American Bar Association
www.supremecourtpreview.org

No. 12-786

In the Supreme Court of the United States

LIMELIGHT NETWORKS, INC.,
Petitioner,
v.

AKAMAI TECHNOLOGIES, INC. AND THE MASSACHUSETTS INSTITUTE OF TECHNOLOGY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* CARGILL, INCORPORATED; THE COCA-COLA COMPANY; GENERAL MILLS, INC.; AND HORMEL FOODS CORPORATION IN SUPPORT OF PETITIONER LIMELIGHT NETWORKS, INC.

Joel D. Sayres
Natalie Hanlon-Leh
FAEGRE BAKER DANIELS LLP
3200 Wells Fargo Center
1700 Lincoln Street
Denver, CO 80203
(303) 607-3500

Calvin L. Litsey
FAEGRE BAKER DANIELS LLP
1950 University Ave.
Suite 450
East Palo Alto, CA 94303
(650) 324-6700

Aaron D. Van Oort
Counsel of Record
Timothy E. Grimsrud
Eva B. Stensvad
Nicholas J. Nelson
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Center
90 S. Seventh Street
Minneapolis, MN 55402
(612) 766-7000
aaron.vanoort@FaegreBD.com

Counsel for Amici Curiae Cargill, Incorporated; The Coca-Cola Company; General Mills, Inc.; and Hormel Foods Corporation

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULE

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici are agriculture, food, and beverage companies that are members of complex supply chains formed of numerous, independent actors. *Amici* all have patents, and all respect the patent rights of others. Yet all are deeply concerned about the adverse consequences of the ruling below. By allowing induced-infringement liability to be imposed on one company for the combined steps of other, independent actors, the decision below dramatically and unjustifiably increases the litigation costs for any company that participates in a complex supply chain, and thus increases the costs of goods provided through such chains.

Amici are submitting this brief to make it clear that the negative consequences of the decision below are not limited to the information-technology context in which it arose. To the contrary, those consequences extend to all industries that depend on supply chains—which is to say, nearly all industries in the modern economy. Indeed, the negative consequences may be greatest in industries that have existed the longest, such as the food and beverage industry to which *amici* belong. In those industries, supply-chain methods have long been performed by multiple, separate actors along the chain, employing processes that are commonly used but largely undocumented in publications. Now, however, with the new ability provided by the decision below to assert inducement liability for divided infringement,

[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation and submission of this brief. All parties consent to its filing.

patentees will have the incentive to assert multi-actor method claims against supply-chain participants, and claimants will have the incentive to submit new patent applications asserting the combination of methods that have long been practiced by separate participants in the chain. Because there is little prior art directed to methods that work across myriad elements of a complex supply chain, the United States Patent & Trademark Office ("USPTO") will be hard-pressed to reject claims even for long-used, obvious methods, and supply-chain participants will face the prospect of lengthy, fact-intensive litigation to defeat even meritless claims. These serious, negative consequences—and their likely adverse effect on food and beverage prices for consumers—prompted *amici* to submit this brief.

Amicus Cargill, Incorporated, is an international producer and marketer of agricultural, financial, and industrial products and services. Cargill's operations and services include buying, processing, and distributing grain, oilseeds, and other commodities to makers of food and animal nutrition products; providing food and beverage manufacturers, foodservice companies, and retailers with high-quality ingredients, meat and poultry products, and health-promoting ingredient systems; and serving industrial users of energy, salt, starch, and steel products. Founded in 1865, Cargill employs 142,000 people in 67 countries. Cargill helps customers succeed through collaboration and innovation, and is committed to sharing its global knowledge and experience to help meet economic, environmental, and social challenges.

Amicus The Coca-Cola Company is the world's largest beverage company. Founded in 1886, The Coca-Cola Company makes its branded beverage products available to consumers in over 200 countries through a sophisticated network of Company-owned as well as independent bottling and distribution partners which together employ over 700,000 people. Along with its partners, it manufactures, markets, and distributes over 500 nonalcoholic beverage brands, including Coca-Cola, Sprite, Fanta, and Minute Maid. In addition to being the largest sparkling beverage company, it is also the world's largest juice company as well as a leading producer of water, tea, coffee, and energy and sports drinks. Over 1.8 billion servings of The Coca-Cola Company's branded products are consumed each day.

Amicus General Mills, Inc. is one of the world's leading food companies. It manufacturers and markets consumer foods sold through retail stores under such brands as Cheerios, Nature Valley, Pillsbury, Betty Crocker, Hamburger Helper, Old El Paso, Yoplait, and Green Giant. General Mills' product categories in the United States include ready-to-eat cereals, refrigerated yogurts, ready-to-serve soups, dry dinners, shelf stable and frozen vegetables, refrigerated and frozen dough products, dessert and baking mixes, frozen pizza and pizza snacks, grain, fruit and savory snacks, and a wide variety of organic products, including granola bars, cereal, and soup. The principal raw materials that General Mills uses are grains (wheat, oats, and corn), dairy products, vegetables, fruits, meats, sugar, vegetable oils, and other agricultural products. General Mills' ability to acquire raw materials, work with contract manufactures, and make, move, and sell products is critical to its success.

Amicus Hormel Foods Corporation is a multinational manufacturer and marketer of consumer-branded food and meat products, many of which are among the best known and trusted in the food industry. Hormel Foods products are sold under many well-established brands that include SPAM canned ham, Hormel Black Label bacon, Dinty Moore stew, Jennie-O turkey products, and SKIPPY peanut butter. Hormel Foods enjoys a strong reputation among consumers, retail grocers, foodservice and industrial customers for producing products highly regarded for quality, taste, nutrition, convenience and value. A multifaceted supply chain that includes suppliers for hogs, turkeys, ingredients, packaging materials, and transportation is critical to Hormel Foods' operations.

SUMMARY OF ARGUMENT

If the decision below is not reversed, it will have serious, adverse consequences far beyond the information-technology context in which it arose that will extend to all companies that, like *amici*, rely on complex supply chains to supply essential products to American consumers.

Until the decision below, it had been settled law that direct liability for infringement of a method claim—and hence indirect liability as well—could be found only when all steps were performed by a single entity or someone acting under that entity's direction or control. The decision below radically departs from this established law by allowing induced-infringement liability to be imposed on one company based on the combined steps of multiple, independent actors.

By creating a brand new category of liability for divided infringement, the decision below will greatly exacerbate the already severe problem caused by infringement suits brought by existing so-called "patent trolls." The decision below dramatically expands the potential for abusive litigation by exposing supply-chain participants to induced-infringement claims based on the actions of other companies they do not control and that, until notice from the patent troll, they may not have had any knowledge of. *Amici* each rely on robust multi-actor supply chains to efficiently deliver food and beverages to American consumers. Each of them, under the decision below, will be exposed to costly new suits brought by patent trolls.

Once an induced-infringement claim is brought against a supply-chain participant based on a multi-actor method claim, it will not be easily disposed of, either on summary judgment or on second review of the patent in the USPTO, because the prior art for these types of method claims exists largely in the practices of industry participants rather than in patents or publications. In addition, the necessary proof to establish the obviousness of a multi-step method claim may require discovery from multiple companies up and down a supply chain—from growers to processors to packagers to retailers—making the litigation exceedingly expensive even if the defense is ultimately successful. The USPTO, even more than private companies in litigation, will be hard-pressed to weed out unpatentable claims covering multi-actor steps along a supply chain because it lacks the resources and discovery tools to find the relevant prior art. Coupled with the powerful incentives the decision below provides litigants and patent monetizers to seek such claims, the decision below will lead to a flood of patents, further increasing the costs of baseless litigation that *amici* and others in their industry experience.

If there is to be an expansion of the scope of liability for induced infringement, it should therefore come from Congress, which is better equipped than the courts to determine whether such an expansion is needed and better able to mitigate the serious negative consequences of expanded liability by cabining it within specific limits and requirements of proof.

Amici therefore respectfully ask this Court to reverse the decision below with respect to induced infringement.

ARGUMENT

I. BY ALLOWING INDUCED-INFRINGEMENT LIABILITY BASED ON THE COMBINED STEPS OF MULTIPLE ACTORS, THE DECISION BELOW WILL IMPOSE SIGNIFICANT, UNJUSTIFIED COSTS ON INDUSTRIES THAT RELY ON COMPLEX SUPPLY CHAINS

Until the decision below, it had been settled law that direct liability for infringement of a method claim—and hence indirect liability as well—could be found only when all steps were performed by a single entity or someone acting under that entity's direction or control. *See, e.g.*, *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318, 1328 (Fed. Cir. 2008). This settled rule is founded on the language of 35 U.S.C. §§ 271(a), 271(b), and 281, and it was confirmed in *Aro Manufacturing Co. v. Convertible Top Replacement Co.*, in which this Court noted that "it is settled that if there is no *direct* infringement of a patent there can be no *contributory* infringement," because contributory infringement depends upon the definition of infringement under Section 271(a). 365 U.S. 336, 341 (1961).

The decision below radically departs from this established law by allowing induced-infringement liability to be imposed on one company based on the combined steps of multiple, independent actors. Under the Federal Circuit's new rule, "[i]f a party has knowingly induced others to commit the acts necessary to infringe the plaintiff's patent and those others commit those acts," the party can be held liable for induced infringement under § 271(b). Pet. App. 9a. Under that court's definition of inducement, moreover, "[i]t is enough that the inducer 'cause[s], urge[s], encourage[s], or aid[s]' the infringing conduct and that the induced conduct is carried out." *Id.* at 8a (all but first alteration in original) (quoting *Arris Grp., Inc. v. British Telecomms. PLC*, 639 F.3d 1368, 1379 n.13 (Fed. Cir. 2011)). As recognized by the dissent below, the combined effects of these two rules dramatically expand the scope of infringement liability beyond what has ever previously existed. *See* Pet. App. 49a (Newman, J., dissenting) ("[T]he new breadth with which the court infuses the concept [of inducement] is an unwarranted and unsupported enlargement of the law.").

If the decision below is not reversed, its negative consequences will extend far beyond the information-technology context in which it arose to affect all industries that rely on complex supply chains—which is to say, nearly all industries in the modern United States economy. Industries that have existed the longest, such as the food and beverage industry to which *amici* belong, may well suffer the greatest adverse effects of the decision. To make these consequences clear, *amici* address the application of the decision's new divided-infringement rule to complex supply chains, the negative litigation consequences of that rule for supply-chain participants, and the incentive the rule will create for a flood of valueless new patent claims.

A. The New Liability for Divided Infringement Created by the Decision Below Will Affect the Complex Supply Chains of Developed Industries Far Outside the Information-Technology Context

Petitioner Limelight Networks, Inc., focuses on the consequences of the decision below for the information-technology industry in which it participates. But it is clear to *amici* that those consequences will extend far beyond the information-technology context to affect all industries that rely on complex supply chains, including the food and beverage industry in which *amici* participate. Specifically, by allowing induced-infringement liability to be imposed on one company for the combined steps of other, independent actors, the decision below will expose companies that participate in a complex supply chain to litigation based on the actions of multiple other participants in the chain—even though the target company has no control over those other participants.

The food and beverage industry to which *amici* belong illustrates clearly how the modern economy relies on complex supply chains to supply core food staples and household goods to American consumers. One of the overriding features of the modern agricultural economy is "the evolution of integrated supply chains linking producers and consumers." Linus U. Opara, *Traceability In Agriculture and Food Supply Chain: A Review of Basic Concepts, Technological Implications, and Future Prospects*, J. Food, Agric. & Env't Vol.1(1): 101, 101 (2003). As described in a research report by the United States Department of Agriculture ("USDA"), the domestic food supply chain often contains links for growers, processors, packagers, manufacturers and contract manufacturers, distributors, transporters, retailers, and others. Patrick Canning *et al.*, *Energy Use in the U.S. Food System*, USDA Economic Research Service, Economic Research Report No. 94 (March 2010), at 19-20. A standard agricultural supply chain also can involve inputs from other actors, including storage facilities, branders, and restaurants. *See, e.g.*, Elise Golan *et al.*, *Traceability in the U.S. Food Supply: Economic Theory and Industry Studies*, USDA Economic Research Service, Agricultural Economic Report No. 830 (March 2004), at 22 ("With the exception of a small amount of on-farm feed use (mainly corn), most grains and oilseeds are marketed through a supply chain that includes country elevators, sub-terminal elevators, processors, river elevators, export port elevators, and retailers.").

The food and beverage industry's use of specialized companies acting within robust supply chains is critical to supporting the country's food network and efficiently delivering staples to consumers. The speed and efficiency provided by such chains have helped to drive the considerable economic output of agriculture and related industries in the United States, which in 2011, the most recent year for which data is available, contributed $742.6 billion to the U.S. gross domestic product. *See* USDA Economic Research Service, *Value added to GDP by agriculture and related industries, 2004-11*, http://www.ers.usda.gov/data-products/chart-gallery/detail.aspx?chartId=40037; *see also* USDA Economic Research Service, *How many jobs in America are related to agriculture?*, http://www.ers.usda.gov/faqs.aspx#jobs (indicating that the farm and agriculture-related industries provided 16,070,600 jobs in 2011).

Complex supply chains such as these are also not unique to the food and beverage industries, but are common among other industries. *See, e.g.*, *Eberspaecher N. Am., Inc. v. Nelson Global Prods., Inc.*, No. 12-11045, 2012 U.S. Dist. LEXIS 52207, at *18 (E.D. Mich. Apr. 13, 2012) ("[T]he potentially catastrophic effects of a disruption in the supply chain of automotive parts is well established in the case law of this court."); Maria Greco Danaher *et al.*, *Emergency Preparedness: What Did We Learn from the H1N1 Scare?*, 3:4, J. Health & Life Sci. L. 117, 119 (2010) (noting "healthcare providers' dependence on supply chains for commercial goods and pharmaceuticals").

B. The Federal Circuit's Decision Will Greatly Exacerbate the Pattern of Baseless but Costly Infringement Suits Against Supply-Chain Participants

Infringement suits brought by so-called patent trolls already impose severe costs on the U.S. economy. The decision below will greatly exacerbate that problem by exposing supply-chain participants to induced-infringement claims based on the actions of other companies they do not control and that, until notice from the patent troll, they may not have had any knowledge of. The intent requirement recognized by the Federal Circuit will provide little protection against such suits because intent can be alleged generally, making induced-infringement suits difficult to dismiss on that ground. Moreover, because little written prior art exists covering multi-actor method claims, supply-chain participants will find it difficult to defeat even baseless claims at the outset, and will instead have to endure the burden of discovery and full litigation—or else pay to settle. *Cf. Bilski v. Kappos*, 130 S. Ct. 3218, 3257 (2010) (Stevens, J. concurring) ("Even if a business method patent is ultimately held invalid, patent holders may be able to use it to threaten litigation and to bully competitors, especially those that cannot bear the costs of a drawn out, fact-intensive patent litigation.").

The severe cost of infringement suits by patent trolls is well known. "An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396-97 (2006) (Kennedy, J., concurring).

Patent trolls "focus on aggressive litigation, using such tactics as: threatening to sue thousands of companies at once, without specific evidence of infringement against any of them; creating shell companies that make it difficult for defendants to know who is suing them; and asserting that their patents cover inventions not imagined at the time they were granted." Executive Office of the President, *Patent Assertion & U.S. Innovation* at 1 (June 2013), *available at* www.whitehouse.gov/sites/default/files/docs/patent_report.pdf. As President Obama declared, patent trolls "don't actually produce anything themselves. They're just trying to essentially leverage and hijack somebody else's idea and see if they can extort some money out of them." *Id.* at 2 (quoting President Obama's remarks of February 14, 2013).

Suits brought by trolls "have tripled in just the last two years, rising from 29 percent of all infringement suits to 62 percent of all infringement suits." *Id.* The cost of these suits for American business is staggering—more than half a trillion dollars in lost wealth from 1990 to October 2010, with a mean loss of wealth per troll lawsuit of $122 million. James E. Bessen *et al.*, *The Private and Social Costs of Patent Trolls*, 34 Reg. 26, 31 (2010-11). And most of the suits are baseless; trolls win only 8% of cases that reach the merits. John R. Allison *et al.*, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677, 694 (2011). In short, "there are a lot of big losers from [troll] litigation, while hardly anyone benefits much." Bessen, *supra*, at 33. Beyond the studies and statistics, *amici* already experience these costs and burdens personally—in the form of litigation costs, business disruption, and pyrrhic victories in suit after baseless suit.

The decision below takes what is already a significant national problem and makes it worse by creating a new category of claims ripe for trolls to assert—induced-infringement against participants in complex supply chains based on the allegation that the combined actions of two or more independent companies infringed a method claim. The barriers to asserting such a claim are low, given that a plaintiff need not identify any direct infringer in its complaint. *See In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1341-42 (Fed. Cir. 2012). The defendant also need not have controlled the other companies whose actions contributed to the infringement. "It is enough that the inducer 'cause[s], urge[s], encourage[s], or aid[s]' the infringing conduct and that the induced conduct is carried out." Pet. App. 8a (quoting *Arris Grp., Inc. v. British Telecomms. PLC*, 639 F.3d 1368, 1379 n.13 (Fed. Cir. 2011)). Nor need the defendant have known of the other companies' actions prior to the suit. Service of a complaint itself provides knowledge sufficient to seek injunctive relief and damages for future infringement, which is all a patent troll needs to get into litigation and put a defendant company at risk. *See, e.g.*, *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 60 (Fed. Cir. 2012) (noting that defendant's first notice of the asserted patent was when the complaint was filed). Supply-chain participants thus can no longer assess their patent-infringement risk simply by reviewing their own actions. They must instead try to review the actions of other members of the supply chain—a task that will often be impossible given the steps companies take to preserve confidentiality over their own methods and processes.

Once an induced-infringement claim is brought against a supply-chain participant, it will be difficult for the participant to win summary judgment on invalidity or obtain a second review of the patent in the USPTO, even for baseless claims. This is because the prior art for such method claims exists largely in the practices of industry participants rather than in patents or publications. Companies at each level of complex supply chains have developed specialized knowledge of their own processes over the generations. But no company has had the incentive to collect the processes of multiple levels into a single patent or publication because of the settled law limiting infringement to instances where a single entity performed all of the claimed steps of a method. As a result, little published prior art exists that a supply-chain participant could cite as proof that a process covering all or part a supply chain is obvious or anticipated. A supply chain participant facing a suit based on a claim covering multi-actor steps thus will face significant obstacles in proving the claim invalid. Instead of citing patents and publications, the participant will have to take discovery of other companies up and down the supply chain to develop evidence showing that each step of the method has been practiced for years. The fact-specific nature of this inquiry creates ample opportunities for a plaintiff to create fact issues precluding summary judgment, and even if a participant prevails, it will only be at great cost.

The Federal Circuit's confidence that the intent element will deter or depress induced-infringement suits by patent trolls is misplaced. *See* Pet. App. 7a & n.1 (*citing DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1306 (Fed. Cir. 2006) (*en banc*)). Intent may be alleged generally, subject only to the pleading requirements of Federal Rule of Civil Procedure 8, making dismissal on that ground difficult to obtain. *Bill of Lading*, 681 F.3d 1323, 1341-42 (Fed. Cir. 2012) (reversing dismissal, finding allegation of intent sufficient). Even at the summary judgment stage, intent to induce infringement "is a factual determination particularly within the province of the trier of fact," allowing plaintiffs to preclude summary judgment simply by creating competing inferences. *See Fuji Photo Film Co. v. Jazz Photo Corp.*, 394 F.3d 1368, 1378 (Fed. Cir. 2005) (*quoting Allen Organ Co. v. Kimball Int'l, Inc.*, 839 F.2d 1556, 1557 (Fed. Cir. 1988)). Finally, although the Federal Circuit has held that "evidence of an accused inducer's good-faith belief of invalidity may negate the requisite intent for induced infringement," *Commil USA, LLC v. Cisco Systems, Inc.*, 720 F.3d 1361, 1368 (Fed. Cir. 2013), the lack of prior art in the form of prior published articles or patents with respect to multi-actor method claims will make it difficult to obtain summary judgment on this basis. *Cf. Golden Blount, Inc. v. Robert H. Peterson Co.*, 438 F.3d 1354, 1369 (Fed. Cir. 2006) (affirming jury verdict rejecting good-faith belief in non-infringement as unreasonable and not supported by sufficient evidence).

Expanding inducement liability to cover processes performed by multiple independent actors thus would have real and severe consequences for companies such as *amici* that participate in complex supply chains.

Patent infringement suits are among the more expensive ones brought in federal court, with average direct costs for tried cases ranging from just under $1M for cases with less than $1M at stake, to $2.8M for cases with $1-25M at stake, to $5.9M for cases with more than $25M at stake. *Report of the Economic Survey 2013*, American Intellectual Property Law Association (2013), at I-129-32. Even where cases are resolved before trial, the average costs of such cases for litigating to the end of discovery are $.5M, $1.7M, and $3.6M, respectively. *Id.* In addition, patent suits inflict considerable indirect costs on defendants, diverting resources away from innovation, deterring entry (or promoting exit) from the market, interrupting business activities, introducing costly licensing fees, and driving down the market value of the affected firms by, on average, $28.7 million. *See* James Bessen & Michael J. Meurer, *Patent Failure: How Judges, Bureaucrats, and Lawyers Put Innovators at Risk* 132-38 (2008).

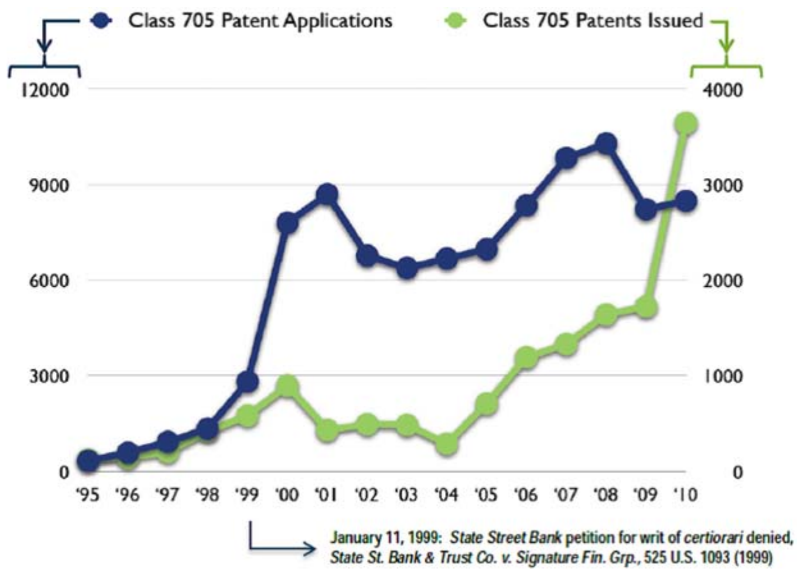
C. The Federal Circuit's Decision Will Result in a Marked Increase in Issued Patents Claiming Steps along Multi-Actor Supply Chains, Even Though Such Methods Are Neither Novel Nor Nonobvious

Because the decision below creates the ability to establish infringement for a new category of activity—methods collectively performed by multiple distinct entities—it establishes powerful incentives for patentees to seek new patents covering such methods and then assert those patents in litigation. The dramatic increase in both applications and litigation after the Federal Circuit's 1998 decision in *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998), is a precursor of what will happen again if the decision below is not reversed—with one modification. Because *State Street* was limited to business-method claims, whereas the decision below will affect method claims generally, the effect of this decision will likely be greater than that of *State Street*.

In *State Street*, the Federal Circuit abrogated the business-method exception for patentable subject matter. As a result, "the proverbial floodgates opened for business method patent applications," Russell A. Korn, *Is Legislation the Answer? An Analysis of the Proposed Legislation for Business Method Patents*, 29 Fla. St. U.L. Rev. 1367, 1370-71 (2002), and the number of applications for patents within U.S. patent class 705—the primary class encompassing business methods, data processing, and financial activity—increased from 927 in 1997 (the year before *State Street* was decided), to 2,821 in 1999 (the year after the decision), to 7,800 in 2000 (the year after this Court denied certiorari in the case). *See* Robert C. Haldiman, *Intellectual Property: Policy Considerations From A Practitioner's Perspective: Prior User Rights for Business Method Patents*, 20 St. Louis U. Pub. L. Rev. 245, 254 n.60 (2001) (citing USPTO statistics); *see also In re Bilski*, 545 F.3d 943, 992 (Fed. Cir. 2008) (Newman, J. dissenting) ("The PTO reports that in Class 705 . . . there were almost 10,000 patent applications filed in FY 2006 alone, and over 40,000 applications filed since FY 98 when *State Street Bank* was decided.").

While the increase in the number of issued business method patents was less pronounced than the increase in the number of applications, there was nonetheless a significant spike in the number of such patents that issued after *State Street*. In 1997, the year before the Federal Circuit's decision, the USPTO issued 206 patents in Class 705. In 1999, that number more than doubled to 585, and in 2000, the year after this Court denied certiorari, that number had jumped to 899, reflecting a more than 400% increase in such issued patents over three years. Haldiman, *supra*, at 254 n.60.[2] The following chart illustrates the spike in business method patent applications and issuances in the wake of *State Street*:

[2] The subsequent drop in the number of patent applications and issued patents in the first half of the last decade was likely due in large part to Congressional and administrative responses to the *State Street* decision, including passage of the First Inventor Defense Act of 1999, which created the safe harbor of 35 U.S.C. § 273, and initiation of a new "BMP Initiative" by the USPTO, which added more examiners and required greater scrutiny and second-level review of Class 705 patent applications. *See Bilski*, 130 S. Ct. 3231 (Stevens, J. concurring) (noting that Congress "quickly responded" to *State Street* by passing the First Inventor Defense Act in order to "limit a potentially significant new problem for the business community"); Jwalant Dholakia, *Reviewing Business Method Patents (BMP's): A Strategic Asset For Companies And Inventors*, 6 Int'l Bus. & Econ. Res. J. 1 (Jan. 2007), at 57-58 (describing the BMP Initiative and other reasons for the decline in business-method patent activity after 2001, including the economy). The decision below, if not reversed, will require similar legislative and administrative responses.



Id.; USPTO, *Class 705 Application Filing and Patents Issued Data*, http://www.uspto.gov/patents/resources/methods/applicationfiling.jsp (last visited Feb. 23, 2014).

The decision below will create similar incentives to submit new patent claims. And unlike business method patents, there currently are no statutory "safe harbors" or mandated patent office second-level reviews in place for multi-actor method claims. *Amici* described above the difficulty private litigants will have in discovering and presenting invalidating prior art. Those problems are only magnified in the context of USPTO evaluations of patent applications. Patent examiners have limited time and resources (by one estimate an average of 18 total hours over the life of a patent's entire prosecution), and thus rely on searchable databases, Mark A. Lemley, *Rational Ignorance at the*

Patent Office, 95 Nw. U.L. Rev. 1495, 1500 (2001), and on "three reference sources"—"domestic patents (including patent application publications), foreign patent documents, and nonpatent literature (NPL)." Manual of Patent Examining Procedure § 904.02 (2012). But as described above, the prior art in multi-actor supply chains exists largely in the practices of separate industry participants rather than in patents or publications found in databases. Without the discovery mechanisms of litigation or the resources of private litigants, the USPTO will thus be hamstrung in its ability to find invalidating prior art, making it likely that invalid patents will issue. *Cf.* Korn, *supra*, at 1372-73 (describing the similar problems faced by the USPTO after *State Street*). And once that happens, the USPTO's reexamination and inter partes review procedures will be of little help to defendants, because they are expressly limited to patents, printed publications, and (in the case of reexamination) relevant statements of the patent owner filed in a federal court or USPTO proceedings. *See* 35 U.S.C. §§ 301, 302 (reexamination); § 311(b) (inter partes review).

At the same time, the flood of patent applications will further drain the USPTO's resources, increasing the likelihood that patents will issue claiming multi-actor method steps that are neither novel nor nonobvious. *See* Michael J. Meurer, *Business Method Patents and Patent Floods*, 8 Wash. U. J.L. & Pol'y 309, 322-26 (2002) (describing how patent floods strain the USPTO's resources, resulting in poor quality issued patents, and thus increase uncertainty about the scope and validity of patents); Bronwyn H. Hall, *Business and Financial Method Patents, Innovation, and Policy*, National Bureau of Economic Research, Working Paper No. 14868, at 15-17 (2009) (describing the characteristics of low quality patents, the causes for their issuances, and their consequences on innovations and costs). The result will be an increase in already costly litigation asserting such claims, particularly by patent trolls. *See The Growing Use of Business Method Patents in NPE Litigation*, Patent Freedom, *available at* https://www.patentfreedom.com/about-npes/blog/the-growing-use-of-business-method-patents-in-npe-litigation/ ("Since 2004, the number of companies facing business method patents in litigation with NPEs has grown at 28% per year. While NPE litigation has clearly been growing during this period, the share of suits that involve business method patents has also grown quite dramatically, from 27% of defenses in 2005-2006 to 41% in 2011-2012.").

II. ANY DECISION TO EXPAND LIABILITY FOR INDUCED INFRINGEMENT SHOULD BE MADE BY CONGRESS

This Court is justifiably reluctant to change settled interpretations of federal statutes, even in the ordinary case, out of deference to Congress. It is particularly reluctant to do so in a way that expands the scope of the patent privilege and takes material out of the public domain. And its respect for *stare decisis* reaches its apex when industries have relied on the existing interpretation, as industries have here in structuring their supply chains based on an expectation that actions by multiple, independent actors could not be combined to yield a finding of induced infringement. If any change to the rules of induced infringement is to be made, it should therefore be made by Congress.

As a general matter, "Congress," not this Court or any lower court, "has the responsibility for revising its statutes. Were we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair." *Neal v. United States*, 516 U.S. 284, 296 (1996). Even when a prior statutory interpretation may be in error, "[s]tare decisis is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled right." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.,* 476 U.S. 409, 424 (1986) (*quoting Burnet v. Coronado Oil & Gas Co*., 285 U.S. 393, 406, (1932) (Brandeis, J., dissenting).

In the patent field in particular, this Court has cautioned that precedent construing the scope of statutory patent rights should be left undisturbed

> unless the argument for expansion of privilege is based on more than mere inference from ambiguous statutory language. We would require a clear and certain signal from Congress before approving the position of a litigant who, as respondent here, argues that the beachhead of privilege is wider, and the area of public use narrower, than courts had previously thought.

Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 531 (1972) *superseded on other grounds by statute*, Patent Law Amendments Act of 1984, Pub. L. No. 98-622, 98 Stat. 3383 (codified at 35 U.S.C. § 271(f)), *as recognized in Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007).

The importance of deferring to settled statutory interpretation reaches its apex when a prior interpretation "has engendered substantial reliance and has become part of the basic framework of a sizable industry." *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 317 (1992); *see also Allied-Signal, Inc. v Dir., Div. of Taxation*, 504 U.S. 768, 785 (1992) (declining to "defeat the reliance interest of those corporations that have structured their activities and paid their taxes based upon the well-established rules we here confirm."). That is exactly the situation here. Precisely because the courts have not previously imposed induced-infringement liability across multi-actor supply chains, those supply chains have developed organically to involve arms-length relationships among their participants, who rarely had reason to comprehensively investigate or document the aggregate processes collectively employed. As described above, this structural reliance on the previous rule is both pervasive and economically desirable in food-and-beverage supply chains as well as many others. Thus, if there is to be a decision to create inducement liability for divided infringement, it should come from Congress, not the courts.

In claiming for itself the role of amending the law of induced infringement, the majority below expressed concern that the change was necessary to prevent parties from evading liability for indirect infringement by "structur[ing] their conduct so that no single defendant has committed all the acts necessary to give rise to liability for direct infringement." Pet. App. 9a. But deciding whether the risk of evasion of the existing rules justifies the extraordinary costs described above of expanding the rules is a quintessential legislative judgment that rests on the type of fact finding and policy determinations that courts are ill-suited to perform. None of the undersigned *amici*, for example, have perceived any attempt by competitors or others in their industries to evade method patents that *amici* hold by dividing the steps among multiple companies. As a practical matter, it is infeasible for companies to do so. To the extent the activities of other actors along a supply chain are even known, each company acts at arm's length in its commercial relationships and structures them according to independent business considerations and market forces. No evidence in the record below would have enabled the Federal Circuit to determine, contrary to *amici*'s experience, that a gap in enforcement justified a wholesale change in the law of induced infringement.

Finally, when the decision to expand a statute is left—as it should be—to Congress, Congress can tailor the expansion to fit the scope of the issue it finds. Particularly in situations that require fine-tuned rules, "Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute's [provisions], rather than delegate to the courts a generalized power to do so wherever a court concludes that equity so requires." *United States v. Brockamp,* 519 U.S. 347, 352-53 (1997). Congress's codification of contributory infringement liability in the Patent Act illustrates this point precisely. Congress decided to extend contributory liability to entities that sell or import "a material or apparatus for use in practicing a patented process," but it expressly limited that new liability to instances in which the material or apparatus constitutes "a material part of the invention" and the accused infringer knows that the component is "especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use." 35 U.S.C. § 271(c). Unlike the blanket rule created by the decision below, this tailored approach "leaves breathing room for innovation and vigorous commerce," *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 933 (2005), and ensures that patentees do not extend their monopoly beyond the limits of their specific grant, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 441 (1984). If there is to be a corresponding expansion of inducement liability, it should similarly be left to Congress.

Accordingly, this Court should reverse the decision below recognizing liability for induced infringement even where no single entity is liable for direct infringement. For the same reasons, to the extent the Court considers divided infringement in the context of direct infringement under Section 271(a) pursuant to the conditional cross-petition, the Court should leave in place existing law that "[a]bsent an agency relationship between the actors or some equivalent . . . a party that does not commit all the acts necessary to constitute infringement . . . [is not] liable for direct infringement." Pet. App. 6a.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court reverse the decision below with respect to induced infringement under 35 U.S.C. § 271(b).

Respectfully submitted,

Joel D. Sayres
Natalie Hanlon-Leh
FAEGRE BAKER DANIELS LLP
3200 Wells Fargo Center
1700 Lincoln Street
Denver, CO 80203
(303) 607-3500

Aaron D. Van Oort
Counsel of Record
Timothy E. Grimsrud
Eva B. Stensvad
Nicholas J. Nelson
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Center
90 S. Seventh Street
Minneapolis, MN 55402
(612) 766-7000
aaron.vanoort@FaegreBD.com

Calvin L. Litsey
FAEGRE BAKER DANIELS LLP
1950 University Ave., Suite 450
East Palo Alto, CA 94303
(650) 324-6700

Counsel for Amici Curiae Cargill, Incorporated; The Coca-Cola Company; General Mills, Inc.; and Hormel Foods Corporation

March 3, 2014