

No. 13-896

IN THE
Supreme Court of the United States

COMMIL USA, LLC,
Petitioner,

v.

CISCO SYSTEMS, INC.,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068 (2011), this Court ruled that a defendant cannot be held liable for actively inducing patent infringement unless the defendant has “knowledge that the induced acts constitute patent infringement.” The questions presented are:

1. Whether evidence of a defendant’s reasonable belief that a patent is invalid is relevant to the determination whether the defendant acted with “knowledge that the induced acts constitute patent infringement.”
2. Whether the Federal Circuit correctly held that this Court’s decision in *Global-Tech* abrogated inconsistent Federal Circuit precedent.

CORPORATE DISCLOSURE STATEMENT

Cisco Systems, Inc., has no parent corporation. To Cisco's knowledge, no publicly held company owns 10 percent or more of Cisco's stock.

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BRIEF IN OPPOSITION

Cisco Systems, Inc., respectfully submits that neither question presented by Commil USA, LLC’s petition warrants this Court’s review.

The Federal Circuit correctly recognized that evidence of a defendant’s reasonable belief of a patent’s invalidity is relevant to the specific intent required to induce infringement. This conclusion is nothing more than a straightforward application of this Court’s decision in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011), which establishes that intent to induce infringement requires “knowledge that the induced acts constitute patent infringement.” *Id.* at 2068.

The panel opinion merely recognizes that an accused inducer cannot *know* that its customers infringe a patent if it has a reasonable basis for thinking the patent invalid. Commil claims (Pet. 14) that there are “conflicting Federal Circuit panel opinions” on this issue, but has not identified any actual conflict between the decision below and any other decision of the Federal Circuit. Moreover, even if such a conflict existed (which it does not), it would not be worthy of this Court’s review. See *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam).

Commil’s second question presented asks this Court to determine “whether *Global-Tech* overruled *en banc* Federal Circuit law” (Pet. 20 (capitalization altered))—an issue best addressed by the Federal Circuit. Not one Federal Circuit judge expressed any doubt on the matter when denying Commil’s petition for rehearing en banc, and this Court does not grant review to determine the effect of its clearly-written decisions on lower court precedent. In any event, the Federal Circuit’s grant of a new trial in light of the district court’s legally erroneous jury instruction breaks no new ground, but simply applies this Court’s decision in *Global-Tech* to the circumstances of this case.

STATEMENT

A. District Court Proceedings

Cisco is a global leader in the development and deployment of wireless networking systems for computers and other devices, and sells devices that provide wireless connectivity through the well-known “WiFi” wireless communication protocol. Commil, a company that does not develop or sell any products, but exists only to hold and monetize intellectual property, accused

Cisco of infringing a patent Commil purchased shortly before filing suit, U.S. Patent No. 6,430,395 (“the ’395 patent”). A5821; A5805; A12552-12553.

In August 2007, Commil sued Cisco in the U.S. District Court for the Eastern District of Texas, asserting that Cisco infringed a method claim of the ’395 patent. A1500-1502. Commil’s claims were first tried to a jury in May 2010. That trial included Commil’s assertions that Cisco directly infringed the patent by performing the claimed steps itself and that Cisco induced infringement by Cisco’s customers, as well as Cisco’s defenses that the asserted claim is invalid and not infringed by either Cisco or its customers. A135-138. The jury found Cisco liable for direct infringement, but not induced infringement, and rejected Cisco’s invalidity defenses. A136-138.¹ The jury awarded Commil \$3.7 million in damages despite Commil’s failure to present evidence of damages for direct infringement. A139.

Over Cisco’s objection, the district court ordered a new trial based on its conclusion that a statement by Cisco’s local counsel “affected the jury’s ability to discharge the functions for which they were empaneled in this case.” A6057. The district court limited the partial retrial to the issues of indirect infringement and damages.

In the second, partial, retrial on induced infringement, Cisco sought to present evidence that its reasonable belief that the ’395 patent was invalid negated the specific intent required for induced infringement. *See*

¹ The district court granted judgment as a matter of law to Cisco of no contributory infringement after Commil conceded that the accused products have substantial non-infringing uses. A19; A6004.

Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2068 (2011) (induced infringement requires actual knowledge that the induced acts would constitute patent infringement). Commil moved *in limine* to preclude Cisco from presenting this evidence. Commil “expressly argued that it would *unduly confuse the jury* to admit [good-faith belief of invalidity] evidence *without also submitting the validity determination to it* to decide.” Pet. App. 37a (O’Malley, J.) (first emphasis added). The district court agreed with Commil and, as a result, excluded any evidence of or argument regarding Cisco’s good-faith belief of the patent’s invalidity, over Cisco’s objection and proffer. *Id.* 46a, 206a-208a; A6365.

During the second trial, Commil’s evidence to establish that Cisco was aware of the patent before Commil instituted this lawsuit was limited to: (1) a single citation to the ’395 patent in an unrelated patent application in a different technical field (cited before Cisco acquired and began selling the accused technology) (A12609; A12611; A12618; A12724); and (2) vague testimony during the second trial (but not the first) that the previous owner of the ’395 patent had mentioned that his company held patents—without specifically mentioning the ’395 patent—to an unnamed Cisco representative at some unspecified time (A6215-6217).

At the close of the second trial, over Cisco’s objection (A6369), the district court instructed the jury that it could find inducement if Cisco “*knew or should have known* that its actions would induce actual infringement” (A6389 (emphasis added)). Commil specifically highlighted the erroneous “should have known” standard during its summation to the second jury. A6386. Cisco objected to the instruction during the charging conference (A6369), and renewed its objection to the

jury verdict in post-verdict motions (A36), after this Court’s decision in *Global-Tech* conclusively established that mere negligence (“should have known”) is insufficient to prove inducement, 131 S. Ct. at 2071-2072. Indeed, the district court here gave the very same “knew or should have known” instruction (Pet. App. 6a-7a) that this Court expressly disapproved of in its *Global-Tech* opinion, 131 S. Ct. at 2068, 2070-2072; *see also id.* at 2074 (Kennedy, J., dissenting).

The second jury found Cisco liable for induced infringement and awarded Commil \$63.8 million in damages. A162-164. Despite Cisco raising the erroneous jury instruction as a basis for new trial after the verdict (A36), the district court denied Cisco’s post-trial motions and entered final judgment against Cisco for \$74 million including costs and interest (Pet. App. 48a-49a).

B. Court Of Appeals Proceedings

Cisco appealed, and the Federal Circuit affirmed in part, vacated in part, and remanded for further proceedings, with each member of the panel (Prost, Newman, and O’Malley, JJ.) writing separately.

The panel unanimously held that a new trial was required because the district court erroneously instructed the second jury that it could find induced infringement if Cisco “knew or should have known” its customers infringed—an instruction contrary to this Court’s decision in *Global-Tech*—and that the error had a prejudicial effect requiring a new trial. Pet. App. 6a-10a (Prost, J.), 22a (Newman, J., concurring in part and dissenting in part), 28a (O’Malley, J., concurring in part and dissenting in part). Specifically, the panel noted that *Global-Tech* “held that induced infringement ‘requires knowledge that the induced acts constitute pa-

tent infringement.” Pet. App. 7a (quoting *Global-Tech*, 131 S. Ct. at 2068). The panel applied this Court’s holding that a plaintiff alleging induced infringement must show “actual knowledge or willful blindness” (*id.* (citing *Global-Tech*, 131 S. Ct. at 2072)), and unanimously concluded that the “jury instruction plainly recite[d] a negligence standard, which taken literally, would allow the jury to find the defendant liable based on mere negligence” (Pet. App. 8a). The panel further unanimously held that the legal error in the jury instruction prejudiced Cisco because it “certainly could have changed the result” of the second trial (*id.* 9a-10a), as “[f]acts sufficient to support a negligence finding are not necessarily sufficient to support a finding of knowledge” (*id.* 10a).

A majority of the panel also concluded that Cisco was entitled to present evidence of its good-faith belief of the patent’s invalidity to negate the required intent for Commil to prove its claim of induced infringement. Pet. App. 10a-13a (Prost, J.), 28a-29a (O’Malley, J.); *but see id.* 22a-27a (Newman, J.). The panel majority concluded that because “one cannot infringe an invalid patent” (*id.* 11a (citing *Prima Tek II, L.L.C. v. Polypap, S.A.R.L.*, 412 F.3d 1284, 1291 (Fed. Cir. 2005); *Richdel, Inc. v. Sunspool Corp.*, 714 F.2d 1573, 1580 (Fed. Cir. 1983))), “a good-faith belief of invalidity is evidence that may negate the specific intent to encourage another’s infringement, which is required for induced infringement” (Pet. App. 12a).

Commil petitioned for rehearing en banc, challenging the panel’s ruling on both the jury instruction and the good-faith belief of invalidity.² The Federal Circuit

² Cisco also petitioned for panel rehearing and rehearing en banc, challenging the panel’s holding permitting a partial retrial of

denied Commil’s petition for rehearing en banc over the dissent of five judges. Pet. App. 53a (Reyna, J., joined by Rader, C.J., Newman, Lourie, and Wallach, JJ.), 61a (Newman, J., joined by Rader, C.J., and Wallach, J.).

REASONS FOR DENYING THE PETITION

I. A GOOD-FAITH BELIEF THAT A PATENT IS INVALID IS A DEFENSE TO A CLAIM OF INDUCED INFRINGEMENT

A. The Specific Intent Required To Prove Induced Infringement Can Be Negated By A Good-Faith Belief Of Invalidity

The Federal Circuit’s determination that a defendant accused of induced infringement may oppose the charge that it specifically intended to induce infringement by pointing to a reasonable belief that the patent was invalid is correct and does not warrant this Court’s consideration. As the panel majority noted (Pet. App. 12a-13a & n.1), this is not to say that belief of the patent’s invalidity *precludes* a finding of induced infringement; rather, it is simply a recognition that a reasonable belief of the invalidity of the patent-in-suit is *relevant* in determining whether the accused infringer had the specific intent to induce infringement required by the statute and reaffirmed in this Court’s decision in *Global-Tech*.³

induced infringement without a retrial of invalidity, which Cisco had argued violates the Seventh Amendment. Cisco’s petition was also denied by the Federal Circuit. The panel’s Seventh Amendment holding is the subject of Cisco’s conditional cross-petition in No. 13-1044.

³ Commil’s framing of the argument as relating to a “mistaken” belief of invalidity is a non sequitur. Pet. 11. It is only because of the strange procedural posture of this case—a posture that violates the Seventh Amendment of the Constitution, as explained in

1. The accused infringer’s good-faith belief of invalidity is a defense to the intent requirement of induced infringement

After noting that “[u]nder our case law, it is clear that a good-faith belief of non-infringement is relevant evidence that tends to show that an accused inducer lacked the intent required to be held liable for induced infringement” (Pet. App. 11a (citing cases)), the panel correctly ruled that there is “no principled distinction between a good-faith belief of invalidity and a good-faith belief of non-infringement for the purpose of whether a defendant possessed the specific intent to induce infringement of a patent” (*id.* 10a). Nothing in Commil’s petition calls the correctness of that holding into question.

As in its briefing and argument before the Federal Circuit and in its petition for rehearing, Commil fails to appreciate the distinction between *direct* infringement and *induced* infringement. This is a crucial difference: while direct infringement—a strict liability tort—can be committed despite the infringer’s reasonable belief of the patent’s invalidity, induced infringement can be

Cisco’s conditional cross-petition—that a jury will be required to determine whether Cisco’s good-faith belief of the patent’s invalidity negates the specific intent to induce infringement without also being asked to determine whether the patent is in fact invalid. *See* Conditional Cross-Pet. 16-19, No. 13-1044. In any event, the Federal Circuit has repeatedly confirmed findings of no induced infringement where defendants “reasonably believed” that there was no infringement, even where the defendants were later found to infringe. *See, e.g., Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317, 1329 (Fed. Cir. 2009); *Ecolab, Inc. v. FMC Corp.*, 569 F.3d 1335, 1351, *amended on reh’g in part*, 366 F. App’x 154 (Fed. Cir. 2009).

proven only upon a showing of the requisite state of mind. *Global-Tech*, 131 S. Ct. at 2068.

The difference in intent required for direct and induced infringement disposes of most of Commil’s arguments and distinguishes its authorities. *Medtronic, Inc. v. Cardiac Pacemakers, Inc.*, 721 F.2d 1563 (Fed. Cir. 1983), involved only direct infringement, and the Federal Circuit’s uncontroversial observation in that case that infringement and validity are separate questions does not foreclose invalidity from affecting the state of mind of an accused *inducer*. See Pet. 13 (citing *Medtronic*, 721 F.2d at 1583; *Pandrol USA, LP v. Airboss Ry. Prods., Inc.*, 320 F.3d 1354, 1365 (Fed. Cir. 2003)).

Indeed, Commil’s argument that a reasonable belief of invalidity cannot be a defense to inducement ignores *Global-Tech*, which does not view inducement in a vacuum, but rather establishes that intent to induce infringement requires “knowledge that the induced acts constitute *patent infringement*.” 131 S. Ct. at 2068 (emphasis added). Unchallenged precedent establishes that “patent infringement” cannot exist if the asserted patent is invalid. See, e.g., *Richdel, Inc. v. Sunspool Corp.*, 714 F.2d 1573, 1580 (Fed. Cir. 1983) (“The claim being invalid there is nothing to be infringed.”). Likewise, imposing liability upon “whoever actively induces infringement” requires a showing of intent amounting to “actual knowledge” or “willful blindness.” *Global-Tech*, 131 S. Ct. at 2068-2069; see also *Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683, 697 (Fed. Cir. 2008) (accused infringer must possess “specific intent to encourage another’s infringement” (quoting *ACCO Brands, Inc. v. ABA Locks Mfr. Co.*, 501 F.3d 1307, 1312 (Fed. Cir. 2007))). To demonstrate this specific intent requires not only knowledge of the patent’s ex-

istence, but also knowledge that the allegedly induced acts will amount to infringement of a *valid* patent. See *Prima Tek II, L.L.C. v. Polypap, S.A.R.L.*, 412 F.3d 1284, 1291 (Fed. Cir. 2005) (“there can be no ... induced infringement of invalid patent claims”). The panel opinion does nothing more than recognize that an accused inducer cannot know that its customers infringe a valid patent if it has a reasonable basis for thinking the patent invalid.⁴ Commil’s arguments to the contrary (Pet. 15-17) are without merit and ignore this Court’s clear statements in *Global-Tech* concerning the proper reach and interpretation of 35 U.S.C. § 271(b).

2. A good-faith belief of non-infringement is well-recognized as a defense, and invalidity should be treated no differently

The Federal Circuit has long recognized that a good-faith belief of non-infringement is a permissible defense to a claim of induced infringement. Pet. App. 11a (a good-faith belief of non-infringement “is relevant evidence that tends to show that an accused inducer lacked the intent required to be held liable for induced infringement”). Neither Commil nor any of the dissenting judges in the Federal Circuit call this into question. Indeed, the Federal Circuit has upheld findings of no induced infringement, “even though [the defendant’s]

⁴ For example, if a car manufacturer were aware of a plainly invalid patent that covered a method of driving a car, which the purchaser of its car would clearly infringe, the car manufacturer could not specifically intend to induce its customers’ infringement because of the patented method’s clear invalidity. “The inducement rule ... premises liability on purposeful, culpable expression and conduct” that is not present in such a case. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937 (2005) (applying patent inducement rule to copyright).

product was ultimately found to infringe,” where the jury had substantial evidence from which to conclude that the defendant lacked the intent required for induced infringement because the defendant “reasonably believed that the use of [its product] would not infringe.” *Ecolab, Inc. v. FMC Corp.*, 569 F.3d 1335, 1351, *amended on reh’g in part*, 366 F. App’x 154 (Fed. Cir. 2009); *see also Kinetic Concepts, Inc. v. Blue Sky Med. Group, Inc.*, 554 F.3d 1010, 1024-1025 (Fed. Cir. 2009) (affirming jury verdict of no induced infringement where “[t]he jury heard [defendant’s] founders explain why they did not believe they were infringing”); *Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317, 1329 (Fed. Cir. 2009) (“The original product instructions do not evidence a specific intent to encourage infringement, since they teach a stirring action which Basic could have reasonably believed was non-infringing.”).

Commil contends that a reasonable belief of non-infringement is a valid defense while a reasonable belief of invalidity is not because “infringement and noninfringement are opposite sides of the same coin whereas infringement and invalidity are altogether entirely different coins.” Pet. 16-17 (quoting Pet. App. 58a). But that misdirection is without merit. A reasonable belief of non-infringement or invalidity, while irrelevant to the question of *actual* infringement or invalidity, is most certainly relevant to the *intent* requirement of induced infringement, which requires the defendant to have “knowledge that the induced acts constitute patent infringement.” *Global-Tech*, 131 S. Ct. at 2068. Where knowledge of patent infringement is required, no principled distinction can be drawn between a defense based on a reasonable belief of non-infringement and a defense based on a reasonable belief of invalidity.

Indeed, Commil identifies no difference between the many cases in which a reasonable belief of non-infringement has been credited by a jury or a court as negating the intent required for induced infringement and this case, where Cisco's reasonable belief of the invalidity of Commil's patent is "relevant evidence" that Cisco lacks the specific intent required for induced infringement. Pet. App. 11a. Commil offers dire predictions about the effect the panel's common-sense holding will have on patent protection (Pet. 19), but its arguments would apply with equal force to a defense based on a reasonable belief of non-infringement, which has long been recognized as a defense to inducement.⁵

Commil's argument is further weakened by the fact that a reasonable belief of invalidity is recognized as a defense to a charge of willful infringement. *See In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc) ("[T]o establish willful infringement, a patentee must show ... that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a *valid* patent." (emphasis added)). Commil's attempts (Pet. 17-18) to distinguish willful infringement from induced infringement are woefully inadequate. Commil argues that because willful infringement requires a higher level of culpability than induced infringement, "a defendant has more defenses to a willfulness allegation (e.g., a good faith belief in invalidity) than to an inducement charge." *Id.* 18. This nonsensical statement underscores the false distinction

⁵ Similarly, Commil's argument (Pet. 15-16) that allowing a reasonable belief of invalidity to serve as a defense to induced infringement violates tort principles would apply equally to a defense of reasonable belief of non-infringement, the legitimacy of which neither Commil nor the dissenting Federal Circuit judges challenge.

upon which Commil’s argument relies—while a plaintiff faces a more demanding burden of proof to establish that a defendant acted with the greater culpability required for a finding of willful infringement than for induced infringement, that does not mean that a defendant should be hamstrung in its ability to demonstrate that it did not possess whatever level of culpability is required. An accused induced infringer must be allowed to present, in rebuttal to a charge of specific intent, any evidence that tends to negate that specific intent—whether or not such evidence is also a recognized defense to a charge of willfulness.

B. The Issue Is Not Ripe For This Court’s Review

Commil’s assertion that the Federal Circuit has created “confusion” through “conflicting Federal Circuit panel opinions” is not a basis for certiorari. Pet. 14. The Federal Circuit could have corrected any such “confusion”—if it existed—on en banc review, but a majority of the Federal Circuit recognized that there was no conflict and therefore en banc review was not warranted. Moreover, the panel opinion is now governing precedent on the point, so there can be no confusion: evidence of a good-faith belief of invalidity can be asserted as a defense to negate the specific intent required to induce infringement. Finally, even if there were a conflict, this Court’s practice is not to wade into intra-circuit conflicts. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam).

Likewise, Commil’s suggestion (Pet. 18) that the Federal Circuit’s ruling will spawn extensive litigation also counsels in favor of denying certiorari to allow development of this issue in the lower courts. There is no need for this Court to confront this question now, when

there is no indication that the Federal Circuit's ruling has created any problems. If Commil's unsubstantiated predictions materialize, the issue will arise when it is properly presented in the future.

II. THE FEDERAL CIRCUIT'S APPLICATION OF *GLOBAL-TECH* TO REVERSE THE DISTRICT COURT'S ERRONEOUS JURY INSTRUCTION IS CORRECT AND DOES NOT MERIT REVIEW

The judges of the Federal Circuit were unanimous in their conclusion that the district court's jury instruction concerning the required culpability for a finding of induced infringement was erroneous and required a new trial before a properly instructed jury. This ruling was unquestionably a correct application of this Court's decision in *Global-Tech*. Even if it were not, the factbound application of *Global-Tech* to a specific jury instruction in a specific case does not merit this Court's attention. This Court does not review case-specific applications of correctly stated rules. *See* S. Ct. R. 10.

Commil does not seriously contest that the district court's jury charge—instructing the jury that Cisco could be liable for induced infringement if it “should have known” that its customers infringed Commil's patent (Pet. App. 239a)—improperly allowed the jury to find inducement if it concluded that Cisco was merely negligent. And for good reason: the “should have known” jury instruction given by the district court is flatly inconsistent with the requirement that inducement liability have “an appropriately limited scope that surpasses recklessness and negligence.” *Global-Tech*, 131 S. Ct. at 2070. Indeed, this Court specifically disapproved of the very standard that the district court recited in its jury instruction in this case. *Id.* at 2071

(rejecting “[t]he test applied by the Federal Circuit in this case ... [because] it permits a finding of knowledge when there is merely a ‘known risk’ that the induced acts are infringing”).

Instead, Commil suggests that other aspects of the jury instruction somehow “cured” this clear defect (Pet. 21-22) or that any error was harmless (*id.* 22 n.2). Apart from being untrue, this is beside the point: There is no reason for this Court to review the Federal Circuit’s fact-specific determination that the district court’s error was not cured and was not harmless in the context of this particular case.

Commil also attempts (Pet. 24-26) to read *Global-Tech* as though it decided only the narrow question whether inducement liability requires actual knowledge of the patent’s existence. But this Court’s holding in *Global-Tech* is not so limited. This Court expressly stated: “[W]e now hold that induced infringement under § 271(b) requires knowledge *that the induced acts constitute patent infringement.*” 131 S. Ct. at 2068 (emphasis added); *see also* Pet. App. 9a (“A finding of inducement requires both knowledge of the existence of the patent and ‘knowledge that the induced acts constitute patent infringement.’” (quoting *Global-Tech*, 131 S. Ct. at 2068)).

The reasoning of *Global-Tech* only confirms the breadth of the holding. In *Global-Tech*, this Court disapproved of an approach that “permit[ted] a finding of knowledge when there is merely a ‘known risk’ that the induced acts are infringing,” and also stated that inducement liability under a “willful blindness” theory “require[s] active efforts by an inducer to avoid knowing about the *infringing nature* of the activities.” 131 S. Ct. at 2071 (emphasis added). And the ultimate af-

firmance of the defendant's liability for inducement in *Global-Tech* depended on the conclusion (stated twice) that the defendant "willfully blinded itself to the *infringing nature*" of a third party's sales. *Id.* at 2071, 2072 (emphasis added). Thus *Global-Tech* required not only knowledge of the patent's existence, but also actual knowledge of (or willful blindness to) "the infringing nature of the activities," i.e., that the third party's conduct constituted infringement.

Commil also suggests (Pet. 22-26) that the panel somehow erred in concluding that *Global-Tech* partially abrogated the Federal Circuit's prior decision in *DSU Medical Corp. v. JMS Co.*, 471 F.3d 1293, 1306 (Fed. Cir. 2006) (en banc), to the extent that decision approved a "should have known" standard. But there is no need for this Court to review a decision in which the Federal Circuit brings its jurisprudence into conformity with this Court's decisions. The Federal Circuit was certainly not barred from recognizing *DSU's* partial abrogation simply because this Court's opinion in *Global-Tech* did not expressly state that it was overruling *DSU*. The courts of appeals are expected to recognize when a decision of this Court overrules their precedents. Indeed, not one judge on the Federal Circuit voiced the opinion that *DSU's* partial abrogation warranted en banc rehearing; it certainly does not warrant certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2014