

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

ERICSSON INC.,	§	
TELEFONAKTIEBOLAGET LM	§	
ERICSSON,	§	
	§	
<i>Plaintiffs,</i>	§	
	§	
v.	§	CIVIL ACTION NO. 2:20-CV-00380-JRG
	§	
SAMSUNG ELECTRONICS CO., LTD.,	§	
SAMSUNG ELECTRONICS AMERICA,	§	
INC., SAMSUNG RESEARCH	§	
AMERICA,	§	
	§	
<i>Defendants.</i>	§	

**MOTION OF THE HONORABLE PAUL R. MICHEL (RET.) FOR LEAVE TO FILE
AMICUS CURIAE BRIEF IN SUPPORT OF ERICSSON’S EMERGENCY
APPLICATION FOR ANTI-INTERFERENCE INJUNCTION**

Under Federal Rule of Civil Procedure 7 and Local Rule CV-7, the Honorable Paul R. Michel (ret.), former Chief Judge of the U.S. Court of Appeals for the Federal Circuit, respectfully moves for leave to file the accompanying amicus curiae brief in support of Plaintiffs Ericsson Inc. and Telefonaktiebolaget LM Ericsson’s (“Ericsson”) Emergency Application for an Anti-Interference Injunction Related to Defendants Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Research America’s (“Samsung”) lawsuit filed in the Wuhan Intermediate People’s Court of China (the “Wuhan Action”). Ericsson does not oppose this motion; Samsung opposes.

JUDGE MICHEL’S BACKGROUND

Judge Michel served as circuit judge on the Federal Circuit for over twenty-two years. From 2004 until his retirement in May 2010, he was the chief judge of the court. During his years

of judicial service, he heard thousands of appeals and authored over 800 opinions, touching on all aspects of the court's jurisdiction, including patent law.

Judge Michel's judicial work extends beyond his patent law expertise, however. He sat by designation on several regional courts of appeals. *See, e.g., Gross v. German Found. Indus. Initiative*, 549 F.3d 605 (3d Cir. 2008) (reparation claims based on Nazi slave labor); *Schmier v. U.S. Court of Appeals for Ninth Circuit*, 279 F.3d 817 (9th Cir. 2002) (complaint alleging that the Circuit Rules prohibiting citation to unpublished opinions violated an individual's constitutional rights); *Elliott Assocs., LP v. Banco De La Nacion*, 194 F.3d 363 (2d Cir. 1999) (whether purchase of debt violated Section 489 of the New York Judiciary Law). *See generally* Hon. James F. Holderman, *Comments on Paul R. Michel's Contributions to Justice*, 10 John Marshall Rev. of Intell. Prop. L. 279 (2010).

Since he retired from the Federal Circuit, Judge Michel has maintained an active role in the public dialogue about optimal policies governing intellectual property and U.S. innovation. He has been invited to speak at scores of events, and he has written numerous articles on pressing intellectual property topics. *See, e.g.,* David Kappos & Hon. Paul R. Michel, *The Smallest Salable Patent-Practicing Unit: Observations on its Origins, Development, and Future*, 32 Berkeley Tech. L.J. 1433 (2018); Paul R. Michel & Matthew J. Dowd, *The Need for "Innovation Certainty" at the Crossroads of Patent and Antitrust Law*, CPI Antitrust Chronicle (Apr. 2017); Hon. Paul R. Michel, *Judicial Litigation Reforms Make Comprehensive Patent Legislation Unnecessary as Well as Counterproductive*, 14 Nw. J. Tech. & Intell. Prop. 131 (2016).

In addition, Judge Michel has been invited to testify before Congress on substantive patent law issues that are critical to the Nation's economic health. On July 13, 2017, he testified before the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet.

On June 4, 2019, he testified before the Senate Judiciary Committee's Subcommittee on Intellectual Property.¹

LEGAL STANDARD

There is no rule addressing amicus briefs in this District. "The extent, if any, to which an amicus curiae should be permitted to participate in a pending action is solely within the broad discretion of the district court." *Waste Mgmt. of Pa., Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995); *see also Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982); *United States ex rel. Gudur v. Deloitte Consulting L.L.P.*, Civil Action No. H-00-1169, 2007 WL 836935, at *6 (S.D. Tex. Mar. 15, 2007); *Sonoma Falls Developers, LLC v. Nevada Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003); *Concerned Area Residents for the Env't v. Southview Farm*, 834 F. Supp. 1410, 1413 (W.D.N.Y. 1993); *United States v. Gotti*, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991); *Pa. Env'tl. Def. Found. v. Bellefonte Borough*, 718 F. Supp. 431, 434 (M.D. Pa. 1989); *Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D. Ill. 1982).

District courts "frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *California v. Azar*, No. 19-cv-01184-EMC, 2019 WL 2029066, at *1 (N.D. Cal. May 8, 2019) (quoting *Sonoma*, 272 F. Supp. 2d at 925). And district courts commonly seek guidance from Federal Rule of Appellate Procedure 29, which establishes standards for filing an amicus brief in the United States Courts of Appeals. *Id.*

¹ See <https://www.judiciary.senate.gov/meetings/the-state-of-patent-eligibility-in-america-part-i> (last visited Jan. 4, 2021).

**INTEREST OF AMICUS CURIAE AND REASONS WHY THE MOTION
SHOULD BE GRANTED**

Judge Michel has a strong interest in offering his unbiased perspective on the likely implications of the district court’s Temporary Restraining Order and Anti-Interference Injunction and the complex—and, particularly in this case, controversial—interaction between U.S. and Chinese patent law. Indeed, Judge Michel is the rare expert who has no hidden agenda behind his views. As Judge Michel explained in his recent congressional testimony:

I have a unique perspective not only as a patent judge but as one completely unhindered by any economic affiliations or interests. I do not represent parties, practice law, own stocks or bonds, serve as an employee of any entity or belong to any lawyers association or trade group. The only exception is unpaid service on the Board of the Intellectual Property Owners Education Foundation, which seeks to educate the public about intellectual property. I receive a Federal pension for 36 years of service. Although I also consult, assignments are diverse as to owners and accused infringers and as to industries, technologies, and companies. Therefore, I can be as objective as humanly possible, since I am totally independent.

Testimony of Judge Paul R. Michel (Ret.), Subcommittee on Intellectual Property U.S. Senate Committee on the Judiciary, at 2 (June 4, 2019).

In sum, Judge Michel is one of the nation’s leading patent law experts, having a unique combination of judicial experience, legal expertise, and total absence of any financial conflicts of interest. His sole objective is to share his perspective respectfully as a true friend of the court to ensure that the U.S. patent system creates the optimal incentives for inventors, innovators, and investors—as it has traditionally done. As to the substance, Judge Michel’s proposed amicus brief focuses on the U.S. public interest prong.

In this case, Judge Michel seeks leave to file his amicus brief to address the substantial notice and due process concerns associated with the anti-suit injunction issued by the Wuhan court. Judge Michel’s amicus brief explains that this Court should independently assess whether it should maintain its jurisdiction and proceed with the FRAND dispute between Ericsson and Samsung. At

this stage, too little information is available to assess appropriately if the Wuhan court's apparent *ex parte* order is sufficient to order—and thus divest—a U.S. court from proceeding to adjudicate a live controversy implicating global and U.S. patent rights. Rather than simply acceding to the purportedly first-filed action, this Court ought to consider which forum will provide the most judicious outcome.

Judge Michel respectfully submits that his amicus brief sheds light on at least the general interest in ensuring that the roles of the U.S. patent system and the U.S. judicial system are properly considered in global FRAND litigation. The brief's targeted focus and limited length are intended to aid this Court in assessing Ericsson's requested relief.

Given the fast moving pace of this case, Judge Michel is submitting his amicus brief at the earliest practicable time. On Friday, January 1, 2021, Judge Michel's counsel contacted the parties' counsel to ask if they would consent to Judge Michel's motion for leave to file his amicus brief. On the same day Plaintiffs' counsel stated that Plaintiffs consent. On Monday, January 4, 2021, counsel for the parties and Judge Michel met and conferred by telephone at the request of Defendants' counsel, at which time Judge Michel's counsel provided additional information about his intended amicus brief. Later the same day, Defendants' counsel informed Judge Michel's counsel by email that Defendants would not consent to the filing of Judge Michel's amicus brief. Defendants' counsel provided no explanation for Defendants opposition.

Judge Michel also makes the following representations regarding his proposed amicus brief.

1. Amicus counsel authored the brief. No party or party counsel authored the brief in whole or in part. *See* Fed. R. App. Proc. 29(a)(4).
2. No party or party's counsel has contributed to the cost of this brief. *Id.*

3. No person other than Judge Michel contributed money to fund this brief. *Id.*

CONCLUSION

For these reasons, Judge Michel respectfully requests that his motion for leave to file his amicus brief be granted.

Dated: January 5, 2021

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Respectfully submitted,

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Hon. Paul R. Michel (ret.)

CERTIFICATE OF CONFERENCE

Under Local Rules CV-7(h) and (i), Peter Corcoran and Matthew J. Dowd, counsel for Amicus Curiae Paul R. Michel, met by telephone with David Rokach, counsel for Samsung, and Nicholas Mathews, counsel for Ericsson, on January 4, 2021. Counsel complied with the meet and confer requirement in Local Rule CV-7(h). Ericsson does not oppose this motion; Samsung opposes. Counsel for Samsung did not provide an explanation for Samsung's opposition. Discussions have conclusively ended in an impasse, leaving an open issue for this Court to resolve.

/s/ Peter J. Corcoran III
Peter J. Corcoran III

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served electronically on January 5, 2021, through this Court's CM/ECF system on all counsel of record who are registered to receive notices by email of electronic filings in this case.

/s/ Peter J. Corcoran III
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