

No. 25-1317

IN THE
United States Court of Appeals
for the Federal Circuit

A.L.M. HOLDING COMPANY, AND ERGON ASPHALT & EMULSIONS, INC.,
Plaintiffs-Appellants

v.

ZYDEX INDUSTRIES PRIVATE LTD., AND ZYDEX INC.,
Defendants-Appellees.

Appeal from the U.S. District Court for the District of Delaware,
No. 1:24-cv-00363-JPM, Judge Jon P. McCalla

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INTRODUCTION

Plaintiffs have Article III standing. They suffered monetary harm, and they retain exclusionary rights. Either suffices; both are present.

Defendants’ opening salvo runs headlong into controlling precedent. They argue that monetary harm is not enough for Article III standing—and even if it were, Plaintiffs failed to allege it here. Both assertions are wrong. “[M]onetary harms readily qualify as concrete injuries under Article III.” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021). And Defendants’ unauthorized practice of the patents deprives Plaintiffs of royalty revenues they would otherwise receive. The parties disagree about whether monetary harm suffices under *Intellectual Tech LLC v. Zebra Technologies Corp.*, but Plaintiffs’ argument that it does is more consistent with Supreme Court precedent. 101 F.4th 807 (Fed. Cir. 2024).

Even if monetary harm were not enough, Plaintiffs still have standing: they retain exclusionary rights under their License Agreement with Ingevity. Because Plaintiffs own the patents, the exclusionary-rights analysis begins from the “baseline” that all exclusionary rights are theirs. *Intell. Tech*, 101 F.4th at 816. Splicing the Agreement apart,

Defendants offer cramped and unreasonable interpretations of its provisions to argue that Plaintiffs gave all exclusionary rights away. Yet separately and together, the Agreement’s provisions show that Plaintiffs retain shared control over sublicensing, assignments, and enforcement by litigation—and total control over royalties. These rights are exclusionary because they “involve the ability to exclude others from practicing an invention.” *Lone Star Silicon Innovations LLC v. Nanya Tech. Corp.*, 925 F.3d 1225, 1234 (Fed. Cir. 2019). Plaintiffs thus have not “transferred *all* exclusionary rights away.” *Intell. Tech.*, 101 F.4th at 814, 816. Under any reading of *Intellectual Tech*, that is enough.

Failing all else, Defendants resort to nitpicking Plaintiffs’ reliance on *Alfred E. Mann Foundation for Scientific Research v. Cochlear Corp.*, 604 F.3d 1354 (Fed. Cir. 2010). But Plaintiffs do not need *Mann* to win. In any event, *Mann* remains relevant as a factually analogous and legally persuasive precedent. It is one of only three cases in which this Court opined on a patent owner’s standing—as opposed to a licensee’s. In all three, the Court held that the patent owner had standing. Defendants name no case in which this Court has held that a patent owner lacked Article III standing. There is no reason to make this case the first.

ARGUMENT

I. Plaintiffs have Article III standing.

A. *Intellectual Tech* guides the analysis in this case.

The Court should begin with its just-last-year decision in *Intellectual Tech*. No other case is as legally or factually relevant. And contrary to Defendants' contention, *Intellectual Tech* left open a broad—and correct—approach to Article III standing that this Court should definitively adhere to.

1. *Intellectual Tech* is more legally and factually analogous than any other case.

Buried deep in their response, Defendants split hairs over factual differences between the licensing agreement in *Intellectual Tech* and the Agreement here. Br.Appellees.50–53. Trivial distinctions notwithstanding, *Intellectual Tech* remains the most legally and factually relevant case decided by this Court for three reasons.

First, *Intellectual Tech* was decided after *Lexmark* and *Lone Star*, in the modern era when this Court clearly separates Article III standing from the right to sue under § 281 (i.e., statutory standing). Defendants' primary case from this Court, *Morrow*, was not.

Second, *Intellectual Tech* addressed a patent owner's Article III

standing—not a licensee’s. This distinction is “critical.” *Intellectual Tech*, 101 F.4th at 816. Whereas “in the licensee context, questions about other entities’ ability to license can provide a reasonable proxy for understanding . . . whether the license granted exclusionary rights,” those “same questions do not provide a reasonable proxy for understanding whether a patent owner retains at least one exclusionary right.” *Id.* Defendants cite *no* patent-owner standing case from this Court that goes their way.

Third, *Intellectual Tech* is the *only* case from this Court to share both of the first two features. Because *Intellectual Tech* is the only case to share both features, it offers crucial insight into the analysis required here. *See* Br.Appellants.18–20. That said, the Court’s two earlier-era patent-owner standing cases support Plaintiffs. *See Mann*, 604 F.3d 1354;¹ *Aspex Eyewear, Inc. v. Miracle Optics, Inc.*, 434 F.3d 1336 (Fed. Cir. 2006). Both were cited affirmingly in *Intellectual Tech*.

¹ Defendants try to downplay *Intellectual Tech*’s citation to *Mann*. Br.Appellees.52 n.7. Contrary to their more limited suggestion, however, *Intellectual Tech* cites *Mann* for the proposition that a “patent owner [does] not transfer[] away all rights, even under an exclusive license with rights to sublicense, where the patent owner retain[s] the right to sue.” *Intellectual Tech*, 101 F.4th at 816.

Defendants’ supposed factual distinctions do nothing to undermine *Intellectual Tech*’s relevance. Their main point is that the patent owner in *Intellectual Tech* retained a greater ability to sublicense than Plaintiffs do here. Even if accurate, that ignores the far more powerful similarity that Plaintiffs here, like the patent owner in *Intellectual Tech*, retain shared *control* over all sublicensing. *Infra* pp.10–16, 18–25. Because “[a] patent owner has exclusionary rights as a baseline matter *unless* it has transferred *all* exclusionary rights away,” and because this Court has never “enumerate[d] the exclusionary rights afforded by a patent or fully define[d] their scope,” Defendants’ proposed distinctions amount to nothing more than extreme parsimony. *Intellectual Tech*, 101 F.4th at 816 (emphases added).

At bottom, Defendants cite no case from this Court that has ever held that a patent owner lacked Article III standing. None exists. Especially in view of *Intellectual Tech*’s recency and relevance, it is Defendants—not Plaintiffs—who ask this Court to tread new ground.

2. *Intellectual Tech* leaves open both a broad and narrow approach to Article III standing.

As Plaintiffs explained in their opening, *Intellectual Tech* left open a broad and narrow approach to Article III standing. Br.Appellants.20–

24. In *Intellectual Tech*, the Court stated that “[i]n general, the question for the injury-in-fact threshold is whether a party has *an* exclusionary right.” *Intell. Tech*, 101 F.4th at 814 (first emphasis added). Plaintiffs and Defendants agree that the Court’s “in general” caveat must allow for an exception. But they disagree over what the exception is.

Plaintiffs maintain that “in general” envisions situations where a party can have Article III standing even without an exclusionary right. Under this broad approach, in other words, an exclusionary right is *sufficient*, but not *necessary*, for Article III standing. Plaintiffs’ reading of “in general” has already been blessed by at least one district court. *See Vericool World LLC v. TemperPack Techs., Inc.*, 739 F. Supp. 3d 322, 332 & n.3 (E.D. Va. 2024).

Defendants reject the broad approach. They instead insist that “in general” means there are situations where more than “an” exclusionary right is required. In their view, sometimes Article III standing requires multiple exclusionary rights.

In a vacuum, both Plaintiffs’ and Defendants’ interpretations of “in general” might have appeal. But zoom out just one level, and Defendants’ argument loses all luster. Over and over, *Intellectual Tech* squarely

rejected Defendants’ position. *See Intellectual Tech*, 101 F.4th at 813 (“All [Article III] requires here is that IT retained *an* exclusionary right” (emphasis in original)); *id.* at 814 (“[T]he question for the injury-in-fact threshold is whether a party has *an* exclusionary right.” (emphasis in original)); *id.* at 813–14 (“Under the only reasonable reading of the patent and trademark security agreement, IT still retained at least *one* exclusionary right, even in view of the rights Main Street gained upon default.” (emphasis added)).

To be sure, this Court has recently analyzed Article III standing by looking to exclusionary rights. Br.Appellees.24–45 (citing *Univ. of S. Fla. Rsch. Found., Inc. v. Fujifilm Med. Sys. U.S.A., Inc.*, 19 F.4th 1315 (Fed. Cir. 2021); *Lone Star*, 925 F.3d 1225). But that does not exclude the broad approach. To the contrary, it merely confirms—consistent with Plaintiffs’ position—that an exclusionary right is *per se* sufficient to show Article III standing.²

² This Court has never “enumerate[d] the exclusionary rights afforded by a patent or fully define[d] their scope.” *Intell. Tech*, 101 F.4th at 816. If the Court prefers to hold that an exclusionary right is *necessary* for Article III standing, then it should also hold that the scope of exclusionary rights extends broadly enough to encompass any right the interference with which would cause monetary harm to the right-holder.

B. Under the broad approach, Plaintiffs have Article III standing because Defendants’ acts caused monetary harm.

Defendants further argue that, even if Plaintiffs are right about the broad approach, they still lack standing. Br.Appellees.53–56. But Defendants are wrong.

It is true, of course, that to meet Article III’s injury-in-fact requirement, a plaintiff must allege that he suffered a “concrete and particularized” injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). But questions of whether an alleged injury suffices arise most often in fringe cases where a plaintiff relies on nonmonetary harm. “[M]onetary harms,” by contrast, “readily qualify as concrete injuries under Article III.” *TransUnion*, 594 U.S. at 425; *see also id.* (“If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III.”).

Plaintiffs suffered monetary harm. Defendants are practicing the patents without a license or other authorization; they have infringed. *E.g.*, Appx26-57 (Compl. ¶¶ 61–172). But for their infringement,

Holding as much would harmonize the exclusionary-rights doctrine with Supreme Court Article III precedent.

Defendants would have had to obtain a sublicense to do what they have done. No matter *who* they obtained a sublicense from (Plaintiffs, Ingevity, Akzo, anyone else), all sublicenses result in Plaintiffs receiving royalties. Because Defendants infringed, Plaintiffs received no royalty payments. Plaintiffs have thus suffered monetary harm. Appx58-65 (Compl. ¶¶ 180, 190, 200, 210, 220, 230). At the pleadings stage, Plaintiffs need not specify, much less prove, exactly how much money they were deprived of.

The broad approach to Article III standing is most consistent with *Intellectual Tech* and Supreme Court precedent. The Court should apply it and conclude that Plaintiffs have Article III standing because Defendants' unauthorized practice of the patents caused Plaintiffs monetary harm.

C. Even under the narrow approach, Plaintiffs have Article III standing because they did not transfer “all” exclusionary rights away.

Here, the analysis begins from the “baseline” that Plaintiffs, as the patent owners, hold all exclusionary rights “unless” they have transferred “all” of them away. *Intell. Tech*, 101 F.4th at 816. Although Plaintiffs granted Ingevity an exclusive license, Plaintiffs still retained

“at least *one* exclusionary right” under the Agreement. *Id.* at 813 (emphasis added). Any of the catalogued Agreement provisions establishes this on its own. But especially when they are all read together, it becomes obvious that Plaintiffs have not transferred all exclusionary rights away. Neither Defendants’ cramped characterization of the Agreement nor their reliance on unpersuasive caselaw defeats that conclusion.

1. Under the Agreement, Plaintiffs have “at least one”—and, in fact, several—exclusionary rights.

a. *Sublicense veto.* Plaintiffs and Ingevity exercise shared control over which third parties can practice the patents and on what terms. Start with Plaintiffs’ right to reasonably veto Ingevity’s proposed sublicenses. Br.Appellants.29–31.

Defendants agree that before Ingevity can sublicense to anyone, it must “first provide[] the terms and conditions of any such sublicense to [Plaintiffs] for their prior review and approval, which approval shall not be unreasonably withheld.” Appx81 (¶ 2.3); *see* Br.Appellees.28. There is no dispute that Plaintiffs *can* reasonably withhold their approval of—in other words, veto—a proposed sublicense. Defendants highlight that Plaintiffs have not yet exercised their veto right. But they do not explain

why the *exercise* of a right is required to prove its *existence*. A person's right to a criminal jury trial always exists, even if he is never indicted.

According to Defendants, “there are very limited circumstances under which Plaintiffs could reasonably withhold approval of a sublicense—and they generally are unable to do so even if Ingevity wanted to sublicense a direct competitor of Plaintiffs.” Br.Appellees.32. Plaintiffs dispute the “very limited” characterization. But even with that qualifier, Defendants concede that there are *some* circumstances in which Plaintiffs can reasonably withhold approval—*some* circumstances in which Plaintiffs can say “no, Ingevity, you cannot allow X to practice the patents.”

That alone is enough for Plaintiffs to show they have not transferred “all” exclusionary rights away. *Intell. Tech*, 101 F.4th at 816. A right to control sublicensing is an exclusionary right because it “involve[s] the ability to exclude others from practicing an invention.” *Lone Star*, 925 F.3d at 1234. Plaintiffs’ retention of that right means they retain at least “*an* exclusionary right” and have not “transferred *all* exclusionary rights away.” *Intell. Tech*, 101 F.4th at 814, 816; *cf. id.* at 816 (observing that the Court has never “enumerate[d] the exclusionary

rights afforded by a patent or fully define[d] their scope”). This remains true even though that right is shared with Ingevity, because a patent owner “meet[s] the injury-in-fact requirement even where . . . it grants another party the ability to license.” *Id.* at 815; *Uniloc USA, Inc. v. Motorola Mobility LLC*, 52 F.4th 1340, 1345 (Fed. Cir. 2022) (*Uniloc II*) (“[T]here is considerable force to [the patent owner’s] argument that, even if [licensee] had been granted a license and an unfettered right to sublicense, [the patent owner] would have Article III standing.”);³ *Lowe v. ShieldMark, Inc.*, No. 2023-1786, 2025 WL 893211, at *2 (Fed. Cir. Mar. 24, 2025) (explaining that a patent owner’s and exclusive licensee’s “shared ability to license’ does not divest the patent owner of all exclusionary rights” (quoting *Intell. Tech.*, 101 F.4th at 816)). The Court could stop there.

Apparently unaware of their concession, Defendants’ main argument is that Plaintiffs’ undisputed right to reasonably veto proposed sublicenses is so immaterial as to not matter at all. *See Br.Appellees.29–*

³ In *Uniloc*, the exclusive licensee had “unfettered” discretion to sublicense, royalty-free. Yet the Court still made its “considerable force” comment. As explained in Plaintiffs’ opening brief and below, the Agreement here is worlds apart from the license agreement at issue in that case. *Br.Appellants.38–40; infra pp.29–30.*

30. In support, they tender two unpersuasive cases.

First, Defendants invoke *National Pasteurized Eggs*, an unpublished district court case that Plaintiffs thoroughly discredited in their opening. Br.Appellants.41–43 (discussing *Nat’l Pasteurized Eggs, Inc. v. Michael Foods, Inc.*, No. 10-CV-646-WMC, 2012 WL 12996200, at *9 (W.D. Wis. May 18, 2012)).

Second, citing *Vaupel*, Defendants characterize a sublicensing veto as “a minor derogation” that does “not substantially interfere with the full use by [the exclusive licensee] of the exclusive rights under the patent.” Br.Appellees.29 (quoting *Vaupel Textilmaschinen KG v. Meccanica Euro Italia SpA*, 944 F.2d 870, 875 (Fed. Cir. 1991)). To be sure, *Vaupel* treated a particular “sublicensing veto” as a “minor derogation.” 944 F.2d at 875. But that case must be considered alongside the more recent *Propat International Corp. v. RPost, Inc.*, 473 F.3d 1187 (Fed. Cir. 2007). *Propat*, for its part, held that a sublicense veto with an “unreasonably withheld” limitation—just like the one here—gave the veto-holder “substantial ongoing control.” *Id.* at 1190–91 (“Although [patent owner] may decline to consent to [licensee’s] decisions only if it does so reasonably, [licensee’s] obligation to notify [patent owner] as to

the selection of all targets for licensing or suit and to obtain [patent owner's] consent to all such decisions indicates that [patent owner] retains substantial ongoing control of the sort typically associated with the retention of an ownership interest in the patent.”). In other words, Plaintiffs’ sublicense veto gives them substantial control over who Ingevity can—and cannot—sublicense the right to practice the patent. This qualifies, at minimum, as “*an* exclusionary right” within the meaning of *Intellectual Tech*.

Contrary to what Defendants imply, both *Vaupel* and *Propat* considered the same exact question: whether a party had transferred “all substantial rights.” Compare *Vaupel*, 944 F.2d at 874 (“We must therefore examine whether the agreements transferred all substantial rights to the ’650 patent . . .”), with *Propat*, 473 F.3d at 1190 (analyzing whether party had transferred “all substantial rights”). While *Vaupel* downplayed the sublicense veto, *Propat* up-played it—on the very same question. To be sure, *that* question is not on appeal here. But to the extent “all substantial rights” cases are relevant to the meaning of a sublicense veto, both are relevant. *Propat* is far more recent, and its reasoning far more detailed. And *Propat*, unlike *Vaupel*, opined specifically on a

sublicense veto with an “unreasonably withheld” limitation.

Separately, Defendants also belittle Plaintiffs’ non-patent examples of how the law treats “unreasonably withheld” limitations in common commercial contracts. But Defendants cannot deny that “unreasonably withheld” has real meaning in the *corpus juris*—meaning enough to spawn innumerable disputes about whether a veto was exercised reasonably or not.

Defendants’ attempts to distinguish Plaintiffs’ non-patent authorities fall flat. They claim that *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, is different because of an agreement’s purpose provision. Br.Appellees.31 (citing 69 F.3d 337 (9th Cir. 1995)). But the Ninth Circuit used that purpose provision to help decide whether a party’s veto was *reasonable*—not whether the “unreasonably withheld” limitation meant anything. Indeed, “unreasonably withheld” had to mean something, otherwise the issue considered by the Ninth Circuit would not have been reached.

Defendants also try to impugn Plaintiffs’ American Law Reports citation on the grounds that it deals with the transfer of interests in real property, not intellectual property. Br.Appellees.32 (citing 54 A.L.R.3d

679, § 11). This distinction helps Plaintiffs, not Defendants. Parties with an interest in real property—whether fee title or leasehold—hold a right to exclude others. In the Anglo-American tradition, the right to exclude others from real property is at least as strong as the right to exclude others from a government-granted patent monopoly. Defendants also pluck one of the several canvassed cases from the A.L.R. treatise. *Id.* (citing *Edelman v. F. W. Woolworth Co.*, 252 Ill. App. 142 (1929)). But *Edelman*, just like *Anheuser-Busch*, involved a dispute over whether a party’s withholding of subletting approval was reasonable, not whether the “unreasonably withheld” provision in the lease meant anything at all.

Defendants’ arguments on these non-patent authorities, if anything, prove Plaintiffs’ point. By focusing on cases involving disputes about whether a veto was reasonable or not, Defendants effectively concede that “unreasonably withheld” has meaning. Indeed, if “unreasonably withheld” provisions are the hollow husk Defendants urge they are, why do countless contracts contain them, why do legion lawyers rely on them, and why do reporters overflow with cases about them?

b. *Assignment veto.* Similarly, Plaintiffs retained the right to reasonably veto any assignment of Ingevity’s license and rights under the

Agreement. All that was said about the sublicense veto applies with equal force to the assignment veto.⁴ It is an exclusionary right because it “involve[s] the ability to exclude others from practicing an invention.” *Lone Star*, 925 F.3d at 1234.

Defendants’ talk of a “reciprocal right” does nothing to advance their cause. Under ¶ 11.4, “[t]his Agreement, and the rights and obligations hereunder, may be assigned by a Party to a third party with the written permission of *all other Parties* (such permission not to be unreasonably withheld).” Appx93 (¶ 11.4) (emphasis added). In other words, if Ingevity wanted to assign its rights under the Agreement, “all other Parties”—that is, Plaintiffs—can reasonably withhold their permission. True, if Plaintiffs wanted to assign *their* rights, Ingevity would have to give its permission, too. But all that “reciprocal” right shows is that Plaintiffs and Ingevity have shared control over assignments.

Defendants contend: “Since the Agreement was executed, there have thus been three exclusive licensees (MWV, WestRock, and Ingevity),

⁴ Ingevity’s rights, moreover, “may only be assigned” in certain narrow circumstances, such as “in connection with the transfer of substantially all of” its “assets.” Appx93 (¶ 11.4).

and Plaintiffs have put forth no evidence that they were able to restrict or otherwise curtail this chain of transfers and assignments.” Br.Appellees.34. But Defendants do not explain *why* Plaintiffs have to put forth such evidence. That Plaintiffs did not veto those assignments says nothing about their *right* to do so.

c. Terms and Conditions of Sublicenses. Under the Agreement, before it can sublicense to anyone, Ingevity must “provide[] the terms and conditions of any such sublicense” to Plaintiffs. Appx81 (¶ 2.3). That requirement is in service of Plaintiffs’ right of “prior review and approval.” Appx81 (¶ 2.3). In other words, before deciding whether to approve or veto a sublicense, Plaintiffs get to know more than just the *identity* of the proposed sublicensee. They also get to know the *terms and conditions* of the proposed sublicense. Plaintiffs, therefore, can veto a proposed sublicense if they disapprove of *either* the sublicensee’s identity *or* the sublicense’s terms and conditions. Plaintiffs thus have the right to shared control over what terms and conditions appear—and don’t appear—in any sublicense. On top of that, the Agreement also provides that its “obligations . . . shall be binding on any sublicensee as if it were a Party hereto.” Appx81 (¶ 2.3). The Agreement’s obligations apply to any

sublicense automatically. Like with the vetoes, a right to control sublicensing by controlling terms is an exclusionary right because it “involve[s] the ability to exclude others from practicing an invention.” *Lone Star*, 925 F.3d at 1234; *see Mann*, 604 F.3d at 1358, 1362 (addressing patent owner’s retained right to control sublicense terms).

With all that in view, Defendants’ counterarguments lack merit.

First, Defendants mention how Plaintiffs once instructed them to confer with Ingevity. Br.Appellees.35–36. That is unremarkable, given how Plaintiffs and Ingevity share control over sublicensing. If Defendants had asked Ingevity for a sublicense, and if Ingevity had proposed that sublicense to Plaintiffs (as required), then Plaintiffs would have evaluated its terms and conditions and decided whether to approve or veto it. The process requires Ingevity’s and Plaintiffs’ involvement.

It is also inaccurate for Defendants to claim that “when Plaintiffs first accused Defendants of infringing the patents-in-suit in September 2017, Plaintiffs were unable to do anything other than refer Defendants to Ingevity.” Br.Appellees.35. Plaintiffs were also able to sue for infringement, as they eventually did. The fact they initially tried to

resolve a dispute amicably supplies no evidence of an inability to do anything else.

Second, Defendants cite other sublicenses of the patents-in-suit. But the fact that Plaintiffs chose not to veto those sublicenses says nothing about their *right* to veto or to shared control over terms and conditions. To be sure, the ArrMaz and Akzo sublicenses contain slightly different definitions and slightly different procedures for reporting and payment than appear in the Agreement. Br.Appellees.37–39. Yet Defendants propose no theory for how the sublicenses’ definitions or reporting and payment terms in any way violated the Agreement’s command that “[t]he obligations in this Agreement shall be binding on any sublicensee as if it were a Party hereto.” Appx81 (¶ 2.3). And even if they did, that violation would at best be a dispute between Plaintiffs and Ingevity or Plaintiffs and the sublicensees. The different language does not and could not undermine the rights Plaintiffs retain under the Agreement.

d. *Royalties.* Plaintiffs retained the right to royalties on sublicenses: “Sales made by a sublicensee shall be reported and royalty paid to Licensors as if [Ingevity] had made such sale.” Appx81 (¶ 2.3). Put

otherwise, the moment a sublicensee makes a sale, an obligation to pay Plaintiffs is triggered. Defendants do not dispute this. A right to royalties is an exclusionary right—especially where, as here, it is combined with the other provisions “involv[ing] the ability to exclude others from practicing an invention.” *Lone Star*, 925 F.3d at 1234; *see id.* (listing Lone Star’s right to “collect royalties” as among the reasons it had Article III standing); *Mann*, 604 F.3d at 1358, 1362 (addressing patent owner’s retained right to pass-through royalties).

Defendants highlight that Ingevity, not the sublicensee directly, has the duty to pay the royalty to Plaintiffs. But that point does not advance Defendants’ cause. They never explain—and cannot explain—why the *payor* of the royalty diminishes Plaintiffs’ *right* to receive it. If Ingevity fails to pay the pass-through royalties, moreover, then Plaintiffs can and would terminate the Agreement. Appx90 (¶ 9.3). And “[u]pon any termination of this Agreement . . . all sublicensee rights shall also terminate.” Appx81 (¶ 2.3).

Defendants also propose a hypothetical: “Ingevity could sue for infringement of the patents-in-suit, stipulate to a damages award in the form of an ongoing royalty, and not be obligated to pay any pass-through

royalties to Plaintiffs.” Br.Appellees.40. But this hypothetical and the argument that flows from it misunderstand ¶ 5.2 multiple times over.

To start, ¶ 5.2 applies when *either* Plaintiffs or Ingevity pursue an infringement suit on their own. Before that happens, however, Plaintiffs always have the option to jointly prosecute infringement with Ingevity, in which case damages are “split 50:50.” Appx87 (¶ 5.1). Defendants’ hypothetical could not happen unless and until Plaintiffs explicitly declined to be part of the litigation.

Further, it is true that a party proceeding under ¶ 5.2 “will retain any damages recovered or obtained in the legal action” and that those damages are not “subject to the payment of Earned Royalty.” That language envisions the following scenario: Suppose Ingevity sues Infringer, a non-sublicensee, under ¶ 5.2 and recovers \$5,000,000. Paragraph 5.2 means those damages are not treated *as if* Infringer had been a sublicensee during the infringing period (and thus subject to Earned Royalty payment).

Defendants’ hypothetical, by contrast, envisions something different. In their hypothetical, Ingevity would “stipulate to a damages award in the form of an ongoing royalty.” Such a stipulation assumes the

defendant would be granted a sublicense to continue to use the patent into the future. Yet all sublicenses are subject to ¶ 2.3; nothing in ¶ 2.3 (or ¶ 5.2) suggests sublicenses granted as part of a settlement are somehow excluded from its scope. This means Plaintiffs would have the right to “review” the “terms and conditions” of the proposed sublicense—and could approve or reasonably veto the sublicense. Defendants’ hypothetical could not happen if Plaintiffs did not, within the bounds of reasonableness, want it to happen.

e. *Sublicenses to affiliates.* Defendants do not dispute that Plaintiffs retained the royalty-free right to sublicense to their affiliates the rights they themselves retained in Agreement ¶ 2.4—without any input from Ingevity. Appx81-82 (¶ 2.4). Nor can Defendants avoid this Court’s clear statement that the “right to sublicense” is an “exclusionary right.” *Morrow v. Microsoft Corp.*, 499 F.3d 1332, 1342 (Fed. Cir. 2007); *accord Lone Star*, 925 F.3d at 1234.

As part of its right to sublicense to certain parties (affiliates) for certain purposes (research and development), Plaintiffs also have the ability to forgive those parties’ infringement. “[E]xclusionary rights” include the ability “forgive activities that would normally be prohibited

under the patent statutes.” *Morrow*, 499 F.3d at 1342. If an affiliate infringed by using the patent for research and development purposes, Plaintiffs could unilaterally forgive that infringement by granting a royalty-free sublicense. Put otherwise, Ingevity categorically *lacks* the right to sue a certain class of potential infringers—affiliates using the patents for research-and-development purposes. *See Lone Star*, 925 F.3d at 1231 (“[The] right to sue for *commercial* infringement, but not non-commercial infringement, signified that the transferee lacked ‘the exclusive right to sue for all infringement.’” (quoting *Sicom Sys., Ltd. v. Agilent Techs., Inc.*, 427 F.3d 971, 979 (Fed. Cir. 2005))).

Defendants effectively argue that Plaintiffs’ right to sublicense is so small as to be legally meaningless. Yes, Plaintiffs can sublicense only to affiliates. And yes, Plaintiffs can sublicense only for research-and-development purposes. But without a sublicense, even a party engaged solely in research-and-development practice would still be liable for infringement. *Madey v. Duke Univ.*, 307 F.3d 1351, 1362 (Fed. Cir. 2002). The small size of an exclusionary right to sublicense does not negate its existence, and Defendants cite no case saying as much. Instead, even though small, Plaintiffs’ retained right to sublicense to affiliates for

limited purposes means they have retained at least “*an* exclusionary right” and have not “transferred *all* exclusionary rights away.” *Intell. Tech*, 101 F.4th at 814, 816.⁵

f. *Enforcement.* As Plaintiffs explained in their opening, Plaintiffs retained the right to bring suit against infringers, to participate in the control of such a lawsuit, and to receive a portion of (and in certain circumstances, all of) the damages. Br.Appellants.33–35; Appx87-88 (¶¶ 5.1, 5.2).

Defendants diminish Plaintiffs’ rights to sue as “nominal” and “illusory.” Br.Appellees.44. Nothing could be further from the truth.

To begin, Defendants call Plaintiffs’ right to sue “nominal” because, in their view, Plaintiffs have only a “contractual right to sue.” Br.Appellees.44–45. Although Defendants’ argument is not clear, no version of it holds water. Defendants appear to suggest that Plaintiffs’ right to sue under the Agreement is only for breach of contract. But that is wrong: Plaintiffs’ right to sue under ¶¶ 5.1 and 5.2 is not merely for breach of contract; Plaintiffs have the right to sue “third parties” for

⁵ Like above, Defendants’ invocation of the Akzo sublicense is immaterial to determining *Plaintiffs’* rights. *Supra* p.20.

“infringement.” Appx87-88 (§§ 5.1, 5.2). By definition, a third-party infringer has *no* contractual relationship with Plaintiffs. There would be no basis for Plaintiffs to sue a third-party infringer on a contract claim.

Defendants’ chief argument appears to be that Plaintiffs cannot unilaterally settle a suit by granting a sublicense without Ingevity’s involvement. Br.Appellees.44. Defendants incorrectly assume that a sublicense would be the *only* way to end infringement litigation. Plaintiffs can pursue an infringement suit to judgment and keep the damages or persuade the court to award an injunction. Appx87-88 (§ 5.2). And Plaintiffs can unilaterally settle an infringement suit on terms that do not include a sublicense—such as a sum of money and agreement to cease further practice of the patents.

Nor is Plaintiffs’ right to sue “illusory.” A right to sue is “illusory” if someone in Ingevity’s position could moot the patent owner’s suit by granting a royalty-free sublicense. *See Mann*, 604 F.3d at 1361–62. That is not the case here, and Defendants do not contend it is.

Defendants retreat to *Deere*, arguing that “the *Deere* court considered exactly these sorts of enforcement rights.” Br.Appellees.45. No, it didn’t. In *Deere*, the patent owner’s enforcement right was illusory,

because the licensee could moot any patent-owner-initiated infringement suit by granting a royalty-free sublicense to the accused infringer. *Deere & Co. v. Kinze Mfg., Inc.*, 683 F. Supp. 3d 904, 923 (S.D. Iowa 2023). That *could not* happen here: Plaintiffs can reasonably veto an Ingevity-proposed sublicense, and all sublicenses are royalty-bearing. The same critique defeats Defendants’ citations to *United Access Techs., LLC v. Verizon Internet Servs., Inc.*, and *Uniloc USA, Inc. v. Apple Inc.*, both of which involved a situation where the “right to grant royalty-free sublicenses (without conditions and without needing Inline’s consent) renders any limited right to sue that Inline may have . . . illusory.” No. 05-cv-866-LPS, 2021 WL 1200650, at *7 (D. Del. Mar. 26, 2021); No. 18-cv-358-WHA, 2020 WL 7122617, at *7 (N.D. Cal. Dec. 4, 2020). Further, unlike Plaintiffs’ express right to sue in ¶¶ 5.1 and 5.2 here, the plaintiff-patent-owner in *United Access* did not have “the express right to sue if [the exclusive licensee] does not.” 2021 WL 1200650, at *7.

Defendants also cite *Morrow and Ortho Pharmaceutical Corp. v. Genetics Institute, Inc.*, 52 F.3d 1026, 1034 (Fed. Cir. 1995). But those are *licensee* cases. In the context of Article III standing, the “licensee-versus-patentee distinction” is “critical,” because “[p]atent owners and licensees

do not have identical patent rights.” *Intell. Tech*, 101 F.4th at 815–16. Also, both of those cases were decided in a bygone era before *Lexmark* and *Lone Star* when “many of this court’s opinions had improperly melded the injury-in-fact inquiry with the § 281 inquiry—often performing a combined analysis of the two simultaneously.” *Id.* at 814.⁶

Moreover, the portion of *Morrow* that Defendants rely on addressed whether a right to sue, without more, was an exclusionary right. Br.Appellees.46 (citing 499 F.3d at 1342). The situation here is different. All the rights above work together to ensure that none are rendered illusory. In one direction, Plaintiffs’ retained enforcement rights to pursue infringement (with or without Ingevity) ensures that its rights related to sublicenses and assignments are not meaningless. In the other direction, Plaintiffs’ retained sublicense and assignment rights—in particular, their rights to receive royalties on all sublicenses and to reasonably veto any sublicense or assignment—ensures that Ingevity cannot moot any Plaintiffs-initiated litigation by granting royalty-free sublicenses to accused infringers.

⁶ Defendant insists that *Morrow* was not a “combined analysis” case, but its vintage and language show otherwise. *Infra* pp.32–33.

2. Defendants’ treatment of caselaw is unpersuasive.

Start with *Uniloc USA, Inc. v. Motorola Mobility, LLC*, No. CV 17-1658-CFC, 2020 WL 7771219, at *8 (D. Del. Dec. 30, 2020) (*Uniloc I*), *aff’d on other grounds, Uniloc II*, 52 F.4th 1340. Defendants argue that “[w]hile Plaintiffs point out several differences between the agreements at issue in *Uniloc* and the Agreement here, the critical difference for purposes of the constitutional standing analysis is that Plaintiffs cannot license the patents-in-suit to unrelated third parties, while the patentee retained that ability in *Uniloc*.” Br.Appellees.26–27. But Defendants do not explain why this is a “critical difference”—and they ignore what actually matters. First, in *Uniloc*—but unlike here—the licensee could moot any patent-owner-initiated infringement suit by granting royalty-free sublicenses to accused infringers. Second, in *Uniloc*—but unlike here—the patent owner had no right to reasonably veto sublicenses or assignments: sublicenses were at the licensee’s “sole and absolute discretion.” And third, in *Uniloc*—but unlike here—both the license and any sublicenses were royalty-free. In other words, Plaintiffs here retain more control over who practices the patents and on what terms. They have a greater “ability to exclude others from practicing an invention.”

Lone Star, 925 F.3d at 1234. This ability to exclude others shows that Plaintiffs’ retain at least “*an* exclusionary right” and have not “transferred *all* exclusionary rights away.” *Intell. Tech*, 101 F.4th at 814, 816

With *Uniloc* out of the way, move on to *Mann*. To be clear, Plaintiffs do not need *Mann* to win: they have more than enough support from more recent precedent to prevail. But *Mann* further supports their position.

It is true, as Defendants point out, that *Mann* did not “use[] the term ‘exclusionary.’” Br.Appellees.48. But that does not render *Mann* irrelevant. *Mann* analyzed the allocation of rights between patent owner and exclusive licensee. *Mann* was a standing case, and it never said it was *not* considering Article III standing.

Even if *Mann* was solely addressing the right to sue under § 281, moreover, it would still be relevant. This Court has sometimes held that a party has constitutional standing but lacks the right to sue under § 281. *See Lone Star*, 925 F.3d at 1234–35 (“[A]lthough *Lone Star* does not possess all substantial rights in the asserted patents [to satisfy § 281] its allegations still satisfy Article III.”); *Univ. of S. Fla. Rsch. Found.*, 19 F.4th at 1324 (“[W]e hold [the plaintiff] fails to meet the statutory

requirements of § 281 but does meet the requirements of constitutional standing.”). But Defendants have identified no case where this Court went the other way and held that a party has the right to sue under § 281 but lacks Article III standing—especially when the plaintiff is the patent owner, not a licensee. The one time it had the opportunity to so hold in *Uniloc II*, it squarely declined. Indeed, while this Court affirmed the *Uniloc I* district court judgment, it did so only on collateral estoppel grounds. As to standing, this Court “recognize[d] there is considerable force to [the patent owner’s] argument that, even if [licensee] had been granted a license and an unfettered right to sublicense, [the patent owner] would have Article III standing.” *Uniloc II*, 52 F.4th at 1345; *see also id.* at 1350–51 (Lourie, J., additional views). “The reasoning of the district court’s standing determination in *Uniloc* has not been endorsed by this court.” *Intell. Tech.*, 101 F.4th at 815 n.5.

All of this is particularly relevant given that *Mann* was decided in an earlier era when “many of this court’s opinions had improperly melded the injury-in-fact inquiry with the § 281 inquiry—often performing a combined analysis of the two simultaneously.” *Intell. Tech.*, 101 F.4th at 814. If Defendants insist on reaching back into this earlier “combined

analysis” era to rely on *Morrow*, then *Mann* must be part of the equation. Simply put, Defendants cannot have *Morrow* without *Mann*.

Defendants’ resistance to *Morrow*’s status as a “combined analysis” case lacks purchase. Although *Morrow* purported to separate its § 281 and Article III analyses, its confusion jumps off the page. To take one example, in its Article III section, *Morrow* states: “The party holding the exclusionary rights to the patent suffers legal injury in fact under the statute.” 499 F.3d at 1339. What is “legal injury in fact”? The point of Article III standing analysis is to *separate* legal injury from factual injury. *TransUnion*, 594 U.S. at 426–47; *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). And what is “injury in fact under the statute”? The point of Article III standing analysis is injury in fact *under the Constitution*, regardless of a statute. It is no surprise that *Intellectual Tech* did not cite *Morrow*, not even once.

Unlike *Morrow*, *Mann* was cited approvingly in *Intellectual Tech*. And unlike *Morrow*, *Mann* addressed a *licensee*’s standing—not, as here, a *patent owner*’s standing. See *Mann*, 604 F.3d at 1359 (“Typically, [courts] are confronted with cases in which an exclusive licensee sues an accused infringer, and [the court] must decide whether the licensee has

been granted rights sufficient to confer standing.”). The “licensee-versus-patentee distinction” is “critical” in the Article III context, because “[p]atent owners and licensees do not have identical patent rights.” *Intell. Tech.*, 101 F.4th at 815–16. “A patent owner”—unlike a licensee—“has exclusionary rights as a baseline matter *unless* it has transferred *all* exclusionary rights away.” *Id.* at 816 (emphases added).

Beyond that, Defendants advert to alleged “significant factual differences between the Agreement and the exclusive license considered in *Mann*.” Br.Appellees.48. Because of these differences, the argument goes, *Mann* is inapposite. But any such differences are insignificant and do nothing to impugn *Mann*’s applicability.

First, Defendants highlight how the parties in *Mann* disputed the scope of the exclusive licensee’s sublicensing right. Br.Appellees.48–49. Yet *Mann* assumed away that dispute in a way favorable to Plaintiffs’ position. 604 F.3d at 1362. No matter the outcome of the scope dispute, the licensee could not render illusory the patent owner’s right to sue, because “any sublicense [the licensee] grants must include specified pass-through royalties.” *Id.* Just the same here, Plaintiffs have a right to sue (that is even more robust than the patent owner’s in *Mann*, compare *id.*

at 1361, *with* Appx87–88 (¶¶ 5.1–5.2), *and* Br.Appellants.33–35), and Ingevity cannot moot a Plaintiffs-initiated infringement suit by granting a royalty-free sublicense to the accused infringer. In short, both in *Mann* and here, the exclusive licensee’s sublicensing right is not so broad as to render the patent owner’s enforcement rights illusory.

Second, Defendants mention that the patent owner in *Mann* could “grant third-party patent licenses under at least some circumstances.” Br.Appellees.49. But that right did not factor into the *Mann* Court’s standing analysis. And here, too, Plaintiffs can grant licenses to certain parties for certain purposes. *Supra* pp.23–25.

Third, Defendants point out that, in *Mann*, “[the patent owner] had the ability under the [] License to decide the terms on which any patent litigation would be settled, and had complete discretion to settle such a case by granting a defendant a license to the asserted patents.” Br.Appellees.49. True, but immaterial. The *Mann* Court expressly said that lesser rights would also do: “In *AsymmetRx*, we held retained litigation rights were sufficient to preserve the licensor’s ownership of the patents-in-suit even when those rights failed to give the licensor complete control over the litigation it initiated; instead, the licensor and licensee

would have joint control of the litigation.” *Mann*, 604 F.3d at 1362 (citing *AsymmetRx, Inc. v. Biocare Med., LLC*, 582 F.3d 1314, 1321 (Fed. Cir. 2009)). Not to mention, as explained, Plaintiffs retain significant control over litigation to final judgment and can unilaterally enter into settlements that do not include a sublicense. *Supra* pp.25–28. Finally, even if Plaintiffs’ retained litigation rights might be slightly lesser in one way than the patent owner’s in *Mann*, they are *broader* in other ways. Beyond the patent owner in *Mann*, Plaintiffs also have the right to 100% damages in any litigation they pursue without the licensee, Appx87-88 (¶ 5.2); and the royalty-free right to sublicense certain rights to affiliates (meaning the right to moot any licensee-initiated infringement suit against an affiliate concerning such rights), Appx81-82 (¶ 2.4).

Fourth and relatedly, Defendants argue that in *Mann*, “all litigation proceeds from patent infringement suits under the [] License were to be shared between the patentee and the exclusive licensee, regardless of who participated in that litigation.” Br.Appellees.49–50. That is a distinction without a difference. Here, Plaintiffs always have the *right* to join any suit commenced by Ingevity, and if they do, damages are split “50:50,” just like in *Mann*. Appx87-88 (¶¶ 5.1, 5.2). And, unlike

in *Mann*, where damages were split no matter who pursued litigation, here if *Plaintiffs* proceed without Ingevity's help, they get to keep 100% of the proceeds for themselves. Appx87-88 (¶ 5.2).

In sum, *Mann* matters. Although the Court need not reach it, *Mann* further shows why Plaintiffs should win and Defendants should lose.

CONCLUSION

The Court should reverse the judgment below.

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FORM 19. Certificate of Compliance with Type-Volume Limitations

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July 2020

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FOR THE FEDERAL CIRCUIT**

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