No. 2014-1802

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPLE INC., a California corporation,

Plaintiff-Appellant,

v.

SAMSUNG ELECTRONICS CO., LTD., a Korean corporation, SAMSUNG ELECTRONICS AMERICA, INC., a New York corporation, and SAMSUNG TELECOMMUNICATIONS AMERICA, LLC, a Delaware limited liability company,

Defendants-Appellees.

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appeal from the United States District Court
for the Northern District of California
Case No. 5:12-cv-00630, Judge Lucy H. Koh

BRIEF OF *AMICUS CURIAE* THE NATIONAL BLACK CHAMBER OF COMMERCE IN SUPPORT OF REHEARING *EN BANC*

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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel for *amicus curiae* certifies the following:

1. The full name of every *amicus* represented in this case by the undersigned counsel is:

   the National Black Chamber of Commerce

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 the undersigned counsel is:

   N/A

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

   None

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

   J. Carl Cecere of Cecere PC

Dated November 2, 2015 */s/ J. Carl Cecere*

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INTEREST OF *AMICUS CURIAE*

The National Black Chamber of Commerce is a nonprofit, nonpartisan organization dedicated to the economic empowerment of African-American communities through entrepreneurship.[*] The Chamber advocates for all of the 2.1 million African-American-owned businesses in the United States. Many of these businesses own patents, and many compete for business against others that own patents. The Chamber therefore has a strong interest in ensuring that the proper balance is maintained between adequately protecting patent-holders and their intellectual property while also preventing patent-holders from "leverag[ing]" their patents "for competitive gain beyond that which the inventive contribution and value of the patent warrant" through improper and unwarranted injunctive relief. *Apple Inc. v. Samsung Elecs. Co., Ltd. ("Apple II")*, 695 F.3d 1370, 1375 (Fed. Cir. 2012).

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the course of nearly four years of litigation between Samsung and Apple, including three previous appeals that concerned eight different patents, this Court has dealt repeatedly with allegations by Apple that it will suffer an assortment of

[*] Pursuant to Fed. R. App. P. 29(c)(5), amicus certifies that no party's counsel wrote this brief in whole or in part, that no counsel or party contributed money intended to fund this brief, and that no one other than amicus, its members, and its counsel made such a contribution.

irreparable harms from Samsung's infringement, including market-share losses, reputational harms, and others. *Apple Inc. v. Samsung Elecs. Co., Ltd. ("Apple I")*, 678 F.3d 1314 (Fed. Cir. 2012); *Apple II*, 695 F.3d 1370; *Apple Inc. v. Samsung Elecs. Co., Ltd.* (*"Apple III")*, 735 F.3d 1352 (Fed. Cir. 2013). These previous appeals have repeatedly tested the boundaries of the proper use of injunctive relief in patent cases. The Court has responded appropriately, by formulating clear standards requiring patentees to prove that the "infringing feature drives consumer demand for the accused product," *Apple II*, 695 F.2d at 1375, before injunctive relief should issue for the types of harms Apple has claimed. And at least until this case, the Court has applied these standards in a suitably stringent manner. Among the eight previous instances in which Apple claimed irreparable harm from Samsung's alleged use of its patented inventions, the Court has agreed only once—on Samsung's infringing use of Apple's patented design for the distinctive shape of its iPad tablet, *Apple I*, 678 F.3d at 1328. The Court has thus correctly decided that injunctions in patent cases should be the exception, not the norm, especially for patented inventions that comprise isolated features of more complex products.

The panel majority in this case failed to heed these clear lessons from this Court's previous cases, treating this Court's reluctance to find irreparable harm from minor features in technologically complex products as the result of a mere "evidentiary" difficulty (Op. at 10), rather than reflective of a hard reality—that a

competitor's incorporation of minor patented features within more complex products rarely *does* cause irreparable harm. The panel majority then rewrote the rules for obtaining injunctive relief to fit that faulty assumption—demonstrably weakening the causal nexus standard to the point that injunctions will now issue in virtually any case in which a competitor incorporates a patentee's invention into its own product, no matter how minor the patented feature.

As Samsung illustrated in its *en banc* petition—and Judge Prost so ardently urged in her dissent—this was an admitted departure from "existing law" (Dissent at 2), an incorrect application of the time-honored restraints on issuance of injunctive relief, and an improper retreat to the days of near automatic issuance of injunctions that the Supreme Court squarely rejected in *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). *See* Dissent at 12-13.

The Chamber agrees, but writes separately to illustrate that the panel majority's analysis suffers from yet another fatal flaw: its upheaval of settled injunctive standards was largely an unwarranted solution to an imaginary problem. The traditional standards for injunctive relief, including the present articulation of the "causal nexus" standard, are more than adequate to protect against true irreparable harms, even those arising from use of patented features within complex, multi-function products. And these safeguards must be maintained to ensure that only harm from infringement, and not "otherwise lawful competition," *Apple III*,

735 F.3d at 1361, is enjoined.

The Chamber also wishes to impress upon the Court the gravity of the anti-competitive harms that will result from allowing the panel majority's dilution of the causal nexus standard to stand. Without question, the panel majority's decision will dramatically expand the availability of injunctive relief to patentees, thereby vastly increasing the risk that injunctions will be used as anti-competitive weapons, allowing established industry leaders (with greater resources to devote to patenting their inventions and litigating their intellectual property rights) to unfairly stifle legitimate competition from less-established rivals. This risk poses a special threat to African-American-owned businesses, which because of systematic, historic barriers that have prevented their entry into many markets, so often find themselves as industry upstarts, especially vulnerable to anti-competitive behavior. *En banc* rehearing is therefore warranted to restore the proper standards of causation for awards of injunctive relief, to prevent injunctions from being used to stifle competition and inhibit innovation, and to protect African-American-owned businesses' chance to thrive in an open, fair, and competitive marketplace.

I. African-American-Owned Businesses Depend on Open, Fair, and Competitive Markets to Overcome the Historical Disadvantages They Have Suffered in the American Marketplace.

The proper standards for awards of injunctive relief, and the anti-competitive risks that follow from their misapplication, are of concern to the Chamber because

of the competitive disadvantages traditionally suffered by African-American-owned businesses. Historically, African-Americans have found it harder to start and develop businesses than whites, because of inequalities in experience and education, access to financial capital, as well as lending and other types of discrimination.[1] African-Americans today own only 5½ percent of all American businesses, and even a smaller proportion—4 percent—of high-tech businesses.[2] As a stark illustration of the continued lack of progress in this area, only 1 percent of the teams seeking funding for technology ventures in 2010 identified themselves as African-American, and only 11 percent even identified themselves as having an African-American on their executive team.[3] These difficulties have disproportionately left African-American-owned businesses in the position of industry upstarts, uniquely dependent upon open, fair, and competitive markets to thrive and, in the process, empower their

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[1] ROBERT W. FAIRLIE & ALICIA M. ROBB, U.S. DEP'T OF COMMERCE, MINORITY BUS. DEV. AGENCY, DISPARITIES IN CAPITAL ACCESS BETWEEN MINORITY AND NON-MINORITY-OWNED BUSINESSES: THE TROUBLING REALITY OF CAPITAL LIMITATIONS FACED BY MBES 17-25 (2010) (hereafter "TROUBLING REALITY").

[2] Gregory L. Brown, Randall McShephard, & Fran Steward, PolicyBridge, *The Fusion of Inclusion* 2 (2012) *available at* http://www.policy-bridge.org/uploaded_files/PolicyBridge%20Fusion%20of%20Incusion%20Report%20on%20Technology_file_1341229622.pdf.

[3] TROUBLING REALITY, *supra* n.1 at 9; DORISSA GRIFFIN & KRISTAL L. HIGH, MINORITIES AND HIGH TECH EMPLOYMENT 10-11 (2011), *available at* http://mmtconline.org/lp-pdf/Jobs%20Report%20-%20Minorities%20&%20High%20Tech%20Employment.pdf.

communities.

II. *En Banc* Review is Warranted Because the Panel Majority's Decision to Liberalize Standards of Causation for Injunctive Relief in Patent Cases Threatens the Open, Fair, and Competitive Marketplace African-American-Owned Businesses Need to Thrive.

The panel majority assumed, because of the "discretionary nature of the four-factor test for injunctive relief," that it could treat the causal nexus requirement as "flexible," to be watered down as it deemed necessary in order to vindicate the right of patentees like Apple "to exclude competitors from using their property rights," even when their inventions comprised only minor, isolated features of more complex products. (Op. at 10, 12) That was wrong. The causal nexus standard has never been treated as either flexible or discretionary, because its rigidity is essential to protect the legitimate competitive interests of those—like most African-American-owned businesses—that find themselves in competition with patent-holders.

A. It is improper and unnecessary to relax the "causal nexus" requirement in order to protect inventors of product components.

The causal nexus standard is "an indispensable prerequisite" that must be met before injunctive relief is justified over other less intrusive remedies. (Dissent at 2) It is not so pliable, as the panel majority suggests, that it can be modified merely to suit the needs of patentees, because this standard does not exist to protect patentees. It instead exists to protect a patentee's *competitors*, by ensuring that injunctions issue only as necessary to stop irreparable harm actually caused by infringement, and are

not "entered on account of 'irreparable harm caused by otherwise lawful competition.'" (Op. at 8 (quoting *Apple III*, 735 F.3d at 1361)) Indeed, up until now, this Court has correctly demanded a *substantial* connection, not merely "some insubstantial connection" between infringement and the alleged irreparable harm to justify injunctive relief, *Apple II*, 695 F.3d at 1375. This is because the only available methods for measuring that connection, including consumer surveys, market data, and economists' opinions, lack mathematical precision. Any lower standard would thus run the risk of falsely registering irreparable harm when none actually exists—especially where infringing features reside side-by-side within a single product with non-infringing features that customers might greatly value. The panel majority's watered-down causal nexus standard thus materially harms the legitimate interests of competitors that this standard is meant to protect—including the interests of African-American-owned businesses.

Nor was it correct for the panel majority to assume that it must discard traditional causation standards in order to prevent "entire industries of patentees"—those who produce inventions that appear in "many-featured products"—from being denied protection of their "right to exclude competitors" from using their property. (Op. at 12) On the contrary, this Court has held on multiple occasions that the causal nexus standard *can* be satisfied even for inventions destined to become part of more technologically complex products, like Apple's own patented design for the iPad

case mentioned above, *Apple I*, 678 F.3d at 1328, or i4i's text-processing programs that Microsoft incorporated in its Word software, *i4i Ltd. P'ship v. Microsoft Corp*., 598 F.3d 831, 839-40, 861-82 (Fed. Cir. 2010). But as each of these cases illustrates, irreparable harm is likely to occur only when those infringing features are *core* to the appeal of the competitor's infringing products. In most circumstances—and especially where patented inventions are but "minor features" among "many thousands" (Dissent at 1, 3)—irreparable harm is unlikely, and damages should provide adequate compensation.

B. The panel majority's relaxed causal nexus standard will also significantly hamper innovation, disrupt investment in new technologies, and impose new barriers that will further inhibit African-American-owned businesses' chances of succeeding in the marketplace.

By relaxing the standards for obtaining injunctions, the panel majority's decision will also increase the likelihood that established industry leaders like Apple—those with the resources to patent their inventions and vigorously litigate their rights—will be able to use their position to "leverage" their newly enhanced right to injunctive relief "for competitive gain beyond that which the inventive contribution and value of the patent warrant," *Apple II*, 695 F.3d at 1375, a risk that falls particularly heavily on African-American-owned businesses.

Competition in a vigorous, even bare-knuckle marketplace fosters innovation, and is vital to give African-American-owned businesses the opportunities they need

to succeed against more-established rivals. Injunctions in patent cases, even when justified, already come at the cost of facilitating patentees' ability to unfairly hamper their infringing competitors' future competitiveness by forcing them to work under a triple threat—including not only the risk of patent-infringement damages, but also the potential for a business-crippling injunction, and even the risk of additional sanctions that naturally follows the issuance of an injunction.

These threats already inhibit the development of new products in many industries, forcing industry upstarts to refrain from even legitimate forms of competition and design-arounds against their more-established patent-wielding rivals. Studies confirm that firms forced to work under threats of future patent infringement suits spend far less on research and development.[4] And in surveys, startup executives admit that litigation risks frequently force their firms to make substantial shifts in strategy or exit business lines entirely.[5] These anti-competitive

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[4] Catherine Tucker, *The Effect of Patent Litigation and Patent Assertion Entities on Entrepreneurial Activity* 2 (MIT Sloan Sch. of Mgmt., Working Paper No. 5095-14, 2014).

[5] Colleen Chien, *Startups and Patent Trolls*, 17 STAN. TECH. L. REV. 461, 461-62 (2014); *see also* Robin Feldman, *Patent Demands and Startup Companies: The View from the Venture Capital Community* 49 (UC Hastings Research Paper No. 75, 2013).

consequences of aggressive patent enforcement are already inhibiting American entrepreneurship and technological innovation, and are most pronounced in smaller firms like most African-American-owned businesses.[6]

This negative impact on competition will be greatly enhanced if the causal nexus standard is relaxed, and near automatic issuance of injunctions again becomes the norm, Dissent at 13-14. These consequences could become debilitating for future upstarts and innovators, especially in the high-technology arena, if they are left to wonder whether any single feature of their product might become the source of an injunction that forces them out of business. But African-American-owned businesses will suffer most of all under the regime the panel majority envisions, because all these increased anti-competitive risks will be piled atop indignities and disadvantages that African-American-owned business have long suffered under, and are only now beginning to overcome. *En banc* review is thus warranted to prevent the panel's erroneous opinion from imposing new barriers that will inhibit African-American-owned businesses' chances of succeeding in the American marketplace.

CONCLUSION

For all these reasons, the Court should grant the petition, reverse the panel's opinion, and affirm the district court's refusal of Apple's requested injunction.

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[6] Chien, *supra* note 5, at 462; Feldman, *supra* note 5, at 49.

Dated: November 2, 2015

Respectfully submitted,

/s/ J. Carl Cecere

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CERTIFICATE OF COMPLIANCE

This brief complies with the page limitation of Federal Rule of Appellate Procedure 29(d) and Federal Circuit Rule 35(g),because the brief is less than 10 pages, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because the brief has been prepared using Microsoft Word 2013 in fourteen-point Times New Roman font, which is a proportionally spaced typeface.

Dated: November 2, 2015 */s/ J. Carl Cecere*

J. Carl Cecere

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of November, 2015, I filed the foregoing Brief of *Amicus Curiae* the National Black Chamber of Commerce in Support of Rehearing *En Banc* with the Clerk of the Court for the U.S. Court of Appeals for the Federal Circuit using the CM/ECF system, which will send notice of such filing to all registered CM/ECF users. Pursuant to ECF-10(B) of this Court's May 17, 2012 Administrative Order Regarding Electronic Case Filing, I certify that I will submit to the Court six paper copies of this Brief within five days of this Court's acceptance of the brief in CM/ECF.

/s/ J. Carl Cecere

J. Carl Cecere