

No. 21-1638

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

KANNUU PTY. LTD.,
Plaintiff-Appellant,

v.

SAMSUNG ELECTRONICS CO. LTD. and
SAMSUNG ELECTRONICS AMERICA, INC.,
Defendants-Appellees.

Appeal from the United States District Court for
the Southern District of New York in Case No. 1:19-cv-04297-ER,
District Judge Edgardo Ramos

**CORRECTED BRIEF OF *AMICI CURIAE* FIVE LAW
PROFESSORS IN SUPPORT OF APPELLANT**

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CERTIFICATE OF INTEREST

Counsel for *Amici Curiae* Five Law Professors states the following:

1. **Represented Entities.** Provide the full names of all entities represented by undersigned counsel in this case. Fed. Cir. R. 47.4(a)(1).

Jonathan M. Barnett, Richard A. Epstein, Jay P. Kesan,
Adam Mossoff, & Kristen Osenga

2. **Real Party in Interest.** 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. Fed. Cir. R. 47.4(a)(2).

N/A

3. **Parent Corporations and Stockholders.** 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. Fed. Cir. R. 47.4(a)(3).

None.

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).

None.

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).

None.

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.

I certify the preceding information is accurate and complete to the best of my knowledge.

Date: March 18, 2021

/s/ Matthew J. Dowd

Signature of counsel

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TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF THE ARGUMENT.....	1
ARGUMENT.....	4
I. The District Court Rewrote a Privately Negotiated Forum- Selection Clause that is a Common Contractual Provision in Patent Licensing Agreements.....	4
A. Forum-Selection Clauses are Common in Patent Licensing Agreements Because They are Reasonable Pricing Provisions Included in Most Patent Contracts.....	4
B. A Forum-Selection Clause is Presumptively Valid	6
C. The District Court Rewrote the Contract by Refusing to Enforce the Forum-Selection Clause that is a Common Pricing Provision in Patent Licensing Agreements	8
II. Public Policy Favors Enforcement of Forum-Selection Clauses that are Valid and Enforceable per <i>Lear v. Adkins</i>	13
III. Conclusion	16

ADDENDUM A – LIST OF ACADEMIC SIGNATORIES

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Atlantic Marine Construction Co. v. U.S. District Court</i> , 571 U.S. 49 (2013).....	6
<i>Bally Gaming, Inc. v. New Vision Gaming & Development, Inc.</i> , No. CBM2018-00006, Paper 47 (P.T.A.B. June 19, 2019)	12
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462 (1985).....	6
<i>Carnival Cruise Lines, Inc. v. Shute</i> , 499 U.S. 585 (1991).....	7, 15
<i>Cuozzo Speech Technologies, LLC v. Lee</i> , 136 S. Ct. 2131 (2016).....	12
<i>Dodocase VR, Inc. v. MerchSource, LLC</i> , 767 Fed. App'x 930 (Fed. Cir. 2019) (non-precedential)	3, 16
<i>General Protecht Group, Inc. v. Leviton Manufacturing Co.</i> , 651 F.3d 1355 (Fed. Cir. 2011).....	7
<i>Lear, Inc. v. Adkins</i> , 395 U.S. 653 (1969).....	<i>passim</i>
<i>M/S Bremen v. Zapata Off-Shore Co.</i> , 470 U.S. 1 (1972).....	6
<i>Metropolitan Area Transit, Inc. v. Nicholson</i> , 463 F.3d 1256 (Fed. Cir. 2006).....	5
<i>Monsanto Co. v. McFarling</i> , 302 F.3d 1291 (Fed. Cir. 2002).....	7

Statutes

35 U.S.C. § 282(a) 7

Other Authorities

Adam Mossoff & Bhamati Viswanathan,
Explaining Efficient Infringement (May 11, 2017) 10

AIPLA Report of the Economic Survey I-188 (2019) 10

James Zimmerman,
*Restrictions On Forum-Selection Clauses In Franchise Agreements
and The Federal Arbitration Act: Is State Law Preempted?*,
51 Vand. L. Rev. 759 (1998) 4, 5

Peter Carstensen,
*Post-Sale Restraints via Patent Licensing: A “Seedcentric”
Perspective*,
16 Fordham Intell. Prop. Media & Ent. L.J. 1053 (2006)..... 4

Richard A. Epstein & Kayvan B. Noroozi,
*Why Incentives for “Patent Holdout” Threaten to Dismantle
FRAND, and Why It Matters*, 32 Berkeley Tech. L.J. 1381 (2017) ... 10

Saurabh Vishnubhakat, Arti K. Rai, & Jay P. Kesan,
*Strategic Decision Making in Dual PTAB and District Court
Proceedings*, 31 Berkeley Tech. L.J. 45 (2016) 9, 10

INTEREST OF *AMICI CURIAE*

Amici curiae are law professors who specialize in patent law. They teach or write about patent licensing, and about the Patent Trial & Appeal Board (“PTAB”). *Amici*’s interest in the case is to ensure proper and predictable application of the patent laws in rewarding and securing innovation through marketplace commercialization. They are concerned about the proper interplay between private-party contractual rights and administrative agency action, especially in the context of post-grant challenges at the PTAB. A complete list of signatories is attached as Addendum A.¹

SUMMARY OF THE ARGUMENT

This Court should reverse the district court’s decision and grant the preliminary injunction based on the presumptively valid and enforceable forum-selection clause in the parties’ agreement. Appellant Kannuu addresses the factual and doctrinal infirmities in the district court’s construction of the forum-selection clause that resulted in its improper

¹ No party’s counsel authored this brief in whole or in part, and no party, party’s counsel, or any other person has contributed money intended to fund the preparation or submission of this brief. All parties consent to the filing of this brief.

denial of Kannuu's preliminary injunction motion. Thus, *Amici* here offer two additional legal insights that are necessary to understand the full scope of the errors in the district court's analysis.

First, in misconstruing the broad scope of the forum-selection clause, the district court did not give proper legal weight to the importance of a privately negotiated agreement to direct patent challenges to federal district court. Forum-selection clauses are very common in patent licenses and in other contracts, as they are one of many pricing provisions negotiated between parties in ultimately reaching a meeting of the minds and in executing an enforceable contract. In discounting the broad applicability of the forum-selection clause in the parties' non-disclosure agreement, the district court effectively rewrote a key provision of their contractual agreement.

Second, the district court misinterpreted and misapplied the rule created in *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969). There, the Supreme Court held that licensee estoppel cannot absolutely prohibit a patent licensee from challenging the validity of a licensed patent. *Lear* does not apply here. Neither the equitable defense of licensee estoppel nor an absolute prohibition against Samsung's freedom to challenge Kannuu's

patents exists in this case. Samsung's ability to invalidate Kannuu's patents is in no way meaningfully diminished by the forum-selection clause. Samsung could have filed a declaratory judgment action, and it can still assert patent invalidity affirmative defenses and counterclaims in Kannuu's patent infringement New York lawsuit.

The district court incorrectly generalized from *Lear* a sweeping and unprecedented public-policy rule. The district court, under the guise of an unconstrained concern about crafting public policy, advanced a novel view that could prohibit any agreement between private parties to have all patent validity challenges decided in federal court. The district court's analysis not only contradicts the facts and decisional rule in *Lear*; it also contradicts this Court's recent rejection of the same argument by an accused infringer who sought to invalidate a valid forum-selection clause in *Dodocase VR, Inc. v. MerchSource, LLC*, 767 Fed. App'x 930 (Fed. Cir. 2019) (nonprecedential). For this reason, the Court should issue a precedential decision that rejects this novel and dangerous expansion of *Lear*.

ARGUMENT

I. The District Court Rewrote a Privately Negotiated Forum-Selection Clause that is a Common Contractual Provision in Patent Licensing Agreements

The district court's narrow construction of the forum-selection clause was unjustified in view of the clause's broad language and the legal and commercial context of the parties' transaction. The forum-selection clause crafted by the district court does not reflect the parties' contractual intent. Nor does it reflect the reality of patent licensing negotiations after the PTAB was created in 2011 by the America Invents Act.

A. Forum-Selection Clauses are Common in Patent Licensing Agreements Because They are Reasonable Pricing Provisions Included in Most Patent Contracts

Forum-selection clauses (and, relatedly, no-challenge clauses) are found in innumerable contractual agreements. *See, e.g.,* Peter Carstensen, *Post-Sale Restraints via Patent Licensing: A "Seedcentric" Perspective*, 16 Fordham Intell. Prop. Media & Ent. L.J. 1053, 1065 (2006) (observing that "forum selection clauses are frequent features of contracts whether or not the contract involves a patented product or some other goods"); James Zimmerman, *Restrictions On Forum-Selection Clauses In Franchise Agreements and The Federal Arbitration Act: Is*

State Law Preempted?, 51 Vand. L. Rev. 759, 760 (1998) (“The use of forum-selection clauses in contracts continues to increase.”).

These clauses are freely negotiated provisions that directly affect the pricing terms agreed upon by the parties as consideration for their agreement. It is a basic rule of contract law that courts are not to ignore the parties’ intent in duly executed contracts; they are only to enforce the contract terms when a party breaches the contract. *Metro. Area Transit, Inc. v. Nicholson*, 463 F.3d 1256, 1260 (Fed. Cir. 2006).

In this case, there is a forum-selection clause that limits the parties to filing all legal claims in New York and it is undisputed that Samsung filed multiple petitions in the PTAB seeking to invalidate Kannuu’s patents. Thus, Samsung was seeking adjudication of the rights of the parties “relating to” the subject matter of the agreement—the patents owned by Kannuu—outside of the agreed-upon jurisdiction in which either party can file legal claims (New York). In refusing to enforce this clear, agreed-upon provision between the parties, the district court rewrote the terms of their agreement. The district court fundamentally altered the consideration offered by Samsung in exchange for access to Kannuu’s technologies during their licensing negotiations.

B. A Forum-Selection Clause is Presumptively Valid

As further legal confirmation of how common and enforceable forum-selection clauses are in most contracts, the Supreme Court has long recognized that forum-selection clauses are presumptively valid. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972). The Supreme Court explained in *Bremen* that “a freely negotiated private . . . agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect.” *Id.* at 12–13 (footnote omitted). The *Bremen* Court further held that forum-selection clauses “are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.” *Id.* at 10; *see also Atl. Marine Constr. Co. v. U.S. Dist. Court*, 571 U.S. 49, 59–60 (2013) (holding that “a forum-selection clause be given controlling weight in all but the most exceptional cases” (internal quotations omitted)); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) (noting that the enforcement of freely negotiated forum-selection provisions “does not offend due process” when the provisions are not unreasonable or unjust).

Similar to enforcing the statutory mandate that patents are presumptively valid, *see* 35 U.S.C. § 282(a), this Court has followed this rule that a forum-selection clause “is enforceable unless the party challenging it clearly demonstrates that it is invalid or that enforcement would be unreasonable and unjust.” *Monsanto Co. v. McFarling*, 302 F.3d 1291, 1294 (Fed. Cir. 2002). This Court has likewise affirmed grants of preliminary injunctions that enforce the plain terms of a forum-selection clause in a settlement agreement. *E.g., Gen. Protecht Grp., Inc. v. Leviton Mfg. Co.*, 651 F.3d 1355, 1365 (Fed. Cir. 2011). Put simply, “[f]orum selection clauses are valid and accepted unless they are clearly unreasonable or fraudulent.” *Monsanto*, 302 F.3d at 1295.

Here, the district court did not identify any of the aforementioned legal conditions that could warrant the non-enforcement of the standard forum-selection clause. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (enforcing valid forum-selection clause in view of proper notice and “no evidence that petitioner obtained respondents’ accession to the forum clause by fraud or overreaching”). *Amici* are unaware of Samsung submitting any evidence of fraud. Neither Samsung nor the

district court identified legal authority that the terms of the forum-selection clause are legally unenforceable.

C. The District Court Rewrote the Contract by Refusing to Enforce the Forum-Selection Clause that is a Common Pricing Provision in Patent Licensing Agreements

Forum-selection clauses are common, and this Court has held they are presumptively valid and enforceable because forum-selection clauses reflect the negotiation over pricing terms by the parties to any agreement that contains such provisions. This is as true for patent licensing negotiations as it is for any other contractual agreement. In fact, the reality of modern patent licensing negotiations—a current or potential licensee can always take preemptive action by either filing a declaratory judgment lawsuit in an Article III court or filing a petition at the PTAB—makes forum-selection clauses even more relevant to the pricing of the consideration offered in a patent licensing agreement than in other commercial contexts.

Whenever a patent owner approaches a potential commercial partner about the possibility of licensing a patent, the other party always considers its options for invalidating the patent as important economic factors in calculating the price it is willing to pay. Before 2011, these

economic factors were primarily driven by patent-challenge options in an Article III court, such as a declaratory judgment action or asserting invalidity as an affirmative defense in response to a patent infringement lawsuit.

The calculus changed significantly in 2011. Since the passage of the America Invents Act, parties in patent-licensing negotiations have known—and have come to expect—that an accused infringer can seek to cancel a patent through the post-grant proceedings at the PTAB, and often with multiple petitions attacking a single patent. *See* Saurabh Vishnubhakat, Arti K. Rai, & Jay P. Kesan, *Strategic Decision Making in Dual PTAB and District Court Proceedings*, 31 Berkeley Tech. L.J. 45, 76 (2016) (identifying substantial filings of serial petitions and a 70% overlap between defendants sued for patent infringement and petitioners in the PTAB). Thus, after September 16, 2011, any reasonable construction of a forum-selection clause governing a dispute “relating to [the] Agreement or the transactions contemplated” in a patent licensing negotiation necessarily encompasses this legal knowledge.

Large, multinational companies, such as Samsung and other “big tech” companies, are well aware of the myriad options for invalidating

patents. *Id.* at 85 (identifying “a substantial amount of serial petitioning” among defendants sued in the high-tech industry). In fact, these large companies (often with sophisticated in-house legal counsel) frequently engage in predatory infringement (also known as “efficient infringement”). *See, e.g.*, Richard A. Epstein & Kayvan B. Noroozi, *Why Incentives for “Patent Holdout” Threaten to Dismantle FRAND, and Why It Matters*, 32 Berkeley Tech. L.J. 1381, 1404 (2017) (discussing the problem of “efficient infringement” and “patent holdout” in licensing negotiations). Predatory infringement occurs when a company decides that it is economically advantageous for it to commit patent infringement, given the many legal options and forums for invalidating patents and imposing substantial transaction costs on patent owners who are seeking a remedy for the patent infringement and must defend their patents at the PTAB. *See* Adam Mossoff & Bhamati Viswanathan, *Explaining Efficient Infringement* (May 11, 2017)²; AIPLA Report of the Economic Survey I-188 (2019) (reporting that PTAB proceedings cost on average \$450,000, and can cost as much as \$750,000).

² <https://cpip.gmu.edu/2017/05/11/explaining-efficient-infringement>.

This case is one such example of this practice. As alleged, after agreeing to a non-disclosure agreement, Samsung obtained access to Kannuu's patented technology, engaged in protracted licensing negotiations, and then terminated the negotiations. Samsung then used its access to Kannuu's technology—obtained from these licensing negotiations and protected by the non-disclosure agreement—to incorporate Kannuu's technologies into its own products without authorization. After trying to no avail for *six years* to convince Samsung to respect its legal rights, Kannuu was left with no choice but to sue Samsung in the agreed-to forum of New York. Samsung immediately responded by filing numerous IPR petitions to invalidate Kannuu's patents.

Samsung has done precisely what the forum-selection clause forbids. Samsung took legal action before the PTAB, instead of in New York as mandated by the forum-selection clause. Samsung's PTAB petitions also "relate to" the "contemplated transactions." If Samsung's PTAB petitions are successful, they will moot the "contemplated transaction" of Samsung having to license Kannuu's patents.

Neither the district court nor Samsung identified any parol evidence that could reasonably suggest that the parties intended to include PTAB petitions within the jurisdictional agreement about where to litigate disputes about the patent licensing negotiations. In its first decade of its operations, the PTAB has been an unexpectedly active forum that has been very controversial given many procedural and substantive “shenanigans.” *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2155 (2016) (Alito, J., concurring in part and dissenting in part).³ Thus, if either Samsung or Kannuu intended to include the PTAB as another possible forum (in addition to the New York forum expressly identified in the forum-selection clause), either party could have required the agreement to so state. There would also likely be some contemporaneous evidence of such an intention in the initial negotiations. *Amici* understand that no such evidence has been identified.

³ It is worth noting that the PTAB routinely gives no consideration to forum-selection clauses when deciding to institute a post-grant proceeding. *See, e.g., Bally Gaming, Inc. v. New Vision Gaming & Dev., Inc.*, No. CBM2018-00006, Paper 47 at 8 (P.T.A.B. June 19, 2019) (“The Board is neither bound by the party’s Agreement, nor do we have independent jurisdiction to resolve any contractual dispute between the parties over the forum selection clause in that Agreement.”).

The forum-selection clause commands the parties to litigate disputes “relating to [the] Agreement or the transactions contemplated” in New York court. Doc. 29-6 at 15. “Relating to . . . the transactions contemplated” logically includes any legal disputes about the validity of the patents that were the core of the negotiations. By interpreting “relating to” and “contemplated transactions” so narrowly, the district court has effectively rewritten the parties’ agreement and created a new forum-selection clause that overlooks the context of the parties’ extended patent licensing negotiations. This Court should reverse the district court’s decision.

II. Public Policy Favors Enforcement of Forum-Selection Clauses that are Valid and Enforceable per *Lear v. Adkins*

The district court misunderstood and misapplied the Supreme Court’s rule that the equitable doctrine of licensee estoppel cannot bar a patent licensee who wishes to challenge a licensed patent’s validity. *See Lear*, 395 U.S. at 674. The agreement in this case does not prohibit Samsung from challenging Kannuu’s patents; it merely directs Samsung to file its validity challenge in federal district court. The parties’ agreed-upon provision is a presumptively valid and enforceable forum-selection clause, and *Lear* is inapposite to this case in both fact and law.

In *Lear*, the patent owner invoked the doctrine of licensee estoppel to prohibit a licensee from challenging the validity of the patent in court, without qualification or limitation. The Supreme Court rejected this application of the doctrine. *Id.* at 670–71. The Court refused to allow licensees to be absolutely and completely “muzzled” against challenging the validity of patents when the public had an interest in not “pay[ing] tribute to would-be monopolists” in possession of invalid patents. *Id.* at 670.

Lear is inapplicable to this case in both fact and law. On the facts, the forum-selection clause does not muzzle Samsung because it does not prevent Samsung from challenging the presumed validity of Kannuu’s patents. Under the agreement, Samsung could have filed a declaratory judgment action in district court seeking to invalidate the patents. It can also fully defend itself in the present patent infringement action by asserting affirmative defenses of patent invalidity or by filing counterclaims that Kannuu’s patents are invalid. In fact, Samsung can assert even more invalidity-related defenses in federal court than it can before the PTAB, such as raising patent eligibility challenges under § 101 or unenforceability for inequitable conduct.

For these reasons, the Supreme Court, other federal appellate courts, and this Court have consistently held that standard forum-selection clauses like the one in this case are presumptively valid and enforceable. *See Carnival Cruise Lines*, 499 U.S. at 596 (recognizing that a valid and enforceable “forum clause does not directly prevent the determination of [legal] claims” relating to the subject matter of the agreement). Nothing in *Lear* suggests that forum-selection clauses of the type agreed to by Samsung and Kannuu is against public policy.

The district court’s capacious reading of *Lear* goes far beyond the Supreme Court’s rationale when the Court rejected an absolute prohibition against any patent challenges based on licensee estoppel. The inexorable result of the district court’s virtually unlimited reframing of *Lear* would be to invalidate all forum-selection clauses that restrict the ability of any accused infringer to file patent invalidity challenges in any other forum. This not only finds no support in *Lear*, but it also contradicts the concomitant enforcement by the Supreme Court and this Court in the decades since *Lear* was decided of both the *Lear* rule and the rule that forum-selection clauses are presumptively valid.

Lear's inapplicability to a forum-selection clause directing all patent validity challenges to federal court is not conjecture. In a non-precedential decision, this Court affirmed a district court's decision that rightly saw as erroneous the same arguments advanced by Samsung and embraced by the district court here. *See Dodocase*, 767 Fed. App'x at 930. The district court, as this Court recognized, had "considered the fact that [the defendant] would be able to challenge the validity of the patents in the district court and that independent third parties could initiate separate PTAB proceedings as relevant to the public interest analysis." *Id.* at 935–36. The preliminary injunction was accordingly affirmed per the terms of the presumptively valid and enforceable forum-selection clause that excluded filing of PTAB petitions. *Id.*

The same is equally true for Samsung and the forum-selection clause it agreed to in this case. Thus, this Court should follow its previously correct decision in *Dodocase*—and it should do so with a precedential decision.

III. Conclusion

For the foregoing reasons, *Amici* respectfully submit that this Court should reverse the district court's decision and grant the preliminary

injunction, based in part on the presumptively valid and enforceable forum-selection clause limiting all legal claims to be filed in New York.

Date: March 18, 2021

Respectfully submitted,

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

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