

2018-1672

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SWAGWAY, LLC,

Appellant,

v.

INTERNATIONAL TRADE COMMISSION,

Appellee,

SEGWAY, INC., DEKA PRODUCTS LIMITED

PARTNERSHIP, NINEBOT (TIANJIN)

TECHNOLOGY CO., LTD.,

Intervenors.

Appeal from the United States International Trade Commission
in Investigation Nos. 337-TA-1007 and 337-TA-1021.

**APPELLANT SWAGWAY, LLC'S RESPONSE TO
INTERVENORS' COMBINED PETITION FOR REHEARING OR
REHEARING EN BANC**

Lei Mei
P. Andrew Riley
Laurence M. Sandell
Robert A. Hall
MEI & MARK LLP
818 18th Street NW, Suite 410
Washington, DC 20006
202-256-1008

July 9, 2019

Counsel for Appellant Swagway, LLC

CERTIFICATE OF INTEREST

In accordance with Federal Circuit Rules 35(e)(4)(B), 40(d)(2), and 47.4(a), Counsel for Appellant Swagway, LLC certifies the following:

1. The full name of every party represented by us:

Swagway, LLC

2. The name of the real party in interest if the party named in the caption is not the real party in interest:

Swagway, LLC

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by us:

None

4. The names of all law firms and the partners and associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this Court:

Lei Mei P. Andrew Riley Irene Chen Jeff Pearson Laurence M. Sandell Richard P. Hadorn Robert A. Hall Jiwei Zhang MEI & MARK LLP P.O. Box 65981 Washington, DC 20035-5981	Barry F. Irwin Jared E. Hedman Lisa Holubar Reid P. Huefner Adam J. Reis Iftekhar A. Zaim IRWIN IP 1333 Burr Ridge Parkway Suite 200 Burr Ridge, IL 60527
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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:

Segway, Inc. et al. v. Swagway, LLC, Civil Action No. 1:15-cv-01198-SLR-SRF (D. Del.) (currently stayed)

Dated: July 9, 2019

Respectfully submitted,

/s/ Laurence M. Sandell

Laurence M. Sandell

Counsel for Appellant Swagway, LLC

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COMMISSION or ITC	Appellee United States International Trade Commission
INTERVENORS	Complainants-Intervenors Segway, Inc., DEKA Products Limited Partnership, and Ninebot (Tianjin) Technology Co., Ltd., collectively
PET.	Intervenors' Combined Petition for Rehearing or Rehearing En Banc (June. 10, 2018)
SECTION 337	Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337
SWAGWAY	Respondent-Appellant Swagway, LLC
TTAB	Trademark Trial and Appeal Board

I. INTRODUCTION

The combined Petition should be denied. Intervenors misconstrue and overstate the precedent set in *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293 (2015). And their cited regional circuit cases both conflict with decades old Federal Circuit precedent and ignore key portions of the controlling legislative history that illustrate the congressional intent underlying Section 337. Moreover, Intervenors' other cited Supreme Court cases do nothing but confirm that this Court had jurisdiction to rule on "the issue that matters specifically to the parties"—the preclusive effect of 337 trademark determinations, which the Court intensely focused upon at oral argument.¹

¹ Swagway did not conduct appeal by ambush, as the Petition suggests. *E.g.*, Pet. at 3, 9-10. Rather, the preclusive effect issue naturally became a focus of oral argument after the Court noted, *sua sponte*, the unmistakable similarity between the consent order favored by Swagway and the 337 determination favored by Intervenors, and asked Swagway's counsel: "Assuming that there is no collateral estoppel effect, what difference does it make?" Oral Arg. at 10:52-11:08, 12:42-12:52 (*available at* <http://www.cafc.uscourts.gov/node/24454>). Only after such invitation did Swagway's counsel indicate that Swagway might withdraw the consent order issue. *Id.* at 12:57-13:05 ("if you'll allow me to ... think on that one minute during the Commission's and the Intervenors' time, I can give a final answer on that."). And only after both Intervenors and the ITC were given an opportunity to address the preclusive effect issue did Swagway formally—yet conditionally—withdraw the consent order issue from the Appeal. Oral Arg. at 34:28-35:30 ("[I]f this Court is able to state that there is no res judicata effect, it is our position that this case is moot."); *see id.* at 12:42-12:52, 27:01-27:20.

II. ARGUMENT AGAINST PANEL OR EN BANC REHEARING

A. There Is No Reason to Treat 337 Trademark Determinations Differently than 337 Patent Determinations

1. *B&B Hardware* Affirms that Where Congress Evinces Intent For an Agency Determination to Lack Preclusive Effect, Congressional Intent Controls

In *B&B Hardware, Inc. v. Hargis Industries, Inc.*, the Supreme Court confirmed a default “presumption” that “absent a contrary indication, Congress presumptively intends that an agency's determination ... has preclusive effect.” 135 S. Ct. at 1305. This presumption, however, is overcome when “when a statutory purpose to the contrary is evident.” *Id.* at 1303; *accord.* Pet. at 4.

At first glance, *B&B Hardware*'s holding that Trademark Trial and Appeal Board (TTAB) likelihood of confusion adjudications carry preclusive effect in Article III Courts may seem tantalizingly relevant to the instant Petition. But it is not. *B&B Hardware*'s result was dictated by the Lanham Act—and, specifically, its absence of an indication of congressional intent that TTAB decisions *lack* preclusive effect. 135 S.Ct. at 1305 (“We conclude that nothing in the Lanham Act bars the application of issue preclusion in such cases.”). In view of this absence, the *B&B Hardware* Court followed the default presumption, and accordingly, gave preclusive effect to the TTAB's likelihood of confusion determination. *Id.* at 1310.

337 determinations by the ITC are a different animal. They are not governed by the Lanham Act, but rather Section 337 of the Tariff Act of 1930, which was

substantively amended by the Trade Reform Act of 1974, and is codified as 19 U.S.C. §1337. Intervenor do not challenge this Court's precedent in *Texas Instruments v. Cypress Semiconductor Corp.*, which holds that patent-related 337 determinations lack preclusive effect. Pet. at 4-5 (citing 90 F.3d 1558, 1569 (Fed Cir. 1996)). And, Intervenor do not challenge *Texas Instruments'* reliance on the legislative history of the Trade Reform Act of 1974, S.Rep. No. 1298, 93d Cong., 2d Sess, 196 (1976), as indicating congressional intent when it comes a lack of preclusive effect for *at least some* 337 determinations. Rather, Intervenor expressly agree that such "legislative history shows that Congress did not intend the Commission's decisions regarding patent validity to have preclusive effect." Pet. at 5. Thus, at least as far as patent-related 337 determinations are concerned, it has been conclusively established that *B&B Hardware's* default presumption is overcome.

The relevant question, therefore, is not whether Congress intended for *at least some* 337 determinations to lack preclusive effect: All parties agree that Congress had this intention. Rather, the dispute boils down to *which* 337 determinations Congress intended to lack preclusive effect. As discussed below, the legislative history of the Trade Reform Act of 1974 indicates that all ITC determinations lack preclusive effect.

2. The Legislative History Relied Upon by this Court in *Texas Instruments* Is Equally Applicable to 337 Trademark Decisions

Intervenors' Petition re-quotes a portion of the legislative history recited in

Texas Instruments:

“*[I]n* patent-based cases, the Commission considers, for its own purposes under section 337, the status of imports with respect to the claims of U.S. patents. The Commission's findings neither purport to be, nor can they be, regarded as binding interpretations of the U.S. patent laws in particular factual contexts. Therefore, it seems clear that *any disposition of a Commission action by a Federal Court should not have res judicata or collateral estoppel effect in cases before such courts.*”

Pet. at 5 (quoting 90 F.3d at 1569; brackets in original; emphasis added).

Importantly, the last sentence of this legislative history excerpt leaves no room for ambiguity: It makes “clear that *any* disposition of a Commission action by a Federal Court should *not* have res judicata or collateral estoppel effect.” *Id.* (emphasis added). This sweeping proclamation regarding 337 determinations' lack of preclusive effect is *not* limited to patent-related dispositions. Accordingly, the inquiry into *which* 337 determinations Congress intended to lack preclusive effect can end here.

But there is more. Intervenors' legislative history excerpt is incomplete: It omits portions of the legislative history that indicate that all ITC decisions—not just patent ones—lack collateral estoppel effect. *Contra* Pet. at 2 (“there is no such

evidence regarding the Commission's decisions on non-patent cases"). The full paragraph reads:

The relief provided for violations of section 337 is "in addition to" that granted in "any other provisions of law." The criteria of section 337 differ in a number of respects from other statutory provisions for relief against unfair trade practices. For example, in patent-based cases, the Commission considers, for its own purposes under section 337, the status of imports with respect to the claims of U.S. patents. The Commission's findings neither purport to be, nor can they be, regarded as binding interpretations of the U.S. patent laws in particular factual contexts. Therefore, it seems clear that any disposition of a Commission action by a Federal Court should not have res judicata or collateral estoppel effect in cases before such courts.

S.Rep. No. 1298, 93d Cong., 2d Sess. 196 (1974). Obscured by the brackets in Intervenor's Petition (and in *Texas Instruments*²) is the text, "For example," which demonstrates that, per congressional intent, patent cases are *not* the only type of 337 determinations that "should *not* have res judicata or collateral estoppel effect in cases before [Federal] Courts." *Id.* Additionally, the first sentence of the legislative history paragraph grounds it in the statutory text of Section 337. 19 U.S.C. §1337(a)(1); *Trade Assocs. v. Makita*, Case No. C88-1028C, 1990 WL 10848940, at 1-2 (W.D. Wash. Mar. 2, 1990) (unpublished) (finding 337 trademark

² *Texas Instruments* was a patent appeal and did not address the preclusive effect of non-patent 337 determinations and, accordingly, reasonably truncated the legislative history excerpt.

determinations not to have preclusive effect based on Congressional intent).

Such an interpretation of Congressional intent is confirmed by yet another portion of the same legislative history. It states:

The Committee bill ... would authorize the Commission to order the exclusion of articles in all causes under section 337, *patent and nonpatent*.... More specifically, the Committee bill incorporates the following provisions:

1. ...

7. Res judicata, collateral estoppel. – Under the Committee bill, decisions by the U.S. Court of Customs and Patent Appeals reviewing Commission decisions under section 337 *should not serve as res judicata or collateral estoppel in matters where U.S. District Courts have original jurisdiction.*

S.REP. No. 1298, 93d Cong., 2d Sess. 35 (1974) (italic emphasis added; italics in original omitted). Here, in the same section where “*patent and nonpatent*” 337 actions are addressed together, Congress unambiguously explained its intent that decisions by Federal Circuit’s predecessor court should *not* be given any preclusive effect “in matters where U.S. District Courts have original jurisdiction.” *Id.* Of particular important to the instant appeal, such “matters” of “original jurisdiction” include federal trademark infringement cases, like the currently stayed trademark infringement action between Intervenors and Swagway in Delaware. 28 U.S.C. § 1338(a); *Trade Assocs.*, 1990 WL 10848940, at 1-2.

In view of the above, the legislative history of the Trade Reform Act of 1974 confirms that there is “no reason to differentiate between the effect of the Commission’s patent-based decisions and the Commission’s decisions regarding trademarks.” [Opinion at 13.] Congress intended for *all* 337 determinations to lack preclusive effect—and it repeatedly said so.

3. *Union Manufacturing’s Holding on the Preclusive Effect of 337 Patent Determinations Contradicts Federal Circuit Precedent*

All of Intervenors’ countermanding authority stems from a single Second Circuit case, *Union Manufacturing Co., Inc. v. Han Baek Trading Co.*, 763 F.2d 42 (2nd Cir. 1985). Pet. at 6-9. Beyond controverting the unequivocal text of the governing legislative history discussed above, *Union Manufacturing* is at odds with Federal Circuit precedent.

Union Manufacturing erroneously holds that the only 337 determinations that lack preclusive effect are those concerning patent *validity*:

The jurisdictional bar to *res judicata* treatment of ITC patent validity decisions simply does not apply to other decisions by the ITC.

763 F.2d at 45 (italics in original). Further, *Union Manufacturing* fails to meaningfully address the above-parsed legislative history text. Instead, it is grounded in the facts that (i) “the ITC has no jurisdiction to determine patent validity except to the limited extent necessary to decide a case properly before it,”

and (ii) that the Second Circuit was, in 1985, unable to find case law concerning 337 trademark determinations' preclusive effect or lack thereof. 763 F.2d at 45. Such reasoning falls short, especially when one recognizes that the ITC does not have jurisdiction to cancel federally registered trademarks either. *Cf. Bio-Technology General Corp. v. Genentech*, 80 F.3d 1553, 1564 (Fed. Cir. 1996) (“Importantly, however, the ITC does not have the power to award damages for patent infringement.”)

In any event, the Second Circuit's unreasonably narrow view of congressional intent is incompatible with long-standing Federal Circuit precedent. This Court has long (and repeatedly) held that, at a minimum, *all aspects* of 337 patent determinations lack preclusive effect in district court.³ For example, in *Texas Instruments Inc. v. Cypress Semiconductor Corp.*, this Court explicitly reiterated its case law that “an ITC's prior decision concerning patent infringement or validity cannot have claim preclusive effect in district courts.” 90 F.3d at 1568

³ The preclusive effect of 337 patent determinations is almost exclusively asserted in federal patent litigations, all appeals of which are, per 28 USC §1295 (a)(1), funneled to this Court. Accordingly, it is no surprise that the Federal Circuit has repeatedly interpreted Section 337 with respect to the preclusive effect of 337 patent determinations. Appeals of federal trademark litigations, on the other hand, are directed to the regional circuit courts of appeal. Accordingly, until the instant Appeal, the Federal Circuit had been denied an opportunity to establish uniformity as to the effect of 337 determinations—adjudications that are unquestionably within its exclusive purview. *See* Section II.B.2, *below*.

n. 9 (citing *Bio-Tech*, 80 F.3d at 1568 n. 9). Further, the *Texas Instruments* opinion emphasized the import of such holding:

[O]nce we accept, as we have done at least since 1986, that ITC decisions are not binding on district courts in subsequent cases brought before them, it necessarily follows that accused infringers can raise whatever defenses they believe are justified, regardless of whether they previously raised them and lost in the ITC.

90 F.3d at 1569 (Fed. Cir. 1996); *see also Texas Instruments Inc. v. ITC*, 851 F.2d 342, 344 (Fed. Cir. 1988) (stating that ITC determinations regarding patent issues should be given no collateral estoppel effect). Such conflict should further render the reasoning of *Union Manufacturing* unpersuasive to this Court.

Finally, the decisions of the First and Fourth Circuits cited by Intervenors offer no additional analysis or reasoning when it comes to interpreting Section 337 or its legislative history. *Aunyx Corp. v. Canon U.S.A.*, 978 F.2d 3, 7 (1st Cir. 1992); *Baltimore Luggage Co. v. Samsonite Corp.*, 1992 U.S. App. LEXIS 27493, at *9 (4th Cir. Oct. 16, 1992) (unpublished). In the absence of other authority regarding preclusive effect, these cases simply parrot *Union Manufacturing's* faulty holding in concluding that non-patent-validity 337 determinations do not escape the default presumption. They offer no additional jurisprudential value or insight to the petitioned issue.

B. The Federal Circuit Had Jurisdiction to Determine the Preclusive Effect of the 337 Commission Decision

1. Intervenors' Cited Authority Gives the Federal Circuit "Discretion" to "Resolv[e] an Issue Not Passed on Below"

In arguing that this Court lacked authority to issue a holding concerning the preclusive effect of 337 determinations, Intervenors cite two aging Supreme Court Opinions, both of which undermine its jurisdictional attack.

First, Intervenors cite *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967), presumably for its discussion of ripeness as it applies to question of statutory interpretation that looks to "congressional intent." Pet. at 10. *Abbott* concerned a pre-enforcement challenge to final FDA regulations by members of the pharmaceutical industry. 387 U.S. at 138-139 There, the Supreme Court considered whether such challenge was "'ripe' for judicial resolution," by evaluating the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 148. Ultimately, the Supreme Court found the issue fit for judicial decision, largely because it was a "purely legal" issue of statutory construction and found sufficient hardship because the "impact of the regulations on the [pharmaceutical industry litigants] is sufficiently direct and immediate." *Id.* at 148, 152.

Here, as in *Abbott Laboratories*, the issue of preclusive effect of 337 determinations is a "purely legal" question of statutory construction. Further, there

can be no reasonable dispute that this Court’s holding will have a “direct and immediate” effect in the related trademark infringement litigation in the District of Delaware that “is stayed pending resolution of the current appeal.” [Opinion at 13]; Pet. at ii. Accordingly, to the extent *Abbott Laboratories* is relevant, it powerfully confirms that the preclusion question was ripe for adjudication by this Court.

Second, Intervenor’s cite *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) for the norm that “a federal appellate court does not consider an issue not passed upon below.” Pet. at 10. In the following paragraph, however, *Singleton expressly* grants appellate courts “discretion” to take up issues in the first instance in some circumstances:

The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below . . .

428 U.S. at 121.

Here, the circumstances—as articulated by Intervenor’s counsel—are that “*the* issue that matters specifically to the parties is the issue about res judicata.” Oral Arg. at 27:01-27:20⁴ (emphasis added); see also *id.* at 24:24-24:47⁵;

⁴ Intervenor’s should not be heard to feign unfair surprise that the Court ruled on “*the* issue that matters specifically to the parties.” At oral argument, Intervenor’s
(continued...)

Appx3059-3061. Given that the preclusive effect issue was the *raison d'être* for the underlying Appeal, and the Court's view that, "[f]rom time immemorial," "[o]ur cases say there is no res judicata, no collateral estoppel," the Court was justified in "resolving an issue not passed on below." *Id.* at 11:35-11:39; 27:20-27:25; *Singleton*, 428 U.S. at 121. Thus, *Singleton* actually *confirms* this Court's jurisdiction to decide the preclusive effect of 337 trademark determinations in this instance.

2. The Federal Circuit is Best Suited to Resolve Questions Concerning Adjudications by the ITC, an Entity Within its Exclusive Jurisdiction

Other than, perhaps, the Supreme Court, no Court is in a better position to interpret Section 337 and its legislative history than the Federal Circuit.

(...continued)

arguing counsel knew his "client's position is that there is a res judicata effect," yet was unable to respond the Panel's questions on this issue. *Id.* at 27:25-28:28. Despite this, Intervenors made no attempt to submit supplemental authority or request supplemental briefing—either at oral argument or in the ensuing two months before this Court's Opinion issued. Thus, even assuming, *arguendo*, that the Court overlooked any decisive authority in confirming 337 trademark determinations' lack preclusive effect, Petition denial would not be unfair in view of Intervenors' de facto waiver of argument on "the issue that matters specifically to the parties."

⁵ "PANEL: Why does it matter? Why does anybody care? I mean the relief that was granted in the motion to terminate and the relief that was granted as part of the final decision are essentially the same. Who cares?

ITC Counsel: Well, the appellant cares because they claim that it will have an effect, you know, as a preclusive effect in the district court case."

First and foremost, Federal Circuit has *exclusive* jurisdiction to hear and pass judgment upon 337 determinations. 28 USC §1295 provides:

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction— ...

(6) to review the final determinations of the United States International Trade Commission relating to unfair practices in import trade, made under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337)

Indeed, this Court has long held that 337 determinations are *not* entitled to preclusive effect, even where it passes appellate judgment thereon. *E.g.*, *Tandon*, 831 F.2d at 1019 (“[O]ur appellate treatment of decisions of the Commission does not estop fresh consideration by other tribunals.”); *see also In re Convertible Rowing Exerciser Patent Litigation*, 903 F.2d 822 (Fed. Cir. 1990) (finding a petition for rehearing on the preclusive effect of 337 patent determinations to be frivolous).

Second, having the Federal Circuit rule upon the preclusive effect of 337 trademark determinations conforms to the general tenet that the preclusive effect of an adjudication, if any, is governed the local law of the tribunal that renders it. *See* Restatement (Second) of Conflict of Laws § 94 cmt. c (1988) (“[T]he local law of the State where the judgment was rendered determines whether, and if so to what

extent, a party to the action is bound by the judgment.”); *id.* at § 94⁶, § 95⁷, § 95 cmt. c⁸; *see also* 28 U.S.C. § 1652 (treating state laws “rules of decision in civil actions in the courts of the United States”). Here, the statutes and regulations governing 337 Investigations are the closest analogue to “local law of the State where the judgment was rendered.” Accordingly, the Federal Circuit’s exclusive appellate jurisdiction over 337 determinations gives it penultimate authority (subject only to that of the Supreme Court) to interpret what the ITC’s “local laws” mean. Indeed, Intervenor’s offer no authority suggesting that the Third Circuit would be a more appropriate arbiter of what preclusive effect 337 determinations are due. *See* Pet. at 9-10. Advantageously, the Federal Circuit’s final word on the issue will prospectively ensure uniformity in treatment of 337 determinations among the federal district courts, as well as regional circuit courts.

⁶ “What persons are bound by a valid State judgment is determined ... by the local law of the State where the judgment was rendered.”

⁷ “What issues are determined by a valid State judgment is determined ... by the local law of the State where the judgment was rendered.”

⁸ “The local law of the State where the judgment was rendered determines the effect of the judgment upon the original claim.”

C. If the Holding on Preclusive Effect is Vacated on Rehearing, Swagway's Conditionally-Withdrawn Consent Order Motion Argument Must Be Decided

Swagway's withdrawal of the consent order issue of this Appeal was contingent on this Court's holding that 337 trademark determinations are not entitled to preclusive effect. [Opinion at 13 n. 13.] Accordingly, if rehearing is granted and this Court's holding is vacated, the consent order issue must be addressed. Assuming, *arguendo*, this occurs, Swagway requests that this Court vacate the Commission determination and remand with instructions to enter the consent order in its stead.

III. CONCLUSION

For the foregoing reasons, Swagway respectfully requests that this Court deny Intervenors' Combined Petition.

Dated: July 9, 2019

Respectfully submitted,

/s/ Laurence M. Sandell

Lei Mei

P. Andrew Riley

Laurence M. Sandell

Robert A. Hall

MEI & MARK LLP

818 18th Street NW, Suite 410

Washington, DC 20006

Telephone: 888-860-5678

Facsimile: 888-706-1173

Counsel for Appellant Swagway, LLC.

PROOF OF SERVICE

I, Laurence M. Sandell, hereby certify that on July 9, 2019, a copy of the foregoing **RESPONSE TO INTERVENORS' COMBINED PETITION FOR REHEARING OR REHEARING EN BANC** was served via the ECF Filing System on all counsel of record.

/s/ Laurence M. Sandell

Laurence M. Sandell

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
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1. This brief complies with the type-volume limitation of Federal Circuit Rule 35(e)(4) and 40(d) because this brief contains 3,437 words excluding the parts of the brief exempted by Federal Circuit Rule 35(c)(2).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font and Times New Roman type style.

Dated: July 9, 2018

/s/ Laurence M. Sandell

Laurence M. Sandell

Counsel for Appellant Swagway, LLC