

No. 12-1128

IN THE
Supreme Court of the United States

MEDTRONIC, INC.,

Petitioner,

v.

BOSTON SCIENTIFIC CORP., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**BRIEF OF INTELLECTUAL PROPERTY OWNERS
ASSOCIATION IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Intellectual Property Owners Association (IPO) is a trade association representing companies and individuals in all industries and fields of technology who own or are interested in U.S. intellectual property rights.¹ IPO's membership includes more than 200 companies and a total of over 12,000 individuals who are involved in the association either through their companies or as inventor, author, executive, law firm, or attorney members. Founded in 1972, IPO represents the interests of all owners of intellectual property. IPO regularly represents the interests of its members before Congress and the USPTO and has filed *amicus curiae* briefs in this Court and other courts on significant issues of intellectual property law. The members of IPO's Board of Directors, which approved the filing of this brief, are listed in the appendix.²

INTRODUCTION

In the modern economy, licensing of intellectual property rights is a widespread and essential activity.

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus Curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

2. IPO procedures require approval of positions in briefs by a two-thirds majority of directors present and voting. Medtronic, Inc. is a member of IPO's Board of Directors; however, it did not participate in the discussions regarding or vote on the decision to file this brief, and did not participate in its preparation.

IPO members are owners of intellectual property rights, which are commonly the subject of license agreements that are entered into to settle litigation, to gain access to technology, to generate a revenue stream for inventors, and for myriad other reasons. The issue presented in this case centers on whether a rigid rule that the licensor always bears the burden of proof on whether the licensee's products are outside the scope of the license results in an unwarranted obligation on the licensor, unless the parties have agreed to allocate the burden of proof in that manner.

The issue here does not challenge this Court's decision in *MedImmune, Inc. v. Genentech, Inc.* providing the licensee with the right to challenge the licensed patent without breaching the license agreement. 549 U.S. 118 (2007). Rather, the only issue here is the narrow question of who bears the burden of proof on the issue of whether the licensee's products are outside the scope of the licensed patent, in the event that the licensor does not, or cannot, allege infringement and the license agreement itself does not allocate the burden of proof.³

This is not purely an issue of patent law. At its heart, it is an issue of contract law, and the impact of requiring a licensor to prove infringement – when the licensor has not and cannot allege infringement and can do nothing more than seek to be discharged from the suit and maintain the status quo due to the continued existence of a negotiated, arms-length license (including

3. This is not a situation where the courts can—and should—enforce a contractual allocation of the burden of proof for challenges to licensed product royalty obligations where the licensor and licensee include such a provision in the license agreement.

where the license was granted to avoid litigation or in the settlement of prior litigation). There is no support, in law or logic, to apply the general patent rule requiring a patent owner to prove infringement in a post-*MedImmune* license challenge. Indeed, as this Court has previously recognized, established equitable principles apply with equal force to patent disputes.

The Federal Circuit, in *Medtronic*, properly applied the equitable principles of contract law in this case.⁴ Recognizing the general rule that the patent owner generally bears the burden of proof on the issue of infringement, even as a defendant in declaratory judgment action, the Federal Circuit distinguished this general principle to the narrow facts of a particular type of post-*MedImmune* license challenge. The Federal Circuit's holding applies only where the patent owner has not – and cannot – allege infringement and is seeking no relief other than to be discharged from the suit and maintain the status quo. The Federal Circuit's holding is wholly consistent with the well-established principle that the challenger generally bears the burden of proving the allegations in its complaint. It also reinforces the strong public interest in upholding the creation of contracts and in the settlement of litigation.

To permit a licensee to maintain the status quo, force the licensor to prove infringement—even where

4. It is recognized that the Solicitor General has submitted an *Amicus* Brief recommending reversal of the Federal Circuit. For the reasons explained herein, IPO respectfully disagrees with the Solicitor General's reasoning since it largely ignores the primacy of contract law in defining the relationship between the licensor and the licensee.

the licensor cannot plead it, let alone seek infringement remedies—and suffer no negative impact even if the licensee loses, would cause a significant imbalance between a patentee-licensor and a licensee. Indeed, such a holding may effectively render patent licenses, whether entered in advance to resolve potential disputes or to settle litigation, worth nothing more than the paper upon which they are written—at least for the patentee-licensor.

SUMMARY OF ARGUMENT

This Court has long recognized the sometimes diametric interests of encouraging and protecting the formation of contracts and litigation settlements against the need to “weed out” invalid and unenforceable patents. *Lear, Inc. v. Adkins*, 395 U.S. 653, 668 (1969). Balancing these interests oft-times requires carving out exceptions to general rules, and applying the most relevant (and logical) law to specific facts of particular legal situations. This is what the U.S. Court of Appeals for the Federal Circuit properly did here in deciding the narrow issue of placing the burden of proof on the licensee where the licensee has filed a declaratory judgment action asserting that its products are not covered by the licensed patent and the licensor cannot counterclaim for infringement. This exception to the general rule does not conflict with any policy favoring the “weeding out” of an invalid patent from being a block to others in the field; here there is no challenge to patent validity, but merely a private dispute between two parties as to whether the licensed patent covers certain of the licensee’s products.

The Federal Circuit relied upon long-established precedent in holding that the party seeking relief bears the burden of proving the allegations in the complaint. *Medtronic Inc. v. Boston Scientific Corp.*, 695 F.3d 1266, 1272 (Fed. Cir. 2012 (quoting *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005) (“Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request ...”)). Acknowledging the general rule that a patentee bears the burden of proving infringement when asserting infringement, the Federal Circuit appropriately identified the narrow circumstances when the burden should properly be on an infringement challenger—where a licensee in good standing seeks a declaratory judgment of non-infringement under a post-*MedImmune* license, foreclosing an infringement counterclaim, as is proper in any case where the plaintiff alone seeks relief. *Medtronic*, 695 F.3d at 1274. To hold otherwise, would have an unintended impact on patent licenses and settlements, placing them outside established contract law.

The Federal Circuit’s holding is in harmony with this Court’s *MedImmune* and *Lear* decisions. It also strikes the only rational balance in allowing a licensee to use the license as a shield under *MedImmune*, while preventing it from using it as a Damoclean sword against the patentee in challenging a license at its sole discretion and benefit. The public’s interest in ensuring such a balance is particularly crucial in the area of patent licensing. IPO therefore urges this Court to affirm the judgment of the Federal Circuit.

ARGUMENT**I. Medtronic is Limited to Cases Where the Patentee Cannot Assert Infringement Against A Licensee and Follows the Well-Settled Rule that the Party Seeking Relief Bears the Burden of Persuasion**

The Federal Circuit's holding in *Medtronic* applies to narrowly defined circumstances:

[w]hen an infringement counterclaim by a patentee is foreclosed by the continued existence of a license, a licensee seeking a declaratory judgment of noninfringement and of no consequent liability under the license bears the burden of persuasion.

Medtronic, 695 F.3d at 1274 (emphasis added). The relief Medtronic seeks relates directly to its obligations under the license. Medtronic already has a license; it cannot be sued for infringement. The ongoing license prohibits the assertion of such a claim by the patentee. *Id.* at 1273. The contract-at-issue requires MFFV⁵ to identify products that it believes fall within the contract. After they are identified, Medtronic is required to either pay royalties or sue for declaratory judgment. Medtronic filed for declaratory judgment. MFFV can seek nothing more than to be discharged from the suit and maintain the status quo. Medtronic is the only party seeking relief.

The Federal Circuit followed the well-established equitable principle that the challenger generally bears

5. Respondent Mirowski Family Ventures, LLC.

the burden of proving the allegations in its complaint. *Medtronic*, 695 F.3d at 1272 (citing *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005)). There is no rationale to shift the burden to the patentee merely because the licensee asserts non-infringement to avoid paying a royalty. To do so would create an unintended loophole in contract and patent law that would effectively render patent licenses (at least from the perspective of a patentee-licensor) of little worth. As this Court recognized in *Ebay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391-92 (2006), established equitable principles apply with equal force to disputes arising under the Patent Act: “[a] major departure from the long tradition of equity practice should not be lightly implied.”

II. The Federal Circuit’s Holding in *Medtronic* Does Not Conflict with *MedImmune*

The *Medtronic* decision is not in conflict with *MedImmune*. This Court in *MedImmune* resolved a narrow jurisdictional issue, specifically whether a patent licensee is to terminate or breach a license agreement to meet the case or controversy criterion under Article III before seeking a declaratory judgment that the licensed patent is invalid, unenforceable or not infringed. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 120-21 (2007). *MedImmune* narrowly held that there was a justiciable controversy even if the licensee continued to pay royalties to the patentee to avoid breaching the license. *Id.* at 137.

The relevant issue before the Federal Circuit in *Medtronic* was whether the patent licensee or the licensor bears the burden of proving non-infringement as it

relates to the scope of the contract in a post-*MedImmune* declaratory judgment action. *Medtronic*, 695 F.3d at 1272. Following well principled law, the Federal Circuit held that when an infringement counterclaim is foreclosed by the continued existence of a license, the licensee seeking declaratory judgment of non-infringement and of no consequent liability under the license bears the burden of persuasion. *Id.* at 1272-74.

MedImmune neither addressed the *Medtronic* issue, nor held that a patentee has the burden of proof where it does not (and indeed legally cannot) counterclaim for infringement and the only party requesting relief is the licensee.⁶

III. The Federal Circuit's Decision in *Medtronic* Does Not Conflict with the Public Policy Concerns in *Lear*

This Court, in *Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969), abolished the doctrine of licensee estoppel, holding that in the interest of public policy to cull out invalid and unenforceable patents, licensees cannot generally be barred by the terms of a license from repudiating that license and challenging a patent.

Medtronic concerns a declaratory judgment of non-infringement. Unlike the public's interest in eradicating invalid and unenforceable patents recognized in *Lear*, the only interests at stake in determining infringement under

6. As more fully addressed in Section IV, IPO does not believe that it was the intent of this Court to apply *MedImmune* to non-infringement challenges of post-*MedImmune* licenses, where the licensor is not legally permitted to counterclaim for infringement.

a license are those of the parties. This is not in conflict with the general policy favoring contracts and settlement of patent disputes. There is no broader supervening public interest involved in determining the scope of the patent license between the licensor and licensee.

IV. The Public's Interest Will Be Best Served by Requiring the Patent Licensee to Prove Non-Infringement under a *MedImmune* Declaratory Judgment Action

The Federal Circuit opinion recognizes the imbalance and burden upon patent owners that would be created if a licensee could—at its sole discretion—force the patentee into full-blown patent-infringement litigation, requiring the licensor to prove infringement, but not be able to assert it; and even if successful, its efforts are simply to maintain the status quo of an already, fully negotiated, existing contract. Whereas, the successful outcome for the licensee is termination of its payment obligation under the contract. And the worst-case scenario for the licensee is that it continues paying what it previously contracted to pay. This cannot be the intended effect of *MedImmune*.

In a post-*MedImmune* patent license challenge, the patent-owner licensor is prevented from counterclaiming infringement against the licensee. The unintended, negative implications of requiring a patent owner to prove infringement to hold a licensee to its bargain, while not being able to assert infringement, are legion.

While patent licenses, as a business decision or to avoid litigation though settlement, are to be encouraged, placing the burden (and all of the risk) on the patent owner who has no upside other than maintaining the license

already negotiated would serve to create disincentives to patent licenses and settlements. If the patent owner needs to fully litigate patent infringement after it has entered into a contract—to which it is solely bound and for the purpose of avoiding such a scenario—the primary perceived benefit to doing so is obliterated. A licensor’s most secure path would be to initiate or proceed with litigation and seek a higher, enforceable and more certain recovery. Meanwhile the accused infringer would be able to take a license, lock in the maximum royalty rate and still be able to fully litigate the issues with the licensor still bearing the burden of proof on infringement.

This Court has repeatedly recognized that public policy encourages and favors both the formation of contracts and the settlement of legal disputes. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 406 (1992) (dissenting); *United States v. Singer Mfg. Co.*, 374 U.S. 174, 199 (1963) (concurring). Each is particularly valuable with respect to patents and the avoidance of patent disputes. *Flex-Foot, Inc. v. CRP, Inc.*, 238 F.3d 1362, 1369 (Fed. Cir. 2001) (“there is strong public interest in settlement of patent litigation and that upholding the terms of a settlement encourages patent owners to agree to settlements”); *Joy Mfg. Co. v. Nat’l Mine Serv. Co.*, 810 F.2d 1127, 1131 (Fed. Cir. 1987) (Newman, J. concurring).

As a general rule, contracts by competent persons, equitably made, are valid and enforceable. Indeed, this Court has stated:

[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have

the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.

Baltimore & Ohio Sw. Ry. Co. v. Voigt, 176 U.S. 498, 505-06 (1900); *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931) (“The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.”). Parties to a contract are bound by the terms to which they have agreed, even if the terms appear to be improvident or one-sided, as long as the contract is not a result of fraud, duress or undue influence. Williston On Contracts § 3.2 (4th ed. 2013). The binding force of a contract derives from the fact that it evinces a meeting of minds. *Id.* A contract, once formed, does not contemplate a right of a party to reject it. *Id.*, § 3.5.

A current reality is that many sophisticated parties voluntarily seek to resolve in advance any potential patent disputes through contract. Indeed, patent licenses often appear as significant components of the consideration in broader business arrangements between sophisticated parties. These arrangements (e.g., cross-licenses, package licenses, freedom-to-operate, joint-development agreements, standards-related licensing policies) often provide the parties freedom of action to design and market products in the face of rapidly evolving technologies and a cloudy picture (at best) of the landscape of future patent

protection. A crucial component of these agreements is to permit the parties to avoid the uncertainty and costs associated with full-blown patent litigation. These agreements should be handled and resolved under the procedural and substantive rules of contract law. In particular, the burden of proof should fall upon the party who challenges the express terms of the contract and who is otherwise seeking the requested relief. *Schaffer*, 546 U.S. at 56 (quoting C. Mueller & L. Kirkpatrick, Evidence § 3.1 (3d ed. 2003)).

A contrary outcome would turn contract law on its head. The licensor cannot charge a licensee with infringement; it cannot cancel the license; it is obligated to comply with the terms of the contract. *Medtronic*, 695 F.3d at 1273. A patentee-licensor, as held by *MedImmune*, is bound by the license. By entering a patent license, the patentee forfeits its right to many types of potential statutory damages and remedies, i.e., enhanced damages, trebled damages, injunction and higher royalty rates. A licensor enters into these types of agreements believing that they will be enforceable as to both parties for the subject matter to which they were executed. To remove the certainty and protections afforded by patent licenses will significantly stifle patent owners' willingness to enter into patent agreements and resolve patent disputes.

A contrary outcome will equally impact the desirability of patent settlements. Patent litigations are often settled through licensing for the purpose of avoiding the uncertainties and costs associated with protracted litigation. If a litigation licensee could then challenge the settlement license for non-infringement—avoiding the risks associated with infringement, while imposing the burden of persuasion on the patentee-licensor, with the only

reward available to the licensor being the already settled rate—the result would significantly dampen patentees’ readiness to settle patent disputes through license, thus harming the corresponding public interest.

The reasoning in *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994) shows this Court’s sensitivity to deterring parties’ readiness to settle disputes. In *Digital Equipment Corp.*, this Court rejected the argument that precluding interlocutory appeals from orders vacating settlements would hinder settlements and frustrate the strong federal policy favoring voluntary resolution of disputes. The Court stated that it:

[d]efies common sense to maintain that parties’ readiness to settle will be significantly dampened (or the corresponding public interest impaired) by a rule that a district court’s decision to let allegedly barred litigation go forward may be challenged as a matter of right only on appeal from a judgment for the plaintiff’s favor.

Digital, 511 U.S. at 881. Here, for a patentee to be forced to prove infringement for the sole benefit of continuing the licensed-settlement rate is not an incentive to enter into patent agreements or to settle patent disputes through license. Such a decision would pose a great obstacle to providing royalties at discounted rates and rates based on the assumption that there will be no litigation costs or risks related to infringement. Even if successful, the patentee ultimately would be the loser. A patent owner would be foolish to agree to a patent-settlement license under this situation.

The practical effect would be that these types of licenses would only be operative against the licensor. The licensee would be free to challenge any patent claims resolved under an already negotiated, arms-length contract. This would truly be the proverbial “have its cake and eat it too” situation. A licensee would be permitted to avoid all of the risks associated with being held an infringer through litigation by entering into a license. Then it could simply challenge the scope of the royalty obligation under the license claiming non-infringement. If the licensee is successful—perfect—no royalties are due; if it loses (found to infringe), it simply must live by the terms of the previously negotiated license. The result would be a loophole to allow licensees and potential infringers to avoid both contract and patent infringement laws. Because this Court was not considering this issue in *MedImmune*, IPO suggests that this was not the intended result of the *MedImmune* decision.

CONCLUSION

IPO urges the Court to affirm the Federal Circuit’s decision below. Otherwise, any potential infringer may enter into a patent contract or settlement agreement, then challenge that contract under *MedImmune* claiming that they do not infringe, thereby, removing the risks associated with a ruling of infringement. This would occur all while the patentee exists as nothing more than a party to a contract—bound to its terms, even if it wins—and receiving nothing more than maintaining the contract that it had previously negotiated at arms-length to avoid this exact scenario.

The licensee has everything to gain in entering such a contract. The licensor has everything to lose (i.e., the license, higher rates, injunction, treble damages). A ruling supporting this result will significantly weaken contract and patent law. And it will have a significantly negative effect on patent licenses and settlements. For these reasons, IPO respectfully requests that this Court affirm the Federal Circuit's ruling.

Dated: September 23, 2013

Respectfully Submitted,

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