

2019-1424

**United States Court of Appeals
for the Federal Circuit**

GENSETIX, INC.,

Plaintiff-Appellant,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM,

Plaintiff-Appellee,

v.

BAYLOR COLLEGE OF MEDICINE,
DIAKONOS RESEARCH, LTD., and WILLIAM K. DECKER,

Defendants-Appellees.

*On Appeal from the United States District Court for the Southern District of Texas
in Case No. 4:17-cv-01025, Hon. Andrew S. Hanen, U.S. District Judge*

**PLAINTIFF-APPELLANT GENSETIX, INC.'S RESPONSE TO
THE PETITION FOR REHEARING *EN BANC***

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October 2, 2020

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

CERTIFICATE OF INTEREST

Case Number 2019-1424

Short Case Caption Gensetix Inc. v. Baylor College of Medicine

Filing Party/Entity Gensetix Inc.

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 10/02/2020

Signature: /s/ Sarah E. Spires

Name: Sarah E. Spires

<p>1. Represented Entities. Fed. Cir. R. 47.4(a)(1).</p>	<p>2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).</p>	<p>3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p> <p><input type="checkbox"/> None/Not Applicable</p>	<p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p> <p><input type="checkbox"/> None/Not Applicable</p>
<p>Gensetix, Inc.</p>	<p>Gensetix, Inc.</p>	<p>None.</p>

Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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Donald J. Kreger		

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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Baylor College of Medicine v. The Board of Regents of the University of Texas System and Gensetix, Inc.	IPR2018-00949 Before the Patent Trial and Appeal Board	
Gensetix, Inc. v. Baylor College of Medicine, et al.	In the District Court of Harris County, Texas No. 2019-02003/Court 129	

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable Additional pages attached

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I. INTRODUCTION

The panel majority correctly applied existing precedent to determine that Gensetix—the exclusive licensee to the patents-in-suit—may maintain its infringement suit in its own name under Rule 19(b). That is sufficient to proceed with the litigation as the majority panel ruled. It is not further required for UT—a sovereign patent owner determined by the district court to have some substantial rights to the patents-in-suit—to be involuntarily joined to Gensetix’s infringement suit under Rule 19(a). Having lost before the panel based on Rule 19(b), BCM seeks *en banc* review based on a different theory it never presented to the panel: “Can a party who is not a patentee ‘have remedy by civil action for infringement?’” (Pet. at 1.) Before both the district court and the panel on appeal, BCM was content to argue that it was the patent owner’s sovereign immunity that forbids applying Rule 19(b) to permit Gensetix to proceed in the patent owner’s absence. But now BCM contends that *even if sovereign immunity was not at issue here*, Rule 19(b) is categorically unavailable to an exclusive licensee without substantial rights to the patent. Because BCM raises this issue for the first time in its Petition, *en banc* review can and should be denied for that reason alone.

BCM’s new argument also fails as a matter of law. In particular, BCM’s new theory ignores Supreme Court precedent holding that “an exclusive licensee that does not have all substantial rights does have standing to sue in his own name

when necessary to prevent an absolute failure of justice...” *Waterman v. Mackenzie*, 138 U.S. 252, 255 (1891). For the same reasons that the panel majority found that the balance of equities under Rule 19(b) compelled its determination that Gensetix’s suit may proceed in UT’s absence, that outcome is likewise “necessary to prevent an absolute failure of justice.” BCM has provided no argument to the contrary.

BCM’s *Pimentel*-based arguments fare no better. BCM fails to address that the Supreme Court’s twenty-page analysis of Rule 19(b) in *Pimentel* examined and weighed all four of that Rule’s factors, and instead urges this Court to impose a bright-line rule purportedly gleaned from the *Pimentel* Court’s criticism of prior cases not directly on point. But there is no way to square the Supreme Court’s analysis in *Pimentel* with BCM’s bright-line rule that if there is any “potential for injury to the interests of the absent sovereign” dismissal is required. (Pet. at 13 (quotation omitted).). To the contrary, although *Pimentel* recognized “a potential for injury to the interests of the absent sovereign,” it proceeded to analyze and weigh all four Rule 19(b) factors, and based its holding on a *combination* of those factors, rather than solely the potential for injury to the absent sovereign’s interests. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 872 (2008). Finally, the Supreme Court explained that, should future events change “[t]he balance of equities” in the Rule 19(b) analysis—such as “if it appears that the Sandiganbayan

cannot or will not issue its ruling within a reasonable period of time”—then the parties would be able to proceed with a new action without the participation of the sovereigns. *Id.* at 873. Because the panel majority’s opinion is consistent with the Supreme Court’s analysis in *Pimentel*—and because not even *Pimentel* adopted BCM’s bright-line rule— rehearing should be denied.

II. REHEARING *EN BANC* IS NOT WARRANTED BECAUSE THE PANEL MAJORITY PROPERLY APPLIES SUPREME COURT PRECEDENT

A. BCM Raises its Single “Precedent-Setting Question of Exceptional Importance” for the First Time in its Petition, Rendering Rehearing *En Banc* Inappropriate

BCM sets forth a single “precedent-setting question of exceptional importance: 1. Can a party who is not a patentee ‘have remedy by civil action for infringement?’” (Pet. at 1.) However, BCM’s Petition is the first time it has presented this question, which was absent from both the briefing and argument on appeal. For this reason alone, precedent requires denying BCM’s petition.

A petition for rehearing must ‘state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended.’ Fed. R. App. P. 40(a); see also Fed. Cir. R. 40(b)(2). In this case, the government’s theory...was not presented on appeal. Just as this court will not address issues raised for the first time on appeal or issues not presented on appeal, we decline to address the government’s new theory raised for the first time in its petition for rehearing. *See United States v. Bongiorno*, 110 F.3d 132, 133 (1st Cir. 1997) (“[A] party may not raise new and additional matters for the first time in a petition for rehearing.”);

Wells v. Rushing, 760 F.2d 660, 661 (5th Cir. 1985) (citing cases supporting the proposition that issues not raised before the court are not addressed on rehearing).

Pentax Corp. v. Robison, 135 F.3d 760, 762 (Fed. Cir. 1998).

BCM blames its failure to raise this argument on the fact that “[w]hen the motion to dismiss was filed [in the district court], Gensetix had alleged that it held ‘all patent rights’ and was ‘the sole and exclusive licensee.’” (Pet. at 16.) BCM ignores the fact that the Rule 19 arguments before the district court were presented as an alternative to the argument that Gensetix had all substantial rights—and thus BCM could and should have raised its new “precedent-setting question of exceptional importance” before the district court. Regardless, BCM’s excuse does not rescue BCM from its failure to raise the issue with the panel on appeal. Indeed, in its Red Brief to the panel, BCM acknowledged that “Gensetix does not challenge on appeal the District Court’s conclusion that the License Agreement did not transfer all substantial rights in the Asserted Patents.” (BCM.Br. at 4.) Despite this acknowledgement, BCM did not argue to the panel—as it does now—that Gensetix cannot maintain its infringement suit against BCM under Rule 19(b) *even if the patent owner did not have sovereign immunity*. BCM therefore waived its opportunity to make this argument for the first time in its Petition for Rehearing.

B. The Panel Majority’s Holding that Gensetix’s Infringement Suit May Proceed without the Patent Owner is Based on Longstanding Precedent

Even absent waiver, BCM’s new argument is wrong as a matter of law.

BCM argues that only a patentee with “all significant rights under the patent” or “all substantial rights in the patent” may sue for infringement. (Pet. at 17.) Not so. As the Supreme Court held in *Waterman* and this Court affirmed in both *Textile Products* and *Sicom Systems*, “at least one exception [to this rule] exists where ‘an exclusive licensee that does not have all substantial rights does have standing to sue in his own name **when ‘necessary to prevent an absolute failure of justice,** as where the patentee is the infringer, and cannot sue himself.’” *Sicom Sys. Ltd. v. Agilent Techs., Inc.*, 427 F.3d 971, 976 (Fed. Cir. 2005) (emphasis added) (quoting *Textile Prods., Inc. v. Mead Corp.*, 134 F.3d 1481, 1484 (Fed. Cir. 1998) and *Waterman*, 138 U.S. at 255).

Though ordinarily, an exclusive licensee holding fewer than all substantial rights does join its licensor in an infringement suit, that rule is prudential rather than constitutional. *Morrow v. Microsoft Corp.*, 499 F.3d 1332, 1340 (Fed. Cir. 2007). “The patentee is joined for the purpose of avoiding the potential for multiple litigations and multiple liabilities and recoveries against the same alleged infringer.” *Id.* For this reason, where “the patentee is the infringer, **or the prudential concerns are not at play in a particular case,** joinder of the patentee is not necessary. This joinder analysis has been incorporated in Federal Rule of

Civil Procedure 19.” *Id.* (emphasis added)). *Morrow* dictates that an infringement suit should be permitted to proceed in the absence of the patent owner when the four Rule 19(b) factors establish that the “prudential concerns” that typically require joinder of the patent owner “are not at play” based on the particular facts of the case at issue. *Id.*

Here, there is no dispute that prohibiting Gensetix from suing BCM in its own name would cause an absolute failure of justice, such as the one the Supreme Court contemplated in *Waterman*. 138 U.S. at 255. Specifically, UT’s “‘Patent And Technology License Agreement’ grants Gensetix the exclusive right to make, use, and sell the patented subject matter for the life of the patents, and requires Gensetix to enforce the patents against any infringer,” but “Gensetix is without recourse to assert its patent rights because UT cannot feasibly be joined.” (Newman Concurring Opinion at 2, 16.) “The University now refuses such cooperation, by refusing to be named as a party to the suit, thereby preventing enforcement of the patents—although the License Agreement requires Gensetix to enforce the patents. The University not only violates its agreement to ‘cooperate fully,’ but also deprives its licensee of the agreed upon exclusivity.” (Newman Concurring Opinion at 4.)

Even the district court, which the panel here reversed, acknowledged this fact, recognizing that it “may be harsh” to leave Gensetix with no forum to proceed

on its infringement claim, and suggesting that Gensetix's License is "a contract that's not worth the paper it's written on if they can't sue on it." (Appx00022, Appx00687 at 11:4-8.) Further, in denying BCM's motion for attorneys' fees, the district court again acknowledged that "the equitable arguments favor Plaintiff's position because[,] as a result of this Court's ruling, [Gensetix] may be an entity which has paid valuable consideration for a license or a patent assignment that it cannot now protect." (Appx00808; *see also* Opinion at 15.) Because UT's contract granting Gensetix its exclusive license also *required* Gensetix to sue infringers on pain of breach and UT to cooperate in this suit, allowing Gensetix to sue BCM in its own name—and rejecting UT's attempt to block Gensetix's enforcement by refusing to join Gensetix's suit—is indeed "necessary to prevent an absolute failure of justice." *See Waterman*, 138 U.S. at 255.

BCM does not even acknowledge the Supreme Court's exception allowing an exclusive licensee without all substantial rights to sue in its own name when "necessary to prevent an absolute failure of justice"—nor does BCM acknowledge that this Court has specifically applied this precedent. (*See* Pet. at 17.) Because BCM has ignored this authority in its Petition, and did not address this topic before the panel, the record here is inadequate to overcome what Gensetix has shown: this case falls within the Supreme Court's exception allowing an exclusive licensee

without all substantial rights to sue in his own name when “necessary to prevent an absolute failure of justice.” *See Waterman*, 138 U.S. at 255.

C. The Panel Majority Properly Applied the Complete Rule 19(b) Analysis in *Pimentel* to Conclude that Gensetix May Proceed without Joining UT

Although not part of its stated “precedent-setting question of exceptional importance,” BCM separately argues that “the panel decision is contrary to: *Republic of Philippines v. Pimentel*” and other cases. (Pet. at 1.) Yet the panel majority correctly applied and distinguished *Pimentel*.

1. The Supreme Court Based its *Pimentel* Decision on a Full Analysis of all Rule 19(b) Factors and Did Not Adopt BCM’s Bright-Line Rule

BCM argues that *Pimentel* adopted a bright-line rule requiring “dismissal where sovereign immunity is asserted with respect to nonfrivolous claims.” (Pet. at 10.) BCM is wrong. As the panel majority correctly held, BCM’s bright-line rule cannot be reconciled with the fact that, upon determining that the district court “gave insufficient weight to the likely prejudice to the Republic and the Commission should the interpleader proceed in their absence,” 553 U.S. at 869, *Pimentel* “analyzed the remaining Rule 19(b) factors before concluding that the action must be dismissed.” (Opinion at 17.) Moreover, when *Pimentel* ultimately dismissed the case, it explicitly stated that it was based on the Court of Appeals’ failure to give proper weight to the likely prejudice to the foreign sovereign “**and**

our further analysis under the additional provisions of Rule 19(b) lead us to conclude the action must be dismissed.” 553 U.S. at 872 (emphasis added).

Indeed, although it dismissed the case in *Pimentel*, the Supreme Court noted that the dismissal was the exception rather than the rule, as “[t]he Court of Appeals’ failure to give sufficient weight to the likely prejudice to the Republic and the Commission should the interpleader proceed in their absence *would, in the usual course, warrant reversal and remand for further proceedings.*” *Id.* at 872 (emphasis added). There is simply no way to square this explanation with BCM’s reading of *Pimentel* as creating a bright-line rule of automatic dismissal whenever there is “potential for injury to the interests of the absent sovereign.” This is further underscored by the Supreme Court’s explanation that if subsequent events change “[t]he balance of equities” that is required in a Rule 19(b) analysis—such as “if it appears that the Sandiganbayan cannot or will not issue its ruling within a reasonable period of time”—then the parties would be able to proceed with a new action, without the participation of the foreign sovereigns. *Id.* at 873.

2. Rule 19(b) Determinations are Case-Specific and Not Amenable to Rigid, Bright-Line Rules

BCM also argues that the panel majority improperly limited *Pimentel* and the cases cited within to the specific facts of *Pimentel*. (Pet. at 10-11.) But the Supreme Court explicitly stated that *Pimentel* and other Rule 19(b) cases should be so limited, explaining that the “design of the Rule [19(b)], then, indicates that the

determination whether to proceed will turn upon factors that are case specific,” and that “the issue of joinder can be complex, and determinations are case specific.” 553 U.S. at 862-63. Indeed, rather than supporting BCM’s bright-line rule, *Pimentel* repeats four times that Rule 19(b) inquiries are “case-specific.” *Id.* at 863-64. Additionally, *Pimentel* made clear that Rule 19(b)’s case-specific approach does not lend itself to rigid application of rules such as the one BCM urges. *See id.* at 863. (“Under the earlier Rules the term ‘indispensable party’ might have implied a certain rigidity that would be in tension with this case-specific approach.”).

BCM overlooks the Supreme Court’s lengthy case-specific Rule 19(b) analysis in *Pimentel*, instead focusing on a single paragraph of the opinion from which it purports to derive its bright-line rule. As the panel majority correctly held, the “seemingly broad language” on which BCM relies “is best understood, however, within the specific facts of *Pimentel*.” (Opinion at 17.) Indeed, when addressing the cases upon which BCM relies—*Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945) and *Minnesota v. United States*, 305 U.S. 382 (1939), *Pimentel* observed that “this Court has not considered a case posing the precise question presented here,” such that these cited cases were not directly on point. 553 U.S. at 866-67. Further, the Supreme Court criticized “[t]he analysis of the joinder issue in those cases []as somewhat perfunctory,” and then went on to perform a complete Rule 19(b) analysis it felt was missing from those prior cases,

and rejected the rigidity of its older cases in favor of a more fulsome analysis of “[t]he balance of equities” that it proceeded to conduct, as described above. *See id.* at 867-873.

3. BCM’s Cited “Wall of Circuit Authority” Predates or Does Not Interpret *Pimentel*

BCM claims there is a “wall of circuit authority” as “confirm[ing] the Supreme Court’s view of the existing law at the time of *Pimentel*.” (Pet. at 13.) However, as the panel majority correctly pointed out, “[t]he cited cases either pre-date *Pimentel* or do not interpret it.” (Opinion at 18 n.9.) Indeed, even *Dine Citizens Against Ruining Our Env’t v. Bureau of Indian Affairs*, 932 F.3d 843, 858 (9th Cir. 2019), upon which BCM relies, does not cite *Pimentel* for BCM’s bright-line rule.¹ Instead, *Dine Citizens* merely quotes another Ninth Circuit case for its “‘wall of circuit authority’ in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity”—and notably, each case within this “wall” pre-dates *Pimentel*. 932 F.3d at 857 (quoting *White v. Univ. of California*, 765 F.3d 1010, 1028 (9th Cir. 2014) (citing as a “wall of circuit authority” Ninth Circuit cases dated between 1989 and 2002).). But whether a bright-line rule existed prior to the Supreme Court’s decision in *Pimentel* is not

¹ BCM also relies on *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1498 (D.C. Cir. 1995). This case also pre-dates *Pimentel* and is not instructive here. (Opinion at 18 n.9.)

relevant here—because *Pimentel* itself clearly instructs that rigid, bright-line rules have no place in a proper Rule 19(b) analysis—even when foreign sovereigns are involved, as discussed above.

Although the Petition only cites cases that pre-date or do not address *Pimentel*, BCM criticizes the panel majority for citing “no other circuit court in support of its conclusion that there was an abuse of discretion because a district court ‘collaps[ed] the multi-factorial Rule 19(b) inquiry into one dispositive fact: [a party]’s status as a sovereign.” (Pet. at 12.) Not so. For example, in one case the panel majority cites—*University of Utah*—this Court held that UMass (a sovereign patent owner like UT) “is not an ‘indispensable’ or ‘mandatory’ party because the district court is fully capable of granting the relief UUtah requests without UMass,” despite the fact that this relief “could entail depriving UMass of its patent.” *Univ. of Utah v. Max-Planck-Gesellschaft Zur Forderung Der Wissenschaften E.V.*, 734 F.3d 1315, 1324 (Fed. Cir. 2013). Moreover, the potential harm to UT—potential invalidation of its patents—is the same harm at issue in *Univ. of Utah*, where this Court previously held a suit could proceed without the sovereign patent owner—because there, like here, a party to the suit shared the sovereign’s interests. *Id.* at 1327-28. Thus, five years after *Pimentel*, this Court already considered BCM’s position, determining that BCM is wrong in its

“assessment of the law as requiring only a ‘potential for injury to the interests of the absent sovereign’ to require dismissal.” (Pet. at 13.)

4. BCM Fails to Demonstrate that this Case Warrants the Same Outcome as *Pimentel*

Beyond urging adoption of a bright-line rule rejected in *Pimentel*, BCM fails to demonstrate that the facts here are similar enough to *Pimentel* to warrant reaching the same conclusion. For example, BCM does not address the panel majority’s analysis finding that *Pimentel* “dealt with foreign sovereign immunity, not state sovereign immunity, and the Court placed some weight on the ‘[c]omity and dignity interests’ at play.” (Opinion at 17 (citing *Pimentel*, 553 U.S. at 869).) This difference cannot be ignored, particularly when *Pimentel* explicitly stated that the “case turns on the interpretation and proper application of Rule 19 of the Federal Rules of Civil Procedure and requires us to address the Rule’s operation **in the context of foreign** sovereign immunity.” 553 U.S. at 854 (emphasis added); *see id.* at 865 (“The doctrine of foreign sovereign immunity has been recognized since early in the history of our Nation. It is premised upon the perfect equality and absolute independence of sovereigns...” (internal quotations omitted).)

Further, the panel majority also correctly noted that, “more importantly, there was no dispute in *Pimentel* that the absence of the Philippines in the interpleader suit would result in its interests going unprotected.” (Opinion at 17.) Here, by contrast, the panel majority held that “Gensetix is fully able (and willing)

to step into UT's shoes and protect the absent sovereign's interests in the validity of the patents-in-suit. Indeed, in the license agreement, UT required that it do so." (*Id.*) The panel majority also found that, "in *Pimentel*, the claim was not extinguished for lack of an alternative forum, unlike here." (*Id.*)

BCM also faults the panel majority for finding it significant that here—unlike any case BCM cites—"one of the parties to the litigation has an interest in the subject matter of the litigation that is identical to the absent sovereign's interest," while "never mention[ing] either the research or non-commercial rights retained by UT." (Pet. at 13-14 (quoting Opinion at 18 n.9).) BCM gives this argument too much credit. The panel majority seemingly did not mention it for the same reason that the dissent—which sided with BCM—also did not. BCM's argument lacks merit. As the concurrence correctly points out, "[t]he University's rights of scientific publication, research, and teaching are not patent rights." (Newman Concurring Opinion at 7.)

BCM further errs in failing to recognize, as *Pimentel* did, that all potential injuries to a sovereign are not the same. *Pimentel* addressed how the privilege of foreign sovereign immunity "is much diminished if an *important and consequential ruling* affecting the sovereign's *substantial* interest is determined, or at least assumed, by a federal court in the sovereign's absence and over its objection." 553 U.S. at 868-69 (emphasis added). *Pimentel* went to great lengths to

explain the ways in which facts involved an “important and consequential ruling affecting the sovereign’s substantial interests”—which goes to the weight given to that factor of the Rule 19(b) analysis:

Comity and dignity interests take concrete form in this case. The claims of the Republic and the Commission arise from events of historical and political significance for the Republic and its people. The Republic and the Commission have a unique interest...in determining if, and how, the assets should be used to compensate those persons who suffered grievous injury under Marcos. There is a comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so. The dignity of a foreign state is not enhanced if other nations bypass its courts without right or good cause.

Id. at 865–66. The Supreme Court then underscored the import of the nature of the sovereign’s interest by explaining that, if circumstances changed such that the foreign sovereign’s “claims in some later interpleader suit would be *less substantial* than they are now,” then the parties would be able to file and proceed with a new action, with or without the participation of the sovereigns missing in *Pimentel*. *Id.* at 873 (emphasis added).

Here, by contrast, there is no risk of substantial harm or prejudice to UT’s interests. Indeed, BCM has not addressed Gensetix’s argument that assignor estoppel prevents Defendants from challenging the patents-in-suit’s validity. (*See* Gen.Op.Br. at 28-29.) And as the panel majority correctly held, “[t]he prejudice to UT is minimal, or at least substantially mitigated, because, unlike the licensee in

A123, Gensetix will adequately protect UT’s interests in the validity of the patents-in-suit.” (Opinion at 16.)

BCM’s attempt to manufacture prejudice to UT in its Petition is at best disingenuous, because, as UT conceded before the district court, “if Gensetix held all substantial rights in the Patents-in-Suit,”—an issue that UT did not oppose in its motion to dismiss before the district court—“the suit could proceed without UT.” (UT.Br.8.) It is difficult to reconcile how UT would not be prejudiced if the district court had found in Gensetix’s favor on the all substantial rights issue that UT did not even oppose, but somehow would be prejudiced because the court ruled the other way on this issue. Thus, BCM’s position does not withstand scrutiny.

III. CONCLUSION

Gensetix respectfully requests that the Court deny BCM’s Petition for Rehearing *En Banc*.

Dated: October 2, 2020

Respectfully submitted:

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

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 2019-1424

Short Case Caption: Gensetix Inc. v. Baylor College of Medicine

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