

No. 2018-2420

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CHRIMAR SYSTEMS, INC. DBA CMS TECHNOLOGIES, INC.,
CHRIMAR HOLDING COMPANY, LLC,

Plaintiffs-Appellees,

v.

ALE USA INC. FKA ALCATEL-LUCENT ENTERPRISE USA, INC.,

Defendants-Appellants.

*on appeal from the United States District Court
for the Eastern District of Texas, 6:15-cv-00163-JDL.
John D. Love, Magistrate Judge, presiding*

**BRIEF OF AMICI CURIAE USIJ, THE INNOVATION ALLIANCE, THE
SMALL BUSINESS TECHNOLOGY COUNCIL, CENTER FOR
INDIVIDUAL FREEDOM, AND CONSERVATIVES FOR PROPERTY
RIGHTS SUPPORTING APPELLANTS AND URGING EN BANC
REVIEW**

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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:

Center for Individual Freedom

Conservatives for Property Rights

The Innovation Alliance

The Small Business Technology Council

USIJ: The Alliance of U.S. Startups and Inventors for Jobs

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

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal.

This Court: *Chrimar Systems, Inc. v. Juniper Networks, Inc.*, consolidated appeal Nos. 2018-1499 (lead), -1500, -1503, and -1984

Patent Trial and Appeal Board: *Cisco Systems, Inc. v. Chrimar Systems Inc., et al.*, Case No. 18-01508 ('012 patent); *Cisco Systems, Inc. v. Chrimar Systems Inc., et al.*, Case No. 18-01511 ('760 patent); *Hewlett Packard Enterprise Company, et al. v. Chrimar Systems, Inc. et al.*, Case No. 19-00032 ('012 patent); and *Hewlett Packard Enterprise Company, et al. v. Chrimar Systems, Inc. et al.*, Case No. 19-00033 ('760 patent).

District Court: *Chrimar Systems, Inc., et al. v. Fortinet, Inc.*, No. 3:16-cv-00897 (N.D. Cal.); *Chrimar Systems, Inc., et al. v. NETGEAR*, No. 3:16-cv-00624 (N.D. Cal.); *Chrimar Systems, Inc., et al. v. Juniper Networks, Inc.*, No. 3:16-cv- 00558 (N.D. Cal.); *Chrimar Systems, Inc., et al. v. Ruckus Wireless Inc.*, No. 3:16-cv-00186 (N.D. Cal.); *Chrimar Systems, Inc., et al. v. Fanvil Technology Co., Ltd.*, No. 6:18-cv-00093 (E.D. Tex.); *Chrimar Systems, Inc., et al. v. Anixter Inc.*, No. 6:18- cv-00248 (E.D.Tex.).

Dated November 4, 2019

/s/ J. Carl Cecere

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**CONCISE STATEMENT OF IDENTITY, INTEREST IN CASE, AND
SOURCE OF AUTHORITY TO FILE¹**

As further detailed in the attached appendix, Amici are USIJ, the Innovation Alliance, the Small Business Technology Council, the Center for Individual Freedom, and Conservatives for Property Rights. Amici are groups that advocate for individual freedoms and strong intellectual property rights. The undersigned has authority to write on their behalf in this case to explain how this Court's decision in *Fresenius USA, Inc. v. Baxter Int'l, Inc.*, 733 F.3d 1369 (Fed. Cir. 2014) has become a threat to those property rights, a threat to a properly functioning intellectual property system, a threat to American startups and inventors, and damaging to the economy as a whole. Amici urge that an en banc rehearing be granted in this case to overturn *Fresenius's* erroneous rule.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *Fresenius USA, Inc. v. Baxter Int'l, Inc.*, 721 F.3d 1330 (Fed. Cir. 2013), this Court established an idiosyncratic view of issue preclusion that has had a devastating effect on patentholders' rights. As normally applied in other courts, issue preclusion naturally relates to particular *issues*. When an issue is definitively resolved in a case and memorialized in a final judgment, that makes resolution of

¹ No counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

the issue final between the parties. The issue cannot not be relitigated even if another portion of the case, regarding *different* issues, gets reopened, as on remand after appeal. That is the law in all areas of U.S. law except for patent law in this Circuit.

Fresenius established that in this Circuit, issue preclusion is not applied on an issue-by-issue basis but on a *case-wide* basis. This leaves parties free to relitigate any issue in the case, and have that litigation influenced by developments *outside* the case like administrative decisions by the Patent Trial and Appeal Board (“PTAB”), so long as any part of that case remains “pending.” 721 F.3d at 1341. So even if a patentholder succeeds in convincing a jury of his peers to award monetary damages for patent infringement after rejecting the infringer’s invalidity defenses, then convinces an Article III district judge to render a monetary judgment based on the jury’s findings, and then convinces a panel of *three more* Article III appellate judges of this Court to affirm that portion of the monetary judgment relating to infringement of that patent, the patentholder is *still* not out of the woods. Under *Fresenius*, if any part of the district court’s judgment is remanded to the trial court—though it relates to issues outside the patent’s validity, indeed, though it relates to a completely different patent or patent claim—that remand creates a new opportunity for the infringer to attack those twice-judicially-approved validity-related findings, and a new opportunity for an intervening administrative PTAB decision to force those findings to be overturned. Indeed, that is exactly what happened in this case.

Fresenius's conception of issue preclusion was controversial when *Fresenius* was first decided. Experience has served only to highlight why its first detractors were right. *Fresenius's* rule has proven unworkable and unbounded in application, and a driving factor that has made district court patent litigation a desperate and wildly expensive horserace against the PTAB, in which infringers try to hamstring the Article III litigation process. Time has also brought a chorus of voices to join the original *Fresenius* dissenters in insisting that its rule, which makes patent property holders and district courts uniquely beholden to judges in administrative agencies, is incorrect. It is now time to reconsider whether this rule, applied in only a single court, ought to govern all patent litigation across the country.

En banc rehearing should be granted.

REASONS FOR GRANTING EN BANC REVIEW

I. *Fresenius* conflicts with Supreme Court precedent and regional circuit law in ways that raise constitutional problems.

En banc review should be granted because *Fresenius* conflicts with all the other circuits on bedrock principles of federal common law. As Judge Newman emphasized in her *Fresenius* dissent, 721 F.3d 1355-59, and Judge O'Malley reiterated in her own dissent in *ePlus, Inc. v. Lawson Software, Inc.*, 789 F.3d 1349, 1370 (Fed. Cir. 2015), under the law of every other circuit issue preclusion attaches “for issues that were litigated and decided,” even if other aspects of the litigation remain pending. 721 F.3d at 1355 (Newman, J., dissenting).

This division over an issue of federal common law that ought to be uniform throughout the country is intolerable on its own. But it is made worse because *Fresenius's* issue-preclusion principle conflicts with the regional circuit law that is *supposed* to apply in patent cases on preclusion issues. *Pharmacia & Upjohn Co. v. Mylan Pharm., Inc.*, 170 F.3d 1373, 1381 n.4 (Fed. Cir. 1999) (“[B]ecause the application of general collateral estoppel principles, such as finality of judgment, is not a matter within the exclusive jurisdiction of this court, we must apply the law of the circuit in which the district court here sits.”). That means *Fresenius's* improper resolution of the law of issue preclusion is trumping the regional circuits’ *proper* resolution of the issue in patent cases, making the law wrong nationwide, and upsetting the legitimate expectations of parties and courts as to the issue preclusion principles they ought to be applying.

This conflict between regional and Federal Circuit federal common law also raises the stakes of *Fresenius's* erroneous rule to constitutional levels. When this Court allows PTAB determinations to overturn findings on issues that ought to have been final for preclusion purposes—and *would* be final under regional circuit law—that allows judges in administrative agencies to trump the final judgments of Presidentially appointed, Senate-confirmed Article III judges. But it has been clear since a year after the Constitution’s ratification, in *Haybern’s Case*, 2 U.S. (2 Dall.) 408 (1792), that the federal judiciary’s final judgments cannot be made subject to

“[r]evision, suspension, modification or other review by the executive or legislative branches.” John E. Nowak, Ronald D. Rotunda, J. Nelson Young, *Constitutional Law* 67 (3d ed. 1986). The judges of the PTAB should not be able to make decisions that overcome final judgments of Article III judges. And they certainly should not be able to do so when their appointments are unconstitutional, as this Court determined just last week in *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 2018-2140, — F.3d —, 2019 WL 5616010 (Fed. Cir. Oct. 31, 2019). *Fresenius* thus permits impermissible Executive intrusion, by improperly appointed Executive officers, into powers that are reserved to the Judiciary. That deepens the significance of this particular split, and makes it all the more imperative for this Court to revisit *Fresenius* through en banc review.

II. The application of *Fresenius* has gotten worse over time.

En banc review is also necessary because *Fresenius* rests on an incorrect conception of bedrock issue preclusion principles. There are many different “preclusion” principles that apply in litigation and rely on the finality of judgments—rules relating to mandates, jurisdiction, law of the case, and res judicata. *Fresenius*, 733 F.3d at 1383 (Newman, J., dissenting from denial of reh’g en banc). This is issue preclusion, one species of res judicata, and pertains to whether particular issues are finally settled between two parties such that they cannot be relitigated in the same case or in any other. 18 Charles Alan Wright & Arthur R.

Miller, *Federal Practice and Procedure* § 4432 (2d ed. 2006). Under the rules of the Restatement (Second) of Judgments, which the Supreme Court “regularly turns to *** for a statement of the ordinary elements of res judicata,” *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293, 1303 (2015), the rules for issue preclusion determine finality according to when those issues are settled in a final judgment—a judgment that remains intact even after appeals have concluded. “A judgment may be final in a res judicata sense as to part of an action although the litigation continues as to the rest.” Restatement (Second) of Judgments § 13 cmt. e. Accordingly, a final resolution of issues is not disturbed simply because litigation continues on entirely different issues. Under the Restatement approach, which is applied in every other circuit, a final resolution of those issues cannot be resurrected after that portion of the judgment resolving them is affirmed on appeal, simply because there is a remand on some other issue. *See id.*; *see also* 18 Wright & Miller § 4432. To allow otherwise would render victory, even after appeal, essentially worthless, offering no real security to the patentholder and facilitating litigation abuse by wealthy infringing defendants.

The *Fresenius* contrary decision was the result of a misinterpretation of the Supreme Court’s nearly century-old decision in *John Simmons Co. v. Grier Brothers Co.*, 258 U.S. 82 (1922). *Simmons* may have allowed relitigation of issues after appeal, but that result followed from the nature of the appeal, not the rules of issue

preclusion. As Judge O’Malley explained in her *Fresenius* dissent, the appeal at issue in *Simmons* was “interlocutory”—during the pendency of the litigation—so finality had not attached to any issue in the case, even in the trial court. *Fresenius*, 733 F.3d at 1378 (O’Malley, J., dissenting from denial of reh’g en banc). *Fresenius* is therefore in tension with the very Supreme Court precedent it claims to follow, inconsistent with the Restatement principles the Supreme Court *currently* follows, inconsistent with the rule of the regional circuits, and inconsistent with the constitutional separation of powers.

The impact of *Fresenius* has only gotten worse over time, because panel applications of the decision have caused it to teeter even further from its unsound foundations. In *Fresenius*, a panel of this Court allowed an intervening patent-invalidating PTAB decision to overturn a monetary infringement award after the panel had remanded the case for recalculation of post-judgment ongoing royalties. 733 F.3d at 1336. In *Fresenius*, there was at least some reason to consider the PTAB’s intervening invalidity determination—invalidating the patent had some arguable connection to the royalty determination on which the remand had been ordered, albeit a tenuous one: Without a valid patent, the proper royalty rate would be zero. So the question whether *Fresenius* would allow reopening validity determinations that had nothing to do with the grounds for remand was simply a theoretical problem.

But that problem is theoretical no more. Cases since *Fresenius* have allowed intervening PTAB invalidity determinations to overturn a jury verdict when the invalidity determinations had no connection to the matters that were reopened through remand. *See, e.g., ePlus, Inc. v. Lawson Software, Inc.*, 789 F.3d 1349, 1361 (Fed. Cir. 2015). That includes this case, in which the original monetary judgment was supported by four different patents, and in the original appeal, that monetary award was left in place. *Chrimar Holding Co., LLC v. ALE USA Inc.*, 732 F. App'x 876 (Fed. Cir. 2018). The remand was solely for claim construction on *one* of the four patents, but the panel determined that it allowed the infringers to challenge the validity of *all four* based on intervening PTAB decisions deeming unpatentable “all the claims at issue in the case.” Op.*3. And this case shows that such abuses are now so routine that they can be doled out in non-precedential opinions. Accordingly, the non-precedential nature of this case is hardly grounds to let *Fresenius* continue to fester. On the contrary, it simply demonstrates how imperative it is that en banc review address it.

III. *Fresenius*'s erroneous issue-preclusion rule is vital to correct.

En banc review is also warranted because *Fresenius*'s rule creates enormous problems for patent owners, changing how patent litigation is conducted in ways that facilitate abusive litigation tactics by infringers. Inter partes review was created as an alternative to district court litigation, but the *Fresenius* rule is one of the driving

factors making it an inevitable adjunct to all district court patent litigation. It has become the ultimate trump card that infringers play in an attempt to invalidate the hard work of district court judges, and to make the very expensive process of pursuing district court patent litigation an exercise in futility. Now virtually every time a patentholder sues an infringer in district court, the defendant initiates satellite litigation before the PTAB, conducted under a lower standard for reviewing the validity of patents. The two parallel proceedings then become a race to a final decision, in which defendants delay at every turn—stretching out discovery, filing motions, making repeated requests for stays, and appealing at every turn to extend the litigation. The strategy is to do whatever is needed to keep some portion of the case alive as long as possible, no matter how unrelated to patent invalidity—just in case the PTAB invalidates the patent.

The *Fresenius* rule is an accelerant to the abuses that patentholders must suffer at the hands of patent infringement defendants. It adds layers of expense to the process of pursuing them—not only from having to defend patents in satellite PTAB litigation, but also from having to combat infringers’ constant dilatory tactics in district court. It also pushes out the timeline before patentholders can obtain any peace. The cloud of uncertainty *Fresenius* casts over a patent, even after the patentholder is victorious in court, can be crippling to startups, which often have to rely on their patents to provide collateral for funding, and to provide their only means

to compete against more established rivals. The *Fresenius* rule thus makes it harder to use patents to attract investment, and likely causes investors to turn elsewhere. Farre-Mensa *et al.*, USPTO, Office of the Chief Economist, *The Bright Side of Patents* 3, 6 (USPTO Working Paper No. 2015-2, Jan. 2016), <<http://bit.ly/1N34XNk>>.

This is exactly why the rule was originally criticized by four judges of this Court in *Fresenius* itself. It has also been criticized by district court judges experienced in patent litigation. *Versata Software, Inc. v. SAP Am., Inc.*, No. 2:07CV153-RSP, 2014 WL 1600327, *2 (E.D. Tex. Apr. 21, 2014). It has been criticized by scholars and patent practitioners.² It has no defenders of note, and has won no converts among the regional circuits. This Court should therefore take this opportunity to retire it.

² Michael Greve, *Exceptional, After All and After Oil States: Judicial Review and the Patent System*, Bos. U.J. Sci. & Tech. L., at 32-33 (forthcoming 2019), <http://dx.doi.org/10.2139/ssrn.3381076> (criticizing *Fresenius*'s "absolute finality" rule as "doubly problematic," and noting that "[i]nfringement actions threaten to become a farce if the Article III action is merely a trial run for subsequent administrative proceedings"); Paul R. Gugliuzza, *(In)valid Patents*, 92 Notre Dame L. Rev. 271, 308 (2016) (*Fresenius*'s "absolute finality rule encourages wasteful procedural maneuvering, allows an adjudged infringer a second chance at proving invalidity, and threatens separation of powers by permitting an administrative agency to effectively nullify court judgments."); Peggy P. Ni, *Rethinking Finality in the PTAB Age*, 31 Berk. Tech. L.J. 557 (2016) ("[T]he incentive to prolong district court litigation so that alleged infringers may potentially receive a favorable PTO decision of invalidity increases gamesmanship, a result that harms the public and patent holder.").

CONCLUSION

For all these reasons, *amicus curiae* requests that the petition for *en banc* review be granted and that the panel's opinion be reversed.

Dated: November 4, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2019 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ J. Carl Cecere

J. Carl Cecere

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 29(b)(4) of the Federal Rules of Appellate Procedure because this brief contains 2,562 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

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 14-point Times New Roman font, which is a proportionately spaced typeface.

/s/ J. Carl Cecere

J. Carl Cecere

APPENDIX

Center for Individual Freedom (CFIF) is a nonpartisan, nonprofit organization dedicated to protecting the individual rights and freedoms guaranteed by the United States Constitution. Since its founding in 1998, CFIF has appeared before this Court as amicus curiae in several cases involving individual liberties guaranteed by the Bill of Rights. In this instance, CFIF maintains an interest in safeguarding the protections specifically enshrined in Article III of the United States Constitution.

Conservatives for Property Rights is a coalition of conservative organizations that stand for private property rights. We believe property rights are divinely endowed to human beings on account of their humanity, and private property is essential to the functioning of free enterprise, investing one's resources in discovery and creativity, and the exercise of ordered liberty.

The Innovation Alliance represents innovators, patent owners and stakeholders from a diverse range of industries that believe in the critical importance of maintaining a strong patent system that supports innovative enterprises of all sizes. What our companies have in common is their commitment to innovation and the belief that strong patents and a strong patent system leads to more innovation, more high-paying U.S. jobs, and a stronger U.S. economy.

The Small Business Technology Council advocates for the 6,000 currently active, highly inventive firms that participate in the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs.

USIJ: The Alliance of U.S. Startups and Inventors for Jobs is a coalition of 30 startup companies and their affiliated executives, inventors and investors that depend on stable and reliable patent protection as an essential foundation for their businesses. USIJ was formed in 2012 to address concerns that legislation, policies and practices adopted by the U.S. Congress, the Federal Judiciary and the U.S. Patent & Trademark Office were placing individual inventors and research-intensive startups at an unsustainable disadvantage relative to their larger incumbent rivals and others that would misappropriate their inventions, both domestic and foreign. USIJ's fundamental mission is to assist and educate the public, Members of Congress, leaders in the Executive branch and the Federal Judiciary regarding the critical role that patents play in our nation's economic system. In this endeavor, USIJ works with other groups and coalitions within the invention community to ensure that protection of the creative role played by individual inventors, universities, startups and small companies is recognized as a primary objective of the U.S. Constitution, which provides the foundation for the U.S. patent system.