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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in MedImmune, Incorporated versus Genentech. Mr. Kester.

ORAL ARGUMENT OF JOHN G. KESTER

ON BEHALF OF PETITIONER

MR. KESTER: Mr. Chief Justice, and may it please the Court:

As of this morning, it is exactly 70 years ago to the day minus 4 months that this Court heard argument challenging the new federal Declaratory Judgment Act of 1934, in an action to construe an insurance contract.

And exactly 25 years later -- 25 days later, in a unanimous opinion written by Chief Justice Hughes, joined by Justices Stone, Brandeis and others, the Act was held fully consistent with Article III of the Constitution.

This morning you are here because an action was brought for a declaratory judgment that a biomedical manufacturer need not pay any large sums under a license as patent royalties, under a patent it contends is invalid, unenforceable, and not infringed, but is paying royalties under protest in the mean time.

1 That complaint was ordered dismissed by the
2 Federal Circuit as outside the Article III judicial
3 power of the United States.

4 In detail, the Petitioner, MedImmune, is a
5 biotech company formed in 1988. In the 1990s --

6 CHIEF JUSTICE ROBERTS: Mr. Kester, would
7 your position be different if the contract contained a
8 specific license, a specific provision specifying that
9 the licensee may not sue.

10 MR. KESTER: No, it would not, Your Honor,
11 because --

12 CHIEF JUSTICE ROBERTS: Do you think such a
13 provision would be enforceable.

14 MR. KESTER: I doubt it would be
15 enforceable. It would be a matter under the Lear case,
16 Lear against Adkins. It would be an affirmative defense
17 if such a claim were raised. This case is here at the
18 level of subject matter jurisdiction.

19 JUSTICE SCALIA: Excuse me, I don't
20 understand what you just said. It would be enforceable.
21 That if such a suit were brought, the licensor could
22 raise that contractual provision as a basis for
23 dismissing the suit.

24 MR. KESTER: Under 12(b)(6).

25 JUSTICE SCALIA: So it is enforceable.

1 JUSTICE SOUTER: Your point is it is not
2 jurisdictional.

3 MR. KESTER: Not jurisdictional, exactly,
4 Justice Souter. This is a jurisdictional ruling. And
5 that's all that this Court granted certiorari on.

6 JUSTICE KENNEDY: Well, but as a matter of
7 policy, at some point, either in this case or some later
8 case, may have to address the question of whether or not
9 such a provision is enforceable. If it is, we may not
10 be talking about much. It's just going to be
11 boilerplate in every license agreement, and that's the
12 end of it.

13 But on the other hand, it may be that there
14 are reasons not to enforce this, so that we don't have
15 courts flooded with law suits, et cetera, et cetera.

16 MR. KESTER: And those reasons, I would
17 suggest, Justice Kennedy, were taken care of in Lear for
18 the most part in 1969. Provisions in license contracts
19 that prevent challenges to the contracts are not
20 enforceable under the patent laws of the United States.
21 But then, as I was saying, that is a matter of patent
22 law. That is not a matter of jurisdictional law.

23 CHIEF JUSTICE ROBERTS: Well, let's look at
24 what might be a matter of jurisdictional law. I take it
25 from your position, there's nothing preventing Genentech

1 from suing either, is there? In other words, to
2 establish the validity of their patent?

3 MR. KESTER: It has happened on various
4 occasions, that patentees have brought suit to establish
5 the validity of --

6 CHIEF JUSTICE ROBERTS: Against licensees?

7 MR. KESTER: Against licensees and others.
8 And the --

9 JUSTICE GINSBURG: Against licensees who are
10 not claiming that the patent is invalid? Where is the
11 controversy?

12 MR. KESTER: The controversy could arise in
13 any number of ways.

14 JUSTICE GINSBURG: I can see it if the
15 licensee says the patent is invalid. If the patentee is
16 paying its royalties, how does it --

17 MR. KESTER: The patentee could be paying
18 his royalties. The patentee could also be putting ads
19 in the paper saying this is not a valid patent, it could
20 have acquired a lot of publicity, and in the end, there
21 could be reasons, and there have been such cases which
22 we cited, 47 of our brief, where such suits have been
23 brought.

24 JUSTICE GINSBURG: If the licensee came into
25 court and said, I'm not contesting this patent, that

1 would be the end of it, wouldn't it?

2 MR. KESTER: If the licensee said, I'm not
3 contesting that, that could be.

4 CHIEF JUSTICE ROBERTS: Well, the patentee
5 would just say, look, we have a license, I think the
6 patent is valid and you owe me a dollar a unit. The
7 licensee says, well, I don't think it is valid, so I owe
8 you nothing, and they settle on a license for 50 cents.
9 Why can't the patentee say, you know, if I get a
10 judicial decision establishing that the patent is valid,
11 I can charge a higher license, either when this
12 agreement expires or for other licenses.

13 MR. KESTER: I agree with that, Mr. Chief
14 Justice. But the practicality is that a patentee starts
15 out with, essentially, a judgment that the patent is
16 valid. There is a presumption of validity. And to
17 challenge that patent, that presumption of validity is a
18 very difficult undertaking. Most of them don't bother.
19 Why would they? If they are receiving -- if they're
20 receiving --

21 CHIEF JUSTICE ROBERTS: I'm trying to see
22 how far you want -- or are willing to push your argument
23 that just because there's been an agreement, or perhaps
24 even a settlement, that that somehow or other doesn't
25 moot the controversy, the underlying legal dispute. I

1 gather your answer to me is that Genentech or a patentee
2 can sue, even though they have an existing, or are
3 getting royalties from a licensee, they can still sue
4 the licensee.

5 MR. KESTER: A settlement does not deprive
6 the federal court of subject matter jurisdiction.
7 That's the narrow point before this court.

8 JUSTICE GINSBURG: You said the only
9 question before the court is jurisdictional. If that's
10 so, why isn't your position that the Federal Circuit put
11 the wrong label on this, that license is listed in 8(C)
12 as a form of defense, so whatever the outcome should be,
13 the wrong label was used. It shouldn't be subject
14 matter jurisdiction, shouldn't be 12(b)(1), it should
15 be an 8 CFR defense. You added the jurisdiction box but
16 you are left with the same underlying question.

17 MR. KESTER: They are not the same
18 underlying question. With respect, Justice Ginsburg,
19 you are in a situation where the Seventh Circuit which
20 came out shortly after -- there was a settled --
21 settlement, and it was argued that the settlement was
22 not effective because of the Lear decision. Parties
23 can't settle themselves out of the Lear decision, but
24 that is all under 12(b)(6) and not 12(b)(1). This case
25 involved a 12(b)(1) motion.

1 JUSTICE GINSBURG: Suppose we said, Federal
2 Circuit, you put the wrong label on it. It should be
3 12(b)(6), not 12(b)(1), or perhaps even 8(C),
4 affirmative defense, then it goes back to the Federal
5 Circuit, and they'll come up with the same decision,
6 that as long as you are licensed and are paying your
7 royalties, you have -- they just put a different label
8 on it. You have not stated a claim.

9 MR. KESTER: That would be effectively
10 overruling Lear, which is what I think is what many of
11 the parties in this case actually seek to do.

12 Lear does not allow in additions of
13 challenges to patent licenses. A licensee can challenge
14 the validity, enforceability of the patent. That's
15 because there's a public interest in this as well.
16 Parties cannot simply contract with each other and
17 prevent a challenge to a --

18 JUSTICE GINSBURG: The Federal Circuit
19 distinguished Lear, and said, in Lear, the licensee had
20 stopped paying royalties; isn't that so?

21 MR. KESTER: Those were the facts of Lear.
22 But it happened that way in Lear, but that wasn't the
23 reasoning of Lear. Lear would not totally cover that
24 situation, but we would submit to this Court, it
25 shouldn't make any difference. The reasoning of Lear is

1 the same. The licensee cannot, by contract, be
2 estopped, licensee estoppel, from challenging the
3 patent.

4 CHIEF JUSTICE ROBERTS: So there is no way,
5 under your view, that a patent holder can protect itself
6 from suit through any license arrangement or any
7 agreement of any kind.

8 MR. KESTER: I suspect there are many ways,
9 Mr. Chief Justice, but not by throwing them out on a
10 jurisdictional basis at the very first moment of the
11 lawsuit. There may be ways it could be arranged at the
12 second level, through --

13 JUSTICE GINSBURG: One of those ways -- and
14 one should have been mentioned as possibilities in the
15 government brief, one you rejected, and the other that
16 was mentioned was if you sue, if the licensee sues, then
17 the royalty fees will be upped. Would that be
18 effective?

19 MR. KESTER: That is a question that would
20 arise under Lear against Adkins. And the question
21 before this Court in that situation, if it got to this
22 Court, would be, is that kind of a provision compatible
23 with the policy that was so firmly expressed by Justice
24 Harlan in Lear, and has been reiterated in so many
25 subsequent cases of this Court.

1 JUSTICE GINSBURG: So you rejected both of
2 the government's suggestions on what the patent holder
3 might do to protect itself. Do you have anything
4 concrete that you would concede the patent holder could
5 do?

6 MR. KESTER: I don't think that I have
7 rejected both the government's suggestions. I have said
8 that they raise problems as to the scope of Lear.

9 JUSTICE SOUTER: Are we talking about a
10 jurisdictional defense or whether we are talking about
11 an affirmative defense assuming jurisdiction, is there
12 any reason for us to except accept your position other
13 than the reason that you have mention add number of
14 times and that is the adoption and encouragement of the
15 public policy that allows patent challenges for -- is
16 that one -- the nub of our reasoning if we were to
17 support your position either jurisdictionally in this
18 case or in recognizing -- in dealing with any
19 affirmative defense in any other case.

20 MR. KESTER: Not quite, Justice Souter. I
21 would say the nub of your position is the Old Quarter
22 case, the Aetna case, the --

23 JUSTICE SOUTER: The narrow category is
24 difficult for you, isn't it, because there was an
25 injunction in Aetna, wasn't there, which raises an

1 entirely different policy issue?

2 MR. KESTER: I would say that what it raises
3 is simply an extra fact but it wasn't a necessary fact.
4 Because this court in *Altveder* specifically pointed out
5 that even if there weren't an injunction there, there
6 would be the danger forced on the licensee of an
7 infringement suit, and an infringement suit means
8 possibly an injunction of the patent, treble damages,
9 any number of sanctions. An injunction suit can put a
10 company out of businesses, especially like a company
11 like my client here.

12 JUSTICE SOUTER: That is a good reason. And
13 I take it it's your logic that that is a good reason to
14 recognize a fairly broad right on the part of a licensee
15 to challenge. In other words, the nub of your position,
16 as I understand it, is that the public policy that
17 favors the freedom of challenge --

18 MR. KESTER: It is more than public policy.
19 It is Article 3. Article 3 says that you can bring a
20 lawsuit in this situation. And that was settled in
21 *Aetna*.

22 JUSTICE SOUTER: No, I realize that. But I
23 mean what we have got in this case, and in any of these
24 cases, is a question of line drawing under Article 3.
25 And your argument is you want to draw the line, the way

1 you want it drawn, primarily because there are practical
2 reasons to favor a public policy of free challenge.

3 MR. KESTER: What we are presenting in this
4 case is a dispute about money. It is not abstract. It
5 is not hypothetical. It is not conjectural. It is
6 concrete, immediate, all the facts are in. It is
7 definitely adversarial. It is legal.

8 JUSTICE SCALIA: You can have such a dispute
9 on a theoretical question between, I don't know, the
10 ACLU and the National Rifle Association, but that
11 doesn't create a case or controversy. What is the
12 injury, the imminent injury to your client that is the
13 basis for the case or controversy? Is it anything other
14 than I have to pay the royalties that I agreed to pay?

15 MR. KESTER: It is, it is that I am having
16 to pay royalties -- that I think I did not agree to pay,
17 because this is an invalid patent. Money is being paid
18 by my client every quarter, large amounts of money that
19 is a major injury.

20 JUSTICE SCALIA: Is it unlawful to agree to
21 pay somebody money who does not have a patent?

22 MR. KESTER: It is --

23 JUSTICE SCALIA: I mean you're speaking
24 somehow as though somehow that, such a contract is
25 contrary to public policy and void.

1 MR. KESTER: No, we're saying that that
2 isn't what we agreed to. We're saying this is a
3 contract dispute. And the whole purpose --

4 CHIEF JUSTICE ROBERTS: Well, then why are
5 you paying it, if you don't think owe it?

6 MR. KESTER: Because, because the --

7 CHIEF JUSTICE ROBERTS: Because of the
8 threat of treble damages and injunction. If we're
9 trying to figure out where the public policy is here,
10 why don't we give some weight to those congressional
11 enactments that obviously fortify the strength of the
12 patent?

13 In other words, Congress passed these
14 provisions providing for treble damages, for attorneys'
15 fees, and to respond that there has got to be a public
16 policy to counterbalance that, Congress can always do
17 that if it wants; but it didn't, it thinks that you need
18 these provisions to protect the patent holders.

19 CHIEF JUSTICE ROBERTS: But Mr. Chief
20 Justice, Congress can also amend the Declaratory
21 Judgment Act if it wants. And Congress was proud of the
22 Declaratory Judgment when it was passed in 1934. And
23 the legislative history of it, and nothing -- to the
24 contrary says the purpose of this is so that contracts
25 be resolved without breach, and judicial determinations

1 can be had.

2 It is like a noninvasive, or less invasive
3 type of surgery.

4 JUSTICE STEVENS: Mr. Kester, may I ask you
5 this question? Is it your view that Genoprobe
6 represented a change in the law?

7 MR. KESTER: Absolutely.

8 JUSTICE STEVENS: Were there, before
9 Genoprobe was decided, were there any cases like this
10 case that were decided?

11 MR. KESTER: There were many, Your Honor,
12 and they were decided --

13 JUSTICE STEVENS: Where the licensee brought
14 suit challenging validity while the license was still in
15 effect?

16 MR. KESTER: We had suits in the Third
17 Circuit, Seventh Circuit, the Second Circuit and even in
18 the Federal Circuit in its early days where it quoted
19 those cases which said it is not necessary for the
20 licensee to stop paying payments in order for Article 3
21 to be satisfied.

22 This case came as a shock in 2004. And in
23 fact, are the judges below in this series of cases all
24 said we thought it was settled law the other way. All
25 this case represents from our point of view is let's go

1 back to the way it has always been. I'd like to reserve
2 the balance of my time.

3 CHIEF JUSTICE ROBERTS: Thank you, Mr.
4 Kester. Ms. Maynard?

5 ORAL ARGUMENT OF DEANNE E. MAYNARD
6 ON BEHALF OF PETITIONER

7 MS. MAYNARD: Mr. Chief Justice, and may it
8 please the court. There is a concrete dispute between
9 the parties about their legal rights and obligations.
10 If that dispute is resolved money will change hands.
11 That is an Article 3 case or controversy.

12 CHIEF JUSTICE ROBERTS: How do you ever end
13 these things? Let's say they have this dispute, they
14 bring the litigation, and they settle it. They say okay
15 we're going to settle it. Instead of paying a license
16 fee of 50 cents it's going to be be 40 cents, and we'll
17 go on. Then they can sue again, I take it.

18 MS. MAYNARD:: In that situation, recognizing
19 that's not the situation we have here --

20 CHIEF JUSTICE ROBERTS: Can they settle
21 that, by the way? Is it all right to settle it, or does
22 that interfere with the policy that patents have to be
23 open to challenge?

24 MS. MAYNARD: If I can answer the first
25 question first.

1 CHIEF JUSTICE ROBERTS: You may.

2 MS. MAYNARD: If there were to be a
3 settlement in the second case, it would not be an
4 Article 3 case or controversy problem with the second
5 case. And that suit should not be dismissed under
6 12(b)(1). In that case the patent holder might have a
7 valid 12(b)(6) defense, and the suit laying aside
8 enforceability issues that you raised, may be easily
9 resolved on that ground. But in terms of the question
10 before the court today, that wouldn't be an Article 3
11 matter.

12 I think as a policy matter, so moving off
13 the question before the Court right now, as a policy
14 matter, it is not clear from this Court's cases exactly
15 what types of agreements would be enforceable. I think
16 there's a spectrum of cases one can imagine ranging from
17 Pope the type of promise that was extracted in
18 Pope which this Court held was unenforceable --

19 CHIEF JUSTICE ROBERTS: Well I think you
20 overread Pope. All Pope said was that they are not
21 going to grant specific performance. In fact, they've
22 said whatever you may think of the policy, we don't --
23 specific performance calls on the equitable discretion.
24 We're not going to do it. But I don't believe Pope was
25 holding that the clauses are otherwise unenforceable.

1 In other words you may be entitled to damages. And that
2 may be measured by the license fee that you agreed to
3 pay.

4 MS. MAYNARD: Well, there certainly would
5 be a question though the way that Lear read Pope, and
6 under Lear about whether a bare agreement not to
7 challenge licenses, especially ones like in Pope, where
8 they agreed not to conflict even beyond the term, would
9 be enforceable. And the government thinks there is a
10 spectrum. At one end of the spectrum would be licenses
11 like those in Pope. And the other end of the spectrum
12 would be a consent decree entered after settlement of a
13 bona fide patent infringement suit which included an
14 agreement not to settle. Now that's clearly not what we
15 have here.

16 JUSTICE BREYER: I guess there are three
17 possible positions on the question of whether a licensee
18 can attack a contract, a patent where he has a license
19 and wants to keep the contract. One, he can never do
20 it. Two, he can always do it. Three, it depends on
21 what the contract said. Now, do any of those questions
22 have anything to do with the question before us? Which
23 is whether it is a case or controversy.

24 MS. MAYNARD: No, Your Honor.

25 JUSTICE BREYER: All right. If we were to

1 reach the question which itself very interesting, what
2 is the Government's position as to which of those three
3 positions is the right position? Were we to reach it.
4 I agree with you, I don't see it in front of us. But
5 maybe it is; if it were, what would be your view?

6 MS. MAYNARD: The Government's view is that
7 there's a spectrum along the spectrum and you would have
8 to consider each case on its terms. And it is not clear
9 from this Court's cases where the policies in that --

10 JUSTICE BREYER: So basically, you are not
11 certain. The Government's view is it is a matter of
12 whether you can sue claiming the patent is invalid,
13 whether the licensee can do it, that probably but you
14 are not certain, you haven't made up your mind
15 definitely because it is not in this case, but you think
16 it is going to be something they could regulate
17 themselves by contract?

18 MS. MAYNARD: It is certainly not
19 foreclosed by this court's precedent and it is an open
20 question where where the policies, how they would weigh
21 out. There's no language in this license however
22 suggesting any type of settlement. Moreover, I think it
23 is important to recognize the parties here actually have
24 a concrete dispute about what the licensing agreement
25 means. Count 1 in the complaint is asking for a

1 declaration --

2 CHIEF JUSTICE ROBERTS: You don't think it
3 matters, though, do you? I mean, even if they all agree
4 there's no dispute about what the license agreement
5 means, your position is still the same, right? There is
6 an Article 3 controversy because they challenge the
7 validity of the patent?

8 MS. MAYNARD: If the parties have a concrete
9 dispute about the validity of the patent and it would
10 affect their rights and obligations in the way it would
11 here; in other words that money would no longer be due
12 to the respondent if the patent is invalid --

13 CHIEF JUSTICE ROBERTS: Is that always the
14 case? I mean, can you enforce a license agreement based
15 on an invalid patent? You thought it was valid; the
16 parties had got a dispute about whether it is valid.
17 You entered into agreement, said well, let's split the
18 difference, you know, 50 cents rather than a dollar or
19 nothing; it is determined the patent is invalid, can the
20 patentee then still say well, you still owe me the
21 money. We kind of split the difference; that was part
22 of the agreement?

23 MS. MAYNARD: It might depend on whether
24 there was consideration beyond the patent itself. In
25 this case, though, the petitioner claims that if the

1 patent is invalid, they no longer owe licensing fees and
2 under Lear they would be entitled to licensing fees that
3 they paid since they began challenging that. So it is
4 clear that under either the contract --

5 JUSTICE SCALIA: Contractually, they say
6 that that's their contractual right?

7 MS. MAYNARD: They claim that under the
8 licensing agreement, they only owe royalties on valid
9 claims. That's count 1 of the complaint.

10 JUSTICE SCALIA: Where does that appear in
11 the licensing agreement?

12 MS. MAYNARD: Where does it appear in the
13 licensing --

14 JUSTICE SCALIA: I took them as just
15 asserting a general proposition of law, that where
16 they've agreed to pay royalties because of the patent,
17 if the patent is invalid they don't have to pay
18 royalties not because there's a special provision in
19 this contract.

20 MS. MAYNARD: The parties actually have a
21 concrete dispute about meaning of the licensing
22 agreement in that regard, Justice Scalia. On page 399
23 of the joint appendix is the provision about which they
24 have a dispute. And the language in there provides that
25 they will pay on substances which would if not ***

1 licensed under this agreement infringe one or more
2 claims of either or both of the Shamir patents or
3 co-expression patents which have either expired or been
4 held invalid by a court or other body of competent
5 jurisdiction. There was similar language --

6 JUSTICE SCALIA: So there is really not much
7 at issue in this case. And that's clearly a case of
8 controversy. It is a dispute over the meaning of that
9 provision of the agreement?

10 MS. MAYNARD: Yes, Your Honor.

11 JUSTICE SCALIA: Gee, there's less here than
12 meets the eye.

13 MS. MAYNARD: That's what the government
14 believes, Your Honor. It is also -- the licensee also
15 does not need to breach the licensing agreement in order
16 to create a case or controversy. The licensee is
17 currently paying royalties that it does not believe it
18 owes and that it believes it would be entitled to have
19 that if it should prevail on its interpretation of the
20 patent and the licensing agreement. It doesn't have to
21 make that injury more severe by breaching. That's clear
22 from this court's decision in *Altveder*? In *Altveder*
23 royalties were being demanded and royalties were being
24 paid but nevertheless this Court held --

25 CHIEF JUSTICE ROBERTS: That's been pointed

1 out that that was pursuant to an injunction.

2 MS. MAYNARD: Yes, it was pursuant to an
3 injunction but that was not important to the Court's
4 reasoning. What the Court is said you need not suffer
5 patent damages in order to bring the suit. Not a
6 contempt. You need not breach the injunction and put
7 yourself at risk of treble damages for infringement. It
8 was the patent damages that put the licensee at risk and
9 that's the same risk the petitioner faces here and
10 should not have to bear in order to bring suit.

11 The case or controversy is whether or not
12 they owe the royalties. The whole point of the
13 Declaratory Judgment Act was allow subcontracting
14 parties not to have to sever their ongoing contractual
15 relations in order to get disputes resolved between
16 themselves.

17 CHIEF JUSTICE ROBERTS: Do you think there
18 would be a case or controversy if Genentech were suing
19 to establish the validity of its patent?

20 MS. MAYNARD: In the situation that we have
21 here, Your Honor?

22 CHIEF JUSTICE ROBERTS: Yes.

23 MS. MAYNARD: Yes, I do. Where the
24 petitioner claims the patent is invalid, that they, that
25 the petitioner's claims unsettled their right, damages

1 their property value potentially and that they could
2 bring a declaratory judgment action of validity.

3 JUSTICE SCALIA: And what would their
4 concrete injury be? What is the threatened imminent
5 injury they would assert in that action? You have a
6 licensee who is paying license fees. What is their
7 concrete injury?

8 MS. MAYNARD: From the moment -- the
9 petitioner has an argument that from the moment it
10 ceased, it starts claiming that the patent is invalid
11 and pays under protest, it is entitled to those
12 royalties back.

13 JUSTICE SCALIA: But still, so long as they
14 are still paying the royalties, isn't that sort of an
15 abstract disagreement? It is sort of like the ACLU
16 saying that the patent is invalid. It's a nice
17 theoretical question that we can argue about, but as
18 long as they're paying the royalties, where's the
19 concrete injury?

20 MS. MAYNARD: Well, I think technically,
21 Justice Scalia, they probably have a claim for patent
22 infringement. There is not an Article 3 case or
23 controversy.

24 JUSTICE SCALIA: I find it very difficult to
25 see how there would be a proper declaratory judgment

1 action by the patentee here. It is just not the kind of
2 situation where you can have a mirror image suit. I
3 don't see what the --

4 MS. MAYNARD: You need -- may I answer that
5 question? You need not have a mirror image suit in that
6 sense, Justice Scalia, and Altvader makes that clear.
7 In Altvader, the patentee's claim was much narrower than
8 the counterclaim, and nevertheless the court allowed
9 that counterclaim to proceed.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 Ms. Mahoney?

12 ORAL ARGUMENT OF MAUREEN E. MAHONEY

13 ON BEHALF OF RESPONDENT

14 MS. MAHONEY: Mr. Chief Justice, and may it
15 please the Court:

16 I would like to start with the fact that
17 there are four counts in the complaint for declaratory
18 relief. The first one is styled as a contractual
19 relations claim. The other three are styled as patent
20 law claims. It is important to emphasize at the outset
21 that this Court in Stone Royal and Caldwell, and in
22 really all of the cases has said it's very important to
23 look behind the labels that a declaratory judgment act
24 plaintiff puts on those claims. We need to actually see
25 what is the cause of action they're trying to adjudicate

1 so we can do an accurate assessment of decisibility
2 standing, like this federal question jurisdiction.

3 I want to start by explaining why there is
4 no contract claim at issue here. You heard today,
5 they're trying to salvage this to say there's a contract
6 dispute, a dispute about the terms of the contract.
7 They didn't argue that below, and with good reason. And
8 I just point you to the briefs in the Federal Circuit.
9 Roman Numeral I, which is all about the improper
10 dismissal of the declaratory judgment act claims refers
11 to the fact these are "patent law claims", at page 27.
12 Nowhere do they say that there is a dispute about the
13 proper interpretation of the contract terms. And let me
14 explain why.

15 The contract terms which were just read to
16 you as Section 110 of -- 1.10 at JA-399 of the license
17 says that there is an obligation to pay royalties for
18 Synagis on any claim, not any valid claim, any claim
19 that has not been held invalid by a court or other
20 competent jurisdiction from which no appeal has or may
21 be taken. Now, they never said below that clause means
22 that we can come to court and have the court decide
23 whether this patent is valid, and depending upon whether
24 we win or not, then we can stop paying. And the reason
25 they didn't make that argument is it was rejected by

1 this Court a hundred years ago in United States versus
2 Harvey Steel.

3 Very similar clause. The United States says
4 this means we don't have to pay if the patent is
5 invalid. And in an opinion by Justice Holmes, this
6 Court rejected it out of hand by -- and said this was a
7 conventional proviso, we don't even need to look to
8 evidence of the party's intent because this is a
9 standard proviso, it does not mean, and they said it was
10 a twisted interpretation that the government was
11 offering. It doesn't mean the licensee, "Stopped the
12 patent bad and would like to have the court say so now."

13 JUSTICE GINSBURG: Was that an Article 3
14 case or controversy?

15 MS. MAHONEY: It is in the following sense,
16 Your Honor. They can't just show up here today and say
17 well, there really is a dispute about the contract that
18 they never argued below, and --

19 JUSTICE BREYER: Shouldn't we send that
20 back? I mean, I thought we were here to decide one
21 question, that the Federal Circuit has said that unless
22 there is a reasonable apprehension of a lawsuit, you
23 can't bring a declaratory judgment action because of the
24 Constitution of the United States. Now I have to admit,
25 I looked up, or I had my law clerk look up probably now

1 hundreds of cases, and we can't find in any case such a
2 requirement. Indeed, the very purpose, as we just heard
3 the SG say of this act, the declaratory judgment act,
4 seems to be to allow people who do a contract, who are
5 in a real concrete disagreement, to get a declaratory
6 judgment without getting rid of the contract. But I
7 might be wrong about that.

8 But you've now argued a different point. So
9 isn't the right thing for us to do, to decide the issue
10 in front of us and then send it back? If you are right
11 that they have to pay, whether they win or lose; if they
12 are right that they promised not to sue; if you are
13 right on 14 other grounds, you might win. But should we
14 decide those grounds today? Why?

15 MS. MAHONEY: Well, first of all, with
16 respect to this issue, whether there would be
17 jurisdiction over a real life contract dispute, they
18 never argued it, Your Honor. It is not part of this
19 case. The Federal Circuit didn't address it because
20 they didn't argue it, because they didn't --

21 JUSTICE GINSBURG: Well, it's presented to
22 us. Whatever they suggested at this oral argument that
23 wasn't in Free, the question presented to us is, was the
24 Federal Circuit right when they said you have no access
25 to a declaratory judgment unless there is a reasonable

1 apprehension that you will be sued.

2 MS. MAHONEY: Your Honor, that is the right,
3 that is the right starting point for a test depending
4 upon the cause of action they are seeking to adjudicate.
5 In here, what the Federal Circuit properly understood is
6 that they are seeking to adjudicate affirmative defenses
7 to an infringement action under the patent laws.

8 And just like in Steffel, if you are trying
9 to adjudicate or on an anticipatory basis an enforcement
10 action, you have to show that you would reasonably fear
11 that enforcement action. And in fact, Steffel uses that
12 language, and Cole versus Amman dismisses a case for
13 failure to establish a genuine fear of prosecution. But
14 then you have to go one step beyond, and that is to say
15 are they -- is the cause of action not ripening because
16 the declaratory judgment plaintiff is forfeiting their
17 legal rights in order to avoid some very severe harm
18 that would become veritable coercion? That's the test
19 that's used in Steffel for in essence being able to test
20 defenses to a cause of action that --

21 JUSTICE SCALIA: Why doesn't that work here?

22 MS. MAHONEY: Well, it doesn't work here for
23 several reasons. Most fundamentally, this is a
24 settlement. I mean, Mr. Steffel did not enter into a
25 settlement or a compromise with the prosecutor. He

1 wasn't complying because he was under an agreement to do
2 so. Here it has been settled forever, that if they --
3 an agreement for making payments pursuant to an
4 agreement in the nature of a compromise, you can't come
5 and say that it has been coerced or is some form of
6 duress.

7 JUSTICE SOUTER: Well then, why should we
8 accept the characterization that it's a compromise, if
9 it may be just factually wrong here? I thought at the
10 time they entered into the license agreement, they had
11 some disagreements about the scope of the then patent,
12 the scope of the anticipated patent, and so on, and they
13 couldn't very well be resolved. But they were not
14 settling in the classic sense of the word, to pay a, let
15 us say a focus claim one against the other.

16 MS. MAHONEY: I think the answer, Your
17 Honor, is they weren't settling for all time in the
18 sense that they could never get out of the deal.
19 Certainly, they could repudiate and then go ahead and
20 sue. But yet, at page three of their petition they
21 expressly say, the reason they entered into this
22 agreement was in order to avoid the costs and risks of
23 litigation. It is the reason --

24 JUSTICE SOUTER: But had they gotten to the
25 point prior to the execution of the contract in which

1 one party was saying, you may not do this, and the other
2 party was saying, oh yes, I can, so that there was a
3 focused controversy that would have been the subject
4 matter of a conventional lawsuit then and there, had
5 there not been this license agreement.

6 MS. MAHONEY: Not exactly, but what they did
7 was they headed it off at the pass. They understood --

8 JUSTICE SOUTER: But the question is, how
9 far ahead of the pass can they get and still call it a
10 settlement in the sense that you're using that term?

11 MS. MAHONEY: It's a compromise. It's a
12 compromise of the very claims they are trying to
13 adjudicate here. What they want to adjudicate are
14 affirmative defenses to a patent infringement action.
15 That is not a ripe claim and there is not sufficient
16 immediacy because they are preventing that claim from
17 ripening by continuing to make voluntary pavements under
18 their agreement.

19 JUSTICE SOUTER: Right, but you were saying
20 that the status of that agreement for purposes of the
21 jurisdictional question here is exactly the same as the
22 status of an agreement that they might have entered into
23 after one party had brought suit against the other, and
24 they settled, and then later on somebody wanted to
25 repudiate the settlement.

1 MS. MAHONEY: I don't know if it's exactly
2 the status. For instance, in a settlement after
3 litigation has been filed, I think that Lear would say
4 that you can't even repudiate that. But certainly -- so
5 there might be some differences, but from the standpoint
6 of coercion --

7 JUSTICE SOUTER: Is it equivalent to a
8 settlement after formal demand has been made?

9 MS. MAHONEY: It is equivalent to that in
10 the following sense. They understood that if they
11 didn't get a license, that they would be exposed to
12 Genentech's claims under the infringement laws. And in
13 order to avoid that exposure, even though they had all
14 the information they needed to assess the validity of
15 this patent at the time --

16 JUSTICE KENNEDY: Suppose they didn't have
17 all the information. Suppose you enter into a license
18 agreement, you're convinced as the one who's going to
19 pay the license fee that it's a good patent. After the
20 agreement is signed, the technological advances, other
21 disclosures indicate that the patent is deficient.
22 Could you sue then?

23 MS. MAHONEY: No, I don't think so, unless
24 --

25 JUSTICE KENNEDY: So then, the argument that

1 you have made is just not relevant for the fact that
2 they knew everything --

3 MS. MAHONEY: They did.

4 JUSTICE KENNEDY: And it also means that
5 this isn't really a settlement in any respect.

6 MS. MAHONEY: It 's a compromise of claims
7 that could be brought.

8 JUSTICE STEVENS: Ms. Mahoney, could I ask
9 this question?. Supposing at the time they negotiate
10 the license agreement, there's some uncertainty about
11 whether the patent is valid or not. So at the end of
12 the license agreement, they agree on the royalties, the
13 term, and everything is covered, but they put in a
14 provision and say we're not entirely sure the patent is
15 valid, so we reserve the right to bring an action
16 challenging the validity of the patent. We'll pay
17 royalties in the meantime and you will accept these
18 royalties as sufficient for the use of the patent, but
19 if we win, you don't have to pay royals, if we lose, you
20 do. Would that be a valid provision?

21 MS. MAHONEY: I don't think so, but that
22 would certainly be a closer case if there --

23 JUSTICE STEVENS: But would it not be
24 precisely the same issue as a jurisdictional matter as
25 to whether there is a case or controversy?

1 MS. MAHONEY: No, I don't think so, because
2 the real issue in terms of Steffel is whether you can
3 say that the party is being coerced. At least in you
4 hypothetical you could say that they have --

5 JUSTICE STEVENS: He's not being coerced,
6 but he's bargaining a little bit of royalty rate that he
7 otherwise would have to pay.

8 MS. MAHONEY: Well, in terms of whether --
9 if the parties expressly agreed that that was part of
10 their deal, then you at least wouldn't say that there
11 was an issue of coercion. But here that isn't what
12 happened. Instead, they used --

13 JUSTICE STEVENS: I'm simply asking whether
14 the parties could agree to create a case or controversy.

15 MS. MAHONEY: I think probably not, Your
16 Honor. I think that is one of the problems.

17 JUSTICE BREYER: Would you assume Justice
18 Stevens' hypothetical, assume it, take it as given.
19 They did put that in. I know you think they didn't, but
20 I want to assume it. Now I'd like to also assume --

21 JUSTICE SCALIA: Could I have a review of
22 the bidding?

23 (Laughter.)

24 JUSTICE SCALIA: What is the hypothetical?

25 JUSTICE BREYER: The hypothetical is that

1 they write into the contract, the party who is the
2 licensee says, and we stipulate that the licensee thinks
3 that the patent is invalid. Nonetheless, the licensee
4 wants a license for business reasons. Therefore, the
5 licensee and the licensor agree that after they sign the
6 contract and he's paying a thousand dollars a month in
7 royalties, he can go into court and challenge the
8 patent.

9 So we assume that's written into the
10 contract. Now let us also assume a state of the law.
11 The state of the law is that there was no public policy
12 or any other policy that forbids such a condition in a
13 contract.

14 All right? Now on those two assumptions,
15 the next thing that happens is that the licensee asks
16 for a declaratory judgment that the patent is invalid.

17 On those assumptions, is there a case or
18 controversy under the federal constitution? If not, why
19 not?

20 MS. MAHONEY: I don't think so, because I
21 think what they're really asking for is advice about a
22 business deal under those circumstances.

23 JUSTICE BREYER: But he says, by the way, if
24 I win, I will in fact save \$42 billion a year in
25 licenses I would either have to pay, and the other

1 side -- or -- I was a thousand dollars, I meant
2 \$42 billion, okay?

3 MS. MAHONEY: But now when they come even
4 before they sign the deal, in other words --

5 JUSTICE BREYER: I'm not asking you more
6 hypothetical. I'm asking my hypothetical.

7 MS. MAHONEY: I know. I think the problem
8 is that it leads to the notion that parties can simply
9 sort of set up a -- even if there's not true adversity,
10 and come to court for answers to legal questions, and
11 that is something --

12 CHIEF JUSTICE ROBERTS: Is it true
13 adversity? I thought the assumption underlying
14 everybody's hypothetical is that if the patent is
15 determined to be invalid, then the license agreement is
16 also invalid. Is that right?

17 MS. MAHONEY: I don't think so. I don't
18 think the license agreement itself is invalid. The
19 royalty agreement says, you know, "We're -- we have a
20 dispute about the validity of this patent. We don't
21 know. We disagree. And so, we've entered into a
22 compromise royalty rate that reflects the uncertainty.
23 But once it's determined to be invalid, the license
24 fees are not collectible."

25 I think that that is correct, your Honor,

1 under the -- under the current state of the
2 law.

3 JUSTICE SOUTER: -- one further -- the
4 contract goes the further step and says, "Even if the
5 patent were determined in any action to be invalid,
6 there will still be a royalty payable, because that's
7 what -- that's -- that is consideration for the fact
8 that we are not going to start any controversy now."
9 Let's assume they assume, precisely, the invalidity.
10 Would you say the contract is unenforceable then, and
11 the -- and the --

12 MS. MAHONEY: Well --

13 JUSTICE SOUTER: -- and, for jurisdictional
14 purposes, there would be no case of controversy then?

15 MS. MAHONEY: That if, under the -- I'm sorry,
16 this --

17 JUSTICE SOUTER: Take the -- take the Chief
18 Justice's hypothetical, add the following. There is a
19 provision in there to the effect that if, during the
20 term of this contract, the license is determined to be
21 invalid, royalties will still be payable under this
22 contract --

23 MS. MAHONEY: Uh-huh.

24 JUSTICE SOUTER: -- because that is one of
25 the contingencies, which is the consideration for our

1 bargain. Would you say, in those circumstances, that
2 your answer would be the same, that there's -- that
3 there's no case --

4 MS. MAHONEY: Well, I don't know what the
5 dispute would be about, Your Honor, because it sounds
6 like the contract terms would be clear. And if the
7 contract terms are clear, they would simply go in
8 accordance, unless they have an argument that the
9 contract is --

10 JUSTICE SOUTER: No --

11 MS. MAHONEY: -- unenforceable. If the -- if
12 the point is that it is actually invalid, illegal, that
13 -- that may be a different case, although I think there
14 would still be an estoppel argument that they should
15 not be permitted to bring that action without giving up
16 the benefits of the bargain, which is the immunity from
17 suits. And that is one of the fundamental problems
18 with this case.

19 JUSTICE SOUTER: But do you see --

20 CHIEF JUSTICE ROBERTS: I thought your
21 argument -- I'm sorry.

22 JUSTICE SOUTER: Well, if -- do you see a
23 difference between -- I guess you're saying there's no
24 difference between my added wrinkle on the hypo and the
25 Chief Justice's hypo, for jurisdictional purposes.

1 MS. MAHONEY: I don't think that there is a
2 difference, from a jurisdictional perspective, but I
3 think, here, that the major problem, from a
4 jurisdictional perspective, is that there is not
5 anything in the language of the contract that gives
6 them a right to come to court to dispute validity.
7 Instead, we're --

8 CHIEF JUSTICE ROBERTS: What about the fact
9 that it's under protest?

10 MS. MAHONEY: That makes no difference, Your
11 Honor. The fact is that they are making the payments
12 pursuant to an agreement. They're not under compulsion
13 of an injunction. They're doing it because they
14 voluntarily entered into it. Altvater is completely
15 different. There, there was no license agreement in
16 force, but the court found that it -- that the reissue
17 patents were never part of the agreement, to begin
18 with. In other words, Altvater never agreed to pay
19 royalties. Altvater had been sued, so there wasn't a
20 counterclaim for invalidity. And --

21 JUSTICE GINSBURG: Could the patent holder
22 take the position that, "Sooner or later, I'm going to
23 have to fight out validity with someone, and might as
24 well do it sooner rather than later, so I am not going
25 to raise the license as a defense"? Would that be a

1 "case or controversy"?

2 MS. MAHONEY: I don't think that the patent
3 holder is allowed to come to court and seek a
4 declaration of validity. I don't think any court has
5 ever allowed that.

6 JUSTICE GINSBURG: Is it -- it's -- no, he's
7 a -- the patent -- the licensee is coming into court
8 and wants a declaration of invalidity so it can
9 manufacture without the fear of an infringement suit.

10 MS. MAHONEY: And they're under a license?

11 JUSTICE GINSBURG: Yes.

12 MS. MAHONEY: Yes.

13 JUSTICE GINSBURG: And the patent holder
14 chooses not to plead the license -- chooses not to
15 plead the license. Wouldn't the patent holder have
16 that option?

17 MS. MAHONEY: Yes, the patent -- well, no. I
18 mean, not necessarily. Their view is that, because of
19 the terms of the agreement, that the patent holder has
20 no choice but to -- because they're receiving the
21 royalties, to simply --

22 JUSTICE GINSBURG: I don't mean their view.
23 I mean, they filed a lawsuit. They're saying, "We're -
24 - we want" --

25 MS. MAHONEY: But that is -- that's what

1 happened here.

2 JUSTICE GINSBURG: -- "we want a declaration
3 of infringement." And the patent holder doesn't take
4 the position that you're taking; instead says, "I'm
5 prepared to fight this out now. I know that I have the
6 license, which could be yes or no, either the court has
7 the power or it doesn't.

8 MS. MAHONEY: But I don't think that the
9 court has to answer that question in order to dismiss
10 on a prudential ground, a prudential jurisdictional
11 ground, and nor is there a need for a remand in *Samuels*
12 versus *Mackell*, and in *Cardinal*, for instance. Those
13 are cases where the Court adopted prudential rule and
14 when it hadn't applied them without remand. I -- and
15 no remand's necessary. The Federal Circuit has already
16 looked at this. They --

17 JUSTICE STEVENS: Ms. Mahoney, can I ask you
18 one question before your light goes off? I know it's
19 not -- goes to the "case or controversy" issue, but, in
20 your view, was the bringing of this action a material
21 breach of an implied condition of the contract that
22 would justify a termination of a license?

23 MS. MAHONEY: It would depend on whether
24 there is an implied covenant, Your Honor. It wasn't --

25 JUSTICE STEVENS: I'm asking you whether --

1 MS. MAHONEY: -- argued below.

2 JUSTICE STEVENS: -- you think it was.

3 MS. MAHONEY: I think it -- it may well be,
4 but I don't think the answer in this case turns on it,
5 because I think they have to have their own right to
6 bring the action, whether it's a breach or not, and
7 that they don't. Because they don't have an implied
8 right of action under Lear, they don't have a right to
9 bring this action. And that is an essential component
10 of their ability to challenge the issue of validity.
11 So, I think that's the first and fundamental --

12 JUSTICE KENNEDY: Well, if that's so, and
13 it's a super violation of an implied covenant, I guess
14 you could get damages.

15 MS. MAHONEY: Well, I think that their
16 theory, Your Honor, is that a licensee can do this at
17 any time. And --

18 JUSTICE KENNEDY: But I think that your
19 theory is that it's a super violation of an implied
20 covenant.

21 MS. MAHONEY: Your Honor, I don't think --
22 whether it's an implied covenant or not --

23 JUSTICE KENNEDY: Not only did we agree to
24 it, but we you can't even do it if you agreed to it.

25 MS. MAHONEY: I think that an additional

1 factor that bears on this analysis is also the fact
2 that Congress has never created an implied right of --
3 has never created a right of action --

4 Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you, Ms.
6 Mahoney.

7 Mr. Kester, you have 3 minutes remaining.

8 REBUTTAL ARGUMENT OF JOHN G. KESTER

9 ON BEHALF OF PETITIONER

10 MR. KESTER: Thank you, Mr. Chief Justice.
11 Just several quick items.

12 I think -- I think, Mr. Chief Justice, you
13 were, a while ago, putting the horse in front of the
14 cart, which was right where it belongs. The contract
15 claim is clear in the record. It's at page 136 of the
16 joint appendix. I don't think more needs to be said
17 about it.

18 Harvey Steel, on which Respondents rely, was,
19 of course, overruled --

20 JUSTICE SCALIA: But, wait. Before you leave
21 that, do you agree that it was not raised below?

22 MR. KESTER: No, we don't.

23 JUSTICE SCALIA: Where -- can you tell us
24 where it was raised below?

25 MR. KESTER: Well, it's -- it's raised in the

1 -- in the first -- It's been here throughout. If it -
2 - if it even matters. I mean, we wouldn't conceive
3 that that -- that that would even matter.

4 CHIEF JUSTICE ROBERTS: But was it raised
5 before the Federal Circuit?

6 MR. KESTER: Yes. Well, the whole record was
7 -- you mean was it argued --

8 CHIEF JUSTICE ROBERTS: Yes.

9 MR. KESTER: I believe it was. I'd have to
10 go back and -- you mean in terms of the oral argument.
11 It was certainly in the briefs. It was certainly not.

12 There was never, of course, any -- anything
13 in the license, or anyplace else, where Petitioners
14 gave up the right to sue. Petitioner doesn't need
15 permission in the license to sue. And as for the shock
16 in the lower court when this case was decided, I would
17 call to your attention what the Federal Circuit, in
18 1983, itself said, and it quoted the Warner-Jenkinson
19 case, which was the Second Circuit case that my friend
20 dismissed somewhat. The C.R. Bard case -- this is
21 Federal Circuit early -- starts out with opening line -
22 - it says, and I quote -- this is 716 -- 875 -- "We
23 hold that a patent license need not be terminated
24 before a patent licensee may bring a Federal
25 declaratory judgment action," close quote. And the

1 last words of the same opinion, at 882 of 716 -- are,
2 "We hold the patent licensee may bring a Federal
3 declaratory judgment action to declare the Federal --
4 to declare the patent subject to the license invalid
5 without prior termination of the -- of the license."
6 That was 1983. Gen-Probe was 2004. Something happened
7 in the interval.

8 Finally, the discussion of settlement here
9 strikes me as, indeed, strange, because if this -- if a
10 license were to be redesignated as a settlement, we
11 would have the situation here where a license was
12 signed in 1977. The only patent at issue in this case
13 was not even issued until 2001.

14 CHIEF JUSTICE ROBERTS: Thank you, Mr.
15 Kester.

16 MR. KESTER: Thank you, Mr. --

17 CHIEF JUSTICE ROBERTS: The case is
18 submitted.

19 [Whereupon, at 11:05 a.m., the case in the
20 above-entitled matter was submitted.]

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