

APPEAL NO. 05-1238

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JAN K. VODA, M.D.,

Plaintiff-Appellee,

v.

CORDIS CORPORATION,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA,
CASE NO. 03-CV-1512, JUDGE TIM LEONARD

BRIEF OF *AMICUS CURIAE*
THE FEDERAL CIRCUIT BAR ASSOCIATION IN SUPPORT OF
DEFENDANT-APPELLANT'S POSITION SEEKING REVERSAL OF
THE DISTRICT COURT'S AUGUST 2, 2004 ORDER

CHARLES F. SCHILL, PRESIDENT
THE FEDERAL CIRCUIT BAR
ASSOCIATION
1620 I STREET, NW, SUITE 900
WASHINGTON, DC 20006

WILLIAM M. ATKINSON
ALSTON & BIRD LLP
101 SOUTH TRYON STREET
SUITE 4000
CHARLOTTE, NC 28280
COUNSEL FOR AMICUS CURIAE
THE FEDERAL CIRCUIT BAR
ASSOCIATION

CERTIFICATE OF INTEREST

Counsel for Amicus, the Federal Circuit Bar Association, certifies the following:

1. The full name of every party or amicus represented by me is the Federal Circuit Bar Association.
2. The real name of the real party in interest represented by me is the Federal Circuit Bar Association.
3. The parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus represented by me are: None.
4. The names of all law firms and the partners or associates that have appeared for the amicus now represented by me in the trial court or agency or are expected to appear in this Court are:

William M. Atkinson of Alston & Bird, LLP; and

Charles F. Schill of Steptoe & Johnson, LLP, President of the Federal Circuit Bar Association.

June 10, 2005

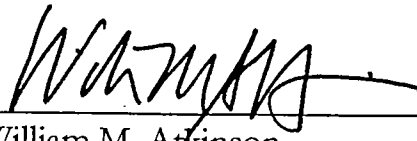

William M. Atkinson

TABLE OF CONTENTS

CERTIFICATE OF INTEREST	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT OF INTEREST OF <i>AMICUS CURIAE</i>	1
I. ISSUES PRESENTED	2
II. A “PAUCITY OF LAW”	3
III. SUPPLEMENTAL JURISDICTION	8
IV. JUDICIAL ABSTENTION.....	10
A. <i>Forum Non Conveniens</i>	11
B. The “Act of State” Doctrine	12
V. CONCLUSION	14
CERTIFICATE OF SERVICE	15
CERTIFICATE OF COMPLIANCE.....	16

TABLE OF AUTHORITIES

FEDERAL CASES

<i>American Dredging Co. v. Miller</i> , 510 U.S. 443 (1994)	11
<i>Banco Nacional de Cuba v. Sabbatino</i> , 376 U.S. 398 (1964)	3, 5, 12
<i>Canada Malting Co. v. Paterson S. S., Ltd.</i> , 285 U.S. 413 (1932)	11
<i>Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.</i> , 412 F.2d 577 (1st Cir. 1969)	5, 13
<i>Goldberg v. Cordis Corp.</i> , 203 USPQ 717 (N.D. Ill. 1976)	3, 4, 5, 7
<i>Gulf Oil Co. v. Gilbert</i> , 380 U.S. 501 (1946)	5
<i>In re Larsen</i> , 292 F.2d 531 (CCPA 1961)	8, 9
<i>Mannington Mills, Inc. v. Congoleum Corp.</i> , 595 F.2d 1287 (3rd Cir. 1979)	13
<i>Mars Inc. v. Kabushiki-Kaisha Nippon Conlux</i> , 24 F.3d 1368 (Fed. Cir. 1994)	2, 4, 5, 7, 8, 12, 14
<i>Mars Inc. v. Nippon Conlux Kabushiki-Kaisha</i> , 825 F. Supp. 73 (D. Del. 1993)	3, 4, 5, 10
<i>New Orleans Public Service, Inc. v. Council of City of New Orleans</i> , 491 U.S. 350 (1989)	11
<i>Ortman v. Stanray</i> , 163 USPQ 331 (N.D. Ill. 1969), <i>rev'd on other grounds</i> , 437 F.2d 231 (7th Cir. 1971)	3, 6
<i>Ortman v. Stanray</i> , 371 F.2d 154 (7th Cir. 1967)	6, 7
<i>Packard Inst. Co. v. Beckman Inst., Inc.</i> , 346 F. Supp. 408 (N.D. Ill. 1972)	3, 5, 7
<i>Piper Aircraft Co. v. Reyno</i> , 454 U.S. 235 (1981)	11
<i>Quackenbush v. Allstate Ins. Co.</i> , 517 U.S. 706 (1996)	10, 11

<i>Stein Associates Inc. v. Heat & Control, Inc.</i> , 748 F.2d 653 (1984)	9
<i>Timberlane Lumber Co. v. Bank of America</i> , 549 F.2d 597 (1976)	33
<i>Underhill v. Hernandez</i> , 168 U.S. 250 (1897)	3
<i>United Mine Workers of Am. v. Gibbs</i> , 383 U.S. 715 (1966)	2, 8
<i>Vanity Fair Mills, Inc. v. T. Eaton Co.</i> , 234 F.2d 633 (2d Cir. 1956)	5, 6, 7, 12
<i>W. S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp. Int'l</i> , 493 U.S. 400 (1990)	5, 12, 13

FEDERAL STATUTES

35 U.S.C. § 112	9
28 U.S.C. § 1332	4, 6, 8
28 U.S.C. § 1338	6
28 U.S.C. § 1404	5, 11
28 U.S.C. § 1367	2, 4, 8, 10

MISCELLANEOUS

Thompson West, <i>Patents Throughout the World</i> (2004)	8
---	---

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Federal Circuit Bar Association (“FCBA”) is a national organization comprising approximately 2600 attorneys who practice before the United States Court of Appeals for the Federal Circuit. The FCBA offers a forum for dialogue between the bar and the Federal Circuit Judges. One function of the FCBA is to offer assistance to the federal courts through the filing of briefs *amicus curiae*. Clients of the membership of the FCBA include patent holders as well as entities having to defend against accusations of infringement. Accordingly, the FCBA’s perspective is meant to be neutral and objective, not favoring one of these constituencies over the other.

This brief is filed with the consent of both parties.

I. ISSUES PRESENTED

Stated narrowly, the issue before the Court in this appeal is whether the district court erred in holding that it had jurisdiction under 28 U.S.C. § 1367 to entertain infringement claims based on foreign patents. Resolution of this appeal may be based on a fact-specific analysis of whether a “common nucleus of operative fact” exists between the claims for infringement based on the United States and foreign patents, respectively. *See Mars Inc. v. Kabushiki-Kaisha Nippon Conlux*, 24 F.3d 1368, 1374 (Fed. Cir. 1994) (citing *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966)). The FCBA does not focus on this fact-specific inquiry other than to note, as set forth in Section III of this brief, that the FCBA believes it should be rare, if ever, that jurisdiction would exist to support adjudication of foreign patent infringement claims in the United States under Section 1367.

Focusing solely on a “common nucleus of operative fact” analysis may mask a broader issue that the district court in this case did not address: Should United States district courts ever entertain suits for infringement based on foreign patents? The answer to this larger question rests not upon the specific statutory basis for the district court’s jurisdiction, but upon notions of the separation of powers between the Judiciary and the Executive Branch, comity and judicial abstention. Section IV addresses this broader issue.

II. A “PAUCITY OF LAW”

As this Court recognized in allowing this certified appeal, only a few cases address the relevant jurisdictional issue. Historically, three district courts have considered the issue and declined to exercise the requested jurisdiction. *See Packard Inst. Co. v. Beckman Inst., Inc.*, 346 F. Supp. 408 (N.D. Ill. 1972); *Goldberg v. Cordis Corp.*, 203 USPQ 717 (N.D. Ill. 1976); *Mars Inc. v. Nippon Conlux Kabushiki-Kaisha*, 825 F. Supp. 73 (D. Del. 1993) (“*Mars I*”). In contrast, only one district court has exercised such jurisdiction on similar facts. *See Ortman v. Stanray*, 163 USPQ 331 (N.D. Ill. 1969), *rev’d on other grounds*, 437 F.2d 231 (7th Cir. 1971)).

The three courts that have declined to exercise jurisdiction over foreign infringement claims gave a number of reasons in support of their decisions. The *Packard* court cited abstention, comity, the “act of state” doctrine¹ and the inability of the forum court to enforce its judgment abroad as reasons for its decision. 346 F. Supp. at 409-10. The *Goldberg* court cited *Packard* for the proposition that “to determine the validity of patents granted by foreign governments would invite conflicts with the administrative and judicial officers of those governments. The power to adjudicate conflicts of this type should be

¹ The “act of state” doctrine stems from the United States Supreme Court’s decision in *Underhill v. Hernandez*, 168 U.S. 250 (1897), and traditionally precludes “the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory.” *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

exercised with great reluctance, This court will not retain jurisdiction here.”
203 USPQ at 718.

In *Mars I*, the district court “assumed” without deciding that it had supplemental jurisdiction under Section 1367 to entertain foreign patent infringement claims, but then declined to exercise that jurisdiction. Similar to the previous courts, the *Mars I* court based its decision not to exercise jurisdiction on the discretion afforded by Section 1367(c)(1) and (2), comity and the act of state doctrine. *Mars I*, 825 F. Supp. at 75-76. On appeal, this Court held, *inter alia*, that because different accused devices and different patents were at issue regarding the domestic and foreign infringement claims, respectively, the requisite common nucleus of operative fact did not exist to support supplemental jurisdiction. *Mars Inc. v. Kabushiki-Kaisha Nippon Conlux*, 24 F.3d 1368, 1376 (Fed. Cir. 1994) (“*Mars IP*”). Accordingly, this Court held that the district court had erred in assuming it had “power to hear the [foreign] infringement claim under Section 1367(a).” *Id.* Additionally, because Plaintiff-Appellant Mars suggested that the district court might also have jurisdiction to hear the foreign infringement claim on diversity grounds, *see* 28 U.S.C. § 1332, this Court considered the “public interest” findings that the district court had made in declining to exercise jurisdiction and indicated that any attempt to “replead jurisdiction [for the foreign infringement claim] based on diversity of

citizenship...would seem ill-founded [based on the doctrine of *forum non conveniens*].” *Id.*²

The authority cited by the district courts in *Packard*, *Goldberg* and *Mars I* for their decisions not to exercise jurisdiction can be traced to the Second Circuit’s decision in *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633 (2d Cir. 1956); see also *Canadian Filters (Harwick) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577 (1st Cir. 1969) (citing *Vanity Fair*). In *Vanity Fair*, the Second Circuit declined to exercise diversity jurisdiction over a claim for foreign trademark infringement on several grounds. First, the court held that the district court was an inconvenient forum for resolution of the foreign claims. *Vanity Fair*, 234 F.2d at 645-46, n.18 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1946)). Second, because the validity of the foreign trademark was in issue, the court noted that it was “well-established that the courts of one state will not determine the validity of the acts of a foreign sovereign done within its borders.” *Id.* at 646 (citing, e.g., *Underhill*, 168 U.S. 250); see also *Sabbatino*, 376 U.S. at 401; *W. S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp. Int’l*, 493 U.S. 400, 408 (1990). According to the Second Circuit, “We do not think it the province of United States district courts to determine the validity of trade-

² As explained in Section IV below, the common law doctrine of *forum non conveniens* allows dismissal only where the alternative forum is in a foreign country. Otherwise, the appropriate remedy is transfer under 28 U.S.C. § 1404.

marks which officials of foreign countries have seen fit to grant.” *Vanity Fair*, 234 F.2d at 647.

Only in *Ortman v. Stanray* has jurisdiction been exercised over claims of foreign patent infringement. In *Ortman*, the plaintiff sued for infringement based on a United States patent and its foreign “equivalents” in Canada, Brazil and Mexico. *See Ortman v. Stanray*, 371 F.2d 154, 156 (7th Cir. 1967). In *Ortman*, the Seventh Circuit first noted, without citing authority, that “[u]nder ordinary circumstances, it would seem clear that plaintiff could not come into a United States District Court and sue for infringement of patents issued by Canada, Brazil and Mexico where such claim is based upon alleged acts of the defendant in each of the foreign countries named.” *Id.*³ Thereafter, however, the court analyzed the then-prevailing authority relating to pendent or ancillary jurisdiction and held that, depending on the language of a contract between the parties, such jurisdiction could exist. On remand, the district court found the requisite “common nucleus of operative fact” and a basis for diversity, and thus jurisdiction. *Ortman v. Stanray*, 163 USPQ 331, 333-34 (N.D. Ill. 1969).

The *Ortman* case is interesting in several respects. First, *Ortman* is the first case to address a jurisdictional issue similar to that raised in this appeal, yet

³ Although this general perception is surely true with respect to 28 U.S.C. § 1338, it is hard to find any express basis for rejecting a claim of jurisdiction for such claims under 28 U.S.C. § 1332 (assuming, of course, the requirements of diversity and amount in controversy are satisfied).

it was decided in the same judicial district that later decided the *Packard* and *Goldberg* cases, the Northern District of Illinois. Notwithstanding, the *Packard* and *Goldberg* courts departed from *Ortman* by declining to exercise jurisdiction. Second, in his concurring opinion to the Seventh Circuit's decision in *Ortman*, Judge Fairchild discussed the comity, act of state, and abstention rationales on which the *Packard* and *Goldberg* courts later relied, but seemed to disregard those rationales as reasons not to exercise jurisdiction. See 371 F.2d at 159. Why the district court in *Packard* and *Goldberg* would adopt reasoning that was seemingly rejected by the Seventh Circuit in *Ortman* is puzzling from a *stare decisis* point of view, yet understandable as a sensible position given the important governmental and international aspects of this issue. In any event, until this case, *Ortman* stands alone regarding the adjudication of foreign patent infringement claims in United States courts.

In summary, the majority of the courts that have considered the issue have concluded that the courts of this country should not exercise jurisdiction over foreign-based infringement claims. While the *Ortman* case stems from an appellate court's decision, so do *Packard*, *Goldberg* and *Mars I*, each of which can be traced to the Second Circuit's decision in *Vanity Fair*. In addition, to the extent that this Court has addressed the question, in *Mars II* this Court indicated that the doctrine of *forum non conveniens* likely suggests abstention.

III. SUPPLEMENTAL JURISDICTION UNDER 28 U.S.C. § 1367

Section 1367, like Section 1332, does not expressly forbid the adjudication of claims based on foreign law. As this court recognized in *Mars II*, whether such jurisdiction exists depends, in part, on whether a “common nucleus of operative fact” exists between the claim within the court’s original jurisdiction and the claim sought to be appended thereto. *Mars II*, 24 F.3d at 1374 (citing *Gibbs*, 383 U.S. at 725). At a minimum, in the context of this appeal, the “common nucleus” standard requires that the asserted patents and the accused acts of the alleged infringer correspond between the domestic and foreign claims. Otherwise, as was the case in *Mars II*, the United States and foreign claims diverge factually. *Id.* at 1375.

Even where these basic premises are satisfied, however, the numerous differences between the respective claims should be considered and, in the FCBA’s view, should normally indicate that jurisdiction is lacking. Paramount in this regard are the many differences that exist between domestic and foreign patent laws. See Thompson West, *Patents Throughout the World* (2004). Indeed, as the United States Court of Customs and Patent Appeals noted in another context, the patent laws of the United States differ significantly from those of other countries. See, e.g., *In re Larsen*, 292 F.2d 531, 533 (CCPA 1961) (“We have repeatedly held that, in view of the differences between foreign patent

laws and those of the United States, the allowance of patent claims in foreign countries is not pertinent to the question whether similar claims should be allowed here.”). Perhaps these same differences led this Court in *Stein Associates Inc. v. Heat & Control, Inc.* to comment that “[o]nly a British court, applying British law, can determine validity and infringement of British patents. British law being different from our own, and British and United States courts being independent of each other, resolution of the question of whether the United States patents are valid could have no binding effect on the British court’s decision.” 748 F.2d 653, 658 (Fed. Cir. 1984).

United States patent law differs from most foreign counterparts with respect to, *inter alia*, what is and is not patentable; priority of invention; the on sale and public use bars, and the related prospect of experimental use; and the best mode requirement of 35 U.S.C. § 112. Even where domestic and foreign laws might be similar, legally significant differences exist, such as between obviousness and anticipation under United States law and “inventive step” and novelty, respectively, under foreign law. *See, e.g., id.; In re Larsen*, 292 F.2d at 533. Thus, even where the issues raised by infringement claims based on “equivalent” United States and foreign patents appear similar, a court called upon to resolve such claims would be required to decide similar issues under different legal regimes. *See Stein*, 748 F.2d at 658. Further, even though some evidence adduced before the court might be the same with respect to the

litigated issues, which of the proven facts would ultimately be “operative” in the sense of leading the court to its proper conclusions under the laws of the various countries, might well be different. Thus, even if the factual predicate for the domestic and foreign claims is similar, the requisite “common nucleus of operative fact” might be lacking.

In addition, the foreign claims, with the attendant multiplied issues, could greatly expand the workload of the district courts, so much so that the foreign claims might well dominate the controversy. *See Mars I*, 825 F. Supp. at 76 (citing 28 U.S.C. § 1367(c)(2)). Indeed, when the prospect that these claims might be tried to a jury is added to the mix, true confusion could result.

Although the FCBA voices no position on the specific facts attendant this appeal, in view of the many inherent differences that exist between the patent laws of countries around the world, the FCBA urges the Court to adopt a rule that requires heightened caution and reluctance before foreign infringement claims are adjudicated in United States courts.

IV. JUDICIAL ABSTENTION

Speaking generally, federal courts have a “strict duty to exercise the jurisdiction that is conferred upon them by Congress.” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). Yet, that duty is not absolute:

‘The proposition that a court having jurisdiction must exercise it, is not universally true.’ Indeed, we have held that federal courts may decline to exercise their jurisdiction, in otherwise “exceptional circumstances,” where denying a federal forum would clearly serve an important countervailing interest

Id. (quoting *Canada Malting Co. v. Paterson S. S., Ltd.*, 285 U.S. 413, 422 (1932)).

The Supreme Court in *Quackenbush* explained that federal courts have narrow discretion to abstain from exercising jurisdiction in certain circumstances, *id.* at 716-23, for example, “in all cases in which the court has discretion to grant or deny relief,” yet rarely does the discretion extend to actions for damages. *Id.* at 718 (citing *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989)). Two bases for judicial abstention include the *forum non conveniens* and the “act of state” doctrines.

A. *Forum Non Conveniens*

The common law doctrine of *forum non conveniens* permits judicial abstention in damages actions, but only “where the alternative forum is abroad.” *Quackenbush*, 517 U.S. at 722 (citing *American Dredging Co. v. Miller*, 510 U.S. 443, 444 n.2 (1994)). In this context, “abroad” is interpreted to mean “in a foreign country” inasmuch as the common law doctrine of *forum non conveniens* as between district courts within this country has been superceded by 28 U.S.C. § 1404 (allowing transfer rather than dismissal). *Id.* (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253 (1981)).

This remnant of the common law doctrine of *forum non conveniens* has precise application to this appeal because the choice of forums is between the courts of this country and the courts of the foreign sovereign that granted the subject patent rights. *See Mars II*, 24 F.3d at 1376 (focusing on diversity jurisdiction, but similarly applicable to supplemental jurisdiction). Indeed, it is the view of the FCBA that, in this limited circumstance, a bright-line rule requiring judicial abstention should be adopted.

B. The “Act of State” Doctrine

Another basis for judicial abstention that is supported by precedent is the “act of state” doctrine by which courts of this country abstain from entertaining claims the resolution of which requires the court to invalidate the acts of a foreign sovereign performed within its territory. *See, e.g., Sabbatino*, 376 U.S. at 401. In order for the act of state doctrine to apply, there must be a qualifying act of state and the court must be called upon in deciding the claim or a defense thereto to invalidate that act. *Kirkpatrick*, 493 U.S. at 405-06. Subsumed within the Second Circuit’s decision in *Vanity Fair* is that court’s conclusion that the registration of a foreign trademark is a qualifying act of state. *See* 234 F.2d at 646. That analysis was arguably extended to foreign

patents by the First Circuit in *Canadian Filters Ltd.* See 412 F.2d at 579.⁴

As for whether litigation of a foreign infringement claim calls into question the validity of the foreign patent grant, certainly it does where the defenses of invalidity or unenforceability are pleaded and allowed to be litigated under the laws of the subject foreign sovereign. Even when these defenses are not raised or allowed, however, the claims of the patent must be interpreted, and in doing so the decisions rendered by the foreign patent office as to the

⁴ In *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293-94 (3rd Cir. 1979), the Third Circuit held otherwise. In *Mannington Mills*, the plaintiff alleged that the defendant had violated the Sherman Act by procuring foreign patents fraudulently and then enforcing those patents abroad against competitors residing in the United States. The defendant raised the act of state doctrine as a basis to bar adjudication of the claim, but the court dismissed that argument, holding that the granting of a patent is not a qualifying act of state. *Id.* at 1296.

Were the *Mannington Mills* case to be decided today, it would not have been necessary for the court to decide whether the granting of a patent constituted a qualifying act of state because the plaintiff's claim did not require the court to invalidate the subject foreign patents, rather it only required that the court accept plaintiff's assertion that the patents had been procured fraudulently. See *Kirkpatrick*, 493 U.S. at 406, 110 S. Ct. at 705. As such, the holding in *Mannington Mills* that the granting of a patent is not a qualifying act of state might in this sense be considered *dictum*.

Further, although the *Mannington Mills* court did not abstain from exercising jurisdiction based on the act of state doctrine, it otherwise questioned whether "extraterritorial" jurisdiction should be exercised as requested by the plaintiff, citing "Comity, Abstention and International Repercussions." In that regard, the court listed ten factors that the district court on remand should consider in deciding whether to exercise jurisdiction. *Id.* at 1297-98 (citing *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 614-15 (9th Cir. 1976)).

scope of the claims of the patent must be revisited. *See Mars II*, 24 F.3d at 1376.


In summary, the better authority counsels that the grant of a foreign patent is an act of state deserving of respect by the courts of this country. Further, the resolution of foreign infringement claims in this country puts our courts in the position of having to question and perhaps invalidate the acts for foreign sovereigns performed on their own soil. In the context of a dispute that by definition affects only foreign commerce, it is hard to envision why it would be in the interest of courts of this country to engage in such an analysis.

V. CONCLUSION

For the foregoing reasons, the FCBA submits that the district court's order should be reversed.

Respectfully submitted this 10th day of June, 2005.

CHARLES F. SCHILL, PRESIDENT
THE FEDERAL CIRCUIT BAR
ASSOCIATION
1620 I STREET, NW, SUITE 900
WASHINGTON, DC 20006


WILLIAM M. ATKINSON
ALSTON & BIRD LLP
101 SOUTH TRYON STREET
SUITE 4000
CHARLOTTE, NC 28280
COUNSEL FOR AMICUS CURIAE
THE FEDERAL CIRCUIT BAR
ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the foregoing document to be served on June 10, 2005 on counsel of record for Plaintiff-Appellee Jan K. Voda, M.D. and on counsel of record for Defendant-Appellant Cordis Corporation at the following addresses via overnight courier:

MITCHELL G. STOCKWELL
JONATHAN K. WALDROP
KILPATRICK STOCKTON LLP
1100 PEACHTREE STREET
SUITE 2800
ATLANTA, GA 30309-4530
COUNSEL FOR PLAINTIFF-APPELLEE

JOHN M. DiMATTEO
KELSEY I. NIX
DIANE C. RAGOSA
ALEXANDER H. SWIRNOFF
WILKIE FARR & GALLAGHER LLP
THE EQUITABLE CENTER
787 SEVENTH AVENUE
NEW YORK, NY 10019-6099
COUNSEL FOR DEFENDANT-APPELLANT

This 10th day of June, 1005.



CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with the applicable 7,000 word limit established in the Federal Rules of Appellate Procedure Rule 32(a)(7)(B)(i). The total number of words in the body of this brief, inclusive of headings and footnotes is 3,726.