

Form 5. Entry of Appearance

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

KNORR-BREMSE SYSTEME DANA CORPORATION
 FUER NUTZFAHRZEUGE GMBH and
 v. HALDEX BRAKE PRODUCTION CORP.

No. 01-1357,-1376, 02-1221, -1256

Entry of Appearance

(INSTRUCTIONS: Counsel should refer to Fed. Cir. R. 47.3. Pro se petitioners and appellants should read paragraphs 1 and 18 of the Guide for Pro Se Petitioners and Appellants. File this form with the clerk and serve a copy of it on the principal attorney for each party.)

Please enter my appearance (select one):

☐ Pro Se

☒ As counsel for:

Attorneys for Amicus Curiae
Securities Industry Association
 Name of party

I am, or the party I represent is (select one):

☐ Petitioner

☐ Respondent

☒ Amicus curiae

☐ Cross Appellant

☐ Appellant

☐ Appellee

☐ Intervenor

As amicus curiae or intervenor, this party supports (select one):

☒ Petitioner or appellant

☐ Respondent or appellee

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☒ I am the principal attorney for this party in this case and will accept all service for the party. I agree to inform all other counsel in this case of the matters served upon me.

☐ I am not the principal attorney for this party in this case.

Date admitted to Federal Circuit bar (counsel only): 1985

This is my first appearance before the United States Court of Appeals for the Federal Circuit (counsel only):

☐ Yes ☒ No

☐ A courtroom accessible to the handicapped is required if oral argument is scheduled.

10-31-03
 Date

Signature of pro se or counsel

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

KNORR-BREMSE SYSTEME FUER	:	
NUTZFAHRZEUGE GMBH,	:	NOS.: 01-1357, 01-1376
Plaintiff-Cross-Appellant,	:	02-1221, 02-1256
	:	
v.	:	
	:	
DANA CORPORATION,	:	
Defendant-Appellant,	:	
	:	
and	:	
	:	
HALDEX BRAKE PRODUCTION	:	
CORPORATION and HALDEX BRAKE	:	
PRODUCTS AB,	:	
Defendants-Appellants.	:	

**MOTION OF SECURITIES INDUSTRY ASSOCIATION FOR LEAVE TO
FILE AMICUS CURIAE BRIEF PURSUANT TO F.R.A.P. 29(b)**

The Securities Industry Association ("SIA"), by and through its undersigned counsel respectfully moves this Court for leave to file an *amicus curiae* brief in the above-referenced matter. Pursuant to Federal Rule of Appellate Procedure 29(b), a copy of SIA's proposed brief accompanies this Motion. In support of its Motion, SIA avers as follows:

1. SIA is an industry association that promotes the shared interests of more than 600 securities firms. Members of the SIA include the nation's leading investment banks, brokers, dealers and mutual fund companies.

2. SIA members are exposed to both the benefits and the burdens of patent protection. Accordingly, its members have a continued interest in ensuring that the governing patent law strikes a reasonable balance between the rights of patent holders and alleged infringers.

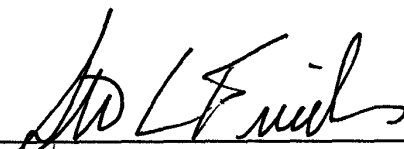
3. In its September 26, 2003 Order ("Order"), this Court announced that it had *sua sponte* taken this case *en banc* to reconsider its precedent considering the drawing of adverse inferences with respect to willful patent infringement. The Court invited additional briefs from the parties with respect to four enumerated questions posed by the Court.

4. In its Order and subsequent errata sheet, the Court invited *amicus curiae* briefs addressing questions 1, 2 and 4 from bar associations, trade or industry associations and government entities.

5. As set forth more fully in the accompanying brief, SIA believes that the adverse inference and affirmative duty rules create an imbalance that hinders the ability of persons threatened with a claim of patent infringement to engage in full and frank discussions with their counsel and allows patent holders to impose significant expense and burden upon a business merely by providing notice of a patent infringement, even where a substantial defense exists. The SIA seeks leave of this Court to file the accompanying *amicus curiae* brief in order to express its views on the subject.

6. Pursuant to F.R.A.P. 29(a), SIA sought to gain the consent of all parties to file an *amicus* brief. However, SIA was advised by counsel for the defendants-appellants that counsel believed it could neither grant nor withhold consent. Accordingly, the SIA submits this Motion for Leave to file the accompanying *amicus curiae* brief.

Respectfully submitted,



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*Attorneys for Amicus Curiae
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Dated: November 3, 2003

CERTIFICATE OF INTEREST

Counsel for proposed *Amicus Curiae* Securities Industry Association certifies the following:

1. The full names of every part or *amicus* represented by us are: Securities Industry Association.

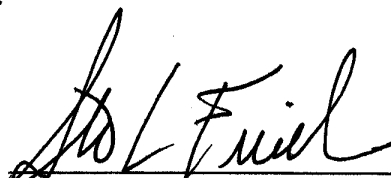
2. The names of the real parties in interest represented by us are: See 1 above.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of any of the parties represented by us are: There is no such corporation as listed in paragraph 3.

4. The name of all law firms and the partners or associates that appeared for any of the parties represented by us in the trial court or are expected to appear in this Court are:

- a. Steven L. Friedman and Thomas S. Biemer, Dilworth Paxson LLP.
- b. George R. Kramer, Scott C. Kursman, Securities Industry Association.

Dated: November 3, 2003



Steven L. Friedman

KNORR-BREMSE SYSTEME FUER
NUTZFAHRZEUGE GMBH,
Plaintiff-Cross-Appellant,

v.

DANA CORPORATION,
Defendant-Appellant,

and

HALDEX BRAKE PRODUCTION
CORPORATION and HALDEX BRAKE
PRODUCTS AB,
Defendants-Appellants.

NOS.: 01-1357, 01-1376
02-1221, 02-1256

ORDER

AND NOW, this ____ day of November, 2003, upon consideration of the Motion of Securities Industry Association for Leave to File *Amicus Curriae* Brief Pursuant to Fed.R.Civ.P. 29(b), it is here by ORDERED that the Motion is GRANTED. The Clerk of Court is directed to accept for filing the accompanying *Amicus Curriae* Brief of Securities Industry Association in support of defendants-appellants and to deem it filed as of November 3, 2003.

BY THE COURT:

J.

01-1357,-1376, 02-1221, -1256

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

KNORR-BREMSE SYSTEME FUER NUTZFAHRZEUGE GMBH,

Plaintiff-Cross-Appellant,

v.

DANA CORPORATION,

Defendant-Appellant,

and

HALDEX BRAKE PRODUCTION CORPORATION
and HALDEX BRAKE PRODUCTS AB,

Defendants-Appellants.

En Banc Reconsideration

AMICUS CURIAE BRIEF OF SECURITIES INDUSTRY ASSOCIATION
IN SUPPORT OF DEFENDANTS-APPELLANTS

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CERTIFICATE OF INTEREST

Counsel for *Amicus Curiae* Securities Industry Association certifies the following:

1. The full names of every part or *amicus* represented by us are: Securities Industry Association.

2. The names of the real parties in interest represented by us are: See 1 above.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of any of the parties represented by us are: There is no such corporation as listed in paragraph 3.

4. The name of all law firms and the partners or associates that appeared for any of the parties represented by us in the trial court or are expected to appear in this Court are:

- a. Steven L. Friedman and Thomas S. Biemer, Dilworth Paxson LLP.
- b. George R. Kramer, Scott C. Kursman, Securities Industry Association.

Dated: November 3, 2003

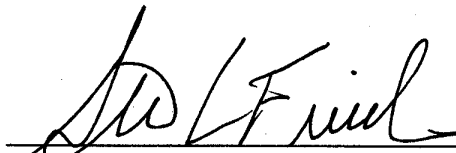

Steven L. Friedman

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STATEMENT OF INTEREST

The Securities Industry Association ("SIA") promotes the shared interests of more than 600 securities firms. Members of the SIA include the nation's leading investment banks, broker-dealers and mutual fund companies. The SIA was established in 1972, through the merger of the Association of Stock Exchange Firms and the Investment Banker's Association. SIA members are active in all United States and foreign markets and all phases of corporate and public finance. The SIA files the instant *amicus* brief pursuant to the accompanying Motion under F.R.A.P. 29(b) and the invitation contained in the Court's September 26, 2003 Order.

SIA's members support and enjoy the rewards of the patent system. That system, however, also imposes cost and inconvenience on members when confronted with an allegation of potential infringement. Because SIA members are exposed to both the benefits and the burdens of patent protection, its members have a continuing interest in insuring that the governing patent law strikes a reasonable balance between the rights of patent holders and alleged infringers. It is SIA's belief that this system is currently out of balance that has led it to file this *amicus* brief.

In particular, SIA believes that the adverse inference rule hinders the ability of persons threatened with a claim of patent infringement to engage in full and

frank discussions with their counsel because of the fear that these privileged communications will have to be disclosed in order to avoid a negative inference in a subsequent willful infringement action. Additionally, the alleged infringer's affirmative duty to obtain a favorable written legal opinion allows patent holders to impose significant expense and burden upon a business merely by providing notice of a patent infringement, even where a substantial defense exists. Accordingly, the SIA submits this *amicus* brief to advocate a negative answer to the first and second questions and an affirmative answer to the fourth question posed in the Court's September 26, 2003 Order.

ARGUMENT

The tort of willful infringement arises from deliberate disregard for the property rights of a patentee. Vulcan Engineering Co. v. Fata Aluminum, Inc., 278 F.3d 1366, 1378 (Fed. Cir. 2002). Willful infringement of a patent subjects the infringer to potential treble damages under 35 U.S.C. § 284. Id. In Underwater Devices, Inc. v. Morrison-Knudsen Co., 717 F.2d 1380, 1389-90 (Fed. Cir. 1983), this Court held that a potential infringer with notice of another's patent rights has an affirmative duty "to seek and obtain competent legal advice before the initiation of any possible infringing activity." This rule is often referred to as the "affirmative duty doctrine." In Kloster Speedsteel AB v. Crucible, Inc., 793 F.3d 1565 (Fed. Cir. 1986), this Court introduced the companion "adverse inference rule," holding that the accused infringer's failure to produce a legal opinion at trial "would warrant the conclusion that it either obtained no advice of counsel or did so and was advised" that its conduct would infringe a valid patent. Id. at 1580

The combined effect of these decisions is to "all but force" alleged infringers to procure a favorable legal opinion from competent counsel for use at trial. See generally Johns Hopkins Univ. v. Cellpro, 160 F.R.D. 30, 34 (D. Del. 1995). These rules effectively tip the balance in infringement actions in favor of the patent holder and undermine the purpose for adopting the rules in the first place. These consequences are particularly pronounced in industries served by SIA's members,

where the use of patented systems or methods are relatively new and the need for full and frank legal counsel is highest.

A. The Growth Of Patented Technology And Processes In The Securities Industry

Prior to 1998, the financial services industry had limited experience with the world of patents as most proprietary business methods were protected as trade secrets. The increased use of patents in the financial services industry followed this Court's decision in State Street Bank & Trust Co. v. Signature Financial Group, Inc., 149 F.3d 1368, 1375 (Fed. Cir. 1998), which rejected the "business method" exception to patentability.

Following State Street, the number of business method patent applications has increased exponentially. See generally Jeffrey P. Duke, *The First Inventors Defense Act (35 U.S.C. § 273): Have Prior User Rights In Patent Law Been Resurrected*, 20 St. Louis U. Pub. L. Rev. 223, 225 n.13 (2001) ("With the State Street decision, the floodgates opened and the PTO was swamped with business method patent applications"). While the decision provides SIA members with increased opportunity to protect their novel business method inventions, it also subjects them to frequent claims that long-practiced methods infringe upon someone else's patent.

Determining the validity of such claims can be considerably more difficult than with traditional types of patents. In fact, the Patent and Trademark Office has

acknowledged that it lacks suitable prior art databases in the area of business method patents. See Matthew D. Powers & Steven C. Carlson, *The Evolution and Impact of the Doctrine of Willful Patent Infringement*, 51 Syracuse L. Rev. 53, 98 (2001) (hereinafter, "Powers & Carlson") (citation omitted). Infringement claims in the business method area also raise difficult issues as to scope and obviousness. Id. As the uncertainty increases, it becomes more difficult – and more costly – for a company to evaluate whether it has a good faith basis to practice a claimed technology. Id. It is with respect to these types of issues that the need for honest and fully informed legal advice is at its highest. Such advice will necessarily require the disclosure of the client's trade secrets and other confidential business information. Additionally, the current state of the law has produced an abuse. In what has become colloquially known as the "37 cent notice" problem, patent holders can set in motion a very costly process for alleged infringers merely by sending a letter.

Stated differently, the affirmative duty and adverse interest rules create a manifestly inequitable situation for accused infringers. Where the recipient determines that a claim of infringement requires the full and frank guidance of outside counsel, the adverse inference rule impedes the client's ability to obtain such advice, thereby undermining the purpose for which the rule was adopted. On the other end of the spectrum, the current doctrine virtually forces a company that

receives any claim of infringement – even one that the infringer believes in good faith to lack merit – to spend significant funds to obtain an exculpatory legal opinion, lest a mistaken conclusion result in a finding of willful infringement.

B. The Adverse Inference Rule Is Not Appropriate In Theory Or Practice.

The affirmative duty and adverse inference doctrines were intended to provide accused infringers with a powerful incentive to conduct thorough and careful investigations as to whether their activities infringe upon valid U.S. patents. See generally Underwater, 717 F.2d at 1389. In practice, however, the doctrines encourage accused infringers to obtain a “showpiece opinion letter” that is intended not to advise the client, but as a defensive tool for trial. Note, *Encouraging Unprofessionalism: the Magic Wand of the Patent Infringement Opinion*, 12 Geo. J. Legal Ethics 593, 594 (1999).

This unintended practical consequence stems from the failure to consider the rule’s chilling impact upon attorney-client communications. See Kloster, 793 F.2d at 1580; accord Note, *Coerced Waiver of the Attorney-Client Privilege for Opinions of Counsel in Patent Litigation*, 80 Minn. L. Rev. 167, 183 (1995) (hereinafter “*Coerced Waiver*”). The attorney-client privilege recognizes that full and frank communications between attorneys and their clients serve the broader public interest. Upjohn Co. v. United States, 444 U.S. 383, 389 (1981). The need for complete and open communications with counsel is particularly evident where

patent infringement claims are asserted against members of the financial services industry. Companies in these fields historically have not patented their systems and methods, but have instead relied upon trade secret protection. Such companies need the assistance and training of patent counsel to recognize potentially patentable business methods, as well as to investigate potential claims of infringement. Peter H. Kang, *A Practitioner's Approach to Strategic Enforcement and Analysis of Business Method Patents in the Post-State Street Era*, 40 IDEA 267, 275 (2000). Obtaining competent advice necessarily requires the client to disclose its confidential trade secrets and business strategies to counsel.

Patent law strives to maintain a "delicate balance" between the rights of patent holders, who rely on the benefits of protection in developing their invention and bringing it forth, and the public, who should be encouraged to pursue innovations and new ideas beyond the inventor's rights. Festo v. Shoketsu Kinzoku Kogyo Kabushiki Co., 122 S. Ct. 1871, 1877 (2002). The adverse inference rule tips the scales too far in favor of the patent holder by forcing infringers to either waive the attorney-client privilege (thereby requiring the public disclosure of these highly confidential communications) or assert the privilege and suffer a prejudicial inference that will almost certainly result in any infringement being found to have been willful. In the words of one commentator: "The Federal Circuit's inference has scared patent practitioners into writing lily-white opinion

letters for their clients, while giving real advice behind closed doors. As a result, attorneys face an ethical quandary and clients do not receive the quality, impartial legal advice they pay for.” *Coerced Waiver* at 195.

Furthermore, the inference that a client asserting the attorney-client or attorney work product privilege is suppressing a negative opinion is not logically justified. There are numerous reasons why a company obtaining legal advice might prefer to keep a favorable legal opinion confidential rather than publicly reveal its attorney-client communications or work product. Among other things, the need to protect confidential communications regarding protected trade secrets, business plans, litigation strategies or legal opinions on related matters (such as the viability of a first inventor defense)¹ might outweigh the probative value of a favorable opinion on infringement. This is especially true if the alleged infringer believes in good faith that it has other substantial defenses.

¹ The first inventor defense provides that it shall be a defense to a claim of infringement of a business method patent that the alleged infringer, acting in good faith, had reduced the subject matter to practice at least one year before the effective date of the patent and used the subject matter before the date of the patent. See 35 U.S.C. § 273(b). The statute does *not* require alleged infringers to obtain the opinion of counsel in order to prevail on such a defense. It would be incongruous to hold that a party asserting a substantial and good faith, but ultimately incorrect, first inventor defense is liable for willfulness for failing to do something the statute does not require.

Courts in other contexts generally have recognized that it is inappropriate to draw an adverse inference from a client's assertion of the attorney-client privilege. See Parker v. Prudential Ins. Co. of America, 900 F.2d 772, 775 (4th Cir. 1990); A.B. Dick Co. v. Marr, 95 F. Supp. 83, 101 (S.D.N.Y. 1950). Accord Deborah Staville Bartel, *Drawing Negative Inferences Upon a Claim of the Attorney-Client Privilege*, 60 Brooklyn L. Rev. 1355, 1400 (1995) (because the attorney-client privilege operates to shield more than unfavorable information, drawing an adverse inference from invocation of the privilege is not logically justified). There is no principled reason for a different result in the context of patent infringement.

C. The Affirmative Duty Rule Imposes Significant, Unjustified Costs On Frequent Recipients Of Infringement Notices

The rights of accused infringers are unfairly prejudiced by the affirmative duty rule, which requires an alleged infringer to undertake significant expense and inconvenience merely because it is notified of another patent. A thorough opinion from competent counsel may cost \$20,000 to \$100,000. Yet, there is considerable doubt as to whether such opinions have any practical significance.

As observed by one commentator "[t]he fact that a party obtained an opinion may only mean that it was litigation-savvy enough to realize the benefits of doing so, not that the party's conduct was proper." Powers & Carlson at 105. See also *Coerced Waiver* at 189-90 (opining that adverse inference "has little practical effect"). Obtaining a legal opinion regarding the validity and potential

infringement of a patent in developing areas of patent law, such as business method and algorithm patents, is even more costly and less certain. Powers & Carlson at 104.

In this regard, it is critical that the issue presented by a willful infringement complaint is *not* whether the patent holder should be compensated for its actual damages, but instead whether the conduct of the infringer is sufficiently culpable to permit a punitive treble damages award. The affirmative duty rule turns the traditional burden for demonstrating willfulness upon its head. Whereas the patent owner once had to *prove* willful infringement, the affirmative duty rule forces an infringer to bear the burden of negating a showing of willfulness. Edwin H. Taylor and Glenn E. Von Tersch, *A Proposal to Shore up the Foundations of Patent Law that the Underwater Line Eroded*, 20 Hastings Comm. & Ent. L.J. 721, 729-30 & n. 44 (1998) (noting that prior to Underwater, courts referred to the need for an “honest doubt” as to validity or infringement without reference to an opinion of counsel). Such result is contrary to the general rule that the imposition of punitive damages must be justified by clear and convincing evidence of willful misconduct.

Furthermore, there is no logical justification for inferring that a costly legal opinion is necessary to demonstrate good faith. Given the rising number of business method patent applications – and the corresponding increase in infringement claims – it is eminently reasonable for a party to prioritize the claims

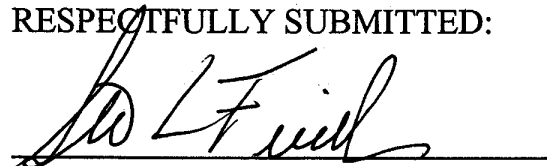
it receives and seek the advise of outside counsel only on those claims it determines to be serious. Where an alleged infringer has a substantial defense to the claim of infringement – and the totality of circumstances indicate that such defense was asserted in good faith – the failure to obtain an expensive legal opinion does not justify the punitive sanction of a willful infringement finding. Rather, advise of counsel should resume its proper status as an affirmative defense. Accordingly, this Court should restore an appropriate balance by holding that a substantial defense to infringement is sufficient to defeat liability for willful infringement, even if no legal advice has been secured.

CONCLUSION

For the foregoing reasons, this Court should hold that:

1. When the attorney-client and/or work product privilege is invoked by a defendant in an infringement action, it is *not* appropriate to draw an adverse inference with respect to willful infringement.
2. When the defendant has not obtained legal advice, it is *not* appropriate to draw an adverse inference with respect to willful infringement; and
3. The existence of a substantial defense to infringement *should* be sufficient to defeat liability for willful infringement even if no legal advice has been secured.

RESPECTFULLY SUBMITTED:



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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 3rd day of November, 2003, I caused two
(2) copies of the foregoing Brief of *Amicus Curiae* Securities Industry
Association to be served, via UPS Overnight, addressed to the following:

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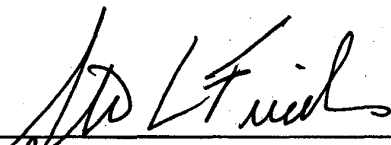
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I also certify that on this 3rd day of November, 2003, I caused the required number of the Brief of *Amicus Curiae* Securities Industry Association to be hand filed at the Office of the Clerk, United States Court of Appeals for the Federal Circuit.



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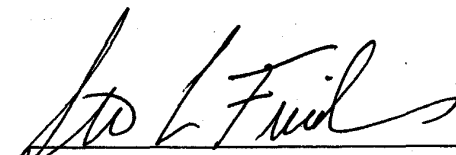
CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and this Court's Order of September 26, 2003.

1. Exclusive of the exempted portions of the brief, as provided in Fed.R.App.P. 32(a)(7)(B)(iii), this brief includes 2,481 words.

2. This brief has been prepared in proportionally spaced typeface Microsoft Word '97 in 14 point Times New Roman font. As permitted by Fed.R.App.P. 32(a)(7)(C), the undersigned has relied upon the word count of this word-processing system in preparing this certificate.

Dated: November 3, 2003


Steven L. Friedman