collateral estoppel.

Collateral estoppel is grounded on preserving judicial and litigants' resources and not allowing relitigation of fully and fairly tried issues, and when we are dealing with judgments that have potential preclusive effect, the vacatur eliminates even the possibility of applying collateral estoppel in the subsequent case, and we say that vacatur is not a fair price to pay for settlement because in the cases where vacatur is sought, most likely there will be further litigation, and the appeal is not in any event necessarily saved, which is one of the theories of preserving or fostering efficiency through settlement on appeal and saving the appellate court's time in deciding the case. The appeal --

QUESTION: I take it the logic of your rule would prohibit vacatur even in the district court after a final judgment has been entered. Suppose a final judgment's been entered, but within the reasonable period of time allowed by Rule 60 for moving to discharge the

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judgment, the parties settled. Under your rule, what result?

MR. MINTZ: Under the rule, it's not necessarily effected. I think the district court at that time, pursuant to Rule 60, could decide to vacate the judgment, and it is a situation there where the district court would be fully familiar with the case, fully familiar with the circumstances, and I think be able to make a judgment as to whether or not it should be vacated as with any Rule 60 motion.

QUESTION: So it's only the filing of the appeal that prohibits the vacatur of the judgment? It doesn't seem to me that that's the logic of your argument. The logic of your argument would seem to me to prohibit the district court from entertaining a motion under Rule 60 to vacate the judgment.

MR. MINTZ: Not --

QUESTION: Assuming a judgment, the parties settle after judgment, not wanting to go through an appeal.

MR. MINTZ: No, not necessarily, because I think the difference is when the parties go on to appeal and jurisdiction shifts to the appellate court, which has not been involved in the case, and I -- we don't -- I don't think we want the appellate court then to be evaluating

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the merits of the appeal and deciding whether or not to vacate on the basis of the merits.

When the case is pending in the district court, I think we have a different situation and a different rule structure. In the Ninth Circuit, the approach is, in fact, to remand when there has been a settlement to the district court to make a judgment as to whether vacatur should be granted or not.

QUESTION: You're not arguing, then, for an automatic rule against vacatur, you're arguing that the court of appeals should look at all the circumstances of the case?

MR. MINTZ: I believe that the best rule is when the case is at the appellate court, that there should be a denial of the motion to vacate as a general rule, and I would argue for that rule. I think that provides more certainty in terms of enforcing it.

QUESTION: I don't see why the same rule shouldn't apply in the district court under your logic.

MR. MINTZ: To not permit the district court under -- once judgment has been entered to vacate. I think that the district court can make a determination as it would in a Rule 60 motion if settlement occurred at the point that you have described.

QUESTION: Mr. Mintz, what do you mean by, as a

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general rule? I confess not to understand what you're asking us to adopt. You mean an invariable rule, no vacatur at the appellate level? Invariable rule?

MR. MINTZ: I would say the Court should adopt an invariable rule in the sense that I have -- I have not, at least in my own mind, been able to really come up with a boundary to the --

QUESTION: Even if you were party to the bargain. Here your complaint is that the parties to the appeal separated and you were left out, although you have a substantial interest in the preclusive effect of that judgment. Suppose you were in on it, too, even so it would be improper? Once the district court judgment is entered, that's it, that's where you draw the line?

MR. MINTZ: I would draw the line at when the appeal -- when the appeal is filed and docketed in the appellate court --

QUESTION: And then even --

MR. MINTZ: And then --

QUESTION: -- even if you -- even if you wanted the Federal circuit to vacate the district court decision, it would still be --

MR. MINTZ: That's correct, Your --

QUESTION: -- impermissible for the Court to do that.

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MR. MINTZ: Yes. I think the rule should be that the appellate -- excuse me. I mean, the appellate court should not grant a motion to vacate when all of the parties ask for it, even --

QUESTION: And interested nonparties.

MR. MINTZ: Even when interested nonparties are willing to say yes, go ahead and do it.

QUESTION: Yes.

MR. MINTZ: No, I think that the rule for the clearest guidance to the court of appeals and the most consistent operation I think with the principles of collateral estoppel would be to not grant vacatur in that case.

QUESTION: Why should the cutoff point be the filing of a notice of appeal rather than the entry of judgment in the district court?

MR. MINTZ: It's just that I'm thinking that in terms of the district court, when jurisdiction is still with the district court, the court can entertain a Rule 60 motion and make a determination for itself whether under the circumstances, all circumstances considered, the judgment should be vacated.

QUESTION: Would you say the district court, considering what sort of a motion it would make, should apply the same test as the court of appeals should?

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MR. MINTZ: No. In terms of the district court, I think can -- then the district court can balance all of the factors, consider the merits of the case, is familiar with the underlying case, and can make a determination whether or not this should be vacated.

QUESTION: So that there are some circumstances in which it is just to vacate a judgment.

MR. MINTZ: Yes, Your -- yes, I would say there are -- yes, there are circumstances --

QUESTION: It's just for the district court to vacate, but apparently there are no such circumstances for the court of appeals.

MR. MINTZ: Unless the -- there are -- the circumstances would be the same, but the difference is that the district court would be familiar with the underlying case.

QUESTION: So -- so --

QUESTION: So the court of appeals should remand to the district court?

MR. MINTZ: That is one possibility, and as I say, I believe that is what is done in the Ninth Circuit, but I think the better rule at the appellate level is to simply deny the motion to vacate and dismiss the appeal.

QUESTION: So the problem here was that the parties went to the court. What they should have done

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was, they should have gone through with the appeal, have the judgment of the district court affirmed, then they should have filed a 60(b) motion with the district court asking the district court to vacate, and they could have entered into a deal, I suppose, before the appeal was concluded.

No matter who wins, after the appeal is concluded, if the -- or rather, if it's affirmed after the conclusion of the appeal, we'll go back to the district court and ask that it be vacated. Do you have no problem with that?

MR. MINTZ: I would have a problem with that.

QUESTION: I would think so.

MR. MINTZ: And I don't think --

QUESTION: That's weird.

MR. MINTZ: -- that that would be --

QUESTION: Then what's the magic of the district court? The -- it's not somehow the magic that the district judge knows when to vacate and the court of appeals doesn't?

MR. MINTZ: Well, I think if we have the court of appeals -- if we put to the court of appeals to actually go through the merits of the appeal and make a decision, I think once that decision is made, that suggests -- and the judgment is affirmed, it suggests to

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me that the judgment should not be vacated.

And the district court in that case -- I don't know what the extraordinary circumstances might be to ever have a district court vacate in that situation, but it shouldn't be solely on the basis of settlement in that circumstance when the appellate court has already affirmed the judgment, and the difference as I see it with a motion that's filed with the district court, though, before the appellate court has acted, is that the district court is familiar with all of the circumstances of the case.

QUESTION: A 60(b) motion is what, for any other reason -- there's a 1-year time limit for some 60(b) motions and there's no time limit for others, so you could conceivably bring a 60(b) motion after an appeal.

MR. MINTZ: It conceivably could be brought, but I think in that case the -- I would not expect, in -- as a general proposition that the district court would vacate the judgment, and --

QUESTION: Why -- I don't understand why -- why you would allow the district court to do it. I thought that you're arguing for a rule of principle here that a judgment is a judgment, and it's not to be traded by private parties once it's issued. It's a public act, and after that you'll leave it alone.

I thought that's the principle you're arguing

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for, but you're saying well, you can't -- you can't trade it at the appellate level, you have to trade it at the district level. Why isn't it just as final at the district court level?

MR. MINTZ: Only because I think that a rule -- the Rule 60(b) does permit a -- has a mechanism for allowing parties to ask the district court judge to vacate under certain circumstances, and at least the district court judge in that case can weigh these factors.

The problem is that on the appeal there are no factors weighed, and when we look at the Federal circuit's decision as exemplary, the Federal circuit weighed absolutely no factors in deciding to vacate the judgment which otherwise would have preclusive effect. It only asks the question, did all of the parties to the appeal join in the motion to vacate, and does the settlement settle all claims?

QUESTION: Well, 60(b) doesn't make it clear that you can vacate because the parties want it vacated. I mean, maybe you can vacate because of discovered fraud, because of all sorts of things. There are other reasons to vacate. 60(b) doesn't require me to admit that settlement by the parties is a valid grounds for vacating, does it?

MR. MINTZ: No, I'm not arguing --

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QUESTION: It mentions vacating, but there are many other reasons than merely the parties cutting a deal.

MR. MINTZ: I'm certainly not arguing for settlement as being a basis to vacate. If the case still is in that period of time from final judgment to appeal, that is not what I'm arguing for.

What I'm arguing for really is a rule at the appellate level when this comes up where parties cannot -- a party who loses on a claim like the trade dress claim here can't simply appeal, settle with the other side, pay enough money to have the appellate court then vacate on the Federal circuit type of rule, and then be able to reassert that trade dress claim wherever and whenever it wants, after having lost it. That is the rule that I'm arguing for.

Mr. Chief Justice if there's no more questions, I'd like to reserve my remaining time.

QUESTION: Very well, Mr. Mintz. Mr. Beeney, we'll hear from you.

ORAL ARGUMENT OF GARRARD R. BEENEY

ON BEHALF OF THE RESPONDENTS

MR. BEENEY: Mr. Chief Justice, and may it please the Court:

If Your Honors please, in light of the discussion this morning, I'd like to first turn to the

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question of intervention, and then proceed to why this Court ought to reaffirm the rule that vacatur is available when a party's settlement completely moots their appeal.

There are two questions raised by the intervention issue. First, was it properly presented to this Court, and second, did the court of appeals abuse its discretion in denying vacatur? We submit the answer to the first question is no, it was not properly presented to this Court, and second, that the court of appeals properly denied intervention.

The petition for certiorari raised a single question going to the merits of the issue of vacatur. The first time the issue of intervention was brought to the attention of this Court was in Philips' opposition to the petition for cert. There is nothing contained either within the question presented or within this Court's grant of the petition that would raise the issue of intervention, and therefore we respectfully submit that the issue was not properly presented to this Court.

As to the issue of the merits of the decision by the court of --

QUESTION: Mr. Beeney, but wouldn't it be -- it could come right back as a result of this now stayed interlocutory appeal in the Seventh Circuit, in the Federal circuit, from the district court, so isn't it kind

of a wasted motion to say although Izumi was not a party in this particular proceeding, that very same question could come up via the appeal now lodged in the Federal circuit where Izumi is a party?

QUESTION: I think, respectfully not, Justice Ginsburg, and the reason is this: there are two questions presented in that interlocutory appeal. The first one in which Izumi is a party has to do with the dismissal of their antitrust claim by the district court in Illinois that obviously did not present this question.

The second question raised in that interlocutory appeal is the issue of whether a vacated judgment should continue to have collateral effect. That would not raise the propriety of the Federal circuit's granting of the vacation order.

QUESTION: Well, what is the significance of the prior judgment, except for its preclusive effect? This was a case where there wasn't even an opinion written, was there?

MR. BEENEY: There was an opinion written on Philips' motion for a new trial, and to set aside the verdict, but there was not an opinion written on the merits --

QUESTION: Right.

MR. BEENEY: -- of the verdict itself. It was a

jury verdict.

QUESTION: So in all -- what is the practical consequence of the vacatur, other than to deprive the judgment of its issue-preclusive effect?

MR. BEENEY: That is quite correct. That is the only practical significance, but Izumi, in the currently pending Federal circuit appeal, takes the position, as it did before the district court in Illinois, that a vacated judgment under these circumstances ought to continue to have collateral effect.

And if, indeed -- if the Federal circuit accepts Izumi's position that the vacated judgment does not -- does continue to have collateral effect, then Izumi has no interest here whatsoever, because then the vacated judgment would be applied collaterally in Illinois, and their interest in the case that comes from Miami is completely vanished, because there is no interest whatsoever in that case, other than an attempt to use the judgment collaterally.

So if Izumi prevails on that appeal, it has no interest in this case whatsoever.

QUESTION: And of course, if they're right there, why do you bother vacating the judgment?

MR. BEENEY: Well, we believe that they are wrong.

QUESTION: I think that's the heart of your position, if they're 100 percent wrong.

MR. BEENEY: Oh, absolutely, and should that appeal proceed --

QUESTION: Otherwise you surely wouldn't pay $57 million to get a judgment vacated.

(Laughter.)

MR. BEENEY: In all due respect, Justice Stevens, there were other components to the settlement. We felt it much superior to pay $57 million then, than take the risk of having to pay $120 million or $130 million after the court of appeals ruled, and obviously Windmere analyzed the situation that they'd prefer to have $57 million then than take the risk of nothing.

QUESTION: Mr. Beeney, while I've got you interrupted, I'd like to call something to your attention. I received a Law Review article not by anyone interested in the case, by a Professor Barnett, describing the California practice on vacatur, and so forth. It appears in the Los Angeles -- Loyola Los Angeles Law Review.

I don't know if you're familiar with the article or not, but I would like you to know that I've read it. It discusses the California practice in a way that has some bearing on the issues in this case.

MR. BEENEY: I'm familiar with the California supreme court's decision in Neary.

QUESTION: It discusses that, and it also has some statistics about settlement procedures, and the number of settlements affected by the practice and all that.

MR. BEENEY: I have not read the Review article though, Justice Stevens.

To get back just briefly to the intervention issue, as to the merits of the court of appeals decision, we respectfully submit that the court of appeals did not abuse its discretion. Izumi's interest in this case is not one that under Rule 24 counsels that intervention should have been permitted.

They were not a party to the case. They intentionally decided not to become a party to the case in order to protect whatever interests they may have in the judgment, and when the case was finally settled, they only moved to intervene after Philips had given up its right to appeal.

QUESTION: Well, they really couldn't have intervened under general Rule 24 principles in the Florida action, could they? They were simply an indemnitor. Indemnitors can't intervene.

MR. BEENEY: That's correct, Justice Kennedy.

However --

QUESTION: So really, it's this particular issue that causes a particular injury to them, and it seems to me that their -- the propriety of intervention ought to be judged based on their interest in this issue, not the entire suit.

MR. BEENEY: Well, the injury, I believe, is caused to Sears, not to Izumi. Sears is the party in Chicago that is attempting to use the judgment collaterally. Here, in this case, Izumi's interest as an indemnitor vanished when Philips and Windmere exchanged mutual general releases.

QUESTION: Would you concede that Sears would have had an interest in intervening in this suit on the appellate level?

MR. BEENEY: I think Sears should have been permitted to intervene in order to present its position as to what ought to have been done with the judgment.

QUESTION: They didn't seek to intervene in this litigation, did they?

MR. BEENEY: They did not, Justice Kennedy.

QUESTION: A person who has an interest in a judgment because that judgment will assist that person's case has a right to intervene?

MR. BEENEY: I think in the circumstances here,

Justice Scalia, where Sears had already used the judgment collaterally, I think under the spirit of Rule 24, I think that they would have been a proper party to present their views as to what should have been done with the parties' joint motion to vacate before the Federal --

QUESTION: What if they'd already cited the opinion in a brief, as authority?

MR. BEENEY: I don't think --

QUESTION: There's no collateral estoppel.

MR. BEENEY: I don't think that would have amounted to an adequate interest under Rule 24 to justify intervention, but I think where they had actually used the judgment to attain the elimination of a claim against them -- I realize I'm arguing against myself, but I think that they should have been -- had they moved, been granted permission to intervene.

QUESTION: Mr. Beeney, that's strange, because Izumi in the beginning of the world was a party in this Florida litigation, too, wasn't it, on the patent infringement claim?

MR. BEENEY: That's correct, Justice Ginsburg.

QUESTION: And indeed, one of the problems it has is, it was -- with the counterclaim that it tried to assert in the Northern District of Illinois, it was told it can't do that because it should have asserted it in the

Florida action when it was a party in that action.

MR. BEENEY: That's correct, Justice Ginsburg.

QUESTION: So it's a little odd to me to say that Sears, that was totally out of the Florida litigation, would be a proper intervenor in the Federal circuit litigation and Izumi not, although initially Izumi was a party, and in fact is being told in the Illinois court, you can't raise your antitrust counterclaim here because you were originally in the Florida action, and should have raised it there.

MR. BEENEY: Well, I think I would make a distinction as to the timing of intervention. Izumi in fact did not even have to intervene below. A pretrial stipulation was submitted to them that they could have signed as a party. They struck their name off that list. Discovery was sought of them as a party. They insisted that they would not provide discovery as a party.

So they made every effort to make it clear that they were not a party, the obvious reason being that should Windmere prevail on the claim, Izumi hoped to use that collaterally, but they wanted to avoid any collateral effect should Philips prevail on the claim.

At the time at which a motion is made, however, to vacate the judgment, that is the point in time in which Sears' interest arises, not in the underlying claim

itself, when Sears, as I say, has already used the judgment collaterally.

QUESTION: Mr. Beeney, you're not arguing that an opinion written in the case should be vacated?

MR. BEENEY: Not at all, Chief Justice Rehnquist. I think the interests that are implicated by the issue of vacating opinions are far different than the issue implicated by the vacation of the judgment.

QUESTION: Do you argue for a rule of automatic vacatur in all cases, if the parties so stipulate, or is the Ninth Circuit Approach the preferred approach?

MR. BEENEY: We would argue for the firm rule, Justice Kennedy. I think we see the wisdom in a rule being advocated by the United States, which is essentially that when complete settlement among the parties moots an appeal, the judgment ought to be vacated. The judgment also ought to be vacated when the prevailing party below unilaterally takes steps to moot the appeal, thereby depriving the appealing party of their right to appeal. In both those --

QUESTION: So you'd take the same position if the issue was before the district court on a Rule 60 motion.

MR. BEENEY: We would, Your Honor, and there are reasons why we think --

QUESTION: Rule 60 doesn't, in specific terms, permit that. I think some of its language might be interpreted that way.

MR. BEENEY: No, I would agree that neither Rule 60 nor Rule 42 of the Rules of Appellate Procedure, nor the statute that we cite in our brief, directly speaks to this issue.

QUESTION: Rule 60 talks about whether it's any longer equitable that the judgment should have prospective application, and that would seem to me to be inconsistent with an automatic rule of vacatur that you are asserting here.

MR. BEENEY: Well, I think the automatic rule has much to say for it for the very reasons of certainty. First of all --

QUESTION: It may have much to say for it, but I'm pointing out that that takes away the effect of the language in Rule 60 that the district court is to determine whether it's equitable that the judgment should have prospective application.

MR. BEENEY: Well, I think Rule 60 could be read vis-a-vis these circumstances in that it is always just and equitable to vacate when all parties to a settlement moot their appeal, and that's the way I would urge Rule 60 to be read in this context.

QUESTION: Mr. Beeney, your answer to the Chief Justice with respect to not at all -- the opinion would stand. What would the status of an opinion stripped of the underlying -- of the ultimate judgment be? It would be like a Law Review article? What would be the significance of such an opinion?

MR. BEENEY: I think, Justice Ginsburg, the opinion would continue to have whatever persuasive effect by power of its logic. The fact that a judgment was vacated does not, in respect of the opinion, I think, detract from whatever force of reasoning the opinion may have.

QUESTION: Like a Law Review article -- just persuasive effect. It has no precedential effect.

MR. BEENEY: Well, the precedential effect, as I understand it, Justice Scalia, comes from the judgment, not from the opinion, that the opinion is the rationale behind the judgment, but the judgment is what is the precedential effect.

QUESTION: So your answer to Justice Ginsburg would be yes, it's like a Law Review article.

MR. BEENEY: Well, I think I would submit --

QUESTION: A disembodied opinion, without any judgment to go with it.

MR. BEENEY: I think I would submit that an

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opinion written by a court sitting resolving a dispute has far more persuasive reasoning by that fact alone.

QUESTION: Wouldn't it be misleading to put it in a collection of judgments with accompanying reasons, if its status is simply that of a Law Review article? If it has no issue-preclusive effect and it has no precedential value, it seems to me strange, indeed, not the practice that has been followed with vacated judgments. If they're caught in time they won't appear in either Fed. Supp. or F.2d.

MR. BEENEY: I think, Justice Ginsburg, the force of the opinion would determine in part on why the judgment was vacated. Here, if the parties' settlement completely moots an appeal and vacates the judgment, it does not go to the issue of the correctness of the judgment, except perhaps in the minds of the litigants, and I see no reason why the opinion should be deprived of whatever forceful effect it may have, simply because an appeal is mooted by a party settlement.

QUESTION: Then you're in agreement that the effect would be like a Law Review article, that it would have no further effect than that?

MR. BEENEY: I think I would say that regardless of whether the judgment is vacated, if the purpose of the vacation is because of a settlement, that that should have

no effect whatsoever on the persuasive force of the opinion, because the reason for the vacation, the settlement of the parties, doesn't go to the merits of the reasoning behind the opinion.

QUESTION: Well, supposing the very same issues come up before the same district court which had decided the case in which the judgment was vacated, would it be proper to argue to that court that the district court is bound by stare decisis?

MR. BEENEY: I think it would be, Justice Rehnquist --

QUESTION: Then it does mean more than a Law Review article.

MR. BEENEY: Right, Your Honor.

QUESTION: I think you would give the same answer if there was another panel of the same circuit that confronted the same issue.

MR. BEENEY: We --

QUESTION: I take it it would be bound by the earlier opinion as a matter of the law of the circuit. At least that's consistent with the answer you've given to the Chief Justice with reference to the district court.

MR. BEENEY: We would, Justice Kennedy. Again, I think one needs to go to --

QUESTION: So it does have precedential effect?

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MR. BEENEY: Yes. I think one needs to go behind the reason of the vacation of the judgment, and if the reason behind the vacation of the judgment has nothing to do with the merits of the dispute, then there's no reason why the opinion ought not to continue to --

QUESTION: It seems to me there's no such thing as a judicial opinion without a judicial judgment. It becomes a judicial opinion only because it is attached to a judgment. It is the explanation of a judgment, and if there's no judgment for it to attach to, it is not an opinion any more.

It's a nice Law Review article, but I don't know how you can say a court continues to be bound by it. The power of the court is to render a judgment, and the opinion is the official act explaining the judgment.

MR. BEENEY: Well, Justice Scalia, I don't see why a vacation of a judgment for reasons having nothing to do with the merits of the action needs to have any effect on the persuasiveness of the opinion. The precedential --

QUESTION: No, no, no -- you keep saying persuasiveness. You gave that answer first, but you've now completely changed and said, it's not just persuasive, it's authoritative. It is binding. It has stare decisis effect. That isn't persuasiveness. You follow stare decisis even if you think the opinion's wrong. That's not

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persuasion, it's compulsion, and I gather you are now saying that that's the effect of a vacated opinion.

MR. BEENEY: As I meant to say originally, if the reason for vacating the opinion has nothing to do with the merits of the decision, it ought to continue to have whatever effect it had with or without the judgment attached to it, and if I may get back, Justice Kennedy, to the question as to why this ought to be a firm rule, it does, we believe, offer quite a bit of advantages to the system.

It allows parties to know that they can settle and vacate and remove whatever question there may be, thereby encouraging settlements, and it also permits the courts of appeals not to engage in the type of collateral litigation that they would have to in balancing the various interests.

QUESTION: In your view, Mr. Beeney, should there be any obligation to give notice to third parties who might be affected by the vacation of the judgment?

MR. BEENEY: No, Justice --

QUESTION: They're the only ones who really have an interest in whether it should be reached -- preserved or not.

MR. BEENEY: I don't think that's a workable rule where the courts or the parties need to go out and

attempt to find who might be interested in the issue.

QUESTION: Presumably the parties paying to get the judgment vacated would have a pretty good idea who might be affected by it.

MR. BEENEY: They may or they may not, and again, involving the appellate court who receives the motion, and the collateral issue of whether adequate notice has been given, or who the parties who may be, I think is just not a workable rule.

QUESTION: Mr. Beeney, could I ask you the same question that was asked to Mr. Mintz? What kind of a rule are you arguing for? Are you arguing for an absolute rule that whenever the parties seek vacatur, both the parties, it must be granted, always and invariably?

MR. BEENEY: I think that is the rule that we would argue for, Justice Scalia, although I certainly wouldn't preclude the --

QUESTION: Well, you'll take something less than that, so long as it applies --

(Laughter.)

QUESTION: I understand. But you think that that is the better rule.

MR. BEENEY: I think that is the better rule, and obviously, in order to affirm the result below, however, the Court need not go that far.

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QUESTION: Mr. Beeney, isn't it only fair, though, if you're able to wipe out the preclusive effect, so should Izumi, and it shouldn't be stuck by the compulsory counterclaim rule? If the Florida adjudication is not going to have any effect on you, shouldn't it equally have no effect on Izumi?

MR. BEENEY: I think the counterclaim rule, Justice Ginsburg, goes to a different point, and therefore I would argue your -- I would answer you question, no, I don't think it's unfair.

The counterclaim rule is intended to encourage all parties to present disputes that they have among each other. At the same time, the rule starts at the time of the filing of the complaint, so regardless of whether the case proceeds to judgment, even if the case is settled before judgment, the compulsory counterclaim rule would still apply, so it's not attached to the judgment, it's attached to the filing of the complaint.

The interests that are served by the firm rule include several that would advance the system of litigation. It promotes fairness among the parties, and because it encourages settlement, it conserves private and judicial resources. There are a number of --

QUESTION: Let me ask, on the encouraging settlement, what about encouraging settlement before

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trial? Would the rule -- which way would the rule cut on that aspect?

MR. BEENEY: I think, Justice Stevens, that it has very little effect on the -- weighing whether a party should settle --

QUESTION: If you don't have the rule you propound, wouldn't the defendant face a greater risk in going to trial --

MR. BEENEY: I think they would --

QUESTION: -- because he'd know he couldn't buy himself out of an adverse judgment?

MR. BEENEY: I think they would, but I think in the practicalities of litigation, that that is really purely an academic concern. When parties are facing the economic and other costs of a trial, when they are facing the effect that a judgment itself has on the settlement components, I don't think they look forward to the appellate court and say, well, we can vacate the judgment and therefore we have a riskless trial.

QUESTION: Isn't the same thing true after trial, that this possible benefit is only one of the factors that determines the amount of the settlement, it will not necessarily determine whether or not the case will settle?

MR. BEENEY: Precisely. The party who is facing

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a trial --

QUESTION: So then, this rule is not necessary to promote a larger number of settlements, merely promotes settlements taking a somewhat different form?

MR. BEENEY: No, I think it does have a profound effect on promoting the number of settlements. As Judge Winter said for the Second Circuit in the Nestle opinion, as United States has said in its brief before this Court, and as the more than a hundred cases that we cite in our brief stand for the proposition, that this rule does encourage settlement, and it allows parties to abandon the judgment and settlement the dispute on their own terms and thereby forever removing the dispute from the courts in a consensual rather than a coercive way.

QUESTION: But it'll only prompt those settlements in those cases where the effect of the settlement will be to enable future district court litigation. Sure, it'll always foster settlement in the particular court of appeals, but only when -- only when the effect of the settlement will be to promote further litigation in the district court, isn't that true?

MR. BEENEY: I think not, Justice Scalia --

QUESTION: Why not?

MR. BEENEY: -- for two reasons, 1) this rule has been in effect since this Court's decision at least in

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Hannon-Clark in the 1930's. History has shown that not to be a serious concern. There simply are not that many cases in which parties vacate judgments and then relitigate the issue, and second, I would say, Justice Scalia, that there are other reasons for parties to seek to vacate judgments.

Admittedly, removing the preclusive effect of a judgment may be the primary one, but parties also may feel that they have been done a great injustice by the system, and there may be various other reasons why they seek to vacate a judgment.

QUESTION: Thank you, Mr. Beeney.

MR. BEENEY: I thank Your Honors.

QUESTION: Mr. Hungar, we'll hear from you.

ORAL ARGUMENT OF THOMAS G. HUNGAR

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING THE RESPONDENTS

MR. HUNGAR: Thank you, Mr. Chief Justice, and may it please the Court:

I'd like to begin by addressing the questions about the precedential effect of opinions accompanying vacated judgments. In our view, the vacatur of a judgment renders the accompanying opinion of no precedential effect, so that it would not be binding on a district court or on a court of appeals panel if a previous opinion

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had -- or the judgment accompanying a previous opinion had been vacated. We believe this Court said as much in County of Los Angeles v. Davis and the other cases cited in our brief.

In keeping with the general rule set forth by this Court in United States v. Munsingwear, this Court has long followed a consistent practice of vacating lower court judgments when cases are rendered moot by settlement.

QUESTION: But why isn't this case like W. T. Grant? This is a voluntary -- where there's voluntary cessation, there isn't mootness, so in Munsingwear it's when something external to the parties causes the mootness, like someone dies, but here, it's the parties' very act, so I don't see that you can apply Munsingwear when Munsingwear speaks of something external to the parties.

MR. HUNGAR: Well, Your Honor, it's true that mootness -- that a case is not necessarily moot when one of the parties has merely ceased its conduct, and in those circumstances Munsingwear does not apply, but where the parties have reached a conclusive settlement agreement that binds the parties and conclusively resolves the case, as in this case, the district court entered a judgment of dismissal with prejudice. This case is not going to arise

again in the future, so this is not like the W. T. Grant case, where the case is not truly moot, because the very same issue may -- the very same circumstances could arise again.

QUESTION: Well, it's truly moot. That isn't the point I think Justice Ginsburg was making. It is truly moot, but it's a different kind of mootness from the mootness that occurs without the cooperation of the parties, and not necessarily the kind of mootness that calls for a Munsingwear vacation of the judgment.

MR. HUNGAR: This Court has applied Munsingwear in cases where mootness occurs as a result of the conduct of one of the parties. Indeed, Munsingwear itself involved mootness that occurred as a result of the conduct of one of the parties, the United States, and the Court in numerous other cases that we've cited in our brief -- Deakins v. Monaghan, the Webster case, the Frank v. Minnesota Newspaper Association case, cases decided on the merits as well as the summary opinions issued by the Court in settlement cases, all show that Munsingwear is not limited to the context of mootness that occurs for reasons outside of the litigation, that even where a party -- for instance, in the Frank case where the Government changed its position with respect to the interpretation of a statute, and the plaintiff then said well, we are no

longer interested in disputing this issue because we're satisfied with the Government's new position, this Court did not merely dismiss the appeal as the winning party below had suggested. Rather, the Court vacated the judgment below, applying Munsingwear, because --

QUESTION: You're saying we've always done that? Aren't there earlier cases where we haven't vacated?

MR. HUNGAR: There are two cases of which I'm aware, one in the 1800's and one in 1911, in which the Court dismissed the appeal, but that doesn't indicate that the Court has not followed the consistent practice of vacatur when the parties request it.

QUESTION: We really haven't focused on this issue before though, have we? Isn't it fair to say that we really haven't focused on that issue?

MR. HUNGAR: The Court has not addressed, after full briefing and argument, this precise question, that's correct, Your Honor. The Court has, however, followed a consistent practice for at least 50 years or more, certainly since the 1930's, and there's no indication that the Court has ever rejected this approach.

QUESTION: Mr. Hungar, what's the matter with leaving the question to the discretion of the court of appeals?

MR. HUNGAR: Your Honor, we believe that a

discretionary rule would have considerable judicial diseconomies in that it would require courts of appeals to weigh the various unclear factors in particular cases without clear guidance as to what factors should be given weight. It would be particularly problematic in this circumstance, because in the vast majority of these cases there would be no adversity. There would be no party to explain to the Court what, if any, reasons there were for denying vacatur, so the Court would in effect be making speculation about the possible future effect of its judgment in the absence of a presentation by adversary parties.

We think that, moreover, the inducement to settlement provided by a certain rule of vacatur provides additional judicial economies because it encourages parties to enter into settlement agreements secure in the knowledge that vacatur will be available.

QUESTION: Do you have any comment on whether this Court has jurisdiction, in light of the petitioner's failure to raise a question about intervention?

MR. HUNGAR: Your Honor, we believe that the Court certainly has jurisdiction and power to reach the issue of vacatur.

Certainly the fact that Izumi did not squarely present this question in their petition for certiorari, at

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least in the questions presented, suggests that the Court could deem -- easily could waive the question, but the Court could either, as Justice Scalia suggested, treat the petition for certiorari as an implicit motion for intervention in this Court, or could conclude that the intervention question was somehow included in the question that was presented in the petition implicitly and therefore reach that question as well.

We agree, of course, that --

QUESTION: On the merits, Mr. Hungar, of course the problem of the court of appeals not having specific standards would be resolved by the rule the petitioner argues for that there be no vacatur in any circumstance, and what is your principle objection to that rule? Are you concerned in part that there might be judgments that are incorrect, or not well-founded, that become controlling law, or are you -- or is that a concern?

MR. HUNGAR: That's one of the concerns. We believe that the problem with petitioner's position is that it places the interests of third parties and the principles and concerns underlying the doctrine of nonmutual collateral estoppel above the interests of the parties to the case precisely in circumstances where the premises for application of collateral estoppel do not apply.

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The premises for collateral estoppel are that application of that doctrine will ensure consistency of judgments, that we have reason to be confident in the correctness of the first adjudication, and that it will --

QUESTION: I was going to suggest that on that -- the law of collateral estoppel can accommodate those concerns. Collateral estoppel just will not apply if there is some underlying basic concern with the judgment, so it seems to me that your principal argument is that you just want to facilitate settlement.

MR. HUNGAR: Well, that's correct, Your Honor, because leaving this question to be adjudicated when it comes up again in the future -- that is, denying vacatur but leaving the parties free to relitigate the collateral estoppel effects -- will not provide the certainty that is necessary for parties that will not be willing to settle unless they can obtain vacatur and be certain that collateral estoppel will not be applied in the future.

QUESTION: Mr. Hungar, why would --

QUESTION: Is it desirability of settlement which is driving your position?

MR. HUNGAR: Well, it's the desirability of settlement and certainty combined with the fact that the premises underlying nonmutual collateral estoppel do not apply here.

Just as in the Mendoza case, where this Court held that nonmutual collateral estoppel would not be applied to the United States because when the United States is a party, there are countervailing considerations, such as the fact that the United States will bring many more appeals, thereby reducing the judicial economies that might otherwise be served by collateral estoppel, just as in the Mendoza case, where the Court adopted a bright line rule that said, because of these countervailing considerations, nonmutual collateral estoppel will not apply, we suggest that by parity of reasoning in this case, the Court should conclude that parties should be permitted to avoid nonmutual collateral estoppel by obtaining vacatur because the premises for nonmutual estoppel are not furthered here, and because the interests of certainty and fairness furthered by permitting settlement would be achieved by adhering to the Court's general rule of vacatur.

QUESTION: Why wouldn't it pay the Government, in all cases where it gets an adverse decision in a particular district and it doesn't want to have to abide by that decision, to agree to do whatever action the suit requested and -- in exchange for the winning parties agreeing to the vacatur?

MR. HUNGAR: Your question is, why wouldn't it

pay the Government to do that, Your Honor?

QUESTION: Yes. I'd do it all the time, if I were the Government.

MR. HUNGAR: Well, in many cases --

QUESTION: Why suffer an adverse judgment? Just agree with the other party. Okay, you won, you can go ahead and do what you wanted to do. Let's just wipe this thing off the slate so the Government agencies won't be bound by this district court judgment.

MR. HUNGAR: Well, in some cases, Your Honor, the deposing party may not be willing to agree to vacatur, in which case our rule would not apply.

QUESTION: No, but very often they would be.

MR. HUNGAR: Again, Your Honor --

QUESTION: The expense of litigation, you're giving them all that they want.

MR. HUNGAR: We see little likelihood that the Government is going to routinely take the approach, but of course it would in some circumstances where, because it believes there is substantial doubt about the correctness of the judgment below, or for other reasons --

QUESTION: We'll always believe that.

(Laughter.)

QUESTION: Well, if you're wrong about the precedential effect of a vacated judgment, then certainly

the Government is not going to do that.

MR. HUNGAR: That's true, Your Honor. Thank you.

QUESTION: Thank you, Mr. Hungar. Mr. Mintz, you have 1 minute remaining.

REBUTTAL ARGUMENT OF HERBERT H. MINTZ

ON BEHALF OF THE PETITIONER

MR. MINTZ: Thank you, Your Honor.

Just one point, and that is that the -- a settlement of this type, which basically goes to the quantum of damages that were awarded for the antitrust violation, essentially buys out the adversarial interest, or incentive of the other party and allows through the settlement a claim such as the trade dress claim, which would be the subject of defensive nonmutual collateral estoppel, an asserted right by the party that lost, to be resuscitated just for the payment of enough money to satisfy the other party, and the only real interested parties who would be adversaries are the parties like Sears and Izumi, who are directly affected, and have already been shown to be affected, in the other litigation where that trade dress claim, once dead, has now come back to life, and that's why we say the vacatur on settlement rule completely undermines and is very much inconsistent with collateral estoppel, and the rule should be

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consistent.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Mintz. The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-captioned matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Mari Federico

(REPORTER)