

No. 18-1672

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

SWAGWAY, LLC,
Appellant

v.

INTERNATIONAL TRADE COMMISSION,
Appellee

SEGWAY, INC., DEKA PRODUCTS LIMITED PARTNERSHIP, AND
NINEBOT (TIANJIN) TECHNOLOGY CO., LTD
Intervenors.

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

**RESPONSE OF APPELLEE
INTERNATIONAL TRADE COMMISSION
TO INTERVENORS' COMBINED PETITION FOR
REHEARING OR REHEARING EN BANC**

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On June 10, 2019, Intervenors (collectively, “Segway”) filed a combined petition for rehearing and rehearing en banc (“Pet.”). ECF No. 65. On June 11, 2019, the Court requested responses. ECF No. 67. Appellee U.S. International Trade Commission (“the Commission”) respectfully files this response to the petition.

As set forth herein, Appellant (“Swagway”) invited this Court to err when, at oral argument, Swagway offered to withdraw a portion of its appeal in exchange for a ruling by the Court on an issue that had not been argued in this case. As a result of Swagway’s representation, the Court improvidently declared that the Commission’s findings from its investigation cannot have preclusive effect in a stayed civil action in the District of Delaware.

The Commission agrees with petitioner Segway that the Court lacks the authority to decide whether the Commission’s trademark findings should be given preclusive effect in the District of Delaware where this issue might be raised sometime in the future. Pet. 9-11. Accordingly, the Commission agrees with petitioner Segway that Part III of the panel opinion should be vacated. The Court should then consider and reject Appellant Swagway’s procedural argument concerning the denial of its consent order motion, thus maintaining the affirmance of the Commission’s final determination. To the extent that petitioner Segway argues that the panel decision concerning

preclusion should be reversed, *cf.* Pet. 3-9, the Commission respectfully submits instead that any such decision as to preclusion should be made by the District of Delaware and the Third Circuit Court of Appeals, not by this Court, in accordance with well-settled law. Should this Court wish to reach the issue, further briefing would be necessary.

ARGUMENT

I. THE PANEL SHOULD NOT HAVE REACHED THE QUESTION OF PRECLUSION

As cited in the panel’s opinion, slip op. at 13 n.2, the panel reached the question of the preclusive effect of Commission decisions concerning trademark infringement based on a representation by Appellant (“Swagway”) in the rebuttal portion of its oral argument. The panel opinion accurately notes that in its rebuttal, Swagway orally agreed “to withdraw its argument regarding its consent order motion if this Court held that the Commission’s trademark determinations are not entitled to preclusive effect.” *Id.* The issue was not briefed. Nor did the panel solicit the views of the other parties as to Swagway’s offer to withdraw certain arguments in exchange for a holding concerning preclusion.

Had the Commission the opportunity to brief the issue before the panel, the Commission would have explained that, under settled law, the question of preclusion was not properly before the Court, but rather is the

province of the second court being asked to apply the preclusion. In connection with preclusion, the question is whether this Court (the “first court” because it is reviewing the first judgment, that of the Commission) may opine on the preclusive effect of the first judgment as to a second court (here, the District of Delaware,¹ in which a related trademark infringement action has been stayed pursuant to 28 U.S.C. § 1659). It is axiomatic that “[t]he first court does not get to dictate to other courts the preclusion consequences of its own judgment”² 18 Charles Alan Wright, *et al.*,

¹ *Segway, Inc., et al. v. Swagway, LLC*, No. 1:15-cv-01198-SLR-SRF (D. Del.) (stayed pending the ITC proceedings). That judicial district previously opined on the preclusive effect of Commission findings in *In re Convertible Rowing Exerciser Patent Litigation*, 814 F. Supp. 1197, 1204 (D. Del. 1993), holding that factual findings of the Commission would be given preclusive effect even though the ITC’s legal determination of patent invalidity had no preclusive effect.

² Wright & Miller acknowledge that while the first court cannot dictate the preclusion consequences of its judgment, the first court “should have [the] authority to make an explicit and binding disclaimer of preclusion.” 18 Wright *et al.*, § 4405, at 89. Such disclaimer is meant to ensure that the second court properly applies the first judgment, and permits the first court to explain, for example, that certain issues were not essential to the judgment, and therefore, “should not have issue-preclusion consequences.” 18 Wright *et al.* § 4424.1, at 695 (discussing the scope of such a disclaimer in connection with issue preclusion); *see also, e.g., D’Amico v. CBS Corp.*, 297 F.3d 287, 293-94 (3d Cir. 2002) (recognizing that the court could not dictate whether its decision was preclusive, but clarifying that the ruling was not “in any way a ruling on the merits,” and citing Wright & Miller). The panel here did not engage in such a case-specific explanation of its necessary findings.

Federal Practice & Procedure § 4405, at 87 (3d ed. 2016); *see also, e.g., Smith v. Bayer Corp.*, 564 U.S. 299, 307 (2011) (“Deciding whether and how prior litigation has preclusive effect is usually the bailiwick of the *second* court”) (emphasis in original); *Midway Motor Lodge of Elk Grove v. Innkeepers’ Telemgmt. & Equip. Corp.*, 54 F.3d 406, 409 (7th Cir. 1995) (“In the law of preclusion, however, the court rendering the first judgment does not get to determine that judgment’s effect; the second court is entitled to make its own decision”) (Easterbrook, J.); *In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 210 n.5 (3d Cir. 2003) (“Whether the court’s findings have a preclusive effect against [a party] only becomes ripe for determination if and when the [other parties] use the findings and conclusions in other contexts.”).

In the second proceeding, in the District of Delaware, preclusion will be the burden of the party seeking to invoke it. *Taylor v. Sturgell*, 553 U.S. 880, 907 (2008) (“Claim preclusion, like issue preclusion, is an affirmative defense. . . . Ordinarily, it is incumbent on the defendant to plead and prove such a defense, . . . and we have never recognized claim preclusion as an exception to that general rule”) (internal citations omitted); 18 Wright *et al.* § 4405, at 89.

The panel (slip op. at 13) relied upon two earlier decisions of this Court concerning preclusion of the Commission's patent determinations: *Texas Instruments Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1569 (Fed. Cir. 1996) and *Tandon Corp. v. U.S. International Trade Commission*, 831 F.2d 1017, 1019 (Fed. Cir. 1987). In *Texas Instruments*, this Court sat as the second court, properly analyzing the preclusive effect of the earlier Commission patent-related decision as to the district court judgment on appeal. *Tex. Instruments*, 90 F.3d at 1568-69.

The Commission recognizes that *Tandon* was an appeal from the Commission in a patent-related investigation, and this Court therefore sat as the first court. *See Tandon*, 831 F.2d at 1018-19. In connection with patent findings, however, this Court has exclusive appellate jurisdiction over patent appeals, and the Court ultimately would have heard any appeal from a subsequent district court action. 28 U.S.C. § 1295(a)(1). This Court lacks exclusive appellate jurisdiction over trademarks, *see id.* § 1295, and—to the extent that the holding here would actually bind the Delaware district court in the second civil action—the panel's decision improperly preempts the regional court of appeals, here the Third Circuit, from deciding the issue.

II. WERE IT PROPER FOR THIS COURT NOW TO REACH THE PRECLUSIVE EFFECT OF COMMISSION TRADEMARK DECISIONS, ADDITIONAL BRIEFING AND LEGAL ANALYSIS WOULD BE REQUIRED

Since the issue of the preclusive effect of Commission trademark decisions was neither raised nor briefed, the Court would need to order briefing if it believes it proper to reach this issue. The panel's legal analysis consists of the observation that this Court earlier found that the Commission's patent-related determinations are not to be afforded preclusive effect, followed by the statement: "We see no reason to differentiate between the effect of the Commission's patent-based decisions and the Commission's decisions regarding trademarks." Slip op. at 13.

Such further briefing would have to include further analysis of *Texas Instruments* and *Tandon*, including whether and why their discussions of the legislative history of the Trade Reform Act of 1974 (amending the Tariff Act of 1930) as to patent invalidity, *Texas Instruments*, 90 F.3d at 1568-69; *Tandon*, 831 F.2d at 1019, would pertain to trademark law.

In its petition, Segway has pointed to authority, not discussed by the panel, which would support a finding of preclusive effect: relevant Supreme

Court authority;³ the Restatement of Judgments;⁴ and the decisions of the three regional circuit courts of appeals, each of which has found that the Commission's non-patent findings are potentially preclusive.⁵ In addition, the Commission notes as additional authority a recent district court decision in accord. *Manitowoc Cranes LLC v. Sany Am. Inc.*, Nos. 13-C-677 & 15-C-647, 2017 WL 6327551 at *2-3 (E.D. Wis. Dec. 11, 2017) (noting that *Texas Instruments* “did not create a general rule against preclusion with

³ See, e.g., *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015) (observing that “courts may take it as given that Congress has legislated with the expectation that the principle of issue preclusion will apply except when a statutory purpose to the contrary is evident”) (quoting *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991)) (modification omitted).

⁴ Generally, “a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.” Restatement (Second) of Judgments § 83(1) (1982).

⁵ *Aunyx Corp. v. Canon U.S.A., Inc.*, 978 F.2d 3, 7-8 (1st Cir. 1992), cert. denied, 507 U.S. 973, 113 S. Ct. 1416, 122 L. Ed. 2d 786 (1993); *Union Mfg. Co. v. Han Baek Trading Co.*, 763 F.2d 42, 44-46 (2d Cir. 1985); *Baltimore Luggage Co. v. Samsonite Corp.*, 977 F.2d 571 (Table), 1992 WL 296368, at *3-4 (4th Cir. Oct. 16, 1992). *Union Manufacturing* and *Baltimore Luggage* addressed preclusive effects of ITC determinations in the context of trademark law; *Aunyx* addressed the issue in the context of antitrust. *Union Manufacturing* held: “The jurisdictional bar to *res judicata* treatment of ITC patent validity determinations simply does not apply to other decisions by the ITC. The ITC has full authority to decide trademark claims concerning imported goods, and the jurisdiction of federal district courts over unfair trade practice and trademark cases is not exclusive.” *Union Mfg.*, 763 F.2d at 45-46.

respect to all ITC determinations” and finding the Commission’s determination on trade secret misappropriation to be entitled to preclusive effect). No doubt, Swagway will argue authorities it believes support a finding of no preclusive effect. The Commission is aware of only one such (unpublished) authority.⁶

⁶ *Trade Assocs. v. Makita*, No. C-88-1028, 1990 WL 10848940, at *1-2 (W.D. Wash. Mar. 2, 1990). The Commission is aware that in that trademark case, it urged the district court not to afford the Commission’s decision preclusive effect. See Amicus Br. of U.S. Int’l Trade Comm’n, *Trade Assocs., Inc. v. Makita*, No. C-88-1028, 1989 WL 1842258 (W.D. Wash. Aug. 17, 1989) (“ITC Makita Amicus Br.”).

Such arguments, while apparently persuasive to the Western District of Washington in the unpublished decision above, did not persuade another district court, *Baltimore Luggage Co. v. Samsonite Corp.*, 727 F. Supp. 202, 205-07 (D. Md. 1989) (Niemeyer, J.). In *Baltimore Luggage*, then-District Judge Niemeyer addressed and rejected the Commission’s similar amicus arguments concerning non-preclusion. *Id.* As discussed earlier, the Fourth Circuit affirmed that district court in an unpublished decision. *Baltimore Luggage*, 1992 WL 296368.

To the extent that the Commission’s concerns at the time were based on the statutory time limits on Commission investigations, ITC Makita Amicus Br. at 19, those limits were removed from section 337 as part of the Uruguay Round Agreements Act, Pub. L. No. 103-465, § 321(a)(1), 108 Stat. 4809, 4943 (1994). Likewise, to the extent the Commission was concerned with displacing other court processes, ITC Makita Amicus Br. at 19, the Uruguay Round amendments added the automatic stay provision of 28 U.S.C. § 1659. Pub. L. No. 103-465, § 321(b), 108 Stat. at 4945-46. Such a stay, which must be requested by a Commission respondent, ensures that Commission decisions will issue first. 28 U.S.C. § 1659(a). To the extent that the Commission’s concerns were founded on the Seventh Amendment’s right to a jury trial, ITC Makita Amicus Br. 26-28, the Supreme Court subsequently

III. THIS COURT SHOULD ADDRESS AND REJECT SWAGWAY’S PROCEDURAL ARGUMENTS REGARDING ITS CONSENT ORDER MOTION AND THUS ADHERE TO ITS AFFIRMANCE OF THE COMMISSION’S FINAL DETERMINATION

In its opinion, the Panel stated that “[b]ecause we hold that the Commission’s trademark decisions, like its patent decisions, do not have preclusive effect, we need not reach Swagway’s procedural arguments regarding its consent order motion.” Slip op. at 13. Should the Court agree that it should not have reached the issue of preclusive effect, it will then have to address the two arguments Swagway makes in its brief concerning the denial of its motion for a consent order. As explained in the Commission’s original (red) brief, both of those arguments have been waived; and, if not waived, they are each without merit.

A. Swagway’s Procedural Arguments Are Waived Because Swagway Failed to Present Them in Its Petition for Commission Review

Swagway argues that the Commission acted arbitrarily and capriciously in adopting the ALJ’s denial of its Consent Order Motion because, Swagway contends: (1) no explanation for the denial was given, Swagway Blue Br. 13-14, and (2) the ALJ never issued an order denying the

rejected such Seventh Amendment arguments. *B&B Hardware*, 135 S. Ct. at 1304.

motion, as allegedly required by Commission rules, Swagway Blue Br. 15-18.

However, the record shows that Swagway did not raise either of these arguments in its petition for Commission review. *See* ITC Red Br. at 20; *see also* Swagway’s Pet. for Comm’n Rev. (Aug. 23, 2017) (Appx3040-3098) (“Petition for Review”). They are therefore waived. 19 C.F.R. § 210.43(b)(2) (“Any issue not raised in a petition for review will be deemed to have been abandoned”); *Finnigan Corp. v. Int’l Trade Comm’n*, 180 F.3d 1354, 1362-63 (Fed. Cir. 1999) (an issue not raised in the petition for review filed with the Commission is waived on appeal).

Swagway argues in reply that its arguments on appeal are “the same concept” that it raised in its petition for Commission review, Swagway Reply Br. at 6, and thus that it has simply made “clarifying arguments on appeal within the scope of the same position asserted below.” *Id.* at 7. Simple inspection of Swagway’s petition for Commission review shows the falsity of Swagway’s argument. *Compare* Swagway Blue Br. 10-18 *with* Petition for Review, at 6-16 (Appx3052-62).

B. The Commission Acted in Accordance with Law

In addition to being waived, Swagway's arguments are without merit.

1. The ALJ's Decision on the Merits at the Late Stage of the Commission Proceeding Was Appropriate and Thus Mooted the Consent Order Motion

The underlying Commission investigations were instituted in June and September 2016.⁷ The evidentiary hearing began on April 18, 2017, with a prehearing conference and continued through April 21, 2017. On March 21, 2017, Swagway filed a motion for partial termination of the investigation as to certain SWAGWAY-branded products (but not its SWAGTRON-branded products) via consent order. Appx499-504. On March 24, 2017, Swagway amended its proposed consent order. Appx519-533. Segway opposed that motion. Appx2828-31. On April 5, 2017, Swagway moved for leave to file a reply to Segway's opposition in which it again amended its proposed consent order.⁸ Segway opposed that second motion. Appx578-581. On

⁷ See Notice, *Certain Personal Transporters, Components Thereof, and Packaging and Manuals Therefor*, Inv. No. 337-TA-1007, 81 Fed. Reg. 41342 (Jun. 24, 2016); Notice, *Certain Personal Transporters, Components Thereof, and Packaging and Manuals Therefor*, Inv. No. 337-TA-1021, 81 Fed. Reg. 64936 (Sep. 21, 2016).

⁸ The Commission's rules of practice and procedure (19 C.F.R. Part 210) do not provide a right to file a reply, nor is there a procedure whereby a new proposed consent order can be attached to a motion for leave to file a reply, essentially circumventing the orderly procedures governing proper consideration and adjudication of motions and responses thereto.

April 18, 2017, at the prehearing conference on the date the evidentiary hearing was to commence, Swagway brought up its motion and was informed by the ALJ that he would not be ruling on it at that time. *See* Appx3034 (Hr'g Tr. at 33:10-24).

As the Commission explained in its brief, section 337 provides that while the Commission “may” terminate an investigation in whole or part without making a final determination on whether a violation of section 337 has occurred based on a consent order, neither the statute nor Commission Rules require the Commission to do so. *See* ITC Red Br. at 21-22; *see also* 19 U.S.C. § 1337(c); 19 C.F.R. § 210.21(c)(1)(ii).

Further, the rules do not require the ALJ to adjudicate a motion for a consent order before issuing a final initial determination. Specifically, Commission Rule 210.21(c)(1)(ii) provides in relevant part that:

Upon request and for good cause shown, the administrative law judge may consider such a motion during or after a hearing. *The filing of the motion shall not stay proceedings before the administrative law judge unless the administrative law judge so orders.*

19 C.F.R. § 210.21(c)(1)(ii) (emphasis added).

Rule 210.21(c)(1)(ii) thus allows the ALJ to proceed to his final initial determination on whether a violation of section 337 exists even if a motion for termination based on a consent order is pending. That was certainly the

ALJ's understanding when he explained that any Commission decision on a grant of a consent order motion would come only after the hearing had been concluded and all evidence had been taken on the underlying issues of violation of section 337. Appx3034 (Hr'g Tr. at 33:17-19); *see* 19 C.F.R. § 210.42(h)(3) (providing the Commission with 30 days to determine whether to review an ALJ's initial determination granting a consent order motion, with additional time should the Commission determine to review).

As discussed in the Commission's brief, ITC Red Br. at 22-23, Rule 210.21(c)(1)(ii) is consistent with well settled legal precedent according to which district courts have "broad discretion to control and manage their dockets," where such discretion "includ[es] the authority to decide the order in which they hear and decide issues pending before them." *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1358 (Fed. Cir. 2008); *see also CLS Bank Int'l v. Alice Corp.*, 717 F.3d 1269, 1284 (Fed. Cir. 2013) (en banc) ("District courts are rightly entrusted with great discretion to control their dockets and the conduct of proceedings before them, including the order of issues presented during litigation."), *aff'd on other grounds*, 573 U.S. 208 (2014). As the Commission further explained in its brief, *see* ITC Red Br. at 23, agencies are likewise empowered with broad discretion to control and manage their dockets. *See, e.g., Olivares v. MSPB*, 17 F.3d 386, 388 (Fed.

Cir. 1994) (finding MSPB has “broad discretion to control its own docket.”). Therefore, the ALJ could (and did) properly continue the proceedings until he issued his final ID, consistent with Commission Rule 210.21(c)(1)(ii).

Swagway does not dispute the meaning or validity of Commission Rule 210.21(c)(1)(ii) anywhere in its briefs. Thus, Swagway does not show, or even claim, in its briefing to the panel that the ALJ violated any Commission Rule or this Court’s precedent by issuing the final ID while the consent order motion was pending. Instead, Swagway contends that “neither the ALJ nor the Commission explained below *why* the finding of a violation was preferred over granting Swagway’s motion, since one would moot the other,” and that “neither the ALJ nor the Commission ever mentioned mootness as a reason for denial.”⁹ Swagway Reply Br. at 10 (emphasis in original).

But the ALJ’s finding of violation, which he was free to make, mooted Swagway’s motion, and the motion then had to be, and was, denied consistent with the common practice of many tribunals. *See* ITC Red Br. at 23-24, and cases cited therein. Swagway concedes that it understood its motion to have been denied (it filed a petition for Commission review of

⁹ Swagway offered no support to the panel for its “alternative” proposed remedy of directing the Commission to enter the proposed consent order, which Segway opposed. *See* Swagway Blue Br. at 18.

such denial). And Swagway acknowledges that the issued final ID would have rendered its Consent Order Motion moot. *See* Swagway Reply Br. at 10 (stating that the final ID and the Consent Order would moot each other); *see also* Swagway Blue Br. at 18, 21.

2. The Commission's Denial of Swagway's Motion Did Not Contravene the Commission's Rules

Similarly unsupported is Swagway's contention that the Commission contravened its own rules because the ALJ's denial was incorporated in his final initial determination, rather than in a separate order. Swagway Blue Br. at 15-18. As discussed above, Swagway has waived this argument because it failed to raise it in its petition for Commission review of the ALJ's final ID. In addition to being waived, this argument fails on the merits.

As discussed in the Commission's brief, the ALJ's denial of the motion in his final initial determination is consistent with Commission rules, Commission practice, and the practice of other tribunals, including this Court. ITC Red Br. at 25-27. The provisions of the Commission Rules that specify which motions should be granted by ID but denied by order apply to dispositions made prior to issuance of the final ID, and govern the scope of the Commission's interlocutory review of decisions by an ALJ. *See id.* By the time the ALJ has issued the final ID, such questions of interlocutory

review are moot. The Commission does not issue separate documents for all the motions that were rendered moot by a final ID, and Commission rules do not mandate that the Commission do so.

CONCLUSION

Rehearing should be granted to vacate Part III of the panel opinion concerning preclusion. That issue should instead be left to the District of Delaware, and if necessary, to the Third Circuit, to conduct an appropriate analysis of preclusion. This Court should address and reject Swagway's procedural arguments regarding its consent order motion and thus adhere to its affirmance of the Commission's final determination.

Respectfully submitted,

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Date: July 9, 2019

CERTIFICATE OF SERVICE

I, Sidney A. Rosenzweig, hereby certify that, on this 9th day of July 2019, I caused a copy of the foregoing **RESPONSE** to be served on counsel of record via the Court's CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2). This response has been prepared in a proportionally spaced typeface (14-point Times New Roman font), and the response contains 3,707 words according to the word-count function of the word-processing system used to prepare this response (Microsoft Word 2016), excepting the portions of the response exempted by Federal Rule of Appellate Procedure 35(c)(2).

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