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IN THE
Supreme Court of the United States

GLOBAL-TECH APPLIANCES INC. and
PENTALPHA ENTERPRISES, LTD.,

Petitioners,

v.

SEB S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the legal standard for the state of mind element of a claim for actively inducing infringement under 35 U.S.C. § 271(b) is “deliberate indifference of a known risk” that an infringement may occur, as the Court of Appeals for the Federal Circuit held, or “purposeful, culpable expression and conduct” to encourage an infringement, as this Court taught in *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937, 125 S. Ct. 2764, 2780, 162 L. Ed. 2d 781, 801 (2005)?

PARTIES TO THE PROCEEDING

The petitioners here, and defendants-appellants in the Federal Circuit, are Global-Tech Appliances Inc. (now “Global-Tech Advanced Innovations Inc.”), and Pentalpha Enterprises, Ltd. (now “Pentalpha Medical, Ltd.”) (collectively “Pentalpha”).

The respondent here, and plaintiff-appellee in the Federal Circuit, is SEB S.A (“SEB”).

CORPORATE DISCLOSURE STATEMENT

Pentalpha Enterprises, Ltd. is a wholly-owned subsidiary of Global-Tech Appliances Inc., a publicly traded corporation, with its principle place of business in Hong Kong.

SEB is a publicly traded corporation, with its principle place of business in France.

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PETITION FOR A WRIT OF CERTIORARI

Pentalpha respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit, insofar as it found Pentalpha liable for actively inducing infringement under 35 U.S.C. § 271(b), based upon Pentalpha's sales of a product FOB Hong Kong or China with "deliberate indifference of a known risk" that an infringement may occur.

OPINIONS BELOW

The opinion of the Federal Circuit is reported at 594 F.3d 1360, and a copy is annexed as Appendix A.

The memorandum and order of the United States District Court for the Southern District of New York is not officially reported, but is available at 2006 U.S. Dist. LEXIS 80394, and a copy is annexed as Appendix B.

The order denying the petition of Pentalpha for rehearing en banc is not officially reported, but is available at 2010 U.S. App. LEXIS 7937, and a copy is annexed as Appendix C.

JURISDICTION

The Federal Circuit entered its judgment on February 5, 2010, and denied Pentalpha's petition for rehearing en banc by an order entered on March 25, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Patent Act, 35 U.S.C. § 271(a), (b), and (c) provide:

“§ 271 Infringement of patent

(a) Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention within the United States, or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.

(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

(c) Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination, or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial non-infringing use, shall be liable as a contributory infringer.”

STATEMENT OF THE CASE

A. Factual Background

SEB is engaged in the business of manufacturing household appliances. It owns United States Patent No. 4,995,312 (the “Patent”), for a specific type of deep fryer. SEB markets its products in the United States through an indirect subsidiary, T-Fal Corporation.

Pentalpha is also engaged in the business of manufacturing household appliances. In 1997, Pentalpha developed a deep fryer by purchasing and studying various deep fryers on the market in Hong Kong, including a SEB deep fryer that lacked United States patent markings. Before selling its deep fryer, Pentalpha contacted a New York patent attorney for an opinion as to whether its deep fryer would infringe any United States patent. Pentalpha did not disclose to the attorney which products it had used to develop its deep fryer. The attorney then provided a written opinion that the deep fryer did not infringe any United States patent. But, the patent search the attorney performed failed to identify SEB’s Patent. Pentalpha in August 1997 began selling deep fryers to Sunbeam Corporation (“Sunbeam”), FOB Hong Kong or China, and Sunbeam imported them into the United States. Pentalpha later sold essentially the same deep fryer FOB Hong Kong or China to two additional United States retailers, Montgomery Ward & Co., Inc. (“Montgomery Ward”), and Fingerhut, Inc., which imported them into the United States.

In March 1998, SEB sued Sunbeam in the District of New Jersey for infringing the Patent. As a result of that action, Pentalpha on or about April 9, 1998 learned—for the first time—of the existence of the SEB Patent. On July 10, 1998, SEB sued Pentalpha in the New Jersey action. In July 1999, Sunbeam paid SEB \$2,000,000 to settle that action. Contemporaneously, the New Jersey district court dismissed SEB's claims against Pentalpha for lack of personal jurisdiction.

B. The Proceedings in the District Court

On August 27, 1999, SEB commenced an action for patent infringement against Pentalpha and one of its customers, Montgomery Ward, in the Southern District of New York. On December 16, 1999, the district court granted a preliminary injunction enjoining Pentalpha from selling its deep fryers. After receiving a non-infringement opinion from new patent counsel, Pentalpha began selling a redesigned deep fryer. On SEB's motion, the district court extended its preliminary injunction to that redesigned deep fryer.

After discovery and pretrial motions, the district court tried the action beginning on April 17, 2006. At the close of evidence on April 20, 2006, Pentalpha moved for judgment as a matter of law on certain claims. Specifically, Pentalpha argued that it could not be liable for actively inducing infringement under 35 U.S.C. § 271(b) for its sales before April 9, 1998 because the parties agreed that Pentalpha had no knowledge of the Patent before that date. The district court denied Pentalpha's motion. In its charge, the district court instructed the jury that it could find Pentalpha liable

for inducing infringement if Pentalpha “knew or should have known” that its actions would induce actual infringement. Pentalpha objected to that charge. On April 21, 2006, the jury found as follows.

- i. Pentalpha had directly infringed and induced infringement for both deep fryers.
- ii. SEB was entitled to a reasonable royalty of \$4,650,000 on Pentalpha’s sales, although the jury did not allocate any amount to either theory of liability.
- iii. Pentalpha’s infringement was willful, but did not specify any product or time period for that finding.

Post-trial motions followed. By memorandum and order dated October 9, 2007, annexed as Appendix B, the district court denied all of Pentalpha’s post-trial motions, except it reduced the verdict by \$2,000,000, the amount Sunbeam had paid SEB in the related suit over the deep fryers. The district court also awarded SEB enhanced damages of \$2,650,000, attorney’s fees of \$932,123, and prejudgment interest at the prime rate. Pentalpha moved to reargue because the district court had failed to consider *In Re Seagate*, 497 F.3d 1360 (Fed. Cir. 2007). The district court granted Pentalpha’s motion to reargue and vacated its award of enhanced damages and attorneys’ fees. It entered judgment on October 2, 2008 in the amount of \$4,878,341.

Pentalpha filed a notice of appeal on October 30, 2008.

C. The Proceedings in the Federal Circuit

The Court of Appeals for the Federal Circuit exercised appellate jurisdiction pursuant to 28 U.S.C. § 1295.

Pentalpha argued, among other things, that the district court erroneously charged the jury concerning the elements of a claim for actively inducing infringement because the Federal Circuit had held, en banc, that knowledge of a patent was a necessary element of a claim for actively inducing infringement, *DSU Medical Corp. v. JMS Co. Ltd.*, 471 F.3d 1293, 1304 (Fed. Cir. 2006) (en banc), and because Pentalpha, the parties agreed, had no knowledge of the Patent before April 9, 1998, seven months after Pentalpha began its sales. In an opinion entered February 5, 2010, annexed as Appendix A, the Federal Circuit held that, because of ambiguous jury instructions, it could not determine whether the jury had found damages based on inducing infringement alone, direct infringement alone, or both. Accordingly, the Federal Circuit held that, to affirm, it had to uphold the judgment based upon both the theories of direct infringement and actively inducing infringement.

The Federal Circuit nevertheless affirmed the district court's judgment that Pentalpha was liable for inducing infringement under 35 U.S.C. § 271(b). The Federal Circuit reasoned that Pentalpha's "deliberate indifference" as to whether its product might infringe a patent satisfied the state of mind element for actively inducing infringement under 35 U.S.C. § 271(b).

On March 2, 2010, Pentalpha filed a petition for rehearing en banc. Two bar associations submitted a joint brief in support of Pentalpha's petition. By order entered March 25, 2010, annexed as Appendix C, and without modifying the decision, the Federal Circuit denied the petition.

REASON FOR GRANTING THE PETITION

I. THE COURT SHOULD DETERMINE WHETHER THE SALE OF A PRODUCT WITH "DELIBERATE INDIFFERENCE OF A KNOWN RISK" THAT AN INFRINGEMENT MAY OCCUR SATISFIES THE INTENT ELEMENT FOR ACTIVELY INDUCING INFRINGEMENT UNDER 35 U.S.C. § 271(b)

A. THE FEDERAL CIRCUIT'S "DELIBERATE INDIFFERENCE" STANDARD FOR ACTIVELY INDUCING INFRINGEMENT UNDER 35 U.S.C. § 271(b) CONFLICTS WITH THE TEACHING OF THIS COURT IN *MGM STUDIOS, INC. v. GROKSTER, LTD.*

In *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 125 S. Ct. 2764, 162 L. Ed. 2d 781 (2005), this Court taught that the state of mind element for actively inducing patent infringement under 35 U.S.C. § 271(b) requires "affirmative intent that the product be used to infringe." *Grokster*, 545 U.S. at 936. *Grokster* was a copyright case in which this Court considered whether a distributor of software with significant non-infringing uses should be secondarily liable for copyright infringement if it intentionally designed and marketed

its product for an infringing purpose. *See Id.* at 941. This Court applied the patent law rule for inducing infringement to the copyright law, to allow secondary copyright liability premised on Grokster's intentional acts to encourage others to infringe. *Id.* at 936-37. In doing so, this Court articulated its view of the level of culpable conduct 35 U.S.C. § 271(b) requires:

“The rule on inducement of infringement as developed in the early cases is no different today. Evidence of ‘active steps . . . taken to encourage direct infringement’ . . . show an **affirmative intent that the product be used to infringe**, and a showing that infringement was encouraged overcomes the law's reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use.”

Id. at 936 (citations omitted) (emphasis added). Thus, this Court in *Grokster* taught that actively inducing patent infringement requires more than a disregard of the risk that a patent infringement might occur.

Furthermore, in applying its interpretation of 35 U.S.C. § 271(b) to the copyright law, this Court held that “mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability . . . The inducement rule, instead premises liability on purposeful, culpable expression and conduct.” *Id.* at 937.

Here, the Federal Circuit adopted a standard for actively inducing patent infringement under 35 U.S.C.

§ 271(b) that conflicts with that teaching of this Court. The *SEB* standard bases liability on conduct manifesting “deliberate indifference of a known risk” that a patent may exist. *SEB S.A. v. Montgomery Ward & Co., Inc.*, 594 F.3d. 1360, 1377 (Fed. Cir. 2010) (“as courts have observed in a variety of settings, the standard of deliberate indifference of a known risk is not different from actual knowledge.”) (citations omitted). The *SEB* standard does not require “affirmative intent that the product be used to infringe.” *Grokster*, 545 U.S. at 936. Instead, the *SEB* standard allows “mere knowledge of infringing potential” to serve as the basis for liability. *Id.* at 937.

The Federal Circuit’s “deliberate indifference” standard does not require recklessness. This Court has previously held that “[t]he civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.” *Farmer v. Brennan*, 511 U.S. 825, 836, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (citing, Prosser and Keeton § 34, at 213-14; Restatement (Second) of Torts § 500 (1965)). Furthermore, “recklessness requires ‘a known or obvious risk that was so great as to make it highly probable that harm would follow.’” *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69, 127 S. Ct. 2201, 2215, 167 L. Ed. 2d 1045, 1065 (2007) (quoting Prosser and Keeton § 34, at 213). The Federal Circuit conspicuously avoided articulating any standard concerning the severity of the risk of infringement necessary to find liability.

Similarly, the Federal Circuit's "deliberate indifference" standard does not require negligence. The Federal Circuit stated "'deliberate indifference' is not necessarily a 'should have known' standard. The latter implies a solely objective test, whereas the former may require a subjective determination that the defendant knew of and disregarded the overt risk that an element of the offense existed." *SEB*, 594 F.3d at 1376 (citations omitted).

In any event, the Federal Circuit's "deliberate indifference" standard involves a level of culpability lower than negligence. The district court charged the jury under a "knew or should have known" negligence standard. Transcript of Record at 987, *SEB S.A. v. Montgomery Ward & Co., Inc.*, 2006 U.S. Dist. LEXIS 80394 (S.D.N.Y. Oct. 2007). If the Federal Circuit intended for "deliberate indifference" to be a standard higher than negligence, like recklessness, it would have reversed and remanded for a new trial under that standard, rather than sit as jury to determine the question of whether that higher standard was met. *Carolina Power & Light Co. v. United States*, 573 F.3d 1271, 1276 (Fed. Cir. 2009) (even "a matter that can be tested by fairly simple arithmetic . . . is nonetheless a factual issue properly within the purview of the trial court"); *Golden Bridge Tech., Inc. v. Nokia, Inc.*, 527 F.3d 1318, 1323 (Fed. Cir. 2008) ("Appellate courts review district court judgments; we do not find facts."); *First Interstate Bank of Billings v. United States*, 61 F.3d 1477, 1479 (Fed. Cir. 1993) ("Fact-finding by the appellate court is simply not permitted"). Accordingly, the new "deliberate indifference" standard requires less culpability than negligence.

The Federal Circuit attempted to reconcile its new “deliberate indifference” standard with the standard set forth in *Grokster*, but failed. The Federal Circuit cited *Farmer v. Brennan*, 511 U.S. 825, an Eighth Amendment case. In *Farmer*, this Court annunciated a subjective “deliberate indifference” standard under which liability can attach when the accused “knows of and disregards an excessive risk.” *Id.* at 837. *Farmer*, however, equated its formulation of “deliberate indifference” to “subjective recklessness as is used in criminal law.” *See, Farmer*, 511 U.S. at 839. In applying the “deliberate indifference” standard, the Federal Circuit did not import the standard of “subjective recklessness as it is used in criminal law,” but imported a standard lower than negligence.

Accordingly, because the Federal Circuit has articulated a standard for the state of mind element for actively inducing infringement that is inconsistent with this Court’s teaching in *Grokster*, this Court should address that inconsistency.

**B. THE FEDERAL CIRCUIT HAS NOT
ADEQUATELY ARTICULATED AN
APPROPRIATE STANDARD FOR
ACTIVELY INDUCING INFRINGEMENT
UNDER 35 U.S.C. § 271(b)**

Putting aside the inconsistency between the teaching of *Grokster* and the decision of the Federal Circuit, the Federal Circuit has failed to articulate a standard for the state of mind element of actively inducing infringement under 35 U.S.C. § 271(b) that lower courts can consistently apply.

Under the “deliberate indifference” standard, a jury could find that the accused inducer “deliberately disregarded a known risk,” *SEB*, 594 F.3d at 1377, that an infringement may occur in virtually any situation. For example:

- If the accused inducer did not conduct a patent search, the jury could find that the accused inducer “deliberately disregarded a known risk” that a patent search would have revealed an applicable patent.
- If the accused inducer conducted a patent search, but did not obtain an opinion of counsel, the jury could find that the accused inducer “deliberately disregarded a known risk” that an opinion of counsel would have identified a problem with the search, and revealed the applicable patent.
- If the accused inducer retained counsel to provide a right to use opinion, the jury could find that the accused inducer “deliberately disregarded a known risk,” usually disclosed in opinions of counsel, that a jury could reach a different conclusion on the issue of infringement.

None of these fact patterns differ materially from the fact pattern of the present case, where Pentalpha relied upon a legal opinion based upon a faulty patent search.

SEB’s confusing treatment of the state of mind element for actively inducing infringement did not

develop in a vacuum. Rather, it represents the culmination of at least three attempts by the Federal Circuit to articulate an appropriate standard for the state of mind element for that claim.

In *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469 (Fed. Cir. 1990), the Federal Circuit articulated a standard suggesting that the patentee need only prove an intent to cause the acts that constituted the infringement, stating:

“On its face, § 271(b) is much broader than § 271(c) and certainly does not speak of any intent requirement to prove active inducement. However, in view of the very definition of ‘active inducement’ in pre-1952 case law and the fact that § 271(b) was intended as merely a codification of pre-1952 law, we are of the opinion that proof of actual intent to cause the acts which constitute the infringement is a necessary prerequisite to finding active inducement.”

In *Manville Sales Corp. v. Paramount Systems, Inc.*, 917 F.2d 543, 553 (Fed. Cir. 1990), the Federal Circuit announced a conflicting standard that required not only knowledge of the acts giving rise to infringement but knowledge of the infringement itself, stating:

“It must be established that the defendant possessed specific intent to encourage another’s infringement and not merely that the defendant had knowledge of the acts alleged to constitute inducement.”

In *DSU Medical Corp. v. JMS Co. Ltd.*, 471 F.3d 1293 (Fed. Cir. 2006) (en banc), the Federal Circuit, recognizing the inconsistency between *Hewlett-Packard* and *Manville*, and, given this Court's decision in *Grokster*, chose to follow *Manville*. The Federal Circuit stated, "*Grokster*, thus, validates this court's articulation of the state of mind requirement for inducement. In *Manville*, this court held that the 'alleged infringer must be shown . . . to have *knowingly* induced infringement' not merely knowingly induced the *acts* that constitute infringement," *DSU*, 471 F.3d at 1306 (quoting *Manville*, 917 F.2d at 544). The Federal Circuit specifically articulated its new standard as follows:

"[T]he plaintiff has the burden of showing that the alleged infringer's actions induced infringing acts and that he knew or should have known his actions would induce actual infringements. The requirement that the alleged infringer knew or should have known his actions would induce actual infringement necessarily includes the requirement that he or she knew of the patent."

DSU, 471 F.3d at 1306 (quoting *Manville*, 971 F.3d at 554) (citation omitted).

The application of *Manville* and *DSU* in *SEB* demonstrated, and deepened, the profound confusion in the law concerning the state of mind element for inducing infringement. The Federal Circuit acknowledged that "inducement requires a showing of 'specific intent to encourage another's infringement.'" *SEB, S.A.*, 594 F.3d at 1376 (citation omitted). But, it

then suggested that specific intent is not a high standard, stating: “As other courts have observed, ‘specific intent’ in the civil context is not so narrow as to allow an accused wrongdoer to actively disregard a known risk that an element of an offense exists.” *Id.* at 1376 (citations omitted). The Federal Circuit therefore held that the mere presence of a risk that infringement could occur would constitute specific intent to infringe.

SEB created additional uncertainty by discarding *DSU*’s express requirement that the accused must have knowledge of the patent. *SEB*’s new standard allowed Pentalpha’s “deliberate indifference of a known risk” that *SEB* held a protective patent to be treated as functionally equivalent to knowledge of the patent. *Id.* at 1377. Under this standard, a trier of fact could find “deliberate indifference” and, thus liability, in virtually any case.

Adding further to the uncertainty, *SEB* noted that “[t]his opinion does not purport to establish the outer limits of the type of knowledge needed for inducement.” *Id.* at 1378. It suggested that “a patentee may perhaps only need to show, as *Insituform [Technologies, Inc. v. Cat Contracting, Inc.]*, 161 F.3d 688 (Fed. Cir. 1998)] suggests, constructive knowledge with persuasive evidence of disregard for clear patent markings, similar to the constructive notice requirement in § 287(a).” *SEB*, 594 F.3d at 1378. Thus, the level of culpability to prove inducing infringement under *SEB* may be so elastic that neither actual knowledge nor even “deliberate indifference” is required to find liability.

The result of *SEB* is utter confusion as to the standard for the state of mind element for the claim of actively inducing infringement. In an *Amicus Curiae* brief submitted in support of Pentalpha's petition for rehearing en banc, the American Intellectual Property Law Association ("AIPLA"), a bar association of over 16,000 members who share an interest in intellectual property, and the Federal Circuit Bar Association ("FCBA"), a bar association of over 2,600 members who practice before the Federal Circuit stated:

"AIPLA and the FCBA are of the view that the reasoning expressed by the panel in *SEB S.A. v. Montgomery Ward & Co. Inc.*, Nos. 2009-1099, 2009-1108, 2009-1119, 2010 WL 398118 (Fed. Cir. Feb. 5, 2010), is symptomatic of the lack of clarity in the law of induced patent infringement. **In the wake of *SEB*, the law regarding the culpability level required to establish induced patent infringement is as confused as ever.** A clearer formulation of the law would allow practitioners and those in the industry to understand better the boundary between allowed and wrongful conduct." (Emphasis added.)

Brief for the American Intellectual Property Lawyers Association and the Federal Circuit Bar Association as *Amici Curiae* Supporting Appellants' Petition for Rehearing En Banc at 2, *SEB S.A. v. Montgomery Ward & Co., Inc.*, 594 F.3d. 1360 (Fed. Cir. 2010).

Thus, for 20 years, the Federal Circuit has struggled to articulate an appropriate standard for inducing infringement. It has failed to do so. It is therefore appropriate for this Court to address this issue.

**C. THE “DELIBERATE INDIFFERENCE”
STANDARD OF SEB MAY PROFOUNDLY
IMPACT INTERNATIONAL AND DOMESTIC
COMMERCE**

The Federal Circuit has, subject to limited exceptions, exclusive jurisdiction over appeals in patent infringement actions. 28 U.S.C. §1295; *The Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 122 S. Ct. 1889, 152 L. Ed. 2d 13 (2002). *SEB* is therefore, for all practical purposes, controlling precedent in the entire United States, not simply a regional circuit.

If the “deliberate indifference” standard of *SEB* remains the law, foreign sellers of goods imported into the United States will face increased costs of doing business. A foreign seller could no longer rely upon its lack of knowledge of a competitor’s patent as a basis to sell its product. To avoid liability, it must, at a minimum, secure a written legal opinion from patent counsel that its product does not infringe. If the foreign seller concludes that the cost of compliance, coupled with the risk of an error in the opinion (as in this case), outweighs its potential profit, the foreign seller may decline to sell its legitimate products for the United States market, resulting in the elimination of a competitor and, if it occurs on a large enough scale, the elimination of competition in the United States market.

At the very least, foreign sellers will pass on the cost of compliance to American consumers and businesses in the form of higher prices. In 2009, the United States imported over \$1.5 trillion worth of merchandise. Trade Stats Express, International Trade Administration, <http://tse.export.gov/NTDChartDisplay.aspx?UniqueURL=aox4m345pk4v0145mgrp3fo55-2010-6-18-10-37-37> (last visited June 22, 2010). While this broad inducement rule will not impact all merchandise imported to the United States, even a trivial increase in the percentage of commerce affected could have a dramatic impact upon the costs United States consumers and businesses are asked to absorb.

Domestic sellers of component parts of finished products would also face increased costs of doing business. A seller of a component of a product would ordinarily evaluate its potential liability under a theory of contributory infringement pursuant to 35 U.S.C. § 271(c). Under 35 U.S.C. § 271(c) a component seller “knowing [its product] to be especially adapted for use in an infringement,” may face liability. However, nothing would prohibit a patentee from bringing a claim for inducing infringement against a seller of a component, asserting “deliberate indifference” to its patent. Indeed, *Grokster* held that copyright owners could potentially succeed on a claim for inducing infringement in circumstances where a theory of contributory infringement would fail. *See Grokster*, 545 U.S. at 935-37. That liability will become real for a component manufacturer if, for example, its customer becomes insolvent.

Additionally, the new “deliberate indifference” standard may increase the costs of certain sellers of

domestic products. That standard will create personal liability for directors and officers of corporations who are not acting with any intent to induce infringement. “[C]orporate officers who actively assist with their corporation’s infringement may be personally liable for inducing infringement regardless of whether the circumstances are such that a court should disregard the corporate entity and pierce the corporate veil.” *Manville*, 917 F.2d at 553 (citation omitted). After *SEB*, directors and officers would face liability based merely upon their “deliberate indifference” as to whether a product their employer sold may infringe. The end result will be reluctance by corporate directors and officers to take even reasonable risks, thereby reducing diversity in the market for consumer goods and increasing costs.

This Court in *Grokster* struck a balance between the protection of intellectual property rights and the promotion of free trade that would create liability for actively inducing infringement only if a party acted with “purposeful, culpable conduct to induce an infringement.” (“We are, of course, mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential”). *Grokster*, 545 U.S. at 937. *SEB* upsets that balance. Unless this Court grants the petition, the burden on domestic and international commerce will needlessly increase.

CONCLUSION

For the foregoing reasons, Pentalpha respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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