

United States Court of Appeals  
for the Federal Circuit

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SCA HYGIENE PRODUCTS AKTIEBOLAG  
and SCA PERSONAL CARE, INC.,

*Plaintiffs-Appellants,*

v.

FIRST QUALITY BABY PRODUCTS, LLC,  
FIRST QUALITY HYGIENIC, INC., FIRST QUALITY PRODUCTS, INC.,  
and FIRST QUALITY RETAIL SERVICES, LLC,

*Defendants-Appellees.*

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*Appeal from the United States District Court for the Western District of  
Kentucky in Case No. 10-CV-0122, Chief Judge Joseph H. McKinley, Jr.*

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**BRIEF OF ASKELADDEN L.L.C. AS  
AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES**

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WILLIAM M. JAY  
BRIAN T. BURGESS\*  
GOODWIN PROCTER LLP  
901 New York Avenue  
Washington, DC 20001  
(202) 346-4000

KEVIN J. CULLIGAN  
JOHN P. HANISH  
GOODWIN PROCTER LLP  
The New York Times Building  
620 Eighth Avenue  
New York, NY 10018  
(212) 813-8800

*Counsel for Amicus Curiae Askeladden L.L.C.*

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April 23, 2015

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

SCA HYGIENE PRODUCTS AKTIEBOLAG AND SCA PERSONAL CARE, INC. V. FIRST  
QUALITY BABY PRODUCTS, LLC, ET AL.

No. 2013-1564

**CERTIFICATE OF INTEREST**

Counsel for the Amicus Curiae, Askeladden L.L.C., certifies the following (use “None” if applicable; use extra sheets if necessary):

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:

None

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

None

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:

Goodwin Procter LLP: Kevin J. Culligan, William M. Jay, John P. Hanish, and Brian T. Burgess.

April 23, 2015

Date

/s/ Kevin J. Culligan

Kevin J. Culligan

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## **INTEREST OF AMICUS CURIAE**

Askeladden L.L.C. is an education, information, and advocacy organization dedicated to improving the understanding, use, reliability, and quality of patents pertinent to financial services and related industries. Askeladden seeks to improve the United States patent system by, among other things, submitting amicus curiae briefs on important issues of intellectual property law.

Askeladden is a wholly owned subsidiary of the Clearing Housing 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 which employ more than one million people in the United States and more than two million people worldwide. The Clearing House clears almost \$2 trillion each day, representing nearly half of all automated clearing house, funds transfer, and check-image payments made in the United States. 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.

Askeladden believes that a strong patent system is vital to continued innovation, and that the health of that system depends on retaining traditional checks on patent abuse, including the traditional defense of laches. Eliminating or

restricting the laches defense to allow patent owners to assert and maintain infringement claims after long periods of delay would invite abuse and threaten investments made in good faith by financial institutions. Financial-services companies face unfair and unreasonable economic prejudice when patent owners bring claims alleging that an important system, method, or piece of software that the company has used and on which it has relied for many years infringes a patent. Because such claims may expose companies to substantial liability, they exert pressure on defendants to settle even weak patent claims. As frequent targets of abusive patent claims, financial-services institutions have a strong interest in preserving the traditional laches defense.<sup>1</sup>

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae or its counsel made a monetary contribution to the brief's preparation or submission. Askeladden files this brief in accordance with the Order issued by this Court on December 30, 2014, which states that briefs of amicus curiae may be filed without consent or leave of the Court.

## SUMMARY OF ARGUMENT

This Court’s longstanding precedent that laches is a defense to stale patent infringement claims for damages is correct and should be reaffirmed. For more than a century, courts have recognized that laches is a defense in patent litigation, and they have applied laches to bar belated claims seeking damages as well as claims that seek purely equitable remedies. This unbroken history reflects the importance of laches in the patent context.

When patent rights are not asserted within a reasonable amount of time, companies invest in methods and technologies based on the good-faith belief that their use does not infringe a valid patent. “[O]nce a large investment has been made in using [a] patented technology, it will often become uneconomical to switch to [another] technology.” Mark A. Lemley & Kimberly A. Moore, *Ending Abuse of Patent Continuations*, 84 B.U. L. Rev. 63, 79 n.62 (2004).

Allowing a patent owner to “intentionally lie silently in wait” while “damages escalate,” *A.C. Aukerman Co. v. R.I. Chaides Construction Co.*, 960 F.2d 1020, 1028- 33 (Fed. Cir. 1992), would subject defendants to disproportionate liability and create overwhelming pressure to settle even dubious patent claims. The problem is particularly acute in industries like financial services, where the stakes are high because of the volume and value of the business that is transacted. These features of the industry have attracted numerous infringement suits targeting

established and highly valuable business practices based on the assertion of vague business and other method claims of doubtful validity. *See infra* Section II.B. Uprooting this Court’s settled precedent would only encourage abusive patent litigation and penalize good-faith investment.

Nothing in the Supreme Court’s recent decision in *Petrella v. Metro-Goldwyn Mayer, Inc.*, 134 S. Ct. 1622 (2014), supports such a disruptive result. *Petrella* turned on the “undisputed” fact that Congress enacted a statute of limitations for damages claims under the Copyright Act. *Id.* at 1668-69. This Court has repeatedly recognized, however, that the Patent Act does *not* have a statute of limitations: although section 286 of the Act places a time limit on damages that are recoverable in a successful infringement suit, it does not dictate when a suit must be brought or require dismissal of untimely claims. Instead, laches plays that role. *See Leinoff v. Louis Milona & Sons*, 726 F.2d 734, 741 (Fed. Cir. 1984). The text of section 286, together with the history and structure of the Patent Act, supports this longstanding interpretation.

*Petrella* does, however, identify one respect in which this Court’s precedent diverges from, and should be conformed to, the longtime understanding that laches applies to claims of patent infringement. Although this Court indicated in *Aukerman* that laches cannot be asserted as a defense to a claim for an *injunction* against patent infringement (absent a showing of estoppel), 960 F.2d 1040-41, the

Supreme Court explained in *Petrella* that laches may be invoked to block injunctive relief, or to limit its scope, 134 S. Ct. at 1977-78. Therefore, as Appellant SCA Hygiene (“SCA”) appears to concede, this aspect of *Aukerman* must be refined. *See* SCA En Banc Br. at 33, 35-37.

## **ARGUMENT**

### **I. Damages Claims for Patent Infringement Are Subject to Laches**

When a plaintiff delays egregiously in bringing suit, but Congress has not expressly adopted a clear and specific time limit for asserting the cause of action, must the courts allow the action to proceed despite the delay? The answer is no, has been no for more than a century, and remains no after the Supreme Court’s decision in *Petrella*. Where there is no statute of limitations, timeliness does not go unregulated; it is litigated case-by-case, through the laches defense. *Petrella* changes none of those principles. Instead, it addresses the converse situation, where there *is* a statute of limitations; laches may not bar a claim brought within that prescribed period. 134 S. Ct. at 1974. The Supreme Court’s holding does not speak to what is and is not a statute of limitations. Under this Court’s longstanding and correct precedent, the Patent Act has no statute of limitations. This Court should reaffirm that precedent and the conclusion that follows from it: that laches continues to apply to claims of patent infringement.

## A. The Patent Act Does Not Include a Statute of Limitations

In common legal usage, a statute of limitations is “[a] statute prescribing limitations to the right of action on certain described causes of action; that is, declaring that no suit shall be maintained on such causes of action unless brought within a specified period after the right accrued.” *Standard Oil Co. v. Nippon Shokubai Kagaku Kogyo Co.*, 754 F.2d 345, 347 (Fed Cir. 1985) (emphasis omitted) (quoting Black’s Law Dictionary (4th ed. 1968)); *see also* Black’s Law Dictionary 1546 (9th ed. 2009) (similarly defining a statute of limitations as “establishing a time limit for suing in a civil case, based on the date when the claim accrued”). Consistent with that definition, statutes of limitations generally share two characteristics: (1) they provide a plaintiff with a time period to bring suit, measured forward from when the claim accrued,<sup>2</sup> and (2) they establish that courts will not entertain an action filed after that time has passed.<sup>3</sup>

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<sup>2</sup> *See, e.g., CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014) (“[A] statute of limitations creates a time limit for suing . . . based on the date when the claim accrued.”) (internal quotation marks omitted); *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416 (1998) (“The terms of a typical statute of limitation provide that a cause of action may or must be brought within a certain period of time.”); *Tidewater Fin. Co. v. Williams*, 498 F.3d 249, 256 (4th Cir. 2007) (collecting decisions recognizing that statutes of limitations “provide a plaintiff . . . with a specified period of time within which [to] act to pursue a claim in order to preserve a remedy”).

<sup>3</sup> *See Standard Oil*, 754 F.2d at 347; *see also Marsh v. Rosenbloom*, 499 F.3d 165, 180 (2d Cir. 2007) (a statute of limitations “extinguishes the right to prosecute an accrued cause of action after a period of time”) (internal quotation marks omitted).

The provision at issue in *Petrella*, for example, had both characteristics. Section 507 of the Copyright Act, entitled “Limitations on actions,” provides that “[n]o civil action shall be maintained” under the Copyright Act “unless it is commenced within three years *after the claim accrued.*” 17 U.S.C. § 507(b) (emphasis added); *see also Petrella*, 134 S. Ct. at 1967, 1978 (explaining that section 507(b) is a “time-to-sue provision” and indicating that it was “undisputed” that the provision “*bars relief of any kind* for conduct occurring prior to the three-year limitations period” (emphasis added)). A copyright claim that is untimely under section 507 therefore is dismissed.

By contrast, section 286 of the Patent Act has neither characteristic. First, it does not establish a time period for a plaintiff to bring an action once the claim accrues; instead, the provision “begins with the date of suit and counts backward” to limit total damages, *Aukerman*, 960 F.2d at 1034. *See* 35 U.S.C. § 286 (“[N]o recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action.”). Second, the statute “does not say that ‘no suit shall be maintained,’” and thus does not “create a bar under § 286 to the *bringing of a suit* for infringement or *maintaining* the suit.” *Standard Oil*, 754 F.2d at 347-48. As a result of these features, section 286 does not bar a suit brought more than six years after an act of infringement—nor does it guarantee that an action brought within that six-year

period will be timely. The provision's "only effect" is to limit the scope of recovery "[a]ssuming" that there is a finding of liability and "assum[ing]" that there is "no other impediment to recovery or maintenance of the suit." *Id.* at 348.

The distinction between section 286 and a true statute of limitations, like section 507 of the Copyright Act, is a significant one. When "Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter." *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946) (quoted in *Petrella*, 134 S. Ct. at 1973). If Congress, on the other hand, has not clearly spoken on the question when a plaintiff must bring suit to preserve its rights, then laches will fill the gap, "serv[ing] as a guide when no statute of limitations control[s] the claim." *Petrella*, 134 S. Ct. at 1974, 1975; *see also id.* at 1974 n.15 (distinguishing trademark claims from copyright claims because the Lanham Act "contains no statute of limitations"). Because section 286 is not a statute of limitations, there is no reason for courts to presume that Congress intended the provision to not only cap liability, but also to provide plaintiffs with "a guarantee of six years damages" regardless of the extent of their delay or the magnitude of the prejudice suffered by the defendants as a consequence of the delay. *Aukerman*, 960 F.2d at 1030.<sup>4</sup>

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<sup>4</sup> SCA appears to recognize as much based on its response to the second question presented in the Court's en banc order: whether, "[i]n light of the fact that there is no statute of limitations for claims of patent infringement," laches should be



**B. The Patent Act’s History Confirms that Laches Is a Defense to Damages and that Section 286 Is Not a Statute of Limitations**

The history of the Patent Act confirms what the language of section 286 makes plain: section 286 is not a statute of limitations, and laches therefore is the only law that governs whether an infringement claim is timely. As this Court explained in *Aukerman*, “the patent statute contained an actual statute of limitations” period only “[f]or the brief time of 1870-1874.” 960 F.2d at 1030 n.8. Outside of that short window, the timeliness of patent infringement claims has been governed by laches.

The application of laches to patent claims dates back to the nineteenth century, *see, e.g. Lane & Bodley Co. v. Locke*, 150 U.S. 193 (1893), and it has been consistently recognized by courts from that time forward. When Congress enacted the Patent Act in 1952 to codify the patent laws in their modern form, *see* Act of July 19, 1952, ch. 950, 66 Stat. 792, the regional circuits uniformly applied laches to claims of patent infringement. *See* En Banc Br. of Intellectual Property Owners Ass’n as Amicus Curiae at 15 & n.5 (collecting decisions), even

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available as a defense “to bar an entire infringement suit for either damages or injunctive relief.” Order at 2-3. Rather than answer the question, SCA simply “disagrees with the premise.” SCA En Banc Br. at 32. In doing so, SCA effectively concedes that if section 286 is *not* a statute of limitations—as this Court has long held and has reiterated in a number of cases—then laches *would* be available as a defense to damages under *Petrella*.

though the patent laws have, since 1897, included materially indistinguishable variations of section 286's limit on recoverable damages.

Notably, many of the decisions in this long line of cases expressly recognized that laches is a defense in infringement actions for *damages* as well as in actions seeking equitable relief.<sup>5</sup> Courts reasoned that in suits for damages it was unfair to allow “the patent owner to sleep on his rights and lead an infringer to make large investments in the belief that he is not infringing or that the patent rights are not to be pressed.” *Potash Co. of Am. v. Int’l Minerals & Chem. Corp.*, 213 F.2d 153, 156, 160 (10th Cir. 1954) (holding that the delay in the case made it “inequitable to allow plaintiff to recover damages for past infringement of its patents”); *see also Brennan*, 182 F.2d at 947, 948 (laches barred patent owner’s “action to recover” for infringement, where the defendant “expended large sums of money in the extension of its manufacturing facilities” as a result of the plaintiff’s delay); *Banker*, 69 F.2d at 666 (squarely rejecting the argument that laches did not apply to claims for damages). SCA and its amici try to explain away this large and consistent body of precedent. It is telling, however, that they do not identify a

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<sup>5</sup> *See, e.g., Brennan v. Hawley Prods. Co.*, 182 F.2d 945, 947-48 (7th Cir. 1950); *Montgomery Ward & Co. v. Clair*, 123 F.2d 878, 883 (8th Cir. 1941); *Universal Coin Lock Co. v. Am. Sanitary Lock Co.*, 104 F.2d 781, 782 (7th Cir. 1939); *Banker v. Ford Motor Co.*, 69 F.2d 665, 665-66 (3d Cir. 1934); *Ford v. Huff*, 296 F. 652, 658 (5th Cir. 1924).

*single case* from before Congress’s recodification of the patent laws in 1952 that held that laches was not available as a defense to a damages claim.<sup>6</sup>

There is no reason to believe that Congress intended to disturb this clear judicial consensus when it enacted the Patent Act and simply carried forward the six-year damages provision that now appears in section 286. To the contrary, a commentary on the Act by one of its drafters explains that Congress intended *to retain* the defenses of laches, specifically by 35 U.S.C. § 282. *See* P.J. Federico, *Commentary on the New Patent Law*, 35 U.S.C.A. 1, 55 (West 1954) (“Federico”); *see also* *Symbol Techs., Inc. v. Lemelson Med.*, 277 F.3d 1361, 1366 (Fed. Cir. 2002) (“Federico’s commentary is an invaluable insight into the intentions of the drafters of the [Patent] Act.”). Congress accomplished this by setting forth patent defenses in “general terms”<sup>7</sup>—section 282(b) broadly recognizes the defenses of “[n]oninfringement, absence of liability for infringement or unenforceability.” 35 U.S.C. 282(b). Among other things, this language was intended to incorporate traditional “equitable defenses such as laches, estoppel and unclean hands.”

*J.P. Stevens & Co. v. Lex Tex Ltd.*, 747 F.2d 1553, 1561 (Fed. Cir. 1984) (quoting

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<sup>6</sup> One amicus cites *Middleton v. Wiley*, 195 F.2d 844 (8th Cir. 1952). *See* En Banc Br. of *Amici Curiae* Law Professors at 18-19. The court in *Middleton*, however, concluded only that there was “no basis *in this case* for applying the doctrine of laches,” and indicated that “*mere delay* in seeking redress” did not justify refusing damages. *Id.* at 847 (emphasis added). The court did not suggest that laches was unavailable as a defense even if the defendant establishes prejudice as a result of the delay.

<sup>7</sup> *See* S. Rep. No. 82-1979, at 9 (1952); H.R. Rep. No. 82-1923, at 29 (1952).

Federico at 55); *see also Symbol Techs.*, 277 F.3d at 1365-66 (relying on this history to hold that when Congress enacted the Patent Act, it intended to retain the defense of patent prosecution laches).

**C. The Patent Act's Structure Confirms the Limited Role Played by Section 286**

This Court's interpretation of section 286 is further supported by the structure of the Patent Act. Properly understood, sections 282(b) and 286 work together to provide courts with flexibility to determine when the patent owner's damages action should be barred due to unfair delay, while providing the defendant with clear assurance that its liability will never extend back more than six years before the suit was filed.

The Act sets forth general defenses to infringement (section 282(b)), which are followed by provisions describing the relief available for successful infringement claims (sections 283, 284, and 285), and then additional sections limiting the scope of that relief based on case-specific circumstances. The latter category includes section 286 (which places a time limit on recoverable damages), and section 287 (which limits damages, and other remedies, according to whether the patent owner provided appropriate notice of its claims).

These subsequent remedial provisions come into play only if the patent is not rendered invalid, unenforceable, or not infringed on the basis of a section 282(b) defense. In a case in which there has been significant delay that was

prejudicial, a defendant may assert that the patent is unenforceable under section 282(b) on the ground of laches. If the action survives because the accused infringer fails to prove its laches defense (*e.g.*, because the defendant fails to establish prejudice), the patent owner is eligible to receive damages under section 284, but section 286 still places a time limit on the damages that the plaintiff may recover. *See Aukerman*, 960 F.2d at 1030; *Standard Oil*, 754 F.2d at 347. This structure balances the competing interests of patent owners and the public by preventing damages from accumulating beyond six years in every case while relying on laches to deal with more extreme cases where delay has prejudiced a defendant who, for example, has built an entire business around a product or method that the patent owner has belatedly claimed infringes its patent.

In contrast, SCA's proposed interpretation would substantially restrict the traditional scope of section 282(b) and leave good-faith business investments completely exposed to a patent owner's dilatory tactics. Notably, the Patent Act does not have a provision that contemplates the reduction of damages to account for economic prejudice caused by delay. *See Robin Feldman, Intellectual Property Wrongs*, 18 *Stan. J.L. Bus. & Fin.* 250, 261 (2013) (explaining that the test for patent damages does not adequately account for "the value added by the manufacturer in putting everything together and marketing the product," or the value of other technologies not covered by the patent). This is a significant

difference from the Copyright Act, which entitles defendants to offset damages by demonstrating their “deductible expenses and the elements of profit attributable to factors other than the copyrighted work.” 17 U.S.C. § 504(b). Thus, even though there is no laches defense to damages under the Copyright Act, that statutory provision enables copyright defendants to “retain the return on investment shown to be attributable to its own enterprise, as distinct from the value created by the infringed work”—a fact the Supreme Court highlighted in *Petrella* to support its interpretation of section 507(b). 134 S. Ct. at 1973. It would be anomalous to suppose that Congress intended to leave parties accused of patent infringement with no analogous protections for their investments, particularly in light of the potential for substantial economic prejudice from delay in the patent-law context. *See infra* Part II. That, however, would be the effect of reading a laches defense out of the statute as SCA urges.

SCA’s effort to limit section 282(b) would also unsettle this Court’s precedent far beyond the context of laches. SCA asserts that laches should not be available as a defense because it is not specifically enumerated in section 282(b). *See* SCA En Banc Br. at 28. SCA’s *expressio unius* argument, however, ignores Congress’s intent to recognize defenses to infringement using “general terms.” *Supra* at Section I.B. If SCA’s argument is accepted, it would rule out many other well-recognized defenses in damages actions that are not specifically enumerated

in section 282(b), including equitable estoppel (*see, e.g., Aspex Eyewear Inc. v. Clariti Eyewear, Inc.* 605 F.3d 1305, 1310-14 (Fed Cir. 2010)), inequitable conduct in patent prosecution (*see, e.g., Baxter Int'l, Inc. v. McGaw, Inc.*, 149 F.3d 1321, 1327 (Fed. Cir. 1998)), and prosecution delay (*see, e.g., Symbol Techs*, 277 F.3d at 1363-68). SCA has not justified such a dramatic evisceration of the defenses that have long been available to accused infringers to protect against multiple kinds of abusive behaviors by patent owners.

## **II. Laches Plays a Critical Role in Protecting Business Investments and Limiting Abusive Patent Practices**

Overturing this Court's decision in *Aukerman* would have serious negative consequences that would impair business investment and innovation. If there is no check in damages cases on unreasonable litigation delay except for section 286, then patent owners will be free to attack systems, methods, and software that have become deeply entrenched over time in the products and services of a company or even an entire industry. Under such a legal regime, even highly questionable patent claims will have the potential to disrupt businesses and allow patent owners to extort settlements from companies seeking to avoid even a slight risk of enormous liability. The experience of companies in the financial-services industry demonstrates just how serious a threat that disruption would pose. Such firms have faced a steady stream of dubious infringement suits challenging what have become

basic and essential business practices, such as providing mobile banking to customers through smartphone applications.

As explained above, nothing in the Patent Act or its history suggests that Congress intended this result. Absent a clear directive from Congress<sup>8</sup> or the Supreme Court,<sup>9</sup> this Court should not take away laches as a tool for courts to ensure that patent monopolies are used in a way that promotes innovation and investment rather than undermines it.

**A. Economic Prejudice Is Particularly Significant in Patent Cases**

The basic “test of laches is prejudice to the other party.” *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 215 (1963). Prejudice exists where, *inter alia*, “a defendant and possibly others will suffer the loss of monetary investments or incur damages which likely would have been prevented by earlier suit.” *Aukerman*, 960 F.2d at 1033.<sup>10</sup> This economic form of prejudice is particularly likely to arise in patent cases, as demonstrated by the many post-*Aukerman* cases

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<sup>8</sup> Congress is more than capable of providing one, *see, e.g.*, 25 U.S.C. § 640d-17(b) (providing that “[n]either laches nor the statute of limitations shall constitute a defense”), but has not done so in any of the numerous revisions to the Patent Act.

<sup>9</sup> *See, e.g., Abbey v. United States*, 745 F.3d 1363, 1371-72 (Fed. Cir. 2014) (reading a Supreme Court decision to have left undisturbed circuit precedent on which litigants had relied for years, and citing similar cases).

<sup>10</sup> This Court has also recognized an “evidentiary” form of prejudice, which is also a common problem in patent cases involving significant litigation delay. *See* En Banc Br. of Intellectual Property Owners Ass’n as Amicus Curiae at 20 (collecting decisions).



in which laches has been applied to protect the interests of defendants that have engaged in significant capital investment to expand their business around a particular method or technology, or devoted significant resources to market and develop that method or technology.<sup>11</sup>

Technologies and business methods typically are not practiced in isolation, and as a result cannot easily be unwound after a lengthy time without substantial disruption to an accused infringer's business and the loss of significant sunk-cost investments. When a patent owner delays suing for patent infringement, other companies (and even entire industries) may—after engaging in due diligence, including undertaking appropriate patent searches—build up their businesses around particular systems, methods, or designs on the assumption that they are not infringing a valid patent and will not be subject to suit. *See* Lemley & Moore, 84 B.U. L. Rev. at 79 & n.62 (making this point in the context of delay in patent prosecution). Delay therefore may turn what could have been a small suit with manageable damages into a bet-the-company litigation, providing the patent owner

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<sup>11</sup> *See, e.g., Lismont v. Alexander Binzel Corp.*, No. 2:12-cv-592, 2014 WL 4181586, at \*10-12 (E.D. Va. Aug. 20, 2014); *LendingTree, LLC v. Zillow, Inc.*, No. 3:10-cv-00439-FDW-DCK, 2014 WL 1309305, at \*9 (W.D.N.C. Mar. 31, 2014); *Medinol Ltd. v. Cordis Corp.*, 15 F. Supp. 3d 389, 408-09 (S.D.N.Y. 2014); *Enel Co. v. Schaefer*, No. 12-cv-1369-IEG (WMC), 2013 WL 5727421, at \*10 (S.D. Cal. Oct. 22, 2013); *Lautzenhiser Techs., LLC v. Sunrise Med. HHG, Inc.*, 752 F. Supp. 2d 988, 1004 (S.D. Ind. 2010); *Crown Packaging Tech., Inc. v. Rexam Beverage Can Co.*, 679 F. Supp. 2d 512, 526-27 (D. Del. 2010); *Manus v. Playworld Sys., Inc.*, 893 F. Supp. 8, 10 (E.D. Pa. 1995), *aff'd*, 86 F.3d 1177 (Fed. Cir. 1996).

with “substantial bargaining power.” *Id.* Companies wary of exposing themselves to such liability might simply decline to invest, to the detriment of consumers and the overall economy.

The experience of the financial-services industry illustrates how time and investment can magnify a defendant’s exposure for alleged patent infringement. Electronic check image processing, for example, has become “standard practice in the banking industry,” S. Rep. No. 110-259, at 34 (2008), and it has even been promoted by Congress: in 2003, Congress enacted the Check Clearing for the 21st Century Act, Pub. L. No. 108-100, 117 Stat. 1177, which was intended to allow banks to handle more checks electronically in order “[t]o improve the overall efficiency of the Nation’s payments system” (12 U.S.C. § 5001(b)(3)). Numerous financial-services institutions have nevertheless been sued for infringement based on their use of this now-bedrock technology by a company that obtained business method patents in 1999 and 2000—after the technology had been developed. Precisely because check imaging is now so ubiquitous, the potential liability associated with those actions is enormous. *See* Megan M. La Belle & Heidi Mandanis Schooner, *Big Banks and Business Method Patents*, 16 U. Pa. J. Bus. L. 431, 455 (2014) (describing suits by the patent owner DataTreasury and indicating that the company collected “an estimated \$400 million in settlement/licensing

fees” from financial institutions over the course of a decade of litigation and threatened litigation). The liability continues to swell over time.

### **B. Eliminating Laches Would Encourage Abusive Patent Suits**

The consequences of eliminating laches as a defense would be bad enough if its effects were limited to legitimate patent claims. The elimination of the defense of laches, however, would have far reaching and harmful consequences because it would increase the incentives for patent owners to assert weak or frivolous patent claims against well-established and highly valuable products and services. *See St. Clair Intellectual Prop. Consultants, Inc. v. Acer, Inc.*, 961 F. Supp. 2d 610, 617 (D. Del. 2013) (granting summary judgment on the basis of laches in a blanket suit against numerous technology companies ); *I/P Engine, Inc. v. AOL Inc.*, 915 F. Supp. 2d 736, 741 (E.D. Va. 2012) (applying laches to bar suit against an internet-service provider and its customers), *rev'd on other grounds by* 576 F. App'x 982, 992 n.9 (Fed. Cir. 2014).

Indeed, a common and “especially damaging” strategy used by some patent owners is to “wait[] after a patent has been issued while an industry advances using the covered technology and then su[e] widely for infringement only after the industry has become locked into the technology through independent innovation and development.” Ronald J. Mann, *Do Patents Facilitate Financing in the Software Industry?*, 83 Tex. L. Rev. 961, 1027 (2005); *see also* Robert P. Merges,

*The Trouble with Trolls: Innovation, Rent-Seeking, and Patent Law Reform*, 24 Berkeley Tech. L.J. 1583, 1590-91 (2009) (“The patent troll strategy is to take advantage of ‘lock-in’ that occurs as a result of [sunk cost] investments.”). By adopting this approach, abusive patent owners maximize their leverage to induce settlement, because once “the product has become locked in and profitable” the damages are greater and “the product or component of a system” is “more expensive [for the defendant] to replace.” Mark Rawls, Note, *Fixing Notice Failure: How to Tame the Trolls and Restore Balance to the Patent System*, 5 Wm. & Mary Bus. L. Rev. 561, 581 (2014).

Abusive patent claims targeting the financial-services industry illustrate the seriousness of this risk. Financial-services institutions are especially attractive targets for vague infringement allegations by owners of weak patents because they provide products and services to millions of customers who in turn enter into many millions of transactions. One study found that patents directed to financial services are 27-39 times more likely to be asserted in litigation than patents generally. Josh Lerner, *The Litigation of Financial Innovations*, 53 J.L. & Econ. 807, 808 (2010). Moreover, third-party patent owners (i.e., parties other than the inventor or original assignee), brought an unusually high number of these suits *id.* at 815-16, which suggests that the bulk of infringement litigation is driven by patent owners opportunistically seeking out lawsuits. Consistent with the incentives for delay

discussed above, abusive companies have adopted the strategy of acquiring old patents to challenge methods and technologies used by a wide variety of financial-services companies after those methods and practices have become entrenched throughout the industry. See Brian J. Love, *An Empirical Study of Patent Litigation Timing: Could a Patent Term Reduction Decimate Trolls Without Harming Innovators?*, 161 U. Pa. L. Rev. 1309, 1345 (2013) (finding that for more than 80% of adjudicated patents in the author’s sample that were litigated in the last three years of the patent term, non-practicing entities failed to establish that the patent claims were valid and had been infringed).<sup>12</sup>

Maxim Integrated Products, Inc., for example, has made a business out of suing financial-services companies (among others) for offering mobile-banking applications on smartphones. Maxim acquired patents that were originally issued in connection with the development of a product called the “iButton”—a small steel fob containing basic internal circuitry designed to store and transfer data, such as digital money for a bus or subway fare. In 2012, ten years after these patents issued, Maxim began to assert those patents against companies in the financial-services industry, sending generic notice letters to numerous financial-services

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<sup>12</sup> Professor Love’s study pool consisted of all patents that issued between May 11, 1993 and May 10, 1994 that were litigated by the time of his study in March 2013. Love, 161 U. Pa. L. Rev. at 1317-18. Of the 1180 total patents in this study pool, Love randomly selected 472 (two-fifths), and after excluding fifty-one that were never actually asserted against an alleged infringer, conducted his analysis on the remaining 421. *Id.* at 1320-21.

institutions and subsequently filing suit against many of the companies for alleged patent infringement. *See, e.g.*, Compl. ¶¶ 23-24, *Maxim Integrated Prods., Inc. v. Bank of America Corp.*, No. 12-cv-617-RAS, D.I. 1 (E.D. Tex. filed Oct. 1, 2012). Notwithstanding the weaknesses of Maxim's patent claims, the overwhelming majority of accused financial-services institutions have settled, rather than face the enormous risk of incurring damages based on the millions of financial transactions effected with mobile-banking applications. *See In re Maxim Integrated Prods., Inc.*, MDL No. 2354, 2015 WL 867651, at \*1 & n.1 (W.D. Pa. Feb. 27, 2015) (noting that all but one defendant in the multi-district litigation had settled with Maxim).

No doubt encouraged by its success leveraging settlements from its dubious patent claims, Maxim very recently filed a new round of suits against additional financial-services companies based on the same general theory. *See Maxim Integrated Prods., Inc. v M&T Bank Corp.*, No. 15-cv-02167-DLC, D.I. 1 (S.D.N.Y. filed Mar. 23, 2015); *Maxim Integrated Prods., Inc. v. HSBC Bank USA, N.A.*, No. 15-cv-02168-DLC, D.I. 1 (S.D.N.Y. filed Mar. 23, 2015); *Maxim Integrated Prods., Inc. v. Santander Bank, N.A.*, No. 15-cv-02169-DLC, D.I. 1 (S.D.N.Y. filed Mar. 23, 2015). Absent a potential laches defense, nothing would stop Maxim from filing the same suit every couple of years going forward as more and more customers conduct their banking on mobile devices.

Laches provides accused infringers with one important way to fight back against opportunistic and abusive suits. *See* Mann, 83 Tex. L. Rev. at 1027-28 (arguing that rigorous application of the laches doctrine could mitigate the problem of opportunistically timed patent suits). Of course, the doctrine is not a panacea: even with a laches defense, many companies will settle these suits rather than incur the substantial costs of patent litigation. *See* Megan M. La Belle, *Against Settlement of (Some) Patent Cases*, 67 Vand. L. Rev. 375, 404 (2014). Without laches as a defense to protect against economic prejudice caused by delay, however, companies would have to gamble that a court will agree on the merits that patent claims were either invalid or not infringed. When the suit comes with risks of enormous liability and could imperil the company's entire way of doing business, most companies will decline to place the bet.

### **III. Laches Should Be Available to Bar Suits for Prospective Injunctive Relief**

Although the Supreme Court's decision in *Petrella* does not disturb this Court's recognition that laches is available as a defense to a damages claim for past patent infringement, *see* Part I, *supra*, *Petrella* does require this Court to refine its decision in *Aukerman* in one important respect. In *Aukerman*, the Court indicated that laches could not bar "post-filing damages or injunctive relief unless elements of estoppel are established." 960 F.2d at 1040. Even SCA appears to concede, however, that such a categorical restriction on the scope of laches cannot be

reconciled with *Petrella* and is inconsistent with the generally flexible nature of the laches defense. See SCA En Banc Br. at 35-37 (recognizing that “laches has a continuing role in equitable relief”) (capitalization omitted). The application of laches to equitable claims has an even *longer* pedigree than its application to an action for patent damages. Thus, in contrast to SCA’s argument with respect to claims for damages, modifying *Aukerman* in this limited respect does not require the Court to abrogate over a century of precedent concerning the application of laches to patent-infringement actions or to alter its longstanding interpretation of section 282(b). Moreover, SCA does not claim that any reliance interest supports retaining this categorical rule from *Aukerman*. Nor could it. There can be little reliance interest in a right to delay suit *unreasonably*. And even if that were not so, district courts could still consider whatever reliance interests may exist on a case-by-case basis when deciding whether to deny a claim for injunctive relief on the basis of laches.

In *Petrella*, the Supreme Court held that although the Copyright Act’s statute of limitations displaced laches as a defense to a damages claim, laches remains available as a defense that may limit or bar claims for injunctive relief—even if those claims were filed within the limitations period. “In extraordinary circumstances,” the Supreme Court explained, “the consequences of a delay in commencing suit may be of sufficient magnitude to warrant, at the very outset of



the litigation, curtailment of the relief equitably awardable.” 134 S. Ct. at 1977. The Supreme Court added that even in more run-of-the-mill cases, courts retain discretion to take account of delay and prejudice to the defendant when “determining appropriate injunctive relief.” *Id.* at 1978.

This Court went off course in *Aukerman* by layering categorical rules on top of an equitable doctrine that is inherently flexible. The Court recognized that “some courts ha[d] concluded that the Supreme Court created no *per se* rule restricting the effect which a district court may afford the defense of laches on a continuing tort,” meaning that in cases where it is appropriate “laches may bar all relief.” 960 F.2d at 1040. The Court concluded that patent law is different, however, and indicated that, “as a matter of policy,” it would adhere to the principle that laches could only bar a claim for the damages accrued prior to suit. *Id.* at 1041. Such a *per se* rule is no longer viable because subsequent Supreme Court precedent has left no doubt that traditional equitable principles governing injunctive relief “apply with equal force to disputes arising under the Patent Act.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Under traditional equitable principles, the propriety of injunctive relief in light of the plaintiff’s delay must be assessed on a case-by-case basis, as *Petrella* itself clearly demonstrates. 134 S. Ct. at 1977-78; *cf. Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S. Ct. 1749, 1755-56 (2014) (rejecting this Court’s categorical

rules as “unduly rigid” and holding that district courts are empowered to decide whether to award attorney’s fees under section 285 of the Patent Act by exercising their equitable discretion on a “case-by-case” basis).

Absent a per se rule, there unquestionably will be cases in which the considerations that justify denying damages on the basis of laches also will justify withholding injunctive relief. Indeed, when a company has developed a product or practice that incorporates an allegedly patented technology or method as one of many components, a patent owner’s ability to enjoin future uses of the product or practice could have even *greater* economic prejudice than an action for damages, because it could substantially disrupt the company’s operations and potentially force it out of the market. In light of that prejudice, allowing a patent owner to obtain an injunction after many years of delay based on a “patented invention [that] is but a small component of the product the compan[y] seek[s] to produce” will provide the patent owner with “undue leverage in [settlement] negotiations”—leverage that is especially problematic in cases involving “patents over business methods” whose “potential vagueness and suspect validity” makes them particularly susceptible to abuse. *eBay*, 547 U.S. at 396-97 (Kennedy, J., concurring). Indeed, the monetary value of the injunctive relief—meaning the amount the defendant would be willing to pay to avoid it—may wildly exceed the

amount that would compensate the patentee for the infringement under any valid measure of money damages.

The potential negative impact of delayed infringement litigation resulting in an injunction is particularly pronounced with respect to patent claims involving the financial-services industry. For example, “[b]ecause the systems for processing credit cards or checks are large, complex and undifferentiated, an injunction on one small part of the system can shut down the entire system.” *Patent Law Reform: Injunctions and Damages, Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 109th Cong. 10 (June 14, 2005) (statement of Jonathan Band on behalf of Visa U.S.A. and the Financial Services Roundtable). Similarly, modern exchanges that operate through electronic trading in order to handle an extraordinary volume of transactions quickly, reliably, and cost-effectively rely on complex and interdependent business methods and technology platforms. As a result, enjoining the use of a particular piece of software or business method could cause major disruptions to the global financial system. *Cf. eSpeed, Inc. v. BrokerTec USA, L.L.C.*, No. Civ. A 03-612-KAJ, 2004 WL 62490, at \*3-4 (D. Del. Jan. 14, 2004) (accepting an argument, urged by the United States on behalf of the Department of the Treasury, that granting a preliminary injunction for the alleged infringement of a trading-protocol patent would be contrary to the public interest and should be denied where it would effectively shut

down an electronic marketplace used for secondary trading with potentially serious repercussions for the value of U.S. Treasury bonds). When disruption of this nature is the result of a patent owner's delay in filing suit, courts should have discretion to apply laches as a tool to prevent it.

### **CONCLUSION**

For the foregoing reasons, the en banc Court should reaffirm that laches is available as a defense to claims for damages in patent actions and should further hold that the defense may bar entire suits for damages, injunctive relief, or both.

/s/ Kevin J. Culligan

Kevin J. Culligan

John P. Hanish

GOODWIN PROCTER LLP

The New York Times Building

620 Eighth Avenue

New York, NY 10018

Tel.: 212.813.8800

Fax.: 212.355.3333

William M. Jay

Brian T. Burgess

GOODWIN PROCTER LLP

901 New York Ave., NW

Washington, DC 20001

Tel.: 202.346.2000

Fax.: 202.346.4444

*Counsel for Askeladden L.L.C.*

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,863 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b). I further certify that the brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word.

Dated: April 23, 2015

/s/ Kevin J. Culligan  
Kevin J. Culligan

## **CERTIFICATE OF SERVICE**

I hereby certify that on April 23, 2015, I electronically filed the foregoing brief using the Court's CM/ECF system, which will send notice of such filing to counsel for all parties. Upon acceptance by the Court of the electronically filed document, thirty-one paper copies will be filed with the Court within the time provided in the Court's rules.

Dated: April 23, 2015

/s/ Kevin J. Culligan  
Kevin J. Culligan