No. 2014-1724

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

INTELLECTUAL VENTURES II LLC,

Plaintiff-Appellee,

v.

JPMORGAN CHASE & CO., JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, CHASE BANK USA, NATIONAL ASSOCIATION, CHASE PAYMENTECH SOLUTIONS, LLC, PAYMENTECH LLC,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of New York in civil action No. 1:13-cv-03777, Judge Alvin K. Hellerstein

BRIEF FOR AMICUS CURIAE
ASKELADDEN L.L.C.
IN SUPPORT OF DEFENDANTS-APPELLANTS' PETITION FOR REHEARING *EN BANC*

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May 15, 2015

CERTIFICATE OF INTEREST

Counsel for Amicus Curiae Askeladden, L.L.C. certifies the following:

1. The full name of every party or amicus represented by me is:

   Askeladden, L.L.C.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   Askeladden, L.L.C.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

   Askeladden, L.L.C. is a wholly-owned subsidiary of The Clearing House Payments Company L.L.C. No corporation or publicly held company owns 10 percent or more of The Clearing House Payments Company L.L.C.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

   Wilmer Cutler Pickering Hale and Dorr LLP: James L. Quarles III; Gregory Lantier; Richard W. O'Neill; and Robert A. Arcamona

Dated: May 15, 2015

/s/ James L. Quarles III
JAMES L. QUARLES III

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Askeladden L.L.C. is an education, information and advocacy organization whose goal is to improve the understanding, use, and reliability of patents in financial services and related industries. Askeladden seeks to improve the United States patent system by, among other things, submitting amicus curiae briefs on important legal issues.[2]

Askeladden is a wholly owned subsidiary of The Clearing House Payments Company L.L.C. Established in 1853, The Clearing House is the oldest banking association and payments company in the United States. It is owned by the world's largest commercial banks, which collectively hold more than half of all deposits in the United States and employ over one million people in the United States and more than two million people worldwide. Its affiliate, The Clearing House Association L.L.C., is a nonpartisan advocacy organization that represents the interests of its owner banks by promoting and developing policies to support a safe, sound, and competitive banking system.

The stay provisions of Section 18 of the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) ("AIA"), are a critically important component of Congress's efforts to diminish abusive patent litigation practices

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[1] No party, and no person other than Askeladden, L.L.C., or its member, contributed to the preparation or submission of this brief.

[2] Defendants-Appellants have consented to the filing of this brief. Plaintiff-Appellee does not oppose the filing of this brief.

involving "business method" patents of dubious quality. Because the financial services sector is particularly prone to lawsuits on such patents, Askeladden has a specific interest in promoting the correct interpretation of Section 18.

ARGUMENT

The panel held as a matter of statutory construction that it lacks jurisdiction over this appeal because it concluded the term "proceeding" in AIA Section 18 must be interpreted "narrowly." *See* Maj. Op. at 7. The panel's reasoning is fundamentally flawed for the reasons set forth in Defendants-Appellants' petition for rehearing *en banc* and Askeladden's amicus brief submitted during the panel stage of this appeal. *See* Dkt. No. 39. This brief will not repeat those arguments, but will instead focus on the broader implications of the panel's decision, which further demonstrate that its interpretation of Section 18(b) is incorrect because the decision contravenes Congress's intent in enacting the AIA.

The effect of the panel's decision is not limited to restricting this Court's jurisdiction to adjudicate appeals under Section 18(b)(2). Because of the panel's "narrow" interpretation of the word "proceeding" in Section 18(b)(1), its decision will also be interpreted to relieve district courts from their duty to apply the four factors Congress established for deciding whether to stay district court litigation pending a decision on institution of a CBMR trial. As a result, the panel's decision will directly harm the interests that Congress specifically sought to protect when enacting Section 18. Respectfully, the Court should rehear this appeal *en banc* and conclude – consistent with the Patent Office's own regulations – that a "proceeding" under Section 18 begins with the filing of a petition for CBMR.

A. The Panel's Decision Upends The Scheme Congress Established to Address Litigation Involving Low Quality Patents and Will Lead to Increased Forum Shopping.

Congress sought to decrease unproductive patent litigation, reduce litigation costs, and prevent forum shopping when it enacted Section 18 of the AIA. But the panel's decision will have precisely the opposite effect because it upends the framework Congress set for accomplishing those goals.

Section 18(b)(1)(A)-(D) sets forth four factors district courts must analyze when a party moves to stay litigation "relating to a [CBMR] proceeding" for an asserted patent:

> (A) whether a stay, or the denial thereof, will simplify the issues in question and streamline the trial;
>
> (B) whether discovery is complete and whether a trial date has been set;
>
> (C) whether a stay, or the denial thereof, would unduly prejudice the nonmoving party or present a clear tactical advantage for the moving party; and
>
> (D) whether a stay, or the denial thereof, will reduce the burden of litigation on the parties and on the court.

AIA § 18(b)(1). Congress intended the fourth factor to "place[] a very heavy thumb on the scale" in favor of a stay, thus reducing litigation costs and the need for unproductive litigation. *See* 157 Cong. Rec. S1053 (daily ed. Mar. 1, 2011) (statement of Sen. Schumer); *Mkt.-Alerts Pty. Ltd. v. Bloomberg Fin. L.P.*, 922 F. Supp. 2d 486, 489-490 (D. Del. 2013) (stating that the fourth factor was added "to ease the movant's task of demonstrating the need for a stay"). Another purpose of codifying the four factor test was to create a uniform body of precedent that could be corrected by the Federal Circuit when needed. *See* 157 Cong. Rec. S1364 (daily ed. Mar. 8, 2011) (statement of Sen. Schumer) (stating that the four factors would prohibit courts from applying "additional factors that are not codified" in the statute). This aspect of Section 18 would reduce forum shopping.

Prior to the panel's opinion, district courts consistently applied the four factors of Section 18(b)(1) when deciding motions to stay pending CBMR, regardless of how far the CBMR proceeding had progressed. In many of the decisions concerning pre-institution stays, the district court expressly read Section 18(b)(1) as *requiring* it to apply the statute's four factors.[3]

[3] *See, e.g.*, *buySAFE, Inc. v. Google, Inc.*, No. 3:12-cv-781, 2014 WL 2714137, at *2-3 (E.D. Va. June 16, 2014) (granting stay prior to institution of CBM review trial because "regardless of whether PTAB grants the Petition and a CBM Review is ultimately conducted, this Court must apply the AIA § 18(b)(1) factors to determine if a stay is appropriate at the time the Petition is first filed"); *Versata Software, Inc. v. Volusion, Inc.*, No. 12-cv-893, 2013 WL 6912688, at *2 (W.D. Tex. June 20, 2013) ("[T]he statute further authorizes district courts to stay civil proceedings once a party has petitioned the PTAB for review under the CBM Program. AIA § 18(b)"); *GT Nexus, Inc. v. Inttra, Inc.*, No. 11-cv-02145, 2014 WL 3373088, at *2 (N.D. Cal. July 9, 2014) (denying motion to lift stay: "The statutory

District courts did not, of course, stay every case after applying the four factors. But, consistent with Congress's intent, the AIA resulted in a sharp increase in the number of cases involving business method patents stayed early in litigation, which avoided massive legal bills while proceedings before the PTAB unfolded.

The panel's opinion, however, effectively abrogates that well accepted and correct interpretation of the statute. As the dissent correctly notes, the panel's decision eliminates any consistent standard that district courts must apply when determining whether to stay litigation while the PTAB considers whether to institute a CBMR trial. Dissent Op. at 5. Instead, under the panel's decision, district courts deciding a pre-institution motion to stay may: (1) apply their own tests to determine whether a stay should be granted; and/or (2) refuse to consider any of the four Section 18(b)(1) factors. Indeed, at least one district court has already cited the panel's opinion and not applied the four factor test of Section 18(b)(1) in deciding a motion to stay. *See ContentGuard Holdings, Inc. v. Amazon.com, Inc., et al.*, No. 2:13-cv-1112, Dkt. No. 554 (E.D. Tex. April 27, 2015) (denying motion to stay pending CBMR solely because "no petition has yet been granted"). Not only does this decision fail to abide by the analysis Congress

stay analysis under the AIA is triggered upon the filing of a petition for CBM review, not upon the granting of a petition for CBM review by the PTAB").

required in Section 18(b)(1), but it is now unreviewable following the majority's decision.

As a result, if the panel's decision stands, some courts will effectively ***never*** grant a stay during the first six months of litigation. This will encourage forum shopping, as patent plaintiffs seeking nuisance-value settlements flock to jurisdictions that categorically decline to stay district court litigation while the PTAB determines whether to institute a CBMR trial. Such a result cannot be squared with Congress's expressed objectives of "plac[ing] a very heavy thumb on the scale" in favor of stays and creating unified precedent across federal judicial districts. Indeed, this type of forum shopping is precisely one of the problems Congress sought to remedy when it enacted Section 18. *Cf.* AIA § 18(c) ("ATM exception for venue purposes" enacted in response to problem of forum shopping).

B. The Panel's Decision Will Cause Significant and Immediate Harm To Entities that The AIA Intended To Protect.

Congress enacted CBMR to protect members of the financial services industry and others from plaintiffs that file extortionist infringement lawsuits in hopes of obtaining settlements that are less costly than what the defendant will pay to litigate a case. *See* 157 Cong. Rec. S1053 (daily ed. Mar. 1, 2011) (statement of Sen. Schumer) (stating that these plaintiffs "attempt to extract settlements from the banks by suing them in plaintiff-friendly courts and tying them up in years of extremely costly litigation"); 157 Cong. Rec. H4496 (daily ed. June 23, 2011) (statement of Rep. Smith) (Section 18 would also "prevent nuisance or extortion lawsuits"). To accomplish that goal, Congress created a two pronged approach: (1) allow defendants to challenge the validity of business method patents in a CBMR; and (2) provide for stays to district court litigation pending that review.

But the panel's decision has critically undermined this framework during the first six months after a validity challenge has been filed with the PTAB. The experience of members of the financial services industry demonstrates that the litigation costs for those six months alone will frequently amount to hundreds of thousands of dollars, which is less than the settlement demand in many such cases. Thus, if the stay provisions of Section 18 become available only after a trial is instituted, financial services institutions sued on low-quality business method patents will not be much better off than they were prior to the enactment of Section 18. They will still have to choose between paying extortionate settlements or expending greater resources litigating for another six months. Before this Court undercuts Congressional intent so directly, the full Court should consider the issue.

CONCLUSION

The panel's decision found that this Court lacks jurisdiction over Defendants-Appellants' appeal through an erroneous interpretation of AIA Section 18(b). If left standing, that decision will undermine Congress's intent in enacting the statute and have detrimental effects on the very institutions that Congress intended to protect. The Court should grant rehearing *en banc*.

Dated: May 15, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2015, I electronically filed the foregoing with the Clerk of Court and caused a copy to be served on counsel of record using the CM/ECF System.

/s/ James L. Quarles III
JAMES L. QUARLES III

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief amicus curiae is less than one-half the maximum length authorized for a party's principal motion under the Federal Circuit Rules and Federal Rules of Appellate Procedure. *See* Fed. R. App. Proc. 29(d).

/s/ James L. Quarles III
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