No. 2010-1406

United States Court of Appeals
For the Federal Circuit

THE ASSOCIATION FOR MOLECULAR PATHOLOGY, THE AMERICAN COLLEGE OF MEDICAL GENETICS, THE AMERICAN SOCIETY FOR CLINICAL PATHOLOGY, THE COLLEGE OF AMERICAN PATHOLOGISTS, HAIG KAZAZIAN, MD, ARUPA GANGULY, PHD, WENDY CHUNG, MD, PHD, HARRY OSTRER, MD, DAVID LEDBETTER, PHD, STEPHEN WARREN, PHD, ELLEN MATLOFF, M.S., ELSA REICH, M.S., BREAST CANCER ACTION, BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, LISBETH CERIANI, RUNI LIMARY, GENAE GIRARD, PATRICE FORTUNE, VICKY THOMASON, and KATHLEEN RAKER,

Plaintiffs-Appellees,

v.

UNITED STATES PATENT AND TRADEMARK OFFICE

Defendant,

and

MYRIAD GENETICS,

Defendant-Appellant,

and

LORRIS BETZ, ROGER BOYER, JACK BRITTAIN, ARNOLD B. COMBE, RAYMOND GESTELAND, JAMES U. JENSEN, JOHN KENDALL MORRIS, THOMAS PARKS, DAVID W. PERSHING, AND MICHAEL K. YOUNG, in their official capacity as Directors of the University of Utah Research Foundation,

Defendants-Appellants.

Appeal From The United States District Court
For The Southern District of New York
In Case No. 09-CV-4515, Senior Judge Robert W. Sweet

SUBMISSION BY *AMICUS CURIAE* FEDERAL CIRCUIT BAR ASSOCIATION IN SUPPORT OF NEITHER PARTY REGARDING PLAINTIFFS'-APPELLEES' MOTION FOR RECUSAL OF CHIEF JUDGE RANDALL R. RADER

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CERTIFICATE OF INTEREST

Counsel for *amicus curiae*, 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 name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: **N/A.**

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are: **None.**

4. There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by me in the trial court or agency or are expected to appear in this court are:

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August 3, 2010
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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Federal Circuit Bar Association ("FCBA") is a national bar association with over 2,400 members from across the country, all of whom practice before or have an interest in the decisions of the Court of Appeals for the Federal Circuit. The FCBA offers a forum for discussion of common concerns of the Court and the bar.

One of the FCBA's purposes is to render assistance to the Court in appropriate instances by submitting its views on legal issues faced by the Court.[1] Such submissions further the core mission of the FCBA, which includes a responsibility to help promote the health of the legal system for the public interest. An informed and balanced set of legal rules in the area of judicial recusal are vitally important to the public interest. In particular, the continued perception of judicial impartiality and the ability of judges to participate in appropriate non-judicial discourse and legal education are both valuable and worthy of vigilant protection. These are the interests the FCBA hopes to advance with this submission.

Defendants-Appellants have consented to the filing of this submission;

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[1] After reasonable investigation, FCBA believes that (a) no member of its Board or *amicus* Committee who voted whether to prepare this submission, or any attorney in the law firm or corporation of such a member, represents a party to this litigation, (b) no representative of any party to this litigation participated in the authorship of this submission, and (c) no one other than FCBA, or its members who authored this submission and their law firms or employers, made a monetary contribution to the preparation or filing of this submission. FCBA members who are government attorneys played no role in the decision to file this submission or in developing the content of this submission.

Plaintiffs-Appellees have also consented to the filing of this submission. The FCBA is concurrently filing a motion for leave to file this submission.

ARGUMENT

This Court has previously addressed recusal under 28 U.S.C. § 455(a), following the general rule that Section 455(a) "create[s] an objective standard under which disqualification of a judge is required when a reasonable person, knowing all the facts, would question the judge's impartiality." *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 882 F.2d 1556, 1568 (Fed. Cir. 1989).[2] This standard applies to recusal decisions of both trial judges and appellate judges. *See Maier v. Orr*, 758 F.2d 1578, 1581 (Fed. Cir. 1985) (applying the objective test of Section 455(a) to a Federal Circuit judge's decision not to recuse himself).

The issue raised by the recusal motion appears to be one of first impression in this Circuit: When should a circuit judge be recused based on prior public statements made in the course of active participation in an educational conference?

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[2] *See also id.* ("'[I]t is critically important ... to identify the facts that might reasonably cause an objective observer to question [the judge's] impartiality.'") (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 2205 (1988)). The vast majority of Federal Circuit cases addressing the recusal standard, including *Hewlett-Packard*, deal with the recusal of district court judges and therefore apply the recusal standard of the appropriate regional circuit (the Ninth Circuit in *Hewlett-Packard*). 882 F.2d at 1567. Nevertheless, the few cases that articulate purely Federal Circuit law appear to adopt the same objective standard. *See, e.g., Maier v. Orr*, 758 F.2d 1578, 1583 (Fed. Cir. 1985) (concluding that section 455(a) presents no basis for recusal "[a]bsent a factual showing of a reasonable basis for questioning [the judge's] impartiality").

FCBA respectfully files this submission as an *amicus curiae* solely to direct the Court to relevant sources of law, and thus to aid resolution of this important issue, which is invested with the public interest.

I. 28 U.S.C. § 455(a) SHOULD BE INTERPRETED IN HARMONY WITH THE JUDICIAL CODE OF CONDUCT, WHICH ENCOURAGES JUDICIAL PARTICIPATION IN EDUCATIONAL CONFERENCES

Judicial participation in educational conferences is beneficial for the legal system and its users. It results in a better education for all involved and helps protect against undue judicial insularity. As a sister circuit court has noted, "[t]his is particularly the case in an age in which specialized knowledge is important in the exercise of the judicial function." *In re Aguinda*, 241 F.3d 194, 205 (2d Cir. 2001). Indeed, active and appropriate judicial participation in the wider legal and academic community is desirable, as a cloistered and isolated judiciary would be hampered in evaluating the effect of legal decisions on society. *See* Howard T. Markey, "A Judicial Need for the 80's: Schooling in Judicial Ethics," 66 NEB. L. REV. 417, 425 (1987) (noting that "judges are in their judging being involved more and more in the management of society. If total isolation of judges from all social contact off the bench would guarantee a totally ethical judiciary, what would be the cost?").

Section 455(a) of the Judicial Code provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in

which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Guidance for the proper interpretation of Section 455(a) can be found in the principles of the Judicial Code of Conduct.[3] *See, e.g. Aguinda*, 241 F.3d at 205 (applying Judicial Code of Conduct in construing mandates of Section 455(a)).

The relevance of the Judicial Code of Conduct has been acknowledged by the parties. The Motion relies on point to Canon 3A(6), which states that judges generally "should avoid public comment on the merits of a pending or impending action." *See* Motion at 7. The Response, in turn, references Canon 4, which provides that a "judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects." *See* Response at 4, n.2.

Subsection (a) of Canon 4 provides further guidance, stating that "[a] judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice." As explained by the commentary to Canon 4, "[c]omplete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially

[3] The Code of Conduct for United States Judges (hereafter, "Judicial Code of Conduct") is available for download at http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct.aspx.

learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice."

As explained further below, the important goal of ensuring that federal judges continue to decide cases in a manner that is, and appears to be, impartial should be harmonized with the need to foster appropriate judicial involvement in public educational activities. Accordingly, any overbroad application of Section 455(a) and Canon 3A(6) that would chill judicial participation in extra-judicial educational activities, as encouraged by Canon 4, should be rejected. A disengaged, less-educated and more insular judiciary would inevitably be less effective, and, in turn, would harm the bench, bar, litigants and, ultimately, the public.

II. A JUDGE'S STATEMENT OF GENERAL VIEWS REGARDING THE LAW DURING ACTIVE PARTICIPATION IN AN EDUCATIONAL CONFERENCE DOES NOT NECESSARILY PRESENT A BASIS FOR RECUSAL

A. Requests For Recusal Based On Participation In Educational Conferences Should Be Resolved In A Manner That Considers The Legitimate Involvement Of Judges In Such Conferences

If judicial participation in extra-judicial educational activities is to have real meaning, judges must be permitted to address, appropriately, the relevant and significant issues that are the subject of such educational conferences. This is true even when (as will usually be the case) those general issues happen to have

relevance to one or more pending cases. Indeed, courts have routinely held that recusal is not required by the mere fact that a judge has previously expressed an opinion on a point of law. *See, e.g., United States v. Cooley*, 1 F.3d 985, 994 (10th Cir. 1993) ("[G]enerally stated views, even when expressed strongly, against a wide variety of conduct ... are not unreasonable for a judge, and would not, absent more, disqualify a judge from sitting on a case involving the same subject matter."); *see also* James Bopp, Jr. & Anita Y. Woudenberg, "An Announce Clause By Any Other Name: The Unconstitutionality of Disciplining Judges Who Fail to Disqualify Themselves For Exercising Their Freedom to Speak," 55 DRAKE L. REV. 723, 739 (2007) ("Recusal for announcing one's views is unprecedented.").[4]

If generally stated views regarding the law were a basis to disqualify a judge, judges would be discouraged from teaching at law schools. Under the

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[4] Other courts have reached similar results. *See, e.g., United States v. Johnson*, 537 F.2d 1170, 1175 (4th Cir. 1976) (concluding that a judge's announced belief that heroin distribution deserved severe punishment did not disqualify him from conducting retrial); *Baskin v. Brown*, 174 F.2d 391, 394 (4th Cir. 1949) ("A judge cannot be disqualified merely because he believes in upholding the law, even though he says so with vehemence."); *Phillip v. ANR Freight Sys., Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991) (recusal not required where district court judge voiced strong feelings about Title VII litigation generally), *cert. denied*, 506 U.S. 825 (1992); *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976) ("The mere fact that a judge has previously expressed himself on a particular point of law is not sufficient to show personal bias or prejudice."). *See also* Susan B. Hoekema, "Comment, Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges Under 28 U.S.C. § 455(a)," 60 TEMP. L.Q. 697, 703 n. 50 (1987).

protection of Canon 4, however, judges routinely teach such courses. In so doing, those judges necessarily address the state of the law. With the proliferation of recording technologies, the specter of appropriate classroom discussions being misused for tactical recusal motions must be avoided. Judges need not teach in an overly-cautious and reticent manner for fear that their statements will serve as grist for such motions.

Likewise, judges often contribute to legal treatises or casebooks and, in doing so, necessarily comment on the state of the law.[5] Such educational publications are a great service to law students, attorneys, and the general public. The public benefits from more, not less, judicial involvement with academic publications and practical guides. An overbroad application of Section 455(a) would chill such activities and, therefore, must be avoided.

Lastly, and most pertinently for purposes of this Motion, meaningful judicial involvement with continuing legal education programs necessarily involves

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[5] *See, e.g.*, Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833); Stephen G. Breyer, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES (Aspen Publishers, 6th ed., 2006); *see also* Richard A. Posner, ECONOMIC ANALYSIS OF LAW (Aspen Publishers 2007); Shira A Scheindlin, MOORE'S FEDERAL PRACTICE, E-DISCOVERY: THE NEWLY AMENDED FEDERAL RULES OF CIVIL PROCEDURE (Matthew Bender 2006); Robert Pitofsky, Harvey J. Goldschmid & Diane P. Wood, TRADE REGULATION: CASES AND MATERIALS (Thomson/West, 5th ed., 2003); Jack B. Weinstein, WEINSTEIN'S FEDERAL EVIDENCE (Matthew Bender 1997); William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, FEDERAL CIVIL PROCEDURE BEFORE TRIAL (Rutter Group 2010).

statements by a range of speakers on a range of legal topics. Such educational events in many ways are the most effective fora for the healthy exchange of ideas and concerns between judges and others involved in the legal system. In light of the general prohibition of Canon 3 and in order to avoid any possible claim of apparent partiality, some judges may already shy away from appropriate—and indeed enlightening—interaction with attorneys. But such caution must remain in balance with the undeniable value of judicial involvement in continuing education legal programs, as contemplated by Canon 4.

The Motion does not directly challenge these principles. *See* Motion at 9-10. Rather, the Motion distills down to two narrower and distinct issues: (a) May a judge attend a conference wherein a legal topic relevant to pending litigation is discussed? and (b) In the course of actively participating in such a conference, to what extent may a judge raise a question or comment on the general subject of pending cases? FCBA sets forth below the specific principles that should govern the resolution of these types of issues.

B. A Judge's Participation In Conferences And Educational Retreats Generally Does Not Necessarily Require Disqualification

Courts that have visited the question of recusal triggered by mere judicial participation in conferences and educational retreats have determined that recusal is inappropriate. *See, e.g.*, *United States v. Bonds*, 18 F.3d 1327, 1331-32 (6th Cir.

1994); *Aguinda*, 241 F.3d at 206-07; *United States v. Pitera*, 5 F.3d 624, 626-27 (2d Cir. 1993).

Courts have also rejected recusal based on a judge's participation at a conference in which information germane to a pending case is discussed, even if the presentation may be described as "one-sided." In that regard, the *Bonds* case is instructive. In that case, similarly to the present situation, the recusal motion was based on a circuit judge's participation at a seminar that touched on an issue (the admissibility of DNA evidence) that was later presented to the appellate court. 18 F.3d at 1330. The motion to recuse the circuit judge (Judge Boggs) alleged that he (1) attended a "highly partisan, one-sided ... vituperative" scholarly conference at UC Riverside regarding forensic uses of DNA, (2) attended a 3-day retreat on the same subject in New York, (3) likely heard "*ad hominem* attacks" directed to the attorneys seeking recusal, and (4) engaged in formal discussions with partisan individuals. *Id.* at 1329.

In deciding the motion for recusal in *Bonds*, Judge Boggs determined that recusal was inappropriate because he did not acquire "extra-judicial knowledge of disputed facts" from attending the conferences but, at worst, was subjected only to "spin" regarding facts and evidence that had "already been frozen into the record sometime before." *Id.* at 1330. Judge Boggs further observed that his participation at the conference and retreat was akin to reading articles or books related to a case

that might come before him. *Id.* While recognizing that perceptions of his actions could differ, Judge Boggs explained that "a judge should never be reluctant to inform himself on a general subject matter area, or participate in conferences relative to any area of law, for fear that the sources of information might later be assailed as one-sided." *Id.*

One of the two conferences discussed in the Motion was sponsored by a group that, having participated before the district court as an *amicus*, has a stated interest in the outcome of the present litigation. *See* Motion at 4. The mere fact that a judge has attended an event sponsored by a group that has an identifiable political or legal orientation or bias does not, however, necessarily lead to the conclusion that the judge is an adherent of the group's political or legal mission, or a fellow traveler. *In re Charges of Judicial Misconduct*, 404 F.3d 688, 694 (2d Cir. 2005); *Bonds*, 18 F.3d at 1331; *see also* Judicial Conference of the United States, Committee on Codes of Conduct, Compendium of Selected Opinions, § 4.5(k) (2001) ("A judge who is a member of the American Bar Association is not regarded as personally supporting positions taken by the Association without the judge's involvement."). Simply put, participation in an organization's event does not imply adoption of every position taken by the organization as an *amicus* or otherwise. *See generally In re Charges of Judicial Misconduct*, 404 F.3d at 694; Judicial Conference of the United States, Committee on Codes of Conduct,

Advisory Opinion 93, Extrajudicial Activities Under Canons 4 and 5, ¶ 12 (1977, rev. Oct. 1998) ("[A] judge may remain a member of a bar association which takes controversial positions on policy issues so long as the judge abstains from participating in the debate or vote on such matters in a manner in which the public may effectively become aware of the judge's abstention.").

To be sure, there are unique situations where attendance at a conference involving subject matter related to a pending case would warrant recusal. In one case, recusal was deemed appropriate where, among other things, the judge watched presentations by 13 of one side's expert witnesses that was similar to their expected trial testimony. *In re School Asbestos Litig.*, 977 F.2d 764, 781-82 (3d Cir. 1992) (granting motion to disqualify judge for attending a conference that was sponsored by plaintiffs with funding that the judge himself had approved, where the judge's expenses were largely defrayed by those same court-approved funds, the judge was exposed to a "Hollywood-style 'pre-screening' of the plaintiffs' case," and 13 of the plaintiff's 18 expert witnesses gave presentations "very similar to what they expected to say at trial"). Such case-specific conferences are the exception, not the rule, however, and in the absence of such unusual circumstances a judge's attendance at a conference or educational retreat should not lead to disqualification.

C. A Judge's Statements Regarding General Legal Issues, Even if Relevant To Pending Litigation, Does Not Necessarily Result In Disqualification Where The Statements Are Made In The Context Of An Educational Conference Or Seminar

Judges' ability to make public comments on topics relevant to pending litigation is not as broad as their ability to attend conferences related to such topics. Case law illustrates that such judicial commentary falls along a spectrum. At one end of the spectrum, as noted *supra*, the law is clear that a judge may normally express his or her opinion on a point of law, regardless of the relevance of that opinion to pending cases. *Cooley*, 1 F.3d at 993; *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976). At the other end, the law is also clear that a judge cannot make public statements suggesting that he or she has pre-judged a case or otherwise is biased in favor of a litigant. Such concerns are typically raised in the context of interviews with the media. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 112 (D.C. Cir. 2001) (disqualification was appropriate where judge publicly "disclosed his views on the factual and legal matters at the heart of the case" to various reporters); *see generally* Judicial Code of Conduct, Canon 3A(6) ("A judge should avoid public comment on the merits of a pending or impending action.").

The text of Canon 3A(6) provides generally that "[a] judge should not make public comment on the merits of a matter pending or impending in any court," but then qualifies that general prohibition by stating that "[t]he prohibition on public

comment on the merits does not extend to public statements made in the course of the judge's official duties, to explanations of court procedures, *or to scholarly presentations made for purposes of legal education*" (emphasis added). This exception expressly recognizes that judges should be encouraged to participate actively in educational activities such as law-related conferences that normally relate to the interesting legal topics of the day. *See* U.S. Judicial Conf. Comm. on Codes of Conduct, Advisory Op. No. 93 ("[A] judge will be given greater latitude when participating in law-related activities expressly encouraged by Canon 4A," *i.e.*, activities that are "directed toward the objective of improving the law, *qua* law, or improving the legal system or administration of justice, and not merely utilizing the law or the legal system as a means to achieve an underlying social, political, or civic objective.").[6]

Against this backdrop, FCBA believes that it would be appropriate to adopt the following standard for assessing whether recusal is required based on a judge's allegedly case-related comments at a conference: If the judge's comments can reasonably be understood as general expressions regarding the law, recusal is not warranted, even if the views expressed are also relevant to a particular pending or impending case. Correspondingly, recusal should be considered, based on such

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[6] Published Advisory Opinions are available for download at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02-OGC-Post2USCOURTS-PublAdvisoryOps.pdf.

comments, only if the objectively reasonable interpretation is that those comments constituted the expression of the judge's specific views regarding the proper disposition of a particular identifiable pending or impending case, and reflect bias or predisposition (*i.e.*, an unwillingness to consider the case with an open mind).

III. TO AVOID INVITING STRATEGIC MANIPULATION, RECUSAL SHOULD BE DENIED UNLESS THE RULES AFFIRMATIVELY REQUIRE IT

Just as it is important that judges recuse themselves when the rules require it, it is equally important that judges refuse to recuse themselves where the rules do not require it. *See In re Certain Underwriter Defendants*, 294 F.3d 297, 302 (2d Cir. 2002) (stating that a judge "'is as much obliged not to recuse' herself unnecessarily as she is obliged to recuse herself when necessary" (citation omitted)); *In re Nat'l Union Fire Ins. Co.*, 839 F.2d 1226, 1229 (7th Cir. 1988) ("Judges have an obligation to litigants and their colleagues not to remove themselves needlessly ... ."); *In re Computer Dynamics, Inc.*, 253 B.R. 693, 698 (E.D. Va. 2000) (noting that a judge is equally obligated not to remove himself when there is no necessity and to remove himself when there is), *aff'd* 10 Fed. Appx. 141 (4th Cir. 2001); *see also Maier*, 758 F.2d at 1583 ("Frivolous and improperly based suggestions that a judge recuse should be firmly declined.").

To step aside to avoid controversy when a party has made a highly publicized yet unwarranted recusal motion would only invite strategic

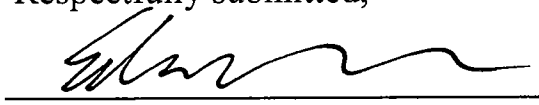
manipulation. *See Aguinda*, 241 F.3d at 206 ("[L]itigants have an incentive to judge-shop, and a judge should not grant a recusal motion simply because a claim of partiality has been given widespread publicity."); *In re Allied-Signal, Inc.*, 891 F.2d 967, 970 (1st Cir. 1989) ("[T]he disqualification decision must reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking."), *cert. denied sub nom ACW Airwall, Inc. v. United States District Court for the District of Puerto Rico*, 495 U.S. 957 (1990).

An increase in such strategic recusal motions would be particularly unwelcome because they are costly in a host of ways, including the chilling effect that they have on the beneficial judicial activities encouraged by Canon 4. Resolution of recusal motions in accordance with the principles enunciated above will avoid those deleterious consequences while preserving full public confidence in the impartiality of the federal judiciary.

CONCLUSION

The FCBA hopes that this submission will help the Court rule on the pending Motion in an informed and balanced way.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that an original and eleven (11) copies of the foregoing **SUBMISSION BY *AMICUS CURIAE* FEDERAL CIRCUIT BAR ASSOCIATION IN SUPPORT OF NEITHER PARTY REGARDING PLAINTIFFS'-APPELLEES' MOTION FOR RECUSAL OF CHIEF JUDGE RANDALL R. RADER** were filed on this date via hand delivery to the Clerk's Office, U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439.

I also certify that two true and correct copies of the foregoing **SUBMISSION BY *AMICUS CURIAE* FEDERAL CIRCUIT BAR ASSOCIATION IN SUPPORT OF NEITHER PARTY REGARDING PLAINTIFFS'-APPELLEES' MOTION FOR RECUSAL OF CHIEF JUDGE RANDALL R. RADER** were served via Federal Express, next day delivery, on this date to each of the principal counsel of record as follows:

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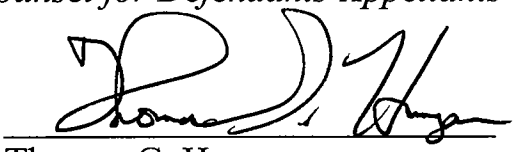

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