

No. 12-35352

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

MICROSOFT CORPORATION, a Washington Corporation,

Plaintiff-Appellee,

v.

MOTOROLA, INC., MOTOROLA MOBILITY, INC., and GENERAL
INSTRUMENT CORPORATION,

Defendants-Appellants.

*On Appeal From The United States District Court
For The Western District Of Washington At Seattle*

PETITION FOR REHEARING AND REHEARING EN BANC

Date of Decision: September 28, 2012

Judges: Wallace, Thomas, and Berzon

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RULE 35(b) STATEMENT

The panel decision in *Microsoft Corp. v. Motorola, Inc.*, --F.3d--, 2012 WL 4477215 (9th Cir. Sept. 28 2012) (Berzon, J., joined by Wallace and Thomas, JJ.) (Appendix A), warrants *en banc* review because its approval of the anti-suit injunction in this case conflicts with decisions of this Court and of other circuits, and also raises a question of exceptional importance regarding the ability of U.S. courts to interfere with the orderly progression of parallel legal proceedings in other countries, particularly as concerns enforcement of their own patents within their own sovereign borders.

The panel held that the United States District Court for the Western District of Washington (Robart, J.) did not abuse its discretion in issuing the first-ever anti-suit injunction barring enforcement of a foreign nation's judgment awarding an injunction against patent infringement within that nation's borders under that nation's laws. This decision conflicts with the framework established in the Court's prior anti-suit injunction decisions, namely, *Applied Medical Distribution Corp. v. Surgical Co. BV*, 587 F.3d 909 (9th Cir. 2009); *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984 (9th Cir. 2006); and *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852 (9th Cir. 1981). *First*, rather than relying upon the factors this Court has long said replace the likelihood of success inquiry in the context of anti-suit injunctions, the panel undertook a

“ballpark, tentative assessment” of the merits, endorsing the view that a patent holder’s obligation to license standard-essential patents on “reasonable and non-discriminatory” (“RAND”) terms precludes injunctive relief for patent infringement anywhere in the world, even in other nations that regard such injunctions as lawful and appropriate. *Second*, the panel found the anti-suit injunction here serves U.S. interests even though the parties had not contracted for any forum-selection clause requiring decision in any U.S. court, much less in the Western District of Washington. *Third*, the panel treated concerns of comity for a foreign judicial system with unprecedented disregard, despite the fact that patents and patent enforcement are singularly territorial.

The decision also places this Circuit in conflict with sister circuits. In contrast to other courts of appeals that require anti-suit injunctions to issue only sparingly, this Court’s four primary decisions now favor liberal issuance of anti-suit injunctions: in *Gallo* and *Applied Medical*, this Court reversed district courts for failing to issue one; in *Seattle Totems* and this case, it affirmed courts for issuing one. The panel’s decision expands upon an approach to anti-suit injunctions that other circuits have deemed “liberal,” *see, e.g., Quak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 17 (1st Cir. 2004); *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products, N.V.*, 310 F.3d 118, 126 n.5 (3d Cir. 2002), allowing anti-suit injunctions to issue in the normal

course instead of letting parallel proceedings continue in different countries. Under the panel’s newly elevated deference, nearly every decision *issuing* an anti-suit injunction seems destined to withstand abuse of discretion review; only where a district court does *not* issue an anti-suit injunction do this Court’s precedents point to meaningful review and reversal. *En banc* review in this case would permit the Circuit to examine whether its courts should become a magnet for parties seeking anti-suit injunctions they could obtain in no other circuit.

For these reasons, Appellants Motorola Mobility, Inc. and General Instrument, Corp. (“Motorola”) respectfully request rehearing *en banc*. *See infra* Part I. In the alternative, Motorola respectfully requests rehearing by the panel. *See infra* Part II.

FACTUAL STATEMENT

A. Background

Microsoft and Motorola are engaged in ongoing litigation over licensing of Motorola’s “standard-essential patents,” which are patents that facilitate compatibility between products manufactured by different companies. Non-governmental standards-setting organizations establish technical standards and members of these organizations that hold essential patents generally must agree to license them on RAND terms. The actual RAND terms are left to negotiations between the parties.

The dispute here concerns two essential patents that Motorola holds and Microsoft uses. Motorola sent Microsoft letters in October 2010, offering to license two of its patent portfolios (ER 375-96, 398-421)¹ on standard terms. Three weeks later, without making any counteroffer or engaging in good-faith negotiations, Microsoft sued Motorola, asserting breach of contract and related claims for Motorola's alleged breach of a commitment to license at RAND rates. Microsoft's complaint seeks a declaration that it was entitled to licensing of Motorola's essential patents and that Motorola's opening offer was not RAND. ER 457-58, 492.

As Microsoft continued to sell products infringing Motorola's patents absent any license, Motorola sued Microsoft in July 2011 in Germany—its second largest market after the United States—for infringing certain of Motorola's German patents. ER 335 (Redacted Declaration of Dr. Marcus Grosch, No. 10-1823, ECF No. 245, at ¶ 14 (W.D. Wash. Apr. 6, 2012) (“Grosch Decl.”)). Motorola's German suit pertains only to the German versions of its patents and seeks relief only in the German market. No cause of action would be available for Motorola to enforce its German patents in the United States.

¹ Citations to “ER” refer to the Excerpts of Record filed in connection with the merits briefing.

Germany has its own “*Orange Book*” procedures for resolving RAND disputes, whereby an infringer can avoid an injunction by making a binding offer on RAND terms and paying the RAND royalty into an escrow account. ER 330-35 (Grosch Decl. ¶¶ 3-13). If a German court determines the patent holder could not reject the infringer’s offer without violating RAND assurances, the patent holder’s action for injunctive relief is dismissed. If the patent holder accepts the offer, a license agreement is established, again precluding injunctive relief. ER 332-33 (Grosch Decl. ¶¶ 7-8). German law also allows the infringer to commit to a licensing rate to be set by the patent holder, subject to review by the German court. ER 332-33 (Grosch Decl. ¶ 8).

Microsoft declined to avail itself of the latter procedure, instead proposing a licensing rate for Motorola’s German patents, and the German court determined Motorola was within its rights in rejecting the rate as too low. ER 336-39 (Grosch Decl. ¶¶ 20, 26); ER 259, 261 (translation of German decision). The German injunction issued on May 2, 2012, leaving Motorola to take additional steps to enforce it.

B. The District Court Decision

On March 28, 2012, eight months into proceedings in Germany and in anticipation of the German court’s impending unfavorable ruling, Microsoft moved in the Seattle district court to block Motorola from enforcing any injunction in

Germany against Microsoft's continuing infringement of Motorola's German patents. Mot. for TRO and Prelim. Inj., No. 10-1823, ECF No. 210 (W.D. Wash. Mar. 28, 2012). Microsoft argued that the German court's anticipated injunction would be "inconsistent with what will ultimately be Microsoft's worldwide license." *Id.* at 13.

On April 11, 2012, the district court granted a temporary restraining order prohibiting Motorola from enforcing any German injunction. ER 29-44. On May 14, 2012, the district court converted its TRO into a preliminary injunction, enjoining Motorola from enforcing the German injunction "until th[e district] court is able to determine whether injunctive relief is an appropriate remedy." ER 25.

In the May 14 opinion, the district court found that the parties are the same in each action (as conceded), ER 13, and that the U.S. litigation would be dispositive of the German litigation, ER 17. The district court next found that allowing the German litigation to proceed would frustrate a "policy" of "avoiding inconsistent judgments," and expressed concern that Motorola was "forum shopping," stating that Motorola's German suit "heightened" its concerns over "duplicative and vexatious litigation." ER 18. Last, the district court found that the impact of the proposed anti-suit injunction on international comity would be tolerable. ER 19-20.

C. The Panel Decision

Motorola appealed from the anti-suit injunction. Following expedited briefing and oral argument, the panel (Wallace, Thomas, and Berzon, JJ.) on September 28, 2012 issued a 36-page opinion (Berzon, J.) for publication. App. A. It affirmed the issuance of the anti-suit injunction, emphasizing its heavy deference to the district court at each turn.

The panel decision first set out the standard for analyzing issuance of an anti-suit injunction. This standard had been established, modified, and clarified in three Ninth Circuit opinions over the past three decades, *all* of which came out in *favor* of anti-suit injunctions, affirming where one had issued and reversing where two had not: *Applied Medical*, 587 F.3d at 911 (reversing for failure to issue anti-suit injunction); *Gallo*, 446 F.3d at 986-87 (same); *Seattle Totems*, 652 F.2d at 856 (affirming issuance of anti-suit injunction). The panel determined that these decisions set forth the following test for whether an anti-suit injunction may issue:

First, we determine whether or not the parties and the issues are the same in both the domestic and foreign actions, and whether or not the first action is dispositive of the action to be enjoined. Second, we determine whether at least one of the so-called “*Unterweser* factors” applies. Finally, we assess whether the injunction’s impact on comity is tolerable.

App. A at 16-17 (citations and quotations omitted).² The panel found that the district court, in applying this test, applied the correct legal standard. *Id.* at 18.

In reviewing the district court's analysis of these factors, the panel first examined whether the parties are the same (which was not disputed) and whether the issues are the same such that the Washington action would be dispositive of the German action. But the panel made new law in determining whether the issues are "the same," undertaking what it termed "a ballpark, tentative assessment of the merits of the contract dispute," which it perceived as "intrinsically bound up with the threshold anti-suit injunction inquiry." *Id.* at 22. The panel acknowledged the lack of precedent for this approach: "Ordinarily, we do not assess at all the likelihood of success on the merits in a case like this, because when a preliminary injunction is also a foreign anti-suit injunction, the likelihood-of-success aspect of the traditional preliminary injunction test is replaced by the *Gallo* test." *Id.* at 22. In nonetheless making its "ballpark, tentative assessment" of the merits, and determining that Motorola's RAND licensing obligations "at least arguably" preclude it from seeking any injunctions worldwide, *id.* at 23, the panel assumed conclusions not yet reached in the district court, namely that Motorola's

² The *Unterweser* factors refer to *In re Unterweser Reederei GMBH*, 428 F.2d 888 (5th Cir. 1970), *aff'd on reh'g*, 446 F.2d 907 (5th Cir. 1971) (en banc) (per curiam), *rev'd on other grounds sub nom. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

essentiality declaration creates a contract that “governs in some way what actions Motorola may take to enforce its ITU standard-essential patents,” *id.* at 23, and that “it could well be that retrospective payment ... not an injunction ... is the only remedy consistent with the contractual commitment to license users of ITU standard-essential patents,” *id.* at 26.

Turning to the second step in the anti-suit injunction inquiry, the panel found the district court did not abuse its discretion in concluding that Motorola’s German litigation was vexatious and compromised the court’s ability to fashion appropriate relief. *Id.* at 27-28.

The panel finally turned to the impact of the injunction on comity, emphasizing that the panel need only “estimate whether any such interference is so great as to be intolerable.” *Id.* at 29. Again, it found that the district court did not abuse its discretion in issuing the injunction because it raises no public international dispute and is “no broader than necessary.” *Id.* at 32 (quotation omitted). The panel concluded that “the mere fact that different jurisdictions answer the same legal question differently does not, without more, generate an intolerable comity problem.” *Id.* at 33. Turning on its head the presumption that parallel proceedings may continue in the ordinary course, the panel determined that deference to Germany’s enforcement of its own patents in its own territory was not due because, otherwise, “[p]arallel proceedings in different jurisdictions would

have to be permitted to proceed any time the two jurisdictions had different rules of law, which is almost always the case.” *Id.* at 33. Thus, the panel rejected Motorola’s argument that the anti-suit injunction bars it from enforcing its German patents in the only forum possible, noting that, “depending on the outcome of the district court litigation, Motorola may well ultimately be able to enforce the German injunction.” *Id.* at 34-35.

ARGUMENT

I. EN BANC REVIEW IS WARRANTED BECAUSE THE PANEL DECISION CONFLICTS WITH THIS COURT’S PRECEDENTS GOVERNING ISSUANCE OF ANTI-SUIT INJUNCTIONS AS WELL AS WITH THOSE OF SISTER CIRCUITS

In upholding an unprecedented anti-suit injunction that prevents Motorola from enforcing an injunction awarded by a German court concerning German patents within Germany, the panel decision departed from this Court’s precedents and those of other circuits. The panel decision recites in theory yet abdicates in practice the principle that such injunctions should issue only sparingly. Unless reviewed by this Court *en banc*, the panel’s decision will make this Circuit an outlier in the law of anti-suit injunctions, signaling that such injunctions will issue freely, whether by reversing district courts that declined to issue one (in *Gallo* and *Applied Medical*) or by affirming courts that did (in *Seattle Totems* and here). Moreover, the panel has for the first time endorsed an anti-suit injunction that blocks a foreign court’s judgment governing enforcement of its own patents within

its own borders. The panel has held that a U.S. court's view that an injunction cannot issue on a standard-essential patent properly trumps the contrary view of a foreign court as to foreign patents. By paving a new path favoring issuance of anti-suit injunctions in the important and unsettled area of RAND licensing of standard-essential patents, the panel has invited litigants to bring global licensing disputes in U.S. courts to shut down efforts to enforce foreign standard-essential patents in foreign courts. *En banc* review is warranted.

A. The Panel Decision Alters The Standards Applicable To Anti-Suit Injunctions In This Circuit

The panel decision conflicts in three important respects with prior holdings of this Court applying the established factors. *First*, rather than relying upon the factors that this Court has long said replace the likelihood of success inquiry for anti-suit injunctions, the panel undertook a “ballpark, tentative assessment” of the merits, endorsing the view—as yet to be adopted by any federal circuit—that RAND obligations preclude worldwide injunctive relief for patent infringement, even in other nations that deem such injunctions lawful and appropriate in circumstances like those here. *Second*, the panel found that special U.S. interests justified issuance of an anti-suit injunction even though the parties had not contracted for any forum-selection clause. *Third*, the panel treated concerns of comity for a foreign judicial system with unprecedented disregard, despite the fact that patents and patent enforcement are singularly territorial and that Microsoft

never availed itself of the German *Orange Book* procedure that would have avoided the German injunction.

1. Noting that “[t]he suitability of an anti-suit injunction involves different considerations from the suitability of other preliminary injunctions,” *Gallo*, 446 F.3d at 990, this Court hitherto substituted a three-step test for the likelihood of success inquiry. Here, however, the panel deemed the merits “intrinsicly bound up with the threshold anti-suit injunction inquiry.” App. A at 22. Yet the panel’s unprecedented “ballpark, tentative assessment of the merits” threatens the worst of all worlds, falling short of the traditional merits inquiry while creating the risk of predetermining issues that remain undecided in the district court. Here, for example, the panel decided that enforcing a German injunction against Microsoft’s infringement would impede the district court’s ability to adjudicate global RAND terms, even though it remains to be decided whether a single offer letter can breach RAND obligations or whether injunctive relief remains unavailable even if a recalcitrant infringer refuses to take a license on any terms.

The panel’s *sui generis* approach to merits review at this preliminary stage fortifies the district court’s controversial approach to adjudicating standard-essential patent disputes without benefit of appropriate appellate review on a full record. It also sows confusion going forward as to whether and how this new merits standard might apply. If a panel reaches the legal merits in this context, it

should either squarely decide the merits or else apply the traditional “likelihood of success” test as readily understood and applied; the new standard fashioned by this panel warrants *en banc* review.

2. In addition, the panel decision disregards this Court’s precedents holding that a U.S. court should avoid interfering with parallel proceedings abroad unless strong U.S. interests are at stake, as they are when a foreign suit thwarts the parties’ express agreement to litigate in a U.S. forum. Such limitation comports with the principle that “the power [to issue anti-suit injunctions] should be used sparingly.” *Gallo*, 446 F.3d at 989 (quoting *Seattle Totems*, 652 F.2d at 855); *see also Applied Medical*, 587 F.3d at 920. Where parties have negotiated a U.S. forum in their contract, “[a]n anti-suit injunction is the only way [a party] can effectively enforce the forum selection clause.” *Gallo*, 446 F.3d at 993.

The mere fact that U.S. law differs from foreign law is no license for a U.S. court to play trump via an anti-suit injunction; rather, such differences are routine in parallel litigation, particularly in the intellectual property context. The panel nonetheless reasoned that differences in U.S. law warrant elevating the U.S. forum over foreign tribunals, effectively inviting any party preferring U.S. law to invoke, on that basis alone, a special U.S. interest supporting an anti-suit injunction. Such an approach is misconceived. Even assuming U.S. law were properly understood to preclude injunctions for standard-essential patents, no reason exists for the U.S.

rule to prevail over Germany's contrary rule permitting injunctions. Unlike other cases in which this Court endorsed anti-suit injunctions, there is neither a forum-selection clause specifying a U.S. forum nor any particular reason why the claimed interests of the U.S. court should trump those of a German court in enforcing German patents declared essential to worldwide standards.

3. Finally, the panel's decision lowers this Court's previous bar against offense to international comity, which has long assumed that parallel proceedings should be the norm. *See Neuchatel Swiss General Ins. Co. v. Lufthansa Airlines*, 925 F.2d 1193, 1995 (9th Cir. 1991) (reversing district court stay of proceedings in favor of Swiss proceedings because both actions should proceed in parallel). A U.S. court should not disturb proceedings in a foreign court absent some special justification, lest international comity be harmed. Whereas this Court's opinion in *Gallo* calls for "detailed analysis of international comity," 446 F.3d at 990, the panel's decision relaxes this standard considerably.

The offense to comity is especially great here because patent law is singularly national; the laws of each country do not have extraterritorial effect. *See, e.g., Subafilms, Ltd. v. MGM-Pathe Commc'ns Co.*, 24 F.3d 1088, 1093 (9th Cir. 1994) (*en banc*) (explaining that intellectual property rights are not extraterritorial); *see also Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455 (2007) ("Foreign conduct is [generally] the domain of foreign law, [which] ... may

embody different policy judgments about the relative rights of inventors, competitors, and the public in patented inventions.”) (quotation omitted). Anti-suit injunctions have routinely been rejected as improper in the intellectual property context given these particular comity concerns. *See Zynga, Inc. v. Vostu USA, Inc.*, 816 F. Supp. 2d 824, 829 (N.D. Cal. 2011) (“[F]ederal courts around the country have considered anti-suit injunctions of parallel proceedings in a variety [of] intellectual property contexts and have uniformly concluded that such injunctions are improper.”); Daniel Tan, *Anti-Suit Injunctions and the Vexing Problem of Comity*, 45 VA. J. INT’L L. 283, 337 (2005) (“In such cases, the United States courts should be slow to issue anti-suit injunctions to enjoin foreign proceedings.”).

The affront to international comity is likewise especially remarkable here because the panel’s decision endorses flagrant disregard for German law and German court procedures that Microsoft could have pursued to prevent the enforcement of the German injunction. Microsoft could have sought a stay from the German court of its judgment, but chose not to. Nor did Microsoft avail itself of the German court’s *Orange Book* procedures by which it could have obtained licensing on RAND terms and avoided entry of an injunction. Any “detailed analysis of international comity” would have required consideration of these strategic choices on Microsoft’s part before affronting the courts and law of a

foreign sovereign. *Cf. Gau Shan Co., Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992) (anti-suit injunction risks “convey[ing] the message, intended or not, that the [U.S.] court has so little confidence in the [German] court’s ability to adjudicate a given dispute fairly and efficiently that it is unwilling even to allow the possibility”).

Rehearing *en banc* is needed to clarify this Court’s framework for allowing anti-suit injunctions.

B. The Panel Decision Conflicts With Other Circuits’ Standards For Reviewing Anti-Suit Injunctions

The panel decision also conflicts with prior holdings of other circuits, deepening an inter-circuit conflict. Other circuits give comity considerations far more careful attention than did the panel, reserving anti-suit injunctions for truly rare instances and presuming that foreign courts may proceed in parallel with U.S. courts, notwithstanding overlapping interests and issues. Thus, they consistently hold that such injunctions should be confined to “the rare occasions when needed to protect jurisdiction or an important public policy.” *Stonington Partners, Inc.*, 310 F.3d at 127 (quotation omitted); *see Gau Shan Co.*, 956 F.2d at 1354 (“Comity dictates that foreign antisuit injunctions be issued sparingly and only in the rarest of cases.”); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987) (similar); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731

F.2d 909, 927 (D.C. Cir. 1984) (similar); *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577, 578 (1st Cir. 1969) (similar).

The panel decision brings into sharp relief that this Court will deem resulting offenses to comity tolerable where other circuits would not. *Quaak*, 361 F.3d at 17 (noting that the Ninth Circuit is in the minority in championing a liberal approach that gives little weight to comity concerns); *Stonington Partners, Inc.*, 310 F.3d at 126 n.5 (same). Sister circuits often point to comity concerns as grounds for denying an anti-suit injunction. *See, e.g., Quaak*, 361 F.3d at 17 (“deem[ing] international comity an important integer”); *Laker Airways*, 731 F.2d at 927 (anti-suit injunctions should issue “only in the most compelling circumstances”).

Other circuits also agree on the well-established principle that “duplication of parties and issues alone is not sufficient to justify issuance of an anti-suit injunction.” *Laker Airways Ltd.*, 731 F.2d at 928. “Since parallel proceedings are ordinarily tolerable, the initiation before a foreign court of a suit concerning the same parties and issues as a suit already pending in a United States court does not, without more, justify enjoining a party from proceeding in the foreign forum.” *China Trade*, 837 F.2d at 36.

Rehearing *en banc* would enable this Court to decide whether to harmonize its precedents with those of sister circuits.

II. IN THE ALTERNATIVE, THE PANEL SHOULD GRANT REHEARING

If rehearing *en banc* is denied, the panel should grant rehearing because the panel misconstrued the scope of Motorola's RAND commitment. In making its "ballpark, tentative assessment" of the merits, the panel concluded that the essentiality declaration "at least arguably" precludes patent holders from seeking injunctions, App. A at 23, and that "injunctive relief against infringement is arguably a remedy inconsistent with the licensing commitment," *id.* at 25.

These determinations that Motorola gave up its rights to enforce standard-essential patents are erroneous but in any event premature. A declaration of essentiality includes "no waiver of claims for injunctive relief," ER 221 (translation of German decision), and the district court has not ruled otherwise. *See* ER 25 (extending injunction "until th[e district] court is able to determine whether injunctive relief is an appropriate remedy"). The declaration contains the disclaimer that it "does not represent an actual grant of a license," and that "[n]egotiations of licenses are left to the parties concerned." ER 353-54 (ITU declaration).

In this light, the panel's statement that "Motorola made promises to the ITU to license its standard-essential patents worldwide to all comers," App. A at 24, overstates matters. Motorola agreed to license its patents only to those "comers" willing to negotiate and pay a RAND rate. To disallow injunctive relief against a

would-be licensee that has yet to negotiate and pay in good faith, as the panel seemingly commends, “would be handing the patent owner over to every dishonest licensee for whom there would no longer be any incentive to conduct licensing negotiations.” ER 232 (translation of German decision).

The law on this point is unsettled and controversial, and no court of appeals has yet to tackle it. If this Court is to do so—and at the expense of German law—it should have the benefit of full merits briefing and analysis. The panel should grant rehearing to amend its opinion accordingly.

CONCLUSION

Motorola respectfully requests that its petition be granted.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(c)(2) and Ninth Circuit Rule 40-1(a), the foregoing Petition For Rehearing And Rehearing En Banc is proportionately spaced, has a typeface of 14 points and contains 4,193 words, which is fewer than the 4,200 words permitted.

s/ Kathleen M. Sullivan
Kathleen M. Sullivan

CERTIFICATE OF SERVICE

I, Kathleen M. Sullivan, a member of the Bar of this Court, hereby certify that on October 12, 2012, I electronically filed the foregoing Petition For Rehearing And Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kathleen M. Sullivan
Kathleen M. Sullivan