

No. 2022-1385

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

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INGURAN, LLC, DBA STGENETICS,  
*Plaintiff-Appellant,*

v.

ABS GLOBAL, INC., GENUS PLC,  
*Defendants-Appellees.*

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Appeal from the U.S. District Court for the Western District of  
Wisconsin, No. 3:20-cv-00085, Honorable William M. Conley

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**APPELLEES' PETITION FOR REHEARING EN BANC**

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August 4, 2023

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## CERTIFICATE OF INTEREST

Counsel for Appellees ABS Global, Inc. and Genus plc, Steven J.

Horowitz, certifies that the following information is accurate and complete to the best of his knowledge:

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

ABS Global, Inc.  
Genus plc

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).

ABS Global, Inc.: None  
Genus plc: None

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).

ABS Global, Inc.: Genus plc  
Genus plc: 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).

Sidley Austin LLP: Jason P. Greenhut,\* Bryan C. Mulder,\* Kevin R. Oliver\*

Axley Brynelson, LLP: Justin H. Lessner, Michael J. Modl

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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).

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).

Not applicable.

August 4, 2023

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## **STATEMENT OF RELATED CASES**

Pursuant to Fed. Cir. R. 47.5, Appellees state that no other appeal from this same civil action was previously before this or any other appellate court. There is also no case pending in this or any other tribunal that will directly affect or be directly affected by this Court's decision in this case.

**STATEMENT OF COUNSEL CONCERNING  
REHEARING EN BANC**

The Panel here announced that—even though Inguran, LLC (referred to as “ST”) had already asserted U.S. Patent No. 8,206,987 (the “987 patent”) in an earlier lawsuit (referred to as *ABS I*), had based its theory of damages on the harm associated with all of the same challenged conduct in *ABS I*, and had already obtained relief in the form of an ongoing royalty from Appellees ABS and Genus plc (collectively, “ABS” or “Appellees”) in *ABS I*—the district court wrongly interpreted its own *ABS I* judgment to cover infringement when it was carried out through third-party licensees. Op. 13–15. The Panel’s decision turns on the misguided assumption that ST could *not* have sought relief in *ABS I* for ABS carrying out infringing conduct in the future through others—even though ST’s damages theory emphasized ABS’s express plans to do so—because the anticipated inducement was not litigated as a separate theory of infringement.

The Panel’s erroneous decision imposes undue restraints on a district court’s ability to appropriately craft prospective relief for anticipated future infringement—and thus to conclusively resolve the full scope of the dispute before it. In this respect, the decision also

conflicts with this Court's decision in *Forest Laboratories v. Ivax Pharmaceuticals, Inc.*, 501 F.3d 1263 (Fed. Cir. 2007), and the principles animating *Fina Research, S.A. v. Baroid Ltd.*, 141 F.3d 1479 (Fed. Cir. 1998). More specifically, the Panel's decision opens a loophole that prevents district courts from issuing meaningful relief by weakening the power to conclusively determine that a party subject to a requirement to refrain from *directly* infringing a patent absent payment to the patent holder may not accomplish infringement by working through other entities beyond the district court's reach.

Based on my professional judgment, I believe this appeal requires an answer to the following question: Does the absence of a specific finding of indirect infringement by a jury render a district court powerless to fashion equitable relief to address an infringer carrying out the infringing conduct through third-parties?

August 4, 2023

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## INTRODUCTION

This Court has long recognized that patent holders have a choice when it comes to remedies for infringement expected to occur after trial. They can file a successive lawsuit, or they can seek equitable relief—often in the form of an ongoing royalty—to protect against the harm of such future infringement. This Court has also recognized that a district court has the power to shape equitable remedies to prevent an accused infringer from directly *and* indirectly infringing a patent in the future, even if no direct infringement has yet taken place. *See Forest Laboratories v. Ivax Pharms., Inc.*, 501 F.3d 1263, 1272 (Fed. Cir. 2007); *Fina Research v. Baroid Ltd.*, 141 F.3d 1479, 1484–85 (Fed. Cir. 1998).

But in this case, the Panel reasoned that a finding of direct infringement by ABS could *not* have resulted in equitable relief limiting ABS’s ability to carry out the infringement through others, even as the district court interpreted its own injunctive relief to cover such conduct. Op. 11–13. By concluding that ST *could not* have obtained a judgment that reached ABS’s asserted inducement, the Panel turned a finding of indirect infringement liability into a threshold requirement for patentees to obtain fully effective prospective relief that conclusively

resolves disputes over future anticipated infringement. This new rule conflicts with *Forest Laboratories* and traditional principles of equitable relief.

The Court should grant *en banc* review to correct the Panel’s error and reaffirm that a finding of direct infringement *can* result in equitable relief that conclusively addresses future anticipated infringement carried out through others. The Panel’s rule vitiates the equitable powers of federal district courts, and it results in wasteful serial litigation. Indeed, this case is a prime example: the district court correctly interpreted its judgment in *ABS I* to foreclose ST’s efforts to seek additional relief—beyond the running royalty to which it was already entitled—in a new litigation. (Appx7.) Absent *en banc* review, courts will have no choice but to entertain serial suits over the same issues.

## **BACKGROUND**

### **A. ABS’s GSS Technology**

This appeal concerns ABS’s GSS Technology. ABS is a bull stud, *i.e.*, a specialized business that owns herds of bulls and sells their semen for artificial insemination in small tubes called “straws.”

(Appx6777.) In many instances, it is valuable to choose the sex of the offspring. For example, a dairy farmer might prefer female calves because only females produce milk. (*Id.*; Appx3172 ¶ 4.) ABS’s “GSS” Technology produces “sexed” semen straws. At a high level, these “sexed” semen straws are processed using specialized technology that disables (or “kills”) undesired cells to increase the likelihood that the semen produces one sex exclusively. *E.g.*, (Appx803.)

ABS uses its GSS technology both to produce sexed semen straws from its own bulls, (Appx270 ¶ 14,) and to furnish that same technology to other companies through two models. (Appx273–274 ¶ 31.) Under the “fee-for-service” model, ABS operates the machine, and under the “licensing” model, ABS transfers the technology and operating instructions to the customer, who operates the machine. *See (id.*; Op. 10 n.2.) In both arrangements, ABS charges the customer a per-straw royalty fee for each straw that is processed. *See (Appx273–274 ¶ 31; Op. 10 n.2.)*

## **B. Procedural Posture**

For over five years, ABS has paid a per-straw royalty fee to use the GSS Technology under a running royalty rate entered by Judge

Conley for infringement of U.S. Patent No. 8,206,987 (“the ’987 patent”). The scope of Judge Conley’s equitable remedy—specifically, what conduct is covered by the royalty—is central to the claim preclusion question in this case.

**1. ABS I**

In 2014, in order to enter the market with its new GSS technology, ABS sued ST for monopolizing the sexed bovine semen processing market, and ST counterclaimed, alleging that ABS’s forthcoming GSS Technology infringed certain patents, including the ’987 patent. *See ABS Glob., Inc. v. Inguran, LLC*, No. 14-cv-503 (W.D. Wis.) (“*ABS I*”); ((Appx21); Appx3171–3199 (*ABS I* Complaint); Appx3235–3273 (*ABS I* Answer & Counterclaims)). According to ST, ABS’s infringing conduct included “using,” “selling,” and “offering for sale” the method covered by the ’987 patent. (Appx3268 ¶ 235.)

The parties stipulated to infringement of the ’987 patent, so the ensuing jury trial centered on invalidity and to what relief, if any, ST was entitled. Through discovery, ABS disclosed that it was considering a “fee-for-service” model and a “licensee” model for its GSS technology. (Appx3347(627:11–628:9)); (Appx3350(638:20–639:4).) ST’s damages

expert, Mr. Schoettelkotte, expressly considered these models and determined that ABS’s licensing model would have an “upward impact” on the royalty rate. (Appx3554 ¶ 122); *see, e.g.*, (Appx3562 ¶ 136) (calculating a reasonable royalty taking into account ABS’s “license fee for XY’s licensees”); (Appx3540 ¶ 94–95) (taking into account ABS’s “sales of hardware and [l]icenses[.]”) He then presented these same facts to the jury at trial. *See, e.g.*, (Appx5785(10-A-106:2–4)) (testifying he saw “documents” concerning ABS’s planned “licensing strategy [with] their own technology”); (*id.*(10-A-106:19–21)) (testifying ABS had “decided” to embark upon a licensing program “once they commercialized”).

By trial in *ABS I*, ABS had not yet commercially launched GSS, but ST elected to pursue—and obtained—forward-looking relief in the *ABS I* judgment. *E.g.*, (Appx3564 ¶ 138.) At trial, ST requested a reasonable royalty to cover the future commercialization of the GSS technology. Finding for ST on some of the ’987 claims, the jury awarded ST a lump sum of \$750,000 for “past infringement” and an ongoing, per-straw royalty “on future[] sales of sexed semen.” (Appx3802.) The court then entered a final judgment, which was later modified, to include

supplemental damages for sexed semen straws processed by foreign ABS licensees and imported for sale in the United States. *See* (Appx7567) (*ABS I* Opinion and Order); (Appx7576) (*ABS I* Second Amended Judgment).

## **2. *ABS III***

In the instant case, ST now reasserts the very same '987 patent at issue in *ABS I*. Referred to as *ABS III* because it is the third suit where ST has serially asserted patent claims against ABS, ST claims that ABS engaged in “selling, leasing, licensing or otherwise transferring interests in and rights to use GSS sorting machines to produce sexed semen to domestic third parties” (Count I), among other things (Appx272–276.)

ABS moved to dismiss Count I on res judicata grounds. Judge Conley—the same judge who presided over *ABS I*—found Count I to be precluded and dismissed under Rule 12(b)(6). Judge Conley found that ST was precluded from seeking a further remedy for ABS’s asserted indirect infringement (via technology-transfer arrangements), because ABS’s licensing plan was “known” to ST during *ABS I*, “relied on” by ST’s damages expert in calculating the proposed royalty, and there was

“no indication that ST elected to hold this type of infringement for a later action.” (Appx7.) He also predicated the decision on his view that the *ABS I* judgment that he had entered “is reasonably interpreted to cover straws produced by third parties using GSS technology as licensed by ABS.” (*Id.*)

A Panel of this Court reversed and remanded. On appeal, ST contended that there was no identity of the “causes of action” between *ABS I* and *ABS III*, based largely on the fact that there was no claim for induced infringement under 35 U.S.C. § 271(b) asserted in *ABS I*. Op. 9 (citing Appellant’s Br. 19–20.) But under this Court’s precedent, a district court is not required to find an actor liable for indirect infringement in order to enjoin that actor from infringing a patent through other actors going forward. *See, e.g., Forest Laboratories*, 501 F.3d at 1271–73. Nevertheless, the Panel accepted ST’s argument that a § 271(a) direct infringement claim cannot preclude a subsequent action based on § 271(b) induced infringement. Op. 11–12. Having accepted that premise, the Panel determined that ST could not have sought relief for ABS’s licensing program in *ABS I* and was not precluded from reopening the issue in *ABS III*. *Id.* 11–13. In doing so, the Panel added

a requirement for a specific finding of indirect infringement as a prerequisite to fashioning fully effective equitable remedies that conclusively resolve to the rights of parties in patent litigation.

## ARGUMENT

### **I. The New Limitations on Equitable Relief Imposed Here Will Impair A Court’s Ability to Conclusively Resolve Forward-Looking Conduct.**

By imposing a new requirement on district courts before they may issue prospective equitable relief, the Panel’s decision creates tension with longstanding precedent and tightly circumscribes a district court’s authority to prevent future infringing conduct or condition future infringing conduct on the payment of an ongoing royalty like the one sought—and awarded—in the lower court here.

#### **A. The Panel’s Opinion Runs Afoul of Settled Precedent and Rules of Civil Procedure.**

Patentees have a choice regarding how to protect their invention from future infringement. Either they may wait and bring a suit for past damages after the future conduct transpires, or at the conclusion of a case resolving past conduct they may elect to seek prospective equitable relief in the form of a traditional injunction or a running royalty. *See, e.g., XY, LLC v. Trans Ova Genetics, L.C.*, 890 F.3d 1282,



1297 (Fed. Cir. 2018) (“[A]n ongoing royalty effectively serves as a replacement for whatever reasonable royalty a later jury would have calculated in a suit to compensate the patentee for future infringement.”)

For this framework to function, the prospective equitable relief cannot be an illusion. The district court must be able to enjoin the targeted party from the anticipated conduct (or condition that conduct on the payment of an ongoing royalty) *and* issue a judgment that will be final and preclusive in disputes involving the same conduct in the future.

This Court equips district courts with considerable discretion to tailor equitable remedies that will offer such effective relief. Once the district court finds an actor liable for directly infringing a patent, that finding is sufficient to conclusively determine that the actor can be enjoined from indirectly infringing through others (or be precluded from indirect infringement absent payment to the patentee). For example, in *Forest Laboratories v. Ivax Pharmaceuticals, Inc.*, 501 F.3d 1263 (Fed. Cir. 2007), the parties stipulated that the proposed products and process submitted in defendant Ivax’s FDA application infringed the

plaintiff's patent. *Id.* 1266. The district court awarded prospective relief, enjoining Ivax and its intended supplier from future infringement. *Id.* 1267. On appeal, this Court addressed, *inter alia*, whether the district court inappropriately enjoined the supplier's prospective infringement. *Id.* 1271. Rejecting the argument that the district court could only enjoin Ivax, not its supplier, from infringing, *id.* 1272–73, the Court reasoned that the supplier would act in concert with, and thus be “as culpable, and hence entitled to be enjoined,” as Ivax. *Id.* 1272. This Court announced that the direct infringement alone “may support an action for induced infringement” and upheld the district court's inclusion of the intended supplier “within the scope of the injunction.” *Id.*

*Forest Laboratories* reflects the straightforward principle that district courts are empowered to enjoin accused infringers, upon a finding of liability, from infringing a patent by themselves *or through others*, even before an accused product has been commercially launched. In *Forest Laboratories*, the proposed generic drug product had not reached the market. 501 F.3d at 1272 (explaining Ivax and the supplier were “not commercially manufacturing or selling the infringing

product”). The dissent asserted that the district court could not enjoin the intended supplier from inducing infringement because the supplier had not actually induced infringement to date—no underlying sales in the U.S. had occurred, *id.* at 1274—but the majority disagreed. *Id.* 1272. Neither the company nor the intended supplier had infringed the patent, but upon “commercial exploitation” the supplier “would be contributing to the infringement, so the injunction should cover both partners.” *Id.*; see also *Fina Research*, 141 F.3d at 1484–85 (holding court could exercise the power to fashion equitable relief even for an entity that may be liable “only for inducing infringement” prior to commercial launch).

The Federal Rules of Civil Procedure underscore this Court’s settled views. Once a liability finding attaches, a district court may enjoin the liable party and other actors working in concert with the defendant. Per Rule 65(d)(2)(C)’s plain language, district courts may bind the parties to the lawsuit from working with “other persons who are in active concert or participation with” the targeted entity. The Supreme Court has recognized the close link between indirect infringement, on the one hand, and “aiding and abetting” direct

infringement, on the other hand. *See Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 764 (2011). “Aiding and abetting” and “acting in concert with” are closely related categories, and it is no wonder that this Court has recognized the authority of district courts to enjoin indirect infringement (“aiding and abetting”), consistent with Rule 65 (which empowers courts to reach those “acting in concert”). The broader principle, which applies outside the patent space as well, is that a party “may not nullify a decree by carrying out prohibited acts through aiders and abettors.” *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y*, 774 F.3d 935, 948 (9th Cir. 2014).

Here, the district court understood its power to restrain ABS from engaging in indirect acts of infringement absent payment of the ongoing royalty to ST. The evidence before Judge Conley showed an expectation of indirect uses. During the proceedings, ST unearthed and introduced evidence about ABS’s planned future uses, including licensing of the GSS technology to third parties. What’s more, ST relied on ABS’s licensing plans to secure a higher running royalty by presenting expert testimony that featured ABS’s plans to license its technology in addition to its plans to make direct sales of straws. With that evidence before

him, Judge Conley interpreted his own order to restrain ABS from accomplishing the prohibited conduct through others absent the specified compensation to ST. *See* (Appx7) (interpreting the scope of its judgment regarding ABS’s licensing activity.)

**B. The Panel’s Decision Distorts the Equitable Power of District Courts.**

In conflict with settled law, the Panel reached its *res judicata* ruling based on the erroneous premise that ST *could not* have asserted an inducement claim during *ABS I*, such that the *ABS I* judgment could not have preclusive effect. *See* Op. 13.

In determining whether ST “could have” pursued relief for ABS’s licensing program, the Panel made two errors. First, the Panel reasoned that the § 271(a) and (b) elements do not map directly onto one another, so they were unlikely to involve the same transactional facts. *See* Op. 12 (explaining that ST’s claim in *ABS I* “centered around ABS’s activity for direct infringement, while the induced infringement claim of *ABS III* centers around third parties whose direct infringement activities are induced by ABS”). But the facts are much more closely linked. As the *Forest Laboratories* majority explained, although induced and direct infringement focus on different “prime mover[s] in the chain of events

leading to infringement,” a “plan to” infringe upon a commercial launch that includes a commercial partner will often involve both direct infringement and induced infringement through others, regardless of which company was the primary mover in that chain. 501 F.3d at 1272. Accordingly, no matter which statutory subsection the parties named when they stipulated that GSS Technology infringed the ’987 patent, ABS’s third party licensing “would be contributing to the infringement by [ABS], so the injunction” could in fact “cover both partners.” *Id.* 1272–73.<sup>1</sup>

Second, the Panel rejected the *actual* evidence that ST litigated the licensing claims in *ABS I*. Although the Panel conceded that “minimal evidence exists in the *ABS I* record that arguably supports an allegation that ABS induced third parties to infringe ST’s patent,” it reasoned that the infringing technology had not reached the market. Op. 12. Thus, the Panel found that “[a]n induced patent infringement claim brought at the time of trial in *ABS I* would have been based on

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<sup>1</sup> Although this case involves subsection (b), not (e), *Forest Laboratories* itself recognizes that the analysis between the two provisions are closely related. 501 F.3d at 1271.

speculation.” Op. 13. But the same is true of all prospective actions, which by definition have not occurred and rely on speculation that they will occur in the future. ABS had not launched *any* technology—whether for sale directly or through others—and it had plans to launch *both* by offering the technology directly to customers *and* by licensing to third parties.

The Panel’s approach reflects the assumed rule that *actual*—not just threatened—indirect infringement is a prerequisite to enjoining third parties from violating a court’s orders. But both *Forest Laboratories* and *Fina* agree that district courts have the power to hear and issue relief related to induced infringement even prior to commercial launch. *See Forest Laboratories*, 501 F.3d at 1272, 1274 (rejecting dissent’s view that direct infringement may exclusively “support an action where the [FDA filer] would induce infringement *if* the [application] were approved” (emphasis added)); *Fina Research*, 141 F.3d at 1485 (“[W]e decline . . . to create a per se rule that an actual controversy predicated only on inducing infringement may exist only if direct infringement has already occurred.”)

Moreover, the decision undermines a critical choice patent holders are supposed to have under this Court's precedent. When an adjudicated infringer intends to infringe in the future, patentees are supposed to have the option to either bring a second suit, or seek prospective relief (including in the form of an ongoing royalty) to bar the anticipated future infringement—whether the infringement is done directly or through others acting in concert with the defendant. But under the Panel's rule, the scope of equitable relief is limited to the scope of the liability finding, such that a finding of direct infringement cannot justify an injunction prohibiting indirect infringement. Not only does that undermine the choice presented to the patentee, but it limits a district court's ability to render conclusive relief to avoid future litigation for all parties and the courts. The result is wasteful litigation, along with uncertainty arising from the specter that the court of appeals may unravel a settled dispute, as in this case. Although the district court interpreted its judgment to apply to ABS's technology-transfer arrangements, and ABS is willing to pay the adjudicated royalty for such arrangements, the Panel carved out licensing, after the



fact, from the order as the district court understood and intended it.

Now, there will be more litigation.

### CONCLUSION

Rehearing is warranted.

August 4, 2023

/s/ Steven J. Horowitz

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**ADDENDUM**

United States Court of Appeals  
for the Federal Circuit

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INGURAN, LLC, DBA STGENETICS,  
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2022-1385

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Appeal from the United States District Court for the  
Western District of Wisconsin in No. 3:20-cv-00085-wmc,  
Judge William M. Conley.

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Decided: July 5, 2023

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Before LOURIE, BRYSON, and REYNA, *Circuit Judges*.

REYNA, *Circuit Judge*.

Appellant Inguran, LLC appeals the dismissal by the Western District of Wisconsin of the induced infringement suit it brought against Appellee ABS Global, Inc. The district court found that Inguran’s claim was precluded by res judicata based on an earlier judgment the court entered against Appellee. On appeal, Inguran challenges the district court’s res judicata finding and the court’s interpretation of the scope of its earlier judgment. We reverse.

#### BACKGROUND

The patent at issue, U.S. Patent No. 8,206,987 (the “’987 patent”), titled “Photo-Damage Method for Sorting Particles,” is directed to a method for sorting bull sperm cells according to a specific DNA characteristic in order to preselect the gender of a domestic animal’s offspring. ’987 patent, col. 19 ll. 40–44. Claim 1 of the ’987 patent recites:

1. A method of sorting a mixture of stained sperm cells having either characteristic A or characteristic B into at least one population, the method comprising the steps of:
  - a. flowing a fluid stream containing stained sperm cells through a flow path at a fluid delivery rate;
  - b. exciting fluorescence emissions from the stained sperm cells having characteristic A and the stained sperm cells having characteristic B flowing in the flow path;
  - c. detecting the fluorescence emissions from the excited sperm cells;
  - d. classifying the stained sperm cells as either having characteristic A or having characteristic B based upon the fluorescence emissions;

- e. selecting stained sperm cells in the flow path based on their classification; and
- f. photo-damaging the selected sperm cells to produce an enriched population of sperm with respect to either characteristic A or characteristic B.

*Id.* at col. 212 l. 57–col. 213 l. 8. Appellant Inguran, LLC is the patent holder of the '987 patent. Inguran, doing business as STGenetics (“ST”), provides bull semen-processing services, including to, at one time, Appellee ABS Global, Inc. and Appellee’s parent company Genus PLC (“ABS”). J.A. 6776–78.

ABS is a “bull stud.” A bull stud is a specialized business that sells semen drawn from its own bulls that is packaged in small tubes, or “straws,” for use in artificial insemination. J.A. 6777; Appellee’s Br. 4. Artificial insemination is needed by, for example, dairy farmers and beef producers to increase fertility rates of female calves, which is profitable for milk production. Appellee’s Br. 4. “Conventional” bovine straws tend to produce an offspring of each sex approximately 50% of the time, since it has approximately 50% of each X-chromosome and Y-chromosome-bearing sperm cells. *Id.* ST provides bull studs like ABS with “sexed semen straws,” which consist either of predominantly male or female sperm cells. J.A. 6777. This appeal focuses on “sexed semen straws.”

#### PROCEDURAL HISTORY

The parties have a lengthy litigation history that stems from a contractual relationship. J.A. 6777. In 2006, ABS and ST entered into a contract for sorting semen. *Id.* The parties entered into another related agreement in 2012. *Id.*

#### *ABS I*

In 2014, ABS filed an antitrust lawsuit in the Western District of Wisconsin, *ABS Global Inc. v. Inguran, LLC*, No.

14-cv-503 (W.D. Wis. 2014) (“*ABS I*”), against ST alleging that ST was maintaining a monopoly power for sexed semen processing by its contractual terms and acquisition of patents on the technology. J.A. 6777. ST brought counterclaims and third-party claims for trade secret misappropriation, breach of contract, and, relevant here, patent infringement. J.A. 6778. ST alleged, in a counterclaim, that ABS’s competing GSS System or technology directly infringed at least one claim of the ’987 patent. J.A. 6798. ABS stipulated to direct infringement of claims 1, 2, and 7 of the ’987 patent. See J.A. 3, 271, 3439, 6798; Appellant’s Br. 3.

The parties presented to a jury expert testimony as to damages. ST’s damages expert based his proposed royalty rate by considering many factors, including by conducting a hypothetical negotiation based on the framework in *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970) (“Georgia-Pacific factors”).<sup>1</sup> J.A. 7227–28. ST’s expert highlighted agreements between ABS and prospective licensees to show what royalty rates ST would expect to receive in exchange for giving another company the right to use its technology to process and sell sexed straws. Appellant’s Br. 32; Appellee’s Br. 11; J.A. 7300. ST’s expert calculated that ABS would charge a

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<sup>1</sup> The fifteen Georgia-Pacific factors set out an analytical framework for assessing a reasonable royalty and for determining the value of the patented technology to parties in the marketplace. *Georgia-Pacific Corp.*, 318 F. Supp. at 1120; see also *LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51, 60, 60 n.2, 76 (Fed. Cir. 2012). Relevant here is factor 6: “[t]he effect of selling the patented specialty in promoting sales of other products of the licensee; that existing value of the invention to the licensor as a generator of sales of his non-patented items; and the extent of such derivative or conveyed sales.” *Georgia-Pacific*, 318 F. Supp. at 1120.

royalty rate of \$2.05 per straw. Appellant’s Br. 9–10; Appellee’s Br. 11. ST’s expert testified that ABS’s licensing plan would open additional lines of revenue for ABS. Appellee’s Br. 10. ST’s expert further opined that the parties would have agreed in a hypothetical negotiation to a per-straw royalty rate of \$1.50. Appellant’s Br. 10.

The jury found that claim 2 of the ’987 patent was invalid and that the remaining claims were infringed. J.A. 3, 6798. The jury awarded ST a “lump sum for ABS’s past infringement in the amount of \$750,000, and a per straw royalty on future sales of sexed semen straws sold by ABS of \$1.25.” J.A. 3802.

The district court provided that:

Judgment is entered for ABS or Genus’s future infringement of the ’987 patent, granting ST an ongoing royalty of One Dollar and Twenty-Five Cents (\$1.25) per straw of sexed semen sold by ABS that was processed with the infringing GSS technology, or any technology not more than colorably different, where such sale or processing took place in the United States through the remaining life of the ’987 patent.

J.A. 7503. Both parties disputed the scope of the ongoing royalty, and the district court issued an order attempting to resolve the dispute, stating: “th[e] ongoing royalty covers straws sold by ABS that were processed with GSS technology and imported into the United States for sale.” J.A. 5.

The judgment was appealed to the Seventh Circuit. *ABS Glob., Inc. v. Inguran, LLC*, 914 F.3d 1054 (7th Cir. 2019). The Seventh Circuit affirmed the district court’s validity findings for the claims and issued a remand order that did not concern judgment of the ongoing royalty of *ABS I*. Appellant’s Br. 12–13.

### *ABS II*

On June 7, 2017, ST filed another patent infringement suit against ABS in the Western District of Wisconsin, *Inguran, LLC v. ABS Global, Inc.*, No. 17-cv-446 (W.D. Wis.) (“*ABS I*”).

*ABS II* was consolidated with the remand proceedings in *ABS I* for trial. Appellee’s Br. 14. During trial, ST learned that, in addition to using the GSS System to sort semen and produce straws for both itself and others, ABS had begun selling and licensing the GSS System to third parties and teaching them how to use the technology so that those parties could process and produce their own sexed straws. Appellant’s Br. 13; J.A. 273–74.

Addressing remaining issues after trial and the remand order from the Seventh Circuit in *ABS I*, the district court entered judgment that included an ongoing royalty “subject of course to a renewed finding of the [’987] patent’s validity,” J.A. 7552, along with supplemental damages for sexed semen straws processed by foreign ABS licensees and imported for sale in the United States, J.A. 7551–67; Appellee’s Br. 14–15.

### *ABS III*

On January 29, 2020, ST filed a third suit against ABS before the Western District of Wisconsin, *Inguran LLC v. ABS Global, Inc.*, No. 20-cv-85 (“*ABS III*”). J.A. 266–83. ST asserted additional patent infringement claims on the same ’987 patent and filed two motions to supplement its complaint to assert two recently issued patents, U.S. Patent Nos. 10,583,439 (the “439 patent”) and 10,689,210 (the “210 patent”). J.A. 2–3. ST asserted, among other claims, induced infringement under 35 U.S.C. § 271(b) based on ABS’s selling or licensing GSS machines to third parties. J.A. 3.

ABS filed a motion to dismiss the induced infringement claims of the ’987 patent on the grounds that the claims



were precluded by the judgment in *ABS I*. J.A. 4. The district court agreed with ABS, finding that *ABS I* “resolve[d] the claims asserted in the original complaint in the ’085 [*ABS III*] case,” and dismissed the action. J.A. 2–3. The district court also ruled to stay the pending case regarding the ’439 patent pending conclusion of the Patent Trial and Appeal Board’s *inter partes* review of that patent. J.A. 3. The district court denied ST’s motions to supplement as moot and noted that, if ST wanted to add additional infringement claims concerning the ’210 patent, they must seek leave to amend in its patent infringement claims and explain “why those claims should proceed at this time in light of the stay of the infringement claims under the ’439 patent.” *Id.*

In June 2020, the district court clarified the scope of its previous order in a second amended judgment. J.A. 7564–67; Reply Br. 9–11; J.A. 7572–78. In December 2021, the district court did so again. J.A. 2–10. To that effect, the district court stated that “the judgment is reasonably interpreted to cover straws produced by third parties using GSS technology as licensed by ABS” and that “the court agrees that Count I of [*ABS III*] is precluded by the judgment in *ABS I*.” J.A. 7. ST appeals both the district court’s interpretation of the scope of the ongoing royalty and the finding of claim preclusion. We have jurisdiction under 28 U.S.C. § 1295(a)(1).

#### STANDARD OF REVIEW

Whether a claim is barred by claim preclusion is a question of law that we review de novo. *Acumed LLC v. Stryker Corp.*, 525 F.3d 1319, 1323 (Fed. Cir. 2008). When assessing the general principles of claim preclusion, this court applies the law of the regional circuit in which the district court sits, here, the Seventh Circuit. *SimpleAir, Inc. v. Google LLC*, 884 F.3d 1160, 1165 (Fed. Cir. 2018). Under Seventh Circuit law, there are three elements to claim preclusion: “(1) an identity of the parties or their

privies in the first and second lawsuits; (2) an identity of the cause of action; and (3) a final judgment on the merits in the first suit.” *Adams v. City of Indianapolis*, 742 F.3d 720, 736 (7th Cir. 2014). We apply our own authority and precedent when addressing questions of U.S. patentability. *Superior Indus., LLC v. Thor Glob. Enters. Ltd.*, 700 F.3d 1287, 1291 (Fed. Cir. 2012). For example, in the context of claim preclusion in a patent case, this court looks to its own precedent to resolve “the operative facts involved in a claim for patent infringement.” *Id.* Here, we have interpreted “same cause of action” to mean “the second claim is based on the same set of transactional facts as the first.” *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1362 (Fed. Cir. 2000).

We review a district court’s interpretation of the scope of equitable authority and its orders for abuse of discretion. *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1358–60 (Fed. Cir. 2008). The Seventh Circuit has cautioned against giving “[t]oo much deference” to a court’s later interpretation where doing so would “create[] the risk that interpretation of an order becomes a means to rewrite it.” *Grede v. FCStone, LLC*, 746 F.3d 244, 257 (7th Cir. 2014).

#### DISCUSSION

On appeal, ST challenges both the district court’s finding that the *ABS I* judgment precluded ST’s induced infringement claims in *ABS III*, and the district court’s interpretation of the scope of its order regarding the ongoing royalty. We first address the issue of res judicata or claim preclusion.

#### I

As noted above, under Seventh Circuit law, there are three elements to claim preclusion: “(1) an identity of the parties or their privies in the first and second lawsuits; (2) an identity of the cause of action; and (3) a final judgment on the merits in the first suit.” *Adams*, 742 F.3d at 736.

The parties only dispute one element of the test, element two: the “same cause of action.” Appellant’s Br. 19; Appellee’s Br. 20. There is no dispute that the parties and the asserted ’987 patent are the same between *ABS I* and *ABS III*, or that there was a final judgment on the merits. Appellee’s Br. 15; Appellant’s Br. 19–20.

Under claim preclusion, “a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action.” *Acumed*, 525 F.3d at 1323. Thus, whether the induced patent infringement claim asserted in *ABS III* is precluded by the *ABS I* judgment hinges on whether the same “cause of action” or set of “transactional facts” are at issue. We have held that “a cause of action” is based on the transactional facts from which it arises. *SimpleAir*, 884 F.3d at 1165 (“In a patent suit, essential transactional facts include both the asserted patents and the accused activity.”) (cleaned up).

ST asserts that the patent infringement claims raised in *ABS I* and *III* are separate and distinct causes of action involving different infringing acts. Appellant’s Br. 19–20. According to ST, *ABS I* focuses on direct infringement while *ABS III* focuses on induced infringement. *Id.* ST argues that an action involving direct infringement cannot preclude a subsequent action based on induced infringement. *Id.* at 21–24. As support, ST highlights the different elements needed to prove direct infringement under 35 U.S.C. § 271(a) from those needed to prove induced infringement under § 271(b). *Id.* at 20–21; *see also Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 843 F.3d 1315, 1332 (Fed. Cir. 2016). ST argues that it would have been premature to bring an induced infringement action against ABS during *ABS I* because, at that time, ABS had not yet begun selling or licensing its GSS technology to third parties. Appellant’s Br. 23. ST argues that, even if it was “on notice” that ABS planned to license its GSS System during *ABS I*, notice of a potentially infringing activity cannot form the basis of a justiciable claim. *Id.* at 24–25.

ABS contends that ST accused the same conduct—its licensing program—in both *ABS I* and *ABS III* and that the transactional facts “are all but identical.” Appellee’s Br. 17, 21–22. ABS disagrees with ST’s argument that it was premature to raise an induced infringement claim in *ABS I* because the entire accused activity in *ABS I* had not yet occurred; ABS had “neither sold a single sexed semen straw nor entered into a single fee-for-service contract” by the time of trial in *ABS I* such that the relief sought was already prospective in nature. *Id.* at 22. ABS cites the testimony from *ABS I* of its business development director who explained the company’s three “business models” for selling the GSS technology such that ST and the jury knew and understood the “anticipated commercial uses” at that time.<sup>2</sup> *Id.* at 22–23.

In patent cases, this court applies the general rule that res judicata does not bar the assertion of “new rights acquired during the action which might have been, but which were not, litigated.” *Gillig v. Nike, Inc.*, 602 F.3d 1354, 1363 (Fed. Cir. 2010) (quoting *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 126 F.3d 365, 370 (2d Cir. 1997)); *see also Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir. 1992) (“[F]or res judicata purposes, claims that ‘could have been brought’ are claims in existence at the time the original complaint is filed or claims *actually* asserted by supplemental pleadings or otherwise in the earlier action.”). Indeed, claim preclusion requires that the claim

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<sup>2</sup> At oral argument, ABS described two main business models: “fee-for-service” and “licensee.” Oral Arg. at 20:57–22:34. In both models, ABS makes the GSS machine and delivers it to the customers configured to the “nature of the animal genetics at play.” *Id.* at 21:43–21:46. ABS employees operate the machine in the first model while, in the second model, the machine is operated by the customer’s employees according to ABS’s operations. *Id.* at 32:43–33:39.

either was asserted, or could have been asserted, in the prior action. *Aspex Eyewear, Inc. v. Marchon Eyewear, Inc.*, 672 F.3d 1335, 1342 (Fed. Cir. 2012). If, for example, the claim did not exist at the time of the earlier action, it could not have been asserted in that action and is not barred by res judicata. *Id.*

In view of the foregoing, we first address whether ST asserted an induced infringement claim against ABS in *ABS I*. It did not. ST's reference to § 271(b) in its answer was its induced infringement claim against the parent company Genus for the actions taken by ABS. We find no support in the record that ST asserted or cited induced infringement against ABS for actions taken by third parties as a result of ABS's activities. J.A. 3270–71; *contra* Appellee's Br. 9–10.

Next, we address whether ST could have brought an induced infringement claim against ABS at the time the complaint was filed before the district court. Here, we look to whether an induced infringement claim could have been raised out of the transactional facts in *ABS I*. *Superior Indus.*, 700 F.3d at 1291; *see also Acumed*, 525 F.3d at 1323–24 (“Under the Restatement approach to claim preclusion, a claim is defined by the transactional facts from which it arises.”). To be sure, courts have wrestled with how to assess the portion of the test stating that any claims that “could have been raised in a prior action.” *See, e.g., Hells Canyon Pres. Council v. U.S. Forest Serv.*, 403 F.3d 683, 686 n.2 (9th Cir. 2005). For example, some courts will find that a claim is precluded by a prior action if it involves the same legal theory or cause of action. *Id.* Here, we resolve whether a claim “could have been raised” on the basis of the same transactional facts. We hold that the induced infringement claim brought in *ABS III* is not precluded by the direct infringement claim brought in *ABS I* because the claims are not based on the same transactional facts.

The accused activity and the transactional facts differ between the direct infringement claims asserted in *ABS I* and the induced infringement claims raised in *ABS III*. *ABS I* centered around ABS's activity for direct infringement, while the induced infringement claim of *ABS III* centers around third parties whose direct infringement activities are induced by ABS. Appellant's Br. 21–22. Framed differently, the evidence that ST needs to support a claim for direct infringement by ABS is different from the evidence required to sustain a claim of induced infringement by third parties. ST would need *additional* facts to plausibly allege an induced infringement claim—facts that largely came to light during discovery in *ABS II*.

We agree with ST that an induced infringement claim rests on evidence and elements beyond those required by direct infringement. *Niazi Licensing Corp. v. St. Jude Medical S.C., Inc.*, 30 F.4th 1339, 1351 (Fed. Cir. 2022) (“For induced infringement under 35 U.S.C. § 271(b), the two steps become three. In addition to showing direct infringement . . . , the patentee must also show that the alleged infringer ‘knowingly induced infringement and possessed specific intent to encourage another’s infringement.’” (quoting *Enplas Display Device Corp. v. Seoul Semiconductor Co.*, 909 F.3d 398 407 (Fed. Cir. 2018)).; see also *Gammino v. Am. Tel. & Tel. Co.*, No. 12-666, 2013 WL 6154569, at \*2 (D. Del. Nov. 22, 2013) (finding that res judicata did not bar a direct infringement claim because induced and indirect infringement claims arise under different statutes and comprise different causes of action).

We recognize that minimal evidence exists in the *ABS I* record that arguably supports an allegation that ABS induced third parties to infringe ST's patent. At the time of the *ABS I* trial, ABS had not yet commercially launched its GSS System. Appellee's Br. 7, 9–10; Appellant's Br. 4–5. The evidence established that ABS directly infringed ST's '987 patent by the sale of sexed straws sold by ABS. Appellant's Br. 5, 31. The only evidence that ABS's proposed

business model involved third parties, which is what ST refers to as “sublicensing,” was a single “brainstorming” internal-facing document. Oral Arg. at 2:32–3:30; Conf. J.A. 3347; J.A. 4250–51.<sup>3</sup> Even so, we have held that a suit may not be barred by claim preclusion, even where the same transactional facts are present in both suits, if infringement allegations are “temporally limited to acts occurring after final judgment was entered in the first suit.” *Brain Life, LLC v. Elekta Inc.*, 746 F.3d 1045, 1054 (Fed. Cir. 2014).

An induced patent infringement claim brought at the time of trial in *ABS I* would have been based on speculation, in part because the parties stipulated to direct infringement and the question of inducement was not before the jury. Oral Arg. at 25:12–26:48. We agree with ST that it could not have asserted an inducement claim during *ABS I*. Accordingly, the district court erred in applying res judicata or claim preclusion to ST’s induced infringement claim. With that context in mind, we turn to whether the district court, in its later interpretation of its *ABS I* order, improperly expanded the scope of the order.

## II

Subsequent to entering judgment in *ABS I*, the district court clarified that the language in its order covered straws sold by ABS that were processed with the GSS technology and imported into the United States for sale. J.A. 5. Years later, the district court again “conclude[d]” that the judgment of *ABS I* “reasonably . . . cover[ed] straws produced by third parties using GSS technology as licensed by ABS.”

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<sup>3</sup> ST stated at oral argument that it believes ABS began sublicensing its GSS technology to third parties at some point after the judgment in *ABS I* was entered. Oral Arg. at 11:53–12:17. ABS clarified that the record contains evidence of foreign licensing with payments made but no known domestic licensing. *Id.* at 13:09–14:11.

J.A. 7. Thus, the district court found that the ongoing royalty rate of *ABS I* reached induced infringement by ABS. See Appellant's Br. 26. The district court's finding relied on its interpretation of its order as well as the testimony of ST's damages expert. J.A. 4–7. On appeal, ST challenges the district court's interpretation and its order in *ABS I*.

ST asserts that its expert's testimony confirms that the ongoing royalty in *ABS I* is limited to ABS's direct infringement of the '987 patent. Appellant's Br. 31–33; Oral Arg. at 9:37–58, 29:29–31:56. ST argues that the district court's interpretation of its order was given five years after the order was issued and is “plainly” broader in scope and “inconsistent with the language of the order.” Reply Br. 28 (citing *Advanced Software Design Corp. v. Fiserv, Inc.*, 641 F.3d 1368, 1381 (Fed. Cir. 2011) and *Int'l Rectifier Corp. v. IXYS Corp.*, 383 F.3d 1312, 1315 (Fed. Cir. 2004)). On the other hand, ABS cites various portions of ST's damages expert testimony that ABS claims reflect the understanding that ABS intended to license the GSS technology, which ABS argues was factored into the proposed reasonable royalty rate and award in *ABS I*. Appellee's Br. 23–24.

We have admonished district courts for issuing sweeping injunctions that cover potential infringing activities. *Aspex*, 672 F.3d at 1344 (citing *Forest Lab'ys., Inc. v. Ivax Pharms., Inc.*, 501 F.3d 1263, 1272 (Fed. Cir. 2007)). The Seventh Circuit has also cautioned that too much deference to an issuing court's much-later interpretation of an order “would undermine the ability of parties and non-parties to rely on a court order” and “creates the risk” where interpretation can become a means to “rewrite it after unintended consequences have given rise to regrets.” *Grede*, 746 F.3d at 257. We conclude that the district court's subsequent interpretation or clarification of its initial order essentially rewrites that order.

Here, the plain language of the royalty is limited to straws. Oral Arg. at 1:02–37. The plain language of the



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clarifying order first issued by the court is also limited to straws. J.A. 5. While “GSS technology” is mentioned throughout *ABS I*, see, e.g., Conf. J.A. 5785; Conf. J.A. 7673, the scope of ABS’s direct infringement allegations cannot reasonably be expanded to cover actions of third-party licensees using GSS technology to make their own straws.

In light of the reasons we state above that claim preclusion does not apply in this case, we hold that the district court improperly broadened the scope of the *ABS I* judgment to address induced infringement activity. See *Amado*, 517 F.3d at 1359; see also *Grede*, 746 F.3d at 257. We therefore reverse the district court’s interpretation of its prior order.

#### CONCLUSION

We hold that ST was not precluded from bringing an induced patent infringement claim in *ABS III* based on the judgment in *ABS I*. We also hold that the district court abused its discretion by interpreting its initial order in *ABS I* in a way that expanded that scope of the order. Thus, we reverse the district court’s dismissal order with respect to claim preclusion.

#### REVERSED

#### COSTS

No costs.

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 40(b)(1) and Federal Circuit Rule 35(b)(1)(2)(A). The brief contains 3,087 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

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