

**IN THE  
INDIANA SUPREME COURT  
CASE NO. \_\_\_\_\_**

**COURT OF APPEALS CASE NO. 19A-PL-00378**

WARSAW ORTHOPEDIC, INC.,  
MEDTRONIC, INC., and  
MEDTRONIC SOFAMOR DANEK, INC.,

Appellants  
(Defendants Below),

v.

RICK C. SASSO, M.D.,

Appellee,  
(Plaintiff Below).

Appeal from the Marshall Circuit  
Court

Trial Court  
Cause No. 50C01-1806-PL-00027

The Honorable Curtis D. Palmer,  
Judge

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**Appellee Rick C. Sasso's  
Response to Petition to Transfer**

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**Question Presented on Transfer**

Whether Indiana courts have subject-matter jurisdiction over two breach-of-contract claims, Vertex and Screw Delivery, when: (a) a federal court upon removal of the Vertex breach claim remanded with no right to appeal in the federal system; (b) as to the Screw Delivery breach, Medtronic did not seek removal at the outset, and instead litigated for four years in state court and then, on the eve of the Indiana state court jury trial, filed a federal declaratory judgment action claiming the Screw Delivery contract claim was really a patent case within the exclusive jurisdiction of the federal courts; and (c) the federal district held the late filed case until after trial before dismissing without prejudice on principles of abstention and the Federal Circuit affirmed its abstention?

**Background and Prior Treatment of Issues on Transfer**

Plaintiff/Appellee Dr. Rick Sasso filed this case nearly eight years ago after Medtronic refused to pay Sasso under two separate contracts, the 1999 Screw Delivery Agreement and the 2001 Vertex Agreement. On November 28, 2018, a Marshall County jury rendered a verdict in Sasso's favor, and the trial court entered judgment the following day.

Medtronic removed this case to federal court after it was filed, alleging §1338(a) jurisdiction for the Vertex dispute. [Sasso.App.Vol.II,pp.3-8.] The federal court disagreed and remanded. [*Id.*,p.53.] After remand, Sasso filed his First Amended Complaint to add Medtronic's breach of the Screw Delivery Agreement.

[*Id.*,pp.75-184.] Medtronic chose not to remove the case and proceeded in the Marshall County Circuit Court.

Sasso filed his Third Amended Complaint on March 29, 2017, alleging new claims for underreporting Vertex royalties, and adding an alternative claim for unjust enrichment relating to the intellectual property transferred in the Screw Delivery Agreement. [Sasso.App.Vol.X,pp.2-182, 29-30.] Again, Medtronic chose not to remove the case and the trial court set trial for November 1, 2018.

In April 2018, after the close of discovery, Medtronic produced over 30,000 pages of documents Sasso would later learn related to a never-before-raised patent “invalidity” defense. [Sasso.App.Vol.XII,p.95.] Medtronic then filed an amended witness list identifying five never-before-disclosed witnesses and moved to continue the trial based on patent issues it never pleaded but now claimed were essential to the dispute.<sup>1</sup> [*Id.*,pp.103-23(continuance); *Id.*,pp.96-102(witnesses).] The trial court denied the motion. [Medtronic.App.Vol.II,p.59.]

Two months later (i.e., almost five years after Sasso filed this lawsuit), Medtronic filed a declaratory judgment action in the Northern District of Indiana alleging the Screw Delivery Agreement required Sasso to prove both patent coverage for any royalty-bearing product and validity of the covering claim.

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<sup>1</sup> On May 1, 2018, just before the hearing on the motion for continuance, Medtronic filed a voluminous *ex parte* reexamination petition with the United States Patent and Trademark Office, seeking to invalidate some of the claims of the patents it bought from Sasso under the Screw Delivery Agreement, despite enjoying the patent's protection for 19 out of the patent's 20-year life. [Tr.Vol.44,pp.137-164.] Two months after trial, the USPTO cancelled the claims. [Sasso.App.Vol.XIX, pp.31-32]

Appellee's Response to Petition to Transfer

[Sasso.App.Vol.XII,pp.124-140.] Medtronic told the federal court patent issues were indispensable to its responsibilities under the Screw Delivery Agreement despite previously telling the Marshall County Circuit Court this:

**Nothing in the Facet Screw Agreement provides for determining royalty products based on patent coverage.**

[Medtronic.App.,Vol.XI,p.74 (emphasis supplied).]

Sasso then moved for partial summary judgment in the trial court arguing nothing in the contract required “valid claim coverage,” and moved to exclude any evidence or witnesses on claim invalidity. [Medtronic.App.Vol.XI,pp.128-Vol.XIII,p.177.] The trial court granted both motions. [Medtronic.App.Vol.II.,pp.112-13; 111.] The Court of Appeals affirmed those orders and affirmed the jurisdiction of our state courts. *Warsaw Orthopedic, Inc. v. Sasso*, 2020 Ind.App.LEXIS 527, at \*\*19-29 (2020).

Judge Jon DeGuilio of the Northern District of Indiana held the 2018 federal lawsuit until after the state court trial and then dismissed it without prejudice based on principles of abstention. *See generally Warsaw Orthopedic, Inc. v. Sasso*, 2019 U.S.Dist.LEXIS 17539, at \*\*11-12 (N.D.Ind.2019). The Federal Circuit affirmed, holding abstention appropriate so Indiana courts could decide the state-law contract issues. *Warsaw Orthopedic, Inc. v. Sasso*, 977 F.3d 1224,1226 (Fed.Cir.2020).

**Reasons This Court Should Deny Transfer**

This case does not fall within the “special and small category” of state-law cases subject to exclusive federal jurisdiction under 28 U.S.C. §1338(a). Our state court

system – with courts of “general” jurisdiction deciding contract disputes between Indiana citizens – was and is empowered to hear this case.

Whether Medtronic's federal case is characterized as a “mirror” action or not, it was not identical to this case. Medtronic pleaded its dispute differently, alleged different contractual provisions at issue, and sought specific relief on patent issues it manufactured and claimed as indispensable after the close of discovery in state court. Medtronic refuses to acknowledge that once our Court of Appeals confirmed the contract did not require “valid claim coverage,” the alleged patent issues in Medtronic's “mirror” action were irrelevant. The Federal Circuit recognized the jurisdiction of our state courts to decide state-law contract issues and affirmed the district's court's abstention so those decisions could be reviewed on appeal.

**A. There is no “stark jurisdictional conflict” – the Federal Circuit simply recognized that jurisdiction turns on a state-law contract question.**

There is no jurisdictional conflict. In affirming dismissal of Medtronic's complaint, the Federal Circuit did nothing more than recognize jurisdiction turned on a state-law contract issue:

We conclude that the district court acted within its jurisdiction, abstaining without prejudice on the facts hereof, **for the question of contract interpretation is on appeal in the Indiana state court**, and federal action based on federal issues is not precluded.

*Warsaw*, 977 F.3d at 1225 (emphasis added). The Federal Circuit had the trial court's decision holding the Screw Delivery Agreement did **not** require “valid claim coverage.” [Medtronic.App.Vol.II.,pp.112-113.] What the Federal Circuit did not have was a decision from our Court of Appeals affirming or reversing the trial court's decision.



## Appellee's Response to Petition to Transfer

If Sasso and the trial court were right, i.e., the contract did not require “valid claim coverage” to trigger royalties, then no exclusive federal jurisdiction could exist because Sasso could prevail without deciding a single issue of patent law.<sup>2</sup> But if the trial court's contractual interpretation was wrong, then patent issues could be relevant to recovery under the agreement.<sup>3</sup> That contract question was squarely before our Court of Appeals when the Federal Circuit handed down its opinion, which explains why the Federal Circuit did what it did:

- (1) If the Indiana Court of Appeals affirmed, then dismissal was proper because Sasso's entitlement to royalties did not require the resolution of any issue of patent law.
- (2) If, however, our Court of Appeals reversed, finding Sasso's royalties required proof of “valid claim coverage” and Indiana state courts did not have subject matter jurisdiction, then Medtronic or Sasso would be free to re-file and proceed in federal court.

In either scenario, the outcome turned on a state-law contract issue pending before our Court of Appeals. Our Court of Appeals affirmed, holding Sasso could prevail without proving “valid claim coverage” for the implants sold. *Warsaw*, 2020 Ind.App.LEXIS 527, at \*\*19-29. The Federal Circuit was simply respecting the jurisdiction of our state courts to decide issues of state contract law.

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<sup>2</sup> See, e.g., *Christiansen v. Colt Indus. Operating Corp.*, 486 U.S.800,810 (1988) (“a claim supported by alternative theories in the complaint may not form the basis for §1338(a) jurisdiction unless patent law is essential to **each** of those theories.”)

<sup>3</sup> Sasso also pleaded an alternative claim of unjust enrichment, which was given to the jury. Unjust enrichment does not raise §1338(a) issues and also negates the “necessarily raised” element. *Inspired Dev. Group, LLC v. Inspired Prods. Group*, 938 F.3d 1355,1361 (Fed.Cir.2019). Medtronic chose not to mention Sasso's unjust enrichment claim in its federal lawsuit.

The Federal Circuit's decision to hear the appeal does not mean this case falls within the exclusive jurisdiction of the federal courts. In exercising jurisdiction to hear the appeal, the Federal Circuit held, "the issues of validity and claim scope are well-pleaded **in this declaratory complaint ...**" *Warsaw*, 977 F.3d at 1229 (emphasis added). The "well-pleaded complaint" rule for ascertaining §1338(a) jurisdiction assumes the truth of Medtronic's allegations in its complaint.<sup>4</sup> *See Lab Corp. of Am. Holdings v. Metabolite Labs, Inc.*, 599 F.3d 1277,1282 (Fed.Cir.2010)(quoting *Christiansen*, "Under the well-pleaded complaint rule, 'arising under' jurisdiction is determined from the plaintiff's statement of his or her own claim 'unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.'")

Finding jurisdiction in Medtronic's "well-pleaded" complaint isn't surprising given Medtronic drafted the complaint to state the Screw Delivery Agreement required "valid claim coverage" without alleging (1) its failure to even raise these patent issues as a defense until 2018 (five years into the litigation, and months before trial), or (2) Sasso's alternative claim for unjust enrichment. We now know Medtronic's "valid claim coverage" argument has been rejected by the trial court and our Court of

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<sup>4</sup> In its opening brief to the Federal Circuit, Medtronic described its "Statement of the Case" in the following way: "The following statement assumes the truth of the allegations in the Complaint as appropriate on appeal of an action," citing a 12(b)(6) appellate decision from the Seventh Circuit. [Brief for Plaintiffs-Appellants, *Warsaw Orthopedic, Inc. v. Sasso*, p.7, No. 19-1583 (Fed. Cir. March 15,2019)] By citing to Medtronic's "well-pleaded" complaint (the jurisdictional words used in *Christiansen*), the Federal Circuit accepted every allegation as true when it decided to hear the appeal, as requested by Medtronic.

Appeals; but Medtronic's **allegation** was enough to allow the Federal Circuit to hear Medtronic's appeal and affirm dismissal.

There is not—nor has there ever been—a “stark jurisdictional conflict.” Put simply, Sasso was not required to establish “valid claim coverage to prevail.” Or, as Medtronic told the trial court in 2016 (before hiring new counsel in 2018):

Nothing in the Facet Screw Agreement provides for determining royalty products based on patent coverage.

[Medtronic.App.,Vol.XI,p.74.]

**B. The Northern District of Indiana's two remand orders demonstrate our state courts are empowered to hear this dispute.**

**1. The 2014 remand order established subject matter jurisdiction for the remainder of the Vertex dispute under 28 U.S.C. § 1447(d).**

On April 2, 2014, Judge Robert Miller of the Northern District of Indiana remanded. While Judge Miller's remand order is short, he references the transcript of the remand hearing, which he docketed, for his reasoning. [Sasso.App.,Vol.II,pp.54-75.]

Judge Miller cited the leading case of *Gunn v. Minton*, 568 U.S. 251,258 (2013), which holds that for exclusive jurisdiction under 28 U.S.C. §1338(a) to exist, patent issues in a contract case must be: (1) necessarily raised; (2) actually disputed; (3) substantial; **and** (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. [Sasso.App.,Vol.II,pp.56-59.] He determined three of the four factors were not met, reasoning, “the important thing isn't whether the Defendants' products are within the scope of any particular patent, but, rather, what the parties intended the agreement to cover.” [*Id.*,p.58.]

Congress was clear: Judge Miller's order was "not reviewable on appeal or otherwise." 28 U.S.C. §1447(d). Medtronic has never cited a case where, after remand, a state court decides it has no subject matter jurisdiction, leaving a plaintiff without any court to hear the dispute. As to Vertex, subject matter jurisdiction was decided conclusively when Judge Miller entered his order of remand.

**2. Sasso did not mislead Judge Miller into mistakenly issuing the remand order.**

To sidestep the statutory effect of remand, Medtronic intimates the remand order was defective somehow because Sasso "erroneously" told Judge Miller he "may recover on his claims without a court deciding a single disputed issue of patent law." [Petition to Transfer, p.8.] Sasso was not duping Judge Miller. Medtronic's transfer petition omits a dispositive fact: Medtronic admitted Patent No. 7,264,621 ("621 patent") had claims covering Vertex.<sup>5</sup> Under the Vertex Agreement, Medtronic was obligated to pay Sasso for eight years with the following potential extension: "[I]f the Medical Device is covered by a valid claim of an issued US patent arising out of the Intellectual Property Rights, then the royalty payment specified above will be payable for the life of the patent." [Tr.Vol.14,p.7.] As an issued patent, the claims of the

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<sup>5</sup> Later, when the case was back in state court, in response to Paragraph 36 of the Complaint (i.e., "Patent 7,264,621 has claims that cover Vertex products sold today"), Medtronic responded, "Defendants admit the allegations of Paragraph 36, except Defendants deny that Dr. Sasso contributed any know-how or technical information to any claims of Patent No. 7,264,621..." [Sasso.App.Vol.II,p.216.] Whether Sasso contributed know-how or technical information was a matter of state law.

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'621 patent were presumed valid.<sup>6</sup> With Medtronic's admission, Sasso could prevail if the '621 patent "arose" from Sasso's "Intellectual Property Rights." Under this theory for relief, the fact-finder would not be required to determine any patent law issue. Whether the improvement embodied in the '621 patent "arose" from the "Intellectual Property Rights" is a state-law contract question turning on the parties' intent. *See Christiansen*, 486 U.S. at 810 ("a claim supported by alternative theories in the complaint may not form the basis for §1338(a) jurisdiction unless patent law is essential to **each** of those theories.")

Medtronic's transfer petition leaves out any mention of the Vertex improvement patents (which include '621). These patents described various improvements to the overall Vertex system (e.g., increasing screw angulation), which Sasso *always* alleged covered Vertex. [Medtronic.App.Vol.II,p.130; Sasso.App.Vol.XII,p.216.] Medtronic never alleged they didn't. Medtronic's negotiator of the Vertex Agreement, Brad Coates, testified at trial these improvement patents provided Sasso continuing royalties for the life of those patents because they arose from Sasso's Intellectual Property Rights. [Tr.Vol.2,pp.206-213; PX111,Tr.Vol.15,p.18.]

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<sup>6</sup> This presumption is created by federal statute. 35 U.S.C. §§282(a),(b). Patent invalidity is an affirmative defense. *Id.* This presumption may be overcome only by clear and convincing evidence. *Microsoft Corp. v. i4i Ltd. P-ship*, 564 U.S. 91,95-98 (2011). Medtronic never pleaded invalidity in this case with respect to either agreement. During the 2014 remand hearing, Judge Miller made sure Medtronic was not contesting validity, which he assumed a patent owner would not do with its own patent, and Medtronic agreed. [Sasso.App.Vol.II,pp.64-65.]

The trial court later found Medtronic failed to timely raise invalidity as a defense and excluded the late-filed evidence. [Medtronic.App.,Vol.II,p.111.] This ruling was affirmed on appeal and is not mentioned in the petition to transfer.

**3. The remand order on the 2019 audit action is consistent with the Court of Appeals' analysis of subject matter jurisdiction.**

After trial, Sasso filed a new state court case requesting an audit of post-2017 sales. Medtronic removed. On March 4, 2020, Judge DeGuilio remanded the case for lack of §1338(a) jurisdiction. *Sasso v. Warsaw Orthopedic*, 2020 U.S. Dist.LEXIS 37365 (N.D.Ind.2020). He found the Vertex dispute could not give rise to §1338(a) jurisdiction in part because patent law issues were not “necessarily raised” given Medtronic admitted the ‘621 patent covered Vertex.<sup>7</sup> His analysis confirmed Sasso’s position six years earlier to his predecessor, Judge Miller, that the Vertex dispute did not meet the “necessarily raised” test because Sasso could prevail without the federal court deciding a single disputed issue of patent law. *Sasso*, 2020 U.S. Dist.LEXIS 37365, at \*\*18-20. Judge DeGuilio also held there was no “substantial” issue of patent law, as required for §1338(a) jurisdiction, for either agreement, citing *Inspired Dev.*, 938 F.3d 1355. Medtronic was the owner of the Screw Delivery patents, which expired on November 23, 2019, twenty years after the filing of the patent application. He found that Medtronic’s 2018 request for the USPTO to invalidate nine Screw Delivery patent claims eliminated any possibility of future infringement. *Sasso*, 2020 U.S.Dist.LEXIS 37365, at \*\*16-17.

Medtronic’s estoppel concern regarding “later patent infringement suits against third parties” is nonsense. With respect to the Screw Delivery Agreement,

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<sup>7</sup> Judge DeGuilio cited *Christiansen*, 486 U.S. at 810-11, the leading case on the “necessarily raised” element in §1338(a) jurisdiction. *Sasso*, 2020 U.S.Dist.LEXIS 37365, at \*7.

Medtronic would be subject to sanctions in an infringement suit for trying to enforce the claims it invalidated with its “unusual” *ex parte* reexamination of the Screw Delivery Agreement patents.<sup>8</sup>

**C. The Court of Appeals wisely analyzed the elements required for §1338(a) jurisdiction and determined the four required elements were not met.**

“Every court possesses the power of determining its own jurisdiction.” *Baltimore & O.R. Co. v. Freeze*, 82 N.E. 761,763 (Ind.1906). When subject matter jurisdiction is challenged, it is the duty of the court to determine its jurisdiction. *Squarcy v. Van Horne*, 321 N.E.2d 858,859 (Ind.1975). Our Court of Appeals wisely exercised that power and fulfilled its duty, thoroughly analyzing why our state courts have subject matter jurisdiction here.

The Court of Appeals correctly determined this case does not raise “substantial” issues of patent law, the third of four required elements under *Gunn v. Minton*, 568 U.S. at 258. A “substantial” issue is one having, “importance to the federal system as a whole.” *Gunn*, 258 U.S. at 260.<sup>9</sup> This case has no such importance. It is a fact sensitive dispute controlling only the relations between Medtronic and Sasso.

The Court of Appeals' reliance on *Inspired Development* is appropriate because, like this case, it was based on a complaint seeking recovery in contract and unjust enrichment. *Inspired Development* held a state law unjust enrichment claim does not

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<sup>8</sup> “Unusual” is the description Judge DeGuilio used for the proceeding in his January 31, 2019 dismissal order.

<sup>9</sup> With this definition, *Gunn* contemplates many different state court cases that could relate to patents and not give rise to §1338(a) jurisdiction.

give rise to “substantial” patent law issues. The value of property transferred (one of the elements of a state law claim for unjust enrichment) is not a §1338(a) issue. Parties to a business breakup or a divorce action may need to prove the value of some intellectual property. Such disputes are not thrown into federal court just because the parties offer proof about patents. And decisions in such cases, like this case, are made by court systems of general jurisdiction.

Our Court of Appeals' rejection of *Jang v. Boston Scientific Corp.*, 767 F.3d 1334 (Fed.Cir.2014)—cited by Medtronic and parroted by the *amicus*—is spot on. *Inspired Development* was decided late in 2019, after Medtronic had raised *Jang* repeatedly in briefing in both cases. *Jang* now has practically no application to state court cases, like this one, where no general patent law issues were decided.

While our Court of Appeals did not decide whether patent issues were “necessarily raised,” that was not necessary for finding subject matter jurisdiction. Its opinion nonetheless demonstrates they are not for at least three reasons. First, the Court affirmed the trial court's “valid claim coverage” order, which removed anything requiring patent issues to recover under the Screw Delivery Agreement. Second, the Court affirmed the order excluding invalidity evidence as a discretionary case management decision. Third, the Court of Appeals appropriately cited to *Studieengesellschaft Kohle, M.B.H., v. Shell Oil. Co.* 112 F.3d 1561 (Fed.Cir.1997) on licensee estoppel. Sasso only recovered damages for the time before Medtronic challenged validity. With validity not challenged until May 2018, damages owed for before that time could not turn on invalidity of an issued patent owned by Medtronic.



**D. The Court of Appeals appropriately harmonized its jurisdictional finding with that of the Federal Circuit.**

The Court of Appeals harmonized its jurisdictional decision with that of the Federal Circuit opinion because the latter was: (a) cursory; (b) based on Medtronic's complaint and its allegations, which were different than the complaint here; and (c) used to support affirmance of the District Court's abstention. 2020 Ind.App.LEXIS 527, at \*27. The Court of Appeals' reasoning is sound.

First, the Federal Circuit did no analysis of the *Gunn* factors required for subject matter jurisdiction. Instead, it relied on the allegations of Medtronic's complaint. [Sasso.App.,Vol.XII,pp.124-40.] Those 2018 allegations alleged a construction of the Screw Delivery Agreement counter to Medtronic's 2016 construction and rejected by the trial court here, but (at the time of the decision) were still on appellate review.

Second, the two complaints differ significantly. Medtronic's federal lawsuit alleged there was no breach because no patent claims covered the products for which Sasso sought royalties and no relevant claim was valid. Sasso alleged a breach because the products for which he sought royalties met the definitions provided in the agreement, consistent with Medtronic's 2016 construction.

Third, the Federal Circuit used its jurisdictional finding – not to rule on the merits of any claim – but instead to affirm dismissal of Medtronic's late filed “declaratory judgment” lawsuit. Considering the “merits” of abstention and dismissing without prejudice an action filed in federal court is not the same as determining federal jurisdiction does not exist but ruling on the merits. *See, Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422,431 (2007)(“a federal court has leeway to

choose among threshold grounds for denying audience to a case on the merits.”) There was no other federal court of appeal with clear jurisdiction to consider the appeal because there was no diversity jurisdiction and no other basis alleged for federal jurisdiction. Dismissing rather than transferring promoted judicial economy. The additional step of handing the case to the Seventh Circuit for automatic dismissal would have been inefficient and confusing.

The Federal Circuit was not, as Medtronic implies, politely suggesting Indiana courts vacate part<sup>10</sup> of the jury verdict to force Sasso to file a new federal “patent” case using Medtronic’s rejected interpretation of the Screw Delivery Agreement. The Federal Circuit’s appropriate use of abstention, to allow Indiana courts to make these state law decisions, prevented that absurdity from taking place.

**E. The Court of Appeals’ finding of subject matter jurisdiction here in this unique dispute does not encourage the filing of “patent law” cases against Indiana businesses in state court.**

The *amicus*’ assertion that finding subject matter jurisdiction here has some broad effect on doing business in Indiana is belied by the record, not supported by the case law of sister states, and not supported by existing federal statutes designed to put federal issues before federal judges when they are raised.

Medtronic, over Sasso’s objection, introduced all the different intellectual property agreements between the parties. [Tr.Vol.31,pp.30-155.] Medtronic added mandatory alternative dispute resolution provisions to its later agreements. [*Id.*, pp.81-

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<sup>10</sup> The Vertex Agreement was not before the Federal Circuit. Medtronic conceded in the federal case it could not challenge the prior remand.

83,102-03,126-27.] These later agreements show this general commercial practice.<sup>11</sup> Today, many inventor royalty disputes are arbitrated by advance agreement.

Sasso provided our Court of Appeals with numerous state court decisions affirming the subject matter jurisdiction of state courts in similar cases, generally decided years ago. [Appellee Br.,pp.35-36.] Before the Court of Appeals, Medtronic did not even address these cases in its reply brief.<sup>12</sup> Similar subject matter jurisdiction issues have been resolved similarly in state courts around the country, recognizing the standards of §1338(a) jurisdiction. The *amicus* brief fails to recognize jurisdiction is determined under federal law. The United States Supreme Court has defined “substantial” under §1338(a). *See Gunn*, 568 U.S. at 260-61. To be “substantial,” cases involving patents must still turn on decisions important to the federal system as a whole, not just the parties to the dispute. *Amicus* cites the Indiana Tax Court as analogous, parroting Medtronic’s opening brief to the Court of Appeals. [Appellants Br.,p.39.] Our Tax Court is not analogous. Its jurisdiction is conferred by Indiana statute. Ind. Code §33-26-3-1. This Court interprets the statute and directs traffic among the state courts as part of its duties under Indiana law. These decisions do not coexist with decisions of the federal court system.

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<sup>11</sup> Most of the Sasso/Medtronic disputes were arbitrated, not litigated in court. These arbitration provisions were used to adjudicate to award three additional contract breaches by Medtronic. [Brief of Appellee/Cross Appellant,pp.67-69.]

<sup>12</sup> The ILF’s newly raised state law cases are very fact sensitive, as is this case. Every federal court considering Medtronic’s claims of exclusive federal jurisdiction has rejected them either by remand order or dismissal.

Finally, the federal removal statutes adequately protect any defendant facing improper litigation of federal law in state courts. Contrary to the claims of *amicus*, all defendants are protected by federal law with the power to remove any cases subject to exclusive federal jurisdiction. This power may be exercised any time a defendant contends a federal issue has arisen in a case. A federal judge then decides the issue, either at the inception of the case or at any time an amended pleading, order, or other new paper demonstrates exclusive federal jurisdiction. 28 U.S.C. §1446(b)(3).

These statutes sufficiently protect defendants in cases filed in the wrong court system while providing a quick and final decision on jurisdiction. The appellate review bar of 28 U.S.C. §1447(d) was included “to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues.” *Kircher v. Putnam Funds Trust*, 547 U.S. 633,650 (2006)(Scalia, J., concurring). Failing to remove the amended complaint after the first remand, raising subject matter jurisdiction years later, and then collaterally attacking adverse decisions of the state court with a federal lawsuit was not efficient or fair to Sasso. Justice delayed is justice denied and a primary purpose behind the removal procedure statutes.

### **Conclusion**

Sasso respectfully requests the Court deny Medtronic's petition for transfer.

Respectfully Submitted,

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**Verified Statement of Word Count**

Pursuant to Appellate Rule 44(E), the undersigned counsel verifies the foregoing contains fewer than 4,200 words, exclusive of the items listed in Appellate Rule 44(C), as counted by the word processing system used to prepare the Brief, Microsoft Word 2018.

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**Certificate of Filing and Service**

I hereby certify that on March 22, 2021, the foregoing was filed with the Indiana Court of Appeals and served electronically on the following via the Indiana E-Filing System in accordance with Indiana Appellate Rule 24:

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