

No. _____

In the Supreme Court of the United States

COMMIL USA, LLC,

Petitioner,

v.

CISCO SYSTEMS, INC.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must the Federal Circuit follow this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), a non-patent case, regarding which evidence must be disregarded and which evidence must be credited when reviewing a decision on judgment as a matter of law regarding patent infringement?
2. Whether, and under what circumstances, the Seventh Amendment permits the Federal Circuit to refuse to credit the technical testimony of qualified expert—unchallenged under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)—when overturning a jury's verdict on the factual issue of direct infringement.
3. Whether, and under what circumstances, the Seventh Amendment permits the Federal Circuit to reject the evidentiary support for a qualified technical expert's testimony that the Accused Products operate in an infringing manner under the applicable claim construction and overturn a jury's verdict of infringement supported by that testimony.

PARTIES TO THE PROCEEDING

The petitioner here, and plaintiff-appellee in the Federal Circuit, is Commil USA, LLC (“Commil”). The respondent here, and the defendant-appellant in the Federal Circuit, is Cisco Systems, Inc. (“Cisco”).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Commil USA, LLC states that it has no parent corporation and no publicly held company owns 10 percent or more its stock.

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Petitioner Commil USA, LLC, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case, or in the alternative, to grant this petition for a writ of certiorari, vacate the Federal Circuit’s opinion, and remand to the Federal Circuit with an order for the Federal Circuit to remand the case to the district court for a trial on infringement, consistent with this Court’s decisions in *Commil USA, LLC v. Cisco Systems, Inc.*, 135 S. Ct. 1920 (2015), and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

INTRODUCTION

Last year, Petitioner Commil secured a victory in this Court in *Commil USA, LLC v. Cisco Systems, Inc.*, 135 S. Ct. 1920 (2015), which addressed the intent requirement for inducing patent infringement and whether that intent requirement can be negated by a good faith belief of invalidity. After Commil prevailed before this Court on that issue, the Federal Circuit retained jurisdiction on remand and decided the issue of direct infringement, which is a *predicate* element for inducing infringement. *Ricoh Co. v. Quanta Computer Inc.*, 550 F.3d 1325, 1341 (Fed. Cir. 2008) (“[A] finding of inducement requires a threshold finding of direct infringement—either a finding of specific instances of direct infringement or a finding that the Accused Products necessarily infringe.”). Specifically, on remand from this Court, the Federal Circuit granted judgment as a matter of law (“JMOL”) *against* Commil on direct infringement. In doing so, it eviscerated two jury verdicts in Commil’s favor on a question of fact (*i.e.*, whether the Accused Products directly infringe the

patent's claims under the applicable claim constructions) and rendered moot this Court's ruling on inducement that necessarily depended upon the satisfaction of this predicate element.

During the second jury trial (which was ordered as a result of Cisco's attempt to invoke religious biases), Cisco declined to proffer disinterested technical expert testimony on infringement or the operation of its Accused Products. Accordingly, the trial pitted Commil's independent technical expert, Mr. Joseph McAlexander, against an interested Cisco engineer, Mr. Robert O'Hara. The jury found direct infringement, reflecting not only its acceptance of Mr. McAlexander's testimony on the mode of operation of Cisco's Accused Products, but also its rejection of Mr. O'Hara's contrary testimony. Nevertheless, in three terse paragraphs, the Federal Circuit overturned the jury's finding because the court decided—in the face of contrary technical expert testimony—that it “agree[d]” with Mr. O'Hara's testimony describing the operation of Cisco's Accused Products. (App. 5). The Federal Circuit's erroneous actions in this case are consistent with the observations of commentators, who have noted “when the Federal Circuit believes the jury verdict was wrong, it substitutes its opinion for that of the jury and simply states that the substantial evidence test was not met.” Ted D. Lee & Michelle Evans, *The Charade: Trying a Patent Case to All “Three” Juries*, 8 *Tex. Intell. Prop. L.J.* 1, 14 (1999).

The Federal Circuit's decision to direct JMOL cannot be reconciled with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), or with the Seventh Amendment's mandate that “no fact tried

by a jury, shall be otherwise reexamined in any court of the United States.” Under *Reeves*, the Federal Circuit was required to disregard Cisco’s evidence unless it was “uncontradicted and unimpeached” and came “from a disinterested witness.” 530 U.S. at 151. Here, *none* of those three requirements was met. Mr. O’Hara’s testimony on the operation of the Accused Products was both contradicted by Mr. McAlexander’s testimony and heavily impeached. Mr. O’Hara also was undoubtedly an interested witness: he was both a current Cisco employee and a founder of the company that sold the accused technology to Cisco. Moreover, under *Reeves*, the Federal Circuit was required to give “credence” to Commil’s evidence and to “draw all reasonable inferences in favor” of Commil. *See id.* Nevertheless, the Federal Circuit disregarded most of Mr. McAlexander’s testimony and construed the remainder in Cisco’s favor. By crediting Cisco’s evidence and disregarding (and misinterpreting) Commil’s evidence, the Federal Circuit turned the JMOL standard on its head. At its core, the Panel Opinion reveals the Federal Circuit’s decision to assert its own “expertise” as a specialist court to reexamine technical expert testimony where generalist courts would have appropriately deferred to the jury’s weighing of this evidence. Two juries accepted Mr. McAlexander’s testimony and rejected Mr. O’Hara’s testimony, and the Federal Circuit was not free to reexamine this evidence.

OPINIONS BELOW

The Federal Circuit panel opinion is reported at 813 F.3d 994 (Fed. Cir. Dec. 2015) (App. 1-7). The Federal Circuit order denying Commil's petition for rehearing *en banc* is not reported (App. 55-56). The district court's order denying Cisco's motion for judgment as a matter of law is entered at Case No. 2:07-cv-00341, Dkt. No. 481 (E.D. Tex. Sept. 28, 2011) (App. 281-284). The Amended Final Judgment of the district court that is the subject of this appeal is not reported. (App. 45-46).

JURISDICTION

The Federal Circuit rendered its decision on December 28, 2015, and denied Commil's petition for rehearing *en banc* by an order entered on March 1, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portion of the Seventh Amendment provides:

[T]he right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII (App. 57).

The relevant portions of 35 U.S.C. Section 271 provides:

(a) Except as otherwise provided in this title, whoever without authority makes, uses, offers to

sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.

(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

(App. 57).

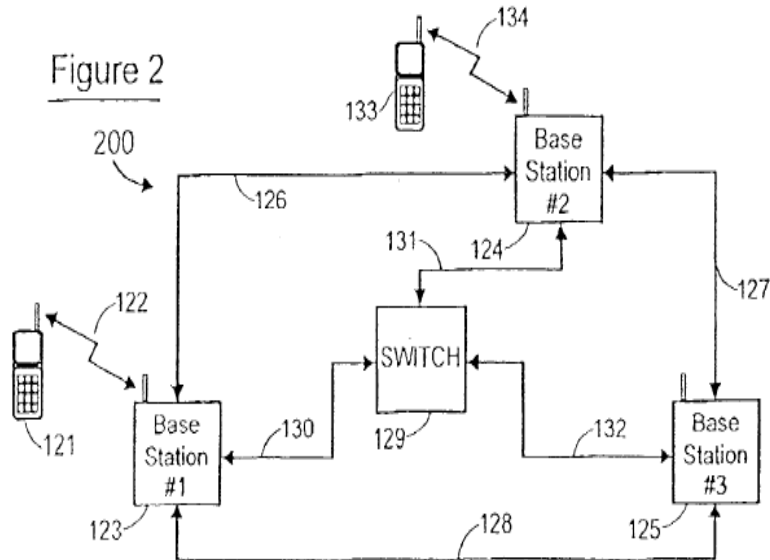
STATEMENT OF THE CASE

I. The Patented Technology

Commil is the owner of U.S. Patent No. 6,430,395 (“the ‘395 Patent”), which describes and claims a “method of communicating between mobile units and the base stations” that provides an improved way to implement a wireless network such as a WiFi network. (App. 141-263). The invention is directed to wireless networks in areas that are too large to be covered by a single base station—for example, universities and large corporate buildings. The problem solved by the invention is how to manage “hand-offs” between multiple base stations that together provide wireless coverage over a large area. In wireless networks predating Commil’s invention, each base station independently handled the entire wireless communication protocol. A mobile device’s transition from one base station to another in such a system resulted in disruptions to the mobile communications.

The inventors of the ‘395 Patent devised a new way to implement short-range wireless networks to provide coordination between base stations and improve the speed and reliability of handoffs. Rather than using the old base stations that handle the entire communication

protocol, the '395 Patent's invention provides a novel architecture that includes a new device called a "switch," which is connected to and supports multiple base stations. Based on this architecture, the communication protocol is divided into two parts, with certain functionality (including functionality that is time-sensitive) performed at the base station and other functionality (including functionality that is not time-sensitive) performed at the switch, as shown in Fig. 2 of the patent:



(App. 145). Claim 1 of the '395 Patent recites:

1. In a wireless communication system comprising at least two Base Stations, at least one Switch in communication with the Base

Stations, a method of communicating between mobile units and the Base Stations comprising:

dividing a short-range communication protocol into a low-level protocol for performing tasks that require accurate time synchronization and a high-level protocol which does not require accurate time synchronization; and

for each connection of a mobile unit with a Base Station, running an instance of the low-level protocol at the Base Station connected with the mobile unit and running an instance of the high-level protocol at the Switch.

(App. 258-259) (emphasis added).

The focus of this petition is on the last limitation (referred to by the parties as the “running” limitation), which the Federal Circuit held that no reasonable jury could find was met by Cisco’s products. The district court construed this limitation to mean: “for each connection of a mobile unit with a Base Station, running at the Base Station a copy of the low-level protocol supporting only that connection” (App. 54). The district court further construed “short-range communication protocol” to mean “a set of procedures required to initiate and maintain short-range communication between two or more devices.” (App. 53). The Federal Circuit applied each of these constructions without considering whether these constructions were correct. (App. 5-6).

II. Cisco's Infringing Products & the Trial Evidence

The Cisco products alleged to infringe are base stations (referred to by Cisco as “access points”) and controllers (collectively, the “Accused Products”) that implement a split-MAC wireless local area networking system. (App. 10-11). Cisco acquired the technology from a company called Airespace, which was founded more than a year *after* the priority date of the ‘395 Patent. Airespace described the Accused Products using language strikingly similar to that found in Commil’s patent:

Split-MAC WLAN systems . . . split[] the processing of the 802.11 data and management protocols, as well as the AP [access point, a/k/a base station] functionality, between the AP and the WLAN switch or controller. . . . In the split-MAC approach, the AP handles the portions of the protocol that have real-time requirements. . . . All other functionality is handled in the WLAN switch/appliance, where time-sensitivity is not a concern. . . .

(App. 266-267).

Whether the Accused Products directly infringe has been addressed in two jury trials, and in each case the jury found in Commil’s favor. In the first trial, the jury found that Cisco directly infringed when it used the Accused Products itself, but did not induce infringement by its customers. (App. 11). In the second trial on inducement (which the trial judge ordered because of inappropriate religious comments made by Cisco’s counsel at the first trial, (App. 20-22)), the jury

again found that the Accused Products directly infringed Commil's patent when used by Cisco's customers and that Cisco induced this direct infringement. (App. 11-12).

At both trials, Commil presented the expert testimony of Mr. Joseph Alexander, who opined based on his review of source code, technical documents, and his testing of the Accused Products that the base stations (access points) ran a separate copy of the low-level protocol for each connected mobile unit and therefore satisfied the "running" limitation as it was construed by the district court. (App. 74). Cisco did not raise any *Daubert* challenges to Mr. McAlexander's technical qualifications or to his approach in analyzing the operation of the Accused Products. There was no dispute that he was a qualified technical expert.

The following is a summary of Mr. McAlexander's testimony as to why the "running" limitation is met by the Accused Products. The Wi-Fi (802.11) standard is "a piece of paper" that describes how to implement certain functionality related to wireless communications. (App. 98-99). The standard is implemented "into the software" via a set of procedures or instructions often referred to as a protocol. (App. 98, 100). Pursuant to the Wi-Fi standard, multiple mobile units may be connected to a base station (an access point) at the same time. (App. 100). The access point, however, can only actually send to or receive data from one of the connected mobile units at a time. (App. 98); (App. 93-94) (explaining that an access point "can *only* communicate with *one unit* at a time." (emphases added)); (App. 100) ("[B]ecause of the way the protocol operates, it can only communicate with one at a time.").

To create the appearance of simultaneous connections with multiple mobile units, access points multiplex their communications—communicating with one mobile unit for a short period of time before pausing the conversation and moving to the next connected mobile unit. (App. 101) (“[T]he access point has to remember where each one is at and be able to multiplex, go back and forth between these two, go from state to another state.”). To keep track of these ongoing communications, access points maintain “state information” for each connected mobile unit. (App. 100-101). State information allows the access point to “know[] precisely where it is in the communication with Mobile Unit No. 1” as compared to another mobile unit and where it should resume those communications. *Id.* Without state information, an access point could not track the status, or “state,” of its communications with different mobile units, and therefore, would not be able to communicate with different mobile units. (App. 102) (“You can’t intersperse them or you would lose sight of where you are or who you’re communicating to.”).

Mr. McAlexander explained that “[t]here *has to be* a separate set of code that is being operated on and executed [for each connection], and *that’s the protocol.*” (App. 102) (emphasis added); (App. 102-103) (“[I]t’s the execution of the procedures in that state that represents the instance or the copy of the communication protocol.”). The jury credited Mr. McAlexander’s testimony that the Accused Products satisfied the claim construction because, although the copies do not run simultaneously, “for each connection of a mobile unit” the base station runs “a *copy of the low-level protocol supporting only that connection*”

when it is actively communicating with a particular mobile unit. (App. 96-98).

During the second trial, Cisco did not present a technical expert to offer an opinion on infringement. Cisco did, however, present testimony about the operation of the Accused Products from one of its engineers, Mr. Robert O'Hara. But Mr. O'Hara's credibility was badly damaged by (1) his repeated admissions on cross-examination that Cisco's own product documentation contradicted his testimony (*e.g.*, (App. 120) ("Q: We have another document, do we not, that flat out contradicts what you told the jury; A: Yes, we do."); (App. 131) ("Q: So this is another—correct me if I'm wrong—Cisco document in black and white that's just flat out different than what you've said in Court; is that true? A: Yes, that's true.")); and (2) an incident in which he departed from the sworn testimony he gave in the first trial about whether Cisco knew about Commil's patent that was so significant that it warranted questioning about the inconsistency from the trial judge in front of the jury. (App. 124-126) ("But did you tell anyone, other than Cisco's lawyer, that you had given false testimony? A. No, but I told them as soon as I realized it."); (App. 136-137). The jury found Cisco liable for inducing infringement, and Cisco appealed to the Federal Circuit.

III. The Federal Circuit's First Opinion and Commil's Appeal to This Court

The Federal Circuit's first opinion ("*Commil I*") vacated the jury's inducement and damages determinations, affirmed the validity determinations, and remanded for a new trial on inducement and damages. (App. 8-44). When reviewing Cisco's

challenge to the inducement verdict, the Federal Circuit based its decision on issues relating to the *scienter* requirement for inducement. (App. 16) (“[W]e vacate the jury’s verdict on induced infringement and remand for a new trial.”). Its basis for vacating the infringement determination was two-fold. First, the panel concluded that the jury instructions on inducement were erroneous because they stated an intent requirement that was inconsistent with *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011). (App. 12-16). Second, the panel majority created a new defense that “a good faith belief of invalidity may negate the requisite intent for induced infringement,” which, according to the panel, entitled Cisco to a new trial where it could present evidence of invalidity to support its argument that it lacked the necessary intent to cause infringement. (App. 16-19).

Although a failure of proof on the issue of direct infringement is necessarily fatal to an inducement claim, the *Commil I* opinion contained no hint that the third trial on infringement it was directing to be held on remand was actually unnecessary (and a total waste of judicial and party resources) because the court believed that *Commil*’s direct infringement evidence was insufficient as a matter of law. *See Limelight Networks v. Akamai Techs.*, 134 S. Ct. 2111, 2117 (2014) (“[O]ur case law leaves no doubt that inducement liability may arise if, but only if, [there is] . . . direct infringement.” (quotation marks omitted)); *Ricoh*, 550 F.3d at 1341 (“[A] finding of inducement requires a threshold finding of direct infringement—either a finding of specific instances of direct infringement or a finding that the accused products necessarily infringe.”).

Commil appealed the aspects of the Federal Circuit's *Commil I* opinion relating to inducement intent to this Court, which granted *certiorari*. This Court held in Commil's favor, determining that a defendant's belief regarding patent validity is not a defense to an induced infringement claim. *Commil*, 135 S. Ct. at 1928. In its opinion, the Court acknowledged the panel's holding that the district court's jury instruction "requires a new trial on the inducement claim with a corrected instruction on knowledge." *Id.* at 1925 (emphasis added).

IV. Subsequent Proceedings in the Federal Circuit

On remand from the Supreme Court, the Federal Circuit abruptly changed course from its previous view (which was shared by this Court) that a third trial was needed. In response to a request from Cisco, the Federal Circuit retained jurisdiction to decide the predicate issue of direct infringement. The Federal Circuit then announced—despite two unanimous jury verdicts in Commil's favor on direct infringement—that "no reasonable jury" could have found direct infringement for Commil and issued an outright reversal. 813 F.3d 994 (Fed. Cir. Dec. 2015) ("*Commil II*") (App. 1-7).

In *Commil II*, the Federal Circuit characterized Commil's expert testimony as an "opinion that tracking separate state information for each device is the same as running, for each connected device, a separate 'set of procedures required to initiate and maintain short-range communication between two or more devices.'" (App. 6-7). Based on this characterization, the panel found his opinion insufficient under the "substantial

evidence” standard because, in their view, he did not “provide evidence or reasonable support for his opinion.” (App. 7). The Court explained its decision—contrary to the decision of the two juries—in three paragraphs:

Cisco contends that [the “running”] step is never performed when its system is used, because its system employs a single copy of the protocol to support all the connected devices.

We agree with Cisco. First, Cisco’s engineer testified that Cisco’s system runs only one copy of the protocol to support multiple connected mobile devices. Specifically, he testified that Cisco’s system “needs and uses only one copy of the protocol to support all 2,000 of those mobile devices The standard was written in a fashion that only one copy of the protocol is necessary to implement the standard.” J.A. 6268.

Although Commil sought to establish otherwise through expert testimony, that testimony falls far short of supporting the jury verdict here. Specifically, Commil’s expert testified that, at most, Cisco’s devices track separate state information for each connected device. He opined that: “[T]he instructions, the protocol . . . it’s a state machine. So this communication state that it is invoking in that communication represents a copy of the protocol that’s unique to that one device that it’s communicating with.” J.A. 6176; *see also id.* (“[A]ll of that information, with regard to that state that it’s using for the communication, is its

own copy of the protocol that's unique to that one communication path "). But tracking separate state information for each device does not provide substantial evidence to satisfy a limitation that requires running a separate protocol copy for each device. Moreover, when pressed, Commil's expert conceded that Cisco's system supports multiple connected devices at the same time, but only runs one copy of the protocol at any one time. J.A. 6204, 6018. In light of this testimony, a reasonable jury could not have found that Cisco's devices run a separate copy of the protocol for each connected device.

(App. 5-6) (emphasis added).

As shown, *Commil II* articulated two reasons for the panel's conclusion that there is "no evidence or reasonable support" for Commil's expert's opinion. First, the panel relied on the contradicted, impeached, and interested (indeed, self-serving) O'Hara testimony (*i.e.*, "J.A. 6268"). (App. 5). Second, without citation to any record evidence, the panel announced its technical conclusion that "tracking separate state information for each device does not provide substantial evidence to satisfy a limitation that requires running a separate protocol copy for each device." (App. 6). Neither of these bases provides a sufficient reason to reject Commil's expert testimony under governing precedent of this Court.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition because the Federal Circuit has failed to respect jury factual findings as required by the Seventh Amendment; the decision below contravenes this Court's precedent on the JMOL standard; and this case presents an ideal vehicle to consider this important question of federal law. Given that this Court is already familiar with this case, it is an excellent vehicle for review, and the direct infringement issue is straightforward. It implicates only one claim limitation, and turns solely on whether the jury was entitled to accept Mr. McAlexander's rather than Mr. O'Hara's explanation of how the Accused Products operate.

I. Usurpation of the Jury's Fact-Finding Role Merits This Court's Attention

Just four years after the Federal Circuit was empaneled in 1982, this Court acknowledged the Federal Circuit's willingness to "substitut[e] its view of factual issues" for those of the fact-finder. *Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809, 811 (1986). Numerous protestations from both individual Federal Circuit judges—when disagreeing with the outcome of the majority opinion—and the legal community demonstrate that the Federal Circuit as a whole has continued its disregard for jury factual findings. *See, e.g., Eon Corp. IP Holdings LLC v. Silver Spring Networks*, 815 F.3d 1314, 1326 (Fed. Cir. 2016) (Bryson, J., dissenting) (explaining record evidence that "provides strong support for the jury's conclusion" that was reversed by the majority); *Mirror Worlds, LLC v. Apple Inc.*, 692 F.3d 1351, 1365 (Fed. Cir. 2012) (Prost, J., dissenting) ("[T]he majority's reasons for

discounting [the plaintiff's] evidence are wholly unconvincing"); *Becton, Dickinson & Co. v. Tyco Healthcare Grp., LP*, 616 F.3d 1249, 1265 (Fed. Cir. 2010) (Gajarsa, J., dissenting) ("[T]he majority turns a blind eye to sufficient evidence supporting the jury's determination of infringement"); *Johns Hopkins Univ. v. Datascope Corp.*, 543 F.3d 1342, 1350 (Fed. Cir. 2008) (Newman, J., dissenting) ("There is no sufficient ground for this court's independent appellate trial of the factual issues that were decided by the jury and sustained by the district court."); *PharmaStem Therapeutics, Inc. v. ViaCell, Inc.*, 491 F.3d 1342, 1367 (Fed. Cir. 2007) (Newman, J., dissenting) ("[M]y colleagues simply reweigh selectively extracted evidence"); William C. Rooklidge & Matthew F. Weil, *Judicial Hyperactivity: The Federal Circuit's Discomfort with its Appellate Role*, 15 Berkeley Tech. L.J. 725, 729 (2000) ("[T]he bar is expressing concern over the court's decision-making procedures and its apparent willingness to take over the roles of patent examiner, advocate and trier of fact.").

Recently, both the number and vociferousness of complaints about the Federal Circuit's propensity to disregard jury findings on factual questions—such as infringement and anticipation—under the guise of the “substantial evidence” standard have increased. *See, e.g.*, Petition for a Writ of Certiorari, *ParkerVision Inc. v. Qualcomm Inc.*, No. 15-1092, at Introduction (Feb. 29, 2016) (“Instead of expressly finding facts, the Federal Circuit now applies the standard of review in an outcome-driven, haphazard manner”); Petition for a Writ of Certiorari, *Alexsam, Inc. v. The Gap, Inc.*, No. 15-736 (Dec. 7, 2015) (“Instead of reviewing evidence which supports the jury's presumed finding, the

Federal Circuit instead looked for evidence that could have supported a different finding, and drew all inferences in favor of [the movant.]”); Apple’s Combined Petition for Panel Rehearing and Rehearing En Banc, *Apple Inc. v. Samsung Elecs. Co.*, Nos. 2015-1171, -1195, -1994, at 2 (Fed. Cir. Mar. 28, 2016) (arguing that the panel’s “appellate fact finding is contrary to the ‘substantial evidence’ standard and violates Apple’s Seventh Amendment right to have a jury decide the factual question of infringement”); Robert W. Morris & Michael R. Jones, *Is Apple v. Samsung The Beginning Of The End For Patents?* Law 360 (Mar. 25, 2016), available at <http://www.eckertseamans.com/wp-content/uploads/2016/03/Morris-Jones-Law360-032516.pdf> (“[T]he Federal Circuit has demonstrated a disturbing willingness to repeatedly set aside jury verdicts of infringement and validity, often on the basis that no reasonable jury could make that factual finding.”).

The unpredictable manner in which the Federal Circuit declares factual evidence insufficient as a matter of law is an important issue. The present case represents the epitome of this unpredictability: Between *Commil I* and *Commil II*, the *same* panel reviewing the *same* issue on the *same* record evidence with *no change* in the governing law reached a *different* result on the ultimate outcome as to the issue of infringement (*i.e.*, new trial on infringement (*Commil I*) versus directing JMOL on infringement (*Commil II*)). This Court’s attention is warranted here. *See Coupe v. Royer*, 155 U.S. 565, 577 (1895) (“This court has had occasion, more than once, to reverse the trial courts for taking away from the jury the question of infringement[.]”).

II. The Panel Opinion Disregarded This Court's Standard For Reviewing Denials of JMOL in *Reeves*.

A. *Reeves* Establishes the Evidence that the Federal Circuit Must and Must Not Disregard in Performing Its JMOL Analysis Regarding Factual Issues.

The two-step infringement analysis and the division of labor between judge and jury is well established. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 384 (1996). First, the construction of the claims, which is a question of law, is determined by the court. *Id.* Second, the purely factual question of whether the allegedly infringing products operate in a way that satisfies the court's construction is submitted to the jury. *Id.*; *see also Coupe*, 155 U.S. at 579 ("Where the defen[s]e denies that the invention used by the defendant is identical with that included in the plaintiff's patent, the court defines the patented invention as indicated by the language of the claims; the jury judge[s] whether the invention so defined covers the art or article employed by the defendant." (quotation marks omitted)). Here, the district court construed the claims, and the Federal Circuit decided whether "the invention so defined covers the art or article employed by the defendant," thereby taking that question away from the jury.

In *Reeves*, this Court clarified the types of evidence that *must* and *must not* be disregarded in resolving a Rule 50 motion for JMOL based on factual issues such as infringement. *Reeves*, 530 U.S. at 151. With regard to the former, "although the court should review the record as a whole, it *must* disregard all evidence

favorable to the moving party that the jury is not required to believe.” *Id.* (emphasis added). The jury is only required to believe the moving party’s evidence when it is “uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.” *Id.* Thus, when the moving party’s evidence is contradicted, impeached, *or* offered by an interested witness, the court may not rely upon it in granting JMOL. With regard to the latter, the court *must not* disregard “evidence favoring the nonmovant.” *Id.* To the contrary, the court must not only give “credence” to the nonmovant’s evidence but must also “draw all reasonable inferences in favor of the nonmoving party” because “the drawing of legitimate inferences from the facts [is a] jury function[], not th[at] of a judge.” *Id.* at 150. In the present case, the Federal Circuit erred by crediting Cisco’s evidence that it was required to disregard and disregarding Commil’s evidence that it was required to credit.

B. The Panel Opinion Relied Upon Cisco’s Evidence Even Though *Reeves* Requires That It Be Disregarded.

Central to the Federal Circuit’s decision to grant JMOL was its holding that it “agree[d] with Cisco” as to the operation of the accused products. (App. 5). Specifically, the Federal Circuit “agreed” that the running step “is never performed when its system is used, because its system employs a *single copy* of the protocol to support *all* the connected devices.” (App. 5). The sole evidence relied upon in the Panel Opinion for that purpose was Mr. O’Hara’s testimony that the Cisco base station “needs and uses only one copy of the

protocol to support all 2,000 of those mobile devices.” (App. 5). To reach this conclusion, the Federal Circuit radically departed from *Reeves*’s JMOL standard by relying on evidence that it was required—for three independent reasons—to disregard in its JMOL analysis. First, Mr. O’Hara’s “single copy of the protocol” argument was contradicted by Mr. McAlexander’s contrary explanation of how the accused products operate. Second, Mr. O’Hara was heavily impeached at trial. Third, Mr. O’Hara was an interested witness. For any one of these three reasons, the jury was not “required to believe” Mr. O’Hara’s testimony and accordingly the Federal Circuit erred under *Reeves* in failing to disregard it. *Reeves*, 530 U.S. at 151.

1. Mr. O’Hara’s Testimony Was Contradicted.

The Federal Circuit erred under *Reeves* in failing to disregard Mr. O’Hara’s testimony that Cisco’s accused base station “needs and uses only one copy of the protocol” because that testimony was contradicted by Commil’s evidence. (App. 5) (relying on O’Hara’s testimony). Specifically, Mr. McAlexander explained that the 802.11 standard used by the Cisco “access points” (*i.e.*, base stations) “allows an access point to communicate with multiple mobile units” but only “one at a time.” (App. 100). When the access point “establishes a connection for communication with [a] first mobile unit, it will establish a communication protocol and begin communicating with that unit.” (App. 100). Mr. McAlexander testified that the “communication state that [the access point] is invoking in that communication represents a copy of

the protocol that's unique to that one device it's communicating with." (App. 100). Further, "[a]s a part of the protocol, it sets up a workspace. It's similar to what Window[s] does when it multitasks. It sets up a workspace that's communicating with this one unit." (App. 100).

Then, Mr. McAlexander testified, when a second mobile unit approaches the access point, it "must now divert its attention to the second [mobile unit.]" (App. 100-101). So the access point "sets aside where it is—it's called a state—so that it knows precisely where it is in the communication with Mobile Unit No. 1. And all of that information, with regard to that state that it's using for the communication, is its own copy of the protocol that's unique to that one communication path to Mobile Unit 1." (App. 101). Once the protocol with the first mobile unit has been halted, the access point then "sets up a corresponding protocol communication with Unit No. 2." (App. 101). Mr. McAlexander explained that "[c]learly, the state that Unit No. 1 and Unit No. 2 are in are different, but the controller—the access point has to remember where each one is at and be able to multiplex, go back and forth between these two, go from state to another state and so forth." (App. 101). Mr. McAlexander then testified that "this is a unique copy of an instance of a protocol that's used for each one of these controller—excuse me—each one of the access points to mobile unit, and that's exactly what, in my estimate, in my belief, this claim language requires." (App. 101).

Mr. McAlexander contradicted Mr. O'Hara's testimony because he explained to the jury that the access point uses multiple copies of the protocol (one for

each connected mobile unit) and that each copy is uniquely tied to a mobile unit based on its state information and the status of the information exchanged between the two. Thus, the Federal Circuit erred by relying on Mr. O'Hara's contradicted testimony. *See Reeves*, 530 U.S. at 151.

2. Mr. O'Hara's Testimony Was Impeached.

The Federal Circuit also erred under *Reeves* in failing to disregard Mr. O'Hara's testimony because it was impeached. During cross examination, Mr. O'Hara admitted that his testimony relating to how the Accused Products operate was inconsistent with Cisco's own documents. *E.g.*, (App. 120) ("Q: We have another document, do we not, that flat out contradicts what you told the jury; A: Yes, we do."); (App. 131) ("Q: So this is another—correct me if I'm wrong—Cisco document in black and white that's just flat out different than what you've said in Court; is that true? A: Yes, that's true."). In the second trial, Mr. O'Hara also departed from the sworn testimony he had given in the first trial about whether Cisco knew about Commil's asserted patent. (App. 124-126) ("But did you tell anyone, other than Cisco's lawyer, that you had given false testimony? A. No, but I told them as soon as I realized it."). The inconsistency in his testimony was glaring enough to warrant direct questions from the trial judge in front of the jury. (App. 136-137). A reasonable jury could have found that Mr. O'Hara was not a credible witness; therefore, it was not "required to believe" his testimony that was relied upon by the Federal Circuit. *See Reeves*, 530 U.S. at 151.

3. *Mr. O'Hara Was an Interested Witness.*

Mr. O'Hara was an interested witness for two reasons, First, as the Federal Circuit acknowledged, Mr. O'Hara was a current "Cisco[] engineer." (App. at 5). Second, Mr. O'Hara was also the founder of Airespace, the company that sold the accused technology to Cisco (App. 111), and therefore had an interest in the outcome of the litigation, which in essence involved determining whether the technology at issue was invented by himself or by Commil. Under *Reeves*, a jury is always free to disregard interested witness testimony, and therefore such evidence favoring the movant must be disregarded in the JMOL analysis. *Reeves*, 530 U.S. at 151. Accordingly, the Panel Opinion erred by relying on interested witness testimony favoring Cisco.

C. The Panel Opinion Improperly Ignored Commil's Evidence and Drew Inferences Against Commil.

1. *The Panel Opinion Improperly Disregarded Portions of Mr. McAlexander's Direct Examination Testimony*

According to the Panel Opinion, Mr. McAlexander testified that "at most" the accused products "track separate *state information* for each connected device." (App. 5) (emphasis in original). The Panel Opinion concluded that merely tracking "state information" does "not provide substantial evidence to satisfy a limitation that requires running a separate protocol copy for each device." (App. 6). The Federal Circuit

erred by refusing to credit the bulk of Mr. McAlexander's testimony.

Mr. McAlexander testified to far more than merely tracking state information, and the Panel Opinion attacked its own strawman by reducing Mr. McAlexander's testimony to this overly simplified characterization and then rejecting it as insufficient as a matter of law. Mr. McAlexander testified that, based upon his examination of the accused products, "there was handling of information back and forth between the access point and the mobile device realtime" and that "[t]hose particular instructions were executed, and the protocol was executed at the access point." (App. 82). Thus, there was substantial evidence that when an access point is communicating with a particular mobile unit, a "protocol [i]s executed" pursuant to the "particular instructions" that establish the protocol. Indeed, these instructions and the protocol exist because the base stations (access points) have been "programmed with their [Cisco's] software" that is "embed[ded] in each of these access points . . . and that's called firmware" that "provides the engine by which the whole system operates." (App. 87-88). Mr. McAlexander testified that, "[o]nce there's a connection that's made [between a base station and mobile unit], now communication can start" and "[t]he communication is done, according to the 802.11 protocol, on a—it's called a packet-by-packet basis." (App. 91).

Mr. McAlexander then proceeded to describe how the base stations run a separate copy of the protocol for each connected mobile unit. He explained that "[t]he base station or access point communicates with a

mobile unit using an 802.11-type protocol.” (App. 98). Thus, each time there is communication between a base station and a mobile unit, a protocol is running. However, although the 802.11 protocol “allows an access point to communicate with multiple mobile units,” it only allows the base station to “communicate with one [mobile unit] at a time.” (App. 100).

When the base station while running a protocol copy with a first mobile unit needs to communicate with a second mobile unit, it must save the “state” (*i.e.*, current state of play in the protocol) with the first mobile unit so that the base station “knows precisely where it is in the communication with Mobile Unit No. (App. 101). That way, when the base station begins communicating with the first mobile unit again, it will be running the copy of the protocol corresponding to the state of the first mobile unit at the time when communications were suspended. Mr. McAlexander explained that “all of that information, with regard to that state that it’s using for the communication [with the first mobile unit], is its own copy of the protocol that’s unique to that one communication path to Mobile Unit 1.” (App. 101).

The base station then “sets up a corresponding protocol communication with Unit No. 2.” (App. 101). Mr. McAlexander further explained that “[c]learly, the state that Unit No. 1 and Unit No. 2 are in are different, but the controller—the access point has to remember where each one is at and be able to multiplex, go back and forth between these two, go from state to another state and so forth.” (App. 101). By initiating the 802.11 protocol independently for each connected mobile unit at the appropriate point in the

protocol for that mobile unit based on its state information, the accused products create “a unique copy of an instance of a protocol that’s used for . . . each one of the access points to mobile unit, and that’s exactly what, in my estimate, in my belief, this claim language requires.” (App. 101). The Federal Circuit erred by refusing to credit the majority of Mr. McAlexander’s testimony, which resulted in the mischaracterization of that testimony.

2. *The Panel Opinion Improperly Drew Inferences Against Commil Based on Mr. McAlexander’s Cross Examination*

The Federal Circuit also erred under *Reeves* by misinterpreting Mr. McAlexander’s cross examination and drawing improper inferences favorable to Cisco rather than proper inferences favoring Commil. According to the Federal Circuit, “when pressed, Commil’s expert conceded that Cisco’s system supports multiple connected devices at the same time, but only runs one copy of the protocol at any one time.” (App. 6). The cross examination testimony at issue is as follows:

Q. *At any moment in time*—would you agree with me, sir, that *at any moment in time*, there’s only one copy of the Wi-Fi protocol running on an access point?

A. If you’re talking about the protocol being the entirety of the program, yes, there’s only one of those.

(App. 110) (emphases added). Mr. McAlexander’s testimony that “at any moment in time” only one copy of the protocol is running was not a concession at all, but rather was an acknowledgement of his direct

examination testimony that the base stations can only “communicate with one [mobile unit] at a time.” (App. 100). Thus, although the base stations run a copy of the protocol for each connected mobile unit, those protocols are run sequentially, not simultaneously. As Mr. McAlexander explained, this is a process known as “multiplex[ing]” in which “the access point has to remember where each [mobile unit] is at and be able to . . . go back and forth between these two, go from state to another state. . . .” (App. 101). However, Mr. McAlexander also explained that as the base stations communicates sequentially with each connected mobile unit, there is a “separate set of code that is being operated on and executed, and that’s the protocol. It’s a communication protocol.” (App. 102).

III. The Panel Opinion Violated Commil’s Seventh Amendment Rights.

Presented with Cisco’s own documents and Mr. McAlexander’s analysis and testimony, on the one hand, and Cisco’s lack of any expert testimony whatsoever on the question of infringement, on the other, it was reasonable for the jury to find that the Accused Products infringe. The Federal Circuit’s contrary conclusion is overt appellate fact finding. The crux of the Panel Opinion is as follows:

We begin with the running step. The district court construed the running step as requiring “for each connection of a mobile unit with a Base Station, running at the Base Station a copy of the low-level protocol supporting only that connection and running at the Switch a corresponding separate copy of the high level protocol supporting only that connection.” J.A. 2

(emphasis added). Cisco contends that this step is never performed when its system is used, because its system employs a *single copy* of the protocol to support *all* the connected devices. *We agree with Cisco.*

(App. 5) (emphasis added). The Federal Circuit went on to hold that this manner of operation dictated that there was no direct infringement. The panel's opinion is clear that the panel "agreed with Cisco," and by implication that they *disagreed* with Mr. McAlexander's testimony, as explained in Section II.C.1. This decision, however, belonged to the jury—not a panel of appellate judges—and the panel's usurpation of this decision from the jury overtly conflicts with the Seventh Amendment's mandate that "no fact tried by a jury, shall be otherwise reexamined in any court of the United States." U.S. Const. amend. VII.

As explained above, Mr. McAlexander testified that, in his opinion as a technical expert, the fact that the Accused Products maintain unique state information and execute unique procedures for each connected mobile device demonstrates that there is a unique copy of the protocol being run for each connection. *Supra* at Section II.C.1. The appellate panel members simply disagreed and declared—without citation—that "tracking separate *state information* does not provide substantial evidence to satisfy a limitation that requires running a separate *protocol copy* for each device." (App. 6). The panel's pronouncement is particularly inappropriate on appellate review because resolution of the factual question of how many copies of the protocol are run by the Accused Products is a

technical fact question rather than a legal one, and none of the appellate panel members purports to be an expert (or even of ordinary skill) in the art of wireless networking and none of them observed any technical expert testimony directed to the question. *See United States v. Raddatz*, 447 U.S. 667, 679 (1980) (“[C]ourts must always be sensitive to the problems of making credibility determinations on the cold record.”); *Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 401 n.3 (2006) (noting “the value of the district court’s input, cautioning the courts of appeals to be ‘constantly alert to the trial judge’s first-hand knowledge of witnesses, testimony, and issues.’”).

Patent owners have a Seventh Amendment right to have their infringement claims tried to a jury. *Markman*, 517 U.S. at 377 (“[T]here is no dispute that infringement cases today must be tried to a jury, as their predecessors were more than two centuries ago.”). If that right is to have any practical meaning in a framework where claim construction is decided by courts, there must be rigorous judicial adherence to the jury’s right to determine how the accused products work. This was expressly recognized in *Markman*, where the Court noted that questions of how *products work* are distinct from questions of how *documents are interpreted* and explained that the former belong to the jury because “investing the court with so dispositive a role would improperly eliminate the jury’s function in answering the ultimate question of infringement.” 517 U.S. at 385 (discussing *Bischoff v. Wethered*, 9 Wall. 812 (1870)). In the present case, the judiciary claimed for itself both roles: the district court construed the claims, and the Federal Circuit determined how the

accused products work. This was a violation of Commil's Seventh Amendment rights.

Nearly 150 years ago, this Court decided a pair of cases establishing that the judiciary's role in the infringement analysis stops after the terms of the patent are construed. See *Tucker v. Spalding*, 80 U.S. 453 (1872); *Bischoff*, 76 U.S. at 814. These cases made clear that the manner in which a product alleged to fall within the scope of a patent claim operates and whether a product operating in that manner is covered by the construed claim are questions of fact that the Seventh Amendment reserves for the jury. *Id.* *Bischoff*, *Tucker*, and *Markman* establish a straightforward proposition: judges construe the claims because they are expected to be more skilled in the interpretation of legal instruments, *Markman*, 517 U.S. at 388, but historical and practical considerations dictate that justice is better served when juries are entrusted with weighing evidence of how real-world products work, *Tucker*, 80 U.S. at 455, *Bischoff*, 76 U.S. at 815.

Bischoff involved a dispute as to whether two machines relating to steam generation, each of which was described in a patent, were identical. 76 U.S. at 813. The plaintiff "called upon the court to compare the two specifications, and to instruct the jury" that the invention of the later patent was described in the earlier patent. *Id.* The trial court declined, and this Court held that it was correct in doing so because the identity of the inventions is "a question of fact for the jury, and not a question of law for the court." *Id.* at 814. The Court was unequivocal about the division of labor between judge and jury: questions concerning "the construction of the instrument" (*i.e.*, claim

construction) belong to the judge, but questions of “the character of the thing invented” (*i.e.*, how embodiments of patented inventions work) are reserved for the jury. *Id.* at 816.

The Court explained that judicial interpretation of patents does not extend to determining how devices, “which have their existence *in pais*, outside the documents themselves,” operate:

[T]he whole subject matter of a patent is an embodied conception outside of the patent itself, which, to the mind of those expert in the art, stands out in clear and distinct relief, whilst it is often unperceived, or but dimly perceived, by the uninitiated. This outward embodiment of the terms contained in the patent is the thing invented, and is to be properly sought, like the explanation of all latent ambiguities arising from the description of external things, by evidence *in pais*.

Id. at 815.

Two years after *Bischoff*, the Court again affirmed the jury’s exclusive responsibility for determining how products work in *Tucker*. In that case, like *Bischoff*, the parties disputed whether a prior patent disclosed the same invention as the asserted patent. *Tucker*, 80 U.S. at 454. Specifically, the defendant sought to introduce expert testimony to show that “the process of [the earlier patent], and of the machine made thereunder, and of the result produced thereby, were the same process, machine, and result as were involved in the patent of the plaintiff.” *Id.* The trial court concluded that the prior patent’s invention was not the same and,

accordingly, excluded it from evidence and refused to permit the defendant's expert testimony. *Id.* at 454-55.

This Court reversed. After initially acknowledging that some might doubt “the fitness of the jury as a tribunal to determine the diversity or identity in principle of two mechanical instruments,” the Court continued that, although the trial court is obliged to “lay down to the jury the law which should govern them ... and may, if they disregard instructions, set aside their verdict, *the ultimate response to the question must come from the jury.*” *Id.* at 455 (emphasis added). The Court reiterated the message from *Bischoff*: courts have no right “to decide that the one patent covered the invention of the other, or that it did not.” *Id.*; see also *Silsby v. Foote*, 55 U.S. 218, 226 (1853) (“[N]ot the construction of the claim, strictly speaking, but the application of the claim, should be left to the jury.”).

Two decades after *Tucker* and *Bischoff*, the Court again confirmed that courts should not be passing judgment on the technical differences between machines in *Royer v. Schultz Belting Co.*, 135 U.S. 319, 325 (1890). In that case, it held that the circuit court erred in concluding that the defendant did not infringe rather than submitting the issue to the jury because “[i]t was not a matter of mere judicial knowledge that the mechanical differences between the [patented and allegedly infringing raw hide treatment] machines were material.” *Id.*

In the present case, the Federal Circuit decided for itself on appeal that Cisco's “system employs a *single copy* of the protocol to support *all* the connected devices,” (App. at 5) (emphasis in original), and rejected the jury's contrary finding that Cisco's products run

separate copies of the protocol for each connected mobile unit. By doing so, the Federal Circuit “improperly eliminate[d] the jury’s function in answering the ultimate question of infringement” and deprived Commil of its Seventh Amendment right to a jury trial. *Markman*, 517 U.S. at 385.

IV. The Panel Opinion Circumvented the Correct Standard for Appellate Review of the Admissibility of Expert Testimony.

Beyond ignoring *Reeves*, the Federal Circuit’s approach also erroneously circumvents the correct procedure for addressing reliability of expert testimony under Federal Rule of Evidence 702. The gate-keeping responsibility belongs to the trial court, and the standard of appellate review is abuse of discretion. *See Daubert*, 509 U.S. at 597 (“[T]he Rules of Evidence—especially Rule 702—do assign to the *trial judge* the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” (emphasis added)); *General Electric v. Joiner*, 522 U.S. 136 (1997) (holding that the correct standard of review for admissibility of expert testimony is abuse of discretion). Here, Mr. McAlexander is indisputably a qualified technical expert; indeed, Cisco never alleged otherwise in a *Daubert* motion, nor did it object (at either trial) when Commil offered him as an expert. Moreover, it is also undisputed that Mr. McAlexander’s methodology was appropriate and that his testimony satisfied the “fit” requirement in that it would “assist the trier of fact to understand the evidence or to determine a fact in issue.” *Daubert*, 509 U.S. at 591. He reviewed Cisco’s product documentation, the source code for the Accused

Products, and performed his own testing of actual products in operation. (App. 68-69, 74, 80, 81-82). Had Cisco challenged his testimony under *Daubert*, Federal Circuit review would have been limited to abuse of discretion. By simply declaring that Mr. McAlexander's testimony as to the operation of the accused products was factually incorrect as a matter of law, the Federal Circuit side-stepped the deference properly owed to a district court's exercise of its gate-keeping responsibility and approach to policing the reliability of expert testimony.

V. This Case Presents an Exceptional Vehicle for Addressing the JMOL and Seventh Amendment Issues.

For several reasons, this case presents an exceptional vehicle for reviewing whether the Federal Circuit's mode of appellate review complies with this Court's JMOL and Seventh Amendment precedent. First, at least for purposes of this Petition, there is a single patent claim limitation subject to an undisputed claim construction. Second, the Cisco testimony relied upon by the Panel Opinion in granting JMOL was clearly contradicted by Commil's evidence, impeached by Commil's lawyers and the trial judge, and offered by a witness whose interests were aligned with JMOL movant Cisco. Third, the Commil testimony disregarded and misinterpreted by the Panel Opinion was evidence that *Reeves* required not be disregarded. Fourth, the Panel Opinion expressly made its own appellate factual finding about how the Accused Products operate. Because this case involves clear violations of the *Reeves* standard, it is an excellent

vehicle for addressing Federal Circuit JMOL practices.

CONCLUSION

For the reasons set forth above, Commil respectfully requests that the Court grant its petition for a writ of certiorari.

Respectfully submitted,

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