

**In The
Supreme Court of the United States**

CISCO SYSTEMS, INC.,
Petitioner,

v.

COMMIL USA, LLC,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Following a jury trial in which Cisco repeatedly played upon religious prejudices and ethnic stereotypes, the district court determined Cisco's conduct resulted in manifest injustice and ordered a partial new trial on the issue of induced infringement, which is "distinct and separable" from the issue of validity. On appeal the Federal Circuit "established a substantive, precedential change in patent law by expressly 'hold[ing] that evidence of an accused inducer's good-faith belief of invalidity may negate the requisite intent for induced infringement.'" Commil Pet. App. 53a (Reyna, J.) In view of this substantive change of the law, the Federal Circuit remanded this case for a second partial retrial (*i.e.*, a third trial) of induced infringement, but not validity, as the Federal Circuit affirmed that Commil's patent is valid. The question presented is:

Whether induced infringement is sufficiently "distinct and separable" from validity such that the grant of a partial new trial on induced infringement alone does not violate the Seventh Amendment where (1) the grant of a partial retrial was caused by Cisco's misconduct, (2) the jury found the patent to be valid, (3) the Federal Circuit affirmed validity, noting that Cisco's arguments were "without merit," and (4) Cisco does not contest validity in its cross-petition.

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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STATUTE

35 U.S.C. § 271(b)	8, 10
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Petitioner Commil USA, LLC, respectfully submits this response to Cisco System Inc.'s Conditional Cross-Petition (hereinafter "Cross Petition").

In its Cross Petition, Cisco goes to great effort to ignore the fact that the partial new trial about which Cisco complains was a self-inflicted wound. The District Court ordered—and the Federal Circuit upheld—a partial new trial based upon the substantial injustice stemming from Cisco's anti-Semitic comments against Commil's corporate representatives and the patent's inventors. Cisco now protests that the partial new trial was a violation of its constitutional rights under the Seventh Amendment, attempting to benefit from its own improper trial conduct. That is, Cisco seeks to use the grant of partial new trial to retry the issue of invalidity despite the fact that the Federal Circuit has affirmed that Cisco's invalidity theories are "without merit," and the Patent Office has confirmed the patentability of the asserted patent during a reexamination proceeding that Cisco filed.

Putting aside the factual context of this case, the Federal Circuit has consistently acknowledged that invalidity and infringement constitute "separate and distinct" issues that can be tried separately without violating the Seventh Amendment. Cisco's Cross Petition attempts to effect yet another substantive change in patent law and highlights yet another reason that the Federal Circuit's creation of a "good faith belief of invalidity" defense to induced infringement is flawed. As Cisco's argues: "the question of invalidity is not 'distinct and separable'

from the question of [the newly created defense of a] good-faith belief of invalidity.” Cross Pet. at 3. Cisco’s argument demonstrates the problems associated with the majority opinion in “hold[ing] that evidence of an accused inducer’s good-faith belief of invalidity may negate the requisite intent for induced infringement.” Commil Pet. App. 12a-13a (Prost, J). The correct response to Cisco’s arguments is not to require district courts to always try induced infringement and invalidity together—even where the patent has been repeatedly established as valid, as here. Instead, this Court should recognize that a good-faith belief of *invalidity* is irrelevant to the question of whether an accused infringer possessed the *specific intent* to cause *infringement*. *Gasoline Products* is consistent with such a result, as “where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement *does not compel* a new trial of that issue even though another and separable issue must be tried again.” *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 499 (1931). As explained below, Cisco’s Cross Petition should be denied.

STATEMENT OF THE CASE

Commil’s Statement of the Case is set forth in its Petition (No. 13-896). To address the specific statements included in Cisco’s Cross Petition, Commil includes the following:

A. Proceedings at the District Court

Commil’s owner and its patents’ inventors are Jewish and reside in Israel. Commil Pet. App. 13a-

17a (Prost, J.).¹ Throughout the first trial in May 2010, Cisco’s counsel “attempted to play upon religious prejudices and ethnic stereotypes.” Commil Pet. App. 13a (Prost, J.). For example, during cross-examination of Jonathan David, Commil’s owner, Cisco’s counsel made the following improper comments:

- Perpetuating stereotypes of Jewish people as greedy opportunists: Cisco’s counsel asked Mr. David if his cousin was a “bottom-feeder” like people involved in the “subprime mortgage catastrophe,” “buying people’s houses that they got kicked out of for next to nothing.” A5823(139:19-140:1).
- Implying that Commil was “hiding” an inventor, Nitzan Arazi: Cisco’s counsel asked Mr. David if Mr. Arazi “hit the road for Israel.” A5825(146:4-147:18).
- Appealing to religious prejudices: When Mr. David mentioned eating at a local BBQ joint, Cisco’s counsel quipped, “I bet not pork.” A5825(146:4-24).

Even after being rebuked for the “pork” comment, Cisco’s counsel continued with his improper comments in closing:

- Cisco’s counsel repeatedly referred to the patent, which names Jewish

¹ As with Cisco’s conditional cross-petition, “App.” refers to the appendix to Cisco’s conditional cross-petition, “Commil Pet. App.” refers to the appendix to Commil’s petition in No. 13-896, and “A__” refers to the court of appeals Joint Appendix.

inventors, as “the little Arazi shrine” and the “little shrine.” *See, e.g.*, A6038(17:19-21); A6039(18:1-2; 18:13-16; 20:18-20); A6040(24:23-24).

- “You remember the most important trial in history, which we all read about as kids, in the Bible had that very question from the judge.” A6038(16:14-16) (emphases added).
- “Mr. David got the inside word from his cousin, who works with the bank that forecloses on people over there and kicks them out of their businesses.” A6038(16:24-17:2).
- “And if you put those three nos down, the one thing that won’t happen is that Mr. David won’t fly back home [to Israel] later this week with a sack full of Cisco’s money that belongs to Cisco and its employees here in Texas and its shareholders.” A6041(29:18-22) (emphasis added).

The first jury determined that Commil’s patent was not invalid, Cisco directly infringed, but Cisco did not induce infringement. A136-39. The first jury adopted Cisco’s damages model and awarded damages of \$3,726,207. Commil Pet. App. 4a-5a (Prost, J.).

In response to Commil’s motion for a new trial, the district court found that Cisco’s conduct “impliedly align[ed] Cisco’s counsel’s religious preference with that of the jurors and employ[ed] an

‘us v. them’ mentality—i.e., ‘we are Christian and they are Jewish.’” Commil Pet. App. 43a. The district court concluded that “when these comments are considered as a whole,” they “prejudiced the jury’s findings ... and had a tendency to appeal to the prejudices of the jurors.” Commil Pet. App. 44a. The district court concluded that the verdict was “inconsistent with substantial justice” and ordered a new trial on inducement and damages. *Id.*

In the second trial, the jury returned a verdict that Cisco induced its customers’ infringement and awarded damages of \$63,791,153. Commil Pet. App. 5a (Prost, J.).

B. Proceedings at the Federal Circuit

On appeal, the Federal Circuit unanimously affirmed the District Court’s grant of a new trial in view of Cisco’s counsel’s prejudicial remarks. Commil Pet. App. 17a (Prost, J.), 22a (Newman, J.), 29a (O’Malley, J.). Moreover, the Majority Opinion affirmed that the grant of a partial new trial of induced infringement and damages did not violate the Seventh Amendment. Commil Pet. App. 20a (Prost, J.), 22a (Newman, J.). In addition, under a *de novo* review standard,² the panel affirmed that Commil’s patent is not invalid for a lack of enablement. Commil Pet. App. 21a (Prost, J.). The panel also affirmed that Commil’s patent is not invalid on the basis of indefiniteness or a lack of an adequate written description. *Id.* In its Petition, Cisco has not challenged the panel’s determinations that Commil’s patent is not invalid.

² Commil Pet. App. 21a.

REASONS FOR DENYING THE PETITION

I. A Partial New Trial Was Warranted in View of Cisco's Trial Tactics

Throughout the first trial, Cisco's counsel "attempted to play upon religious prejudices and ethnic stereotypes." Commil Pet. App. 13a (Prost, J.). In its Cross Petition, Cisco ignores its conduct at trial. Cisco skips over the premise of its Seventh Amendment "question" with the singular statement, "During the trial, Cisco's local counsel made a comment to which Commil did not object, but that the district court later concluded inappropriately referred to Commil's principal's Jewish heritage." Cross Pet. at 4.

Cisco does not dispute that its attempt to play upon religious prejudices and ethnic stereotypes were proper grounds for a new trial. *See, e.g., Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 275-78 (5th Cir. 1998) (improper appeal to local bias and "Golden Rule" argument); *Hall v. Freese*, 735 F.2d 956, 960-61 (5th Cir. 1984) (racial prejudice and local bias). Yet Cisco maintains its self-serving argument that "the statements during the first trial that served as the basis for the district court's decision to order a new trial must—if they affected the first trial at all—necessarily have affected the entire trial, which further indicates that only a full retrial is possible in this case." Cross Pet. at 16. Cisco's attempt to benefit from its counsel's improper conduct in seeking a full new trial of validity is beyond the pale. Given that Cisco bore the burden of proving invalidity by "clear and convincing evidence"

and that Cisco failed to do so even after biasing the jury against Commil, the District Court was entitled to conclude that retrial of validity was not necessary. The District Court appropriately tailored the partial new trial in such a manner as to not reward Cisco for its misdeeds.

II. Cisco's Argument Is Premised On An Acceptance Of The Majority Opinion's Flawed Holding, Which Should Be Rejected

Cisco's Cross Petition requests review of the Majority Opinion's Seventh Amendment holding regarding the constitutionality of the partial new trial *only if* this Court agrees to review the Majority Opinion's holding that a good-faith belief of invalidity is relevant to whether an accused infringer possessed the requisite intent to induce infringement. As explained in Commil's Petition (No. 13-896), the Majority Opinion's holding "that evidence of an accused inducer's good-faith belief of invalidity may negate the requisite intent for induced infringement" is flawed. Commil Pet. 11-19. Cisco's Cross Petition is premised upon an acceptance of that flawed holding.

Cisco's Cross Petition does not acknowledge that infringement and invalidity are separate and distinct issues. Even the flawed Majority Opinion recognizes this foundational principle: "patent infringement and invalidity are separate and distinct issues." Op. at 16 (citing *Pandrol USA, LP v. Airboss Ry. Prod., Inc.*, 320 F.3d 1354, 1364-65 (Fed. Cir. 2003)). Cisco attempts to carve out an exception

to this principle for cases in which a good-faith belief of invalidity has been asserted to negate the requisite intent for induced infringement.³ Cisco’s Cross Petition, however, demonstrates yet another problem created by the Federal Circuit’s new “good-faith belief of invalidity” defense. If this new defense is rejected, Cisco’s Seventh Amendment argument must also be rejected as the only basis for Cisco’s Seventh Amendment argument is that “Cisco’s good-faith belief of invalidity is not ‘distinct and separable’ from its actual invalidity defense.”⁴

Induced infringement “requires specific intent *to cause infringement*”—not a specific intent to cause *liability for infringement*. *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 692 F.3d 1301, 1308 n.1 (Fed. Cir. 2012) (emphasis added); *see also* 35 U.S.C. § 271(b) (“Whoever actively induces infringement of a patent shall be liable as an infringer.”). Infringement involves a determination that each and every limitation set forth in a claim appears in an accused product. *Wenger Mfg., Inc. v. Coating Mach. Sys., Inc.*, 239 F.3d 1225, 1231 (Fed. Cir. 2001). Such an analysis is a “separate and distinct” analysis from invalidity. In other words, an accused infringer can intend to cause infringement of an invalid patent, but there is no liability for such infringement

³ In effect, Cisco’s argument would require the Federal Circuit always to remand both induced infringement and validity, lest an accused infringer decide on remand to assert a good faith belief of invalidity in an attempt to negate intent to induce infringement and thereby give rise to a Seventh Amendment violation according to Cisco.

⁴ As discussed in Section II, *supra*, it is unclear that Cisco has an “actual invalidity defense.”

because the patent is invalid. *Medtronic, Inc. v. Cardiac Pacemakers, Inc.*, 721 F.2d 1563, 1583 (Fed. Cir. 1983) (“Though an invalid claim cannot give rise to liability for infringement, whether it is infringed is an entirely separate question capable of determination without regard to its validity.”); *see also Lazare Kaplan Int’l, Inc. v. Photocopy Techs., Inc.*, 714 F.3d 1289, 1295 (Fed. Cir. 2013); *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1320 (Fed. Cir. 2009); *Pandrol USA, LP v. Airboss Ry. Prods.*, 320 F.3d 1354, 1365 (Fed. Cir. 2003); *Spectra-Physics, Inc. v. Coherent, Inc.*, 827 F.2d 1524, 1535 (Fed. Cir. 1987) (“The single instruction to the jury that invalid claims cannot be infringed (*a nonsense statement*), one of many on supposed general principles of patent law, does not operate to convert the interrogatories on infringement into general verdicts which subsumed all of Spectra’s invalidity defenses, including best mode.”) (emphasis added). As Judge Newman’s dissenting opinion explained:

Patent invalidity, if proved, eliminates an invalid patent and thus is a total defense to infringement. However, a “good-faith belief” in invalidity does not avoid liability for infringement when the patent is valid. No rule eliminates infringement of a valid patent, whether the infringement is direct or indirect.

Commil Pet. App. 23a (Newman, J.) In effect, the Majority Opinion’s holding permits an accused infringer—that intended to cause direct

infringement of an adjudged valid patent—to avoid infringement where the accused infringer wrongly believed that there could be no *liability* for infringement because the patent was invalid. There is no indication that Congress intended to preclude a finding of inducement infringement in such situations, as the statute clearly provides: “Whoever actively induces *infringement* of a patent shall be liable as an infringer.” 35 U.S.C. § 271(b) (emphasis added). There is no need to revisit the Majority Opinion’s Seventh Amendment holding, as infringement and invalidity are separate and distinct issues.

III. The Facts Of This Case Do Not Warrant Review Of The Majority Opinion’s Seventh Amendment Holding

While Cisco argues that it should be allowed to retry invalidity, the fact remains that it has no viable invalidity theories to re-try. The Federal Circuit rejected all of Cisco’s invalidity theories in two sentences:

Cisco argues that the claims are invalid for reasons of indefiniteness, non-enablement, and lack of written description. We find these contentions without merit.

Commil Pet. App. 21a (Prost, J.). Cisco does not request review of this decision. Moreover, before the first trial—of both invalidity and infringement—Cisco dropped all claims of anticipation and obviousness. Instead, Cisco only tried invalidity

theories that the Federal Circuit summarily rejected as “without merit.” The Patent Office likewise confirmed the patentability of the asserted patent during a reexamination proceeding filed by Cisco. Cisco’s meritless invalidity theories do not warrant this Court’s consideration.

IV. The Federal Circuit Properly Applied *Gasoline Products*

Cisco contends that the Federal Circuit improperly inverted the standard articulated by this Court in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931). Cross Pet. at 11-12. *Gasoline Products* stated: “Here we hold where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement *does not compel* a new trial of that issue even though another and separable issue must be tried again.” *Id.* at 515. The Majority Opinion’s articulation of the standard is consistent with—and even quotes—*Gasoline Products*:

The Federal Rules of Civil Procedure allow the courts to grant partial new trials so long as the issues are “distinct and separable.” A court’s authority to grant a partial new trial is likewise constrained by the Seventh Amendment. “Where the practice permits a partial new trial, it may not properly be resorted to *unless* it clearly appears that the issue to be retried is so *distinct and separable* from the others that a trial of it alone

may be had without injustice.” A partial new trial should not be granted where the issues to be retried are “so interwoven” with other issues in the case “that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty.”

Commil Pet. App. 17a-18a (Prost, J.) (emphasis added) (internal citations omitted). In fact, the focus of the Majority Opinion’s analysis is whether the issues that will be re-tried are “so interwoven” with the issues that will not re-tried. *Id.* Specifically, the Majority Opinion considers whether a partial retrial would require having “two juries [to] review the same evidence” as opposed to “having two juries decide the same essential issues,” which is prohibited. *Id.* The Majority Opinion reasons that:

[T]he fact that a second jury will consider evidence of invalidity that supports Cisco’s position on the good-faith belief issue does not compel the conclusion that the second jury will decide the ultimate issue of invalidity. Indeed, the issue of whether Cisco possessed a good-faith belief of invalidity is distinct and separate from the issue of whether the patent claims are invalid. In order to determine that Cisco had a good-faith belief of invalidity, the jury must merely decide whether Cisco possessed that belief in good-faith. The jury need not decide whether the underlying

position was meritorious. Thus, although the two juries will review the same evidence of invalidity, they will not decide the same essential issues.

Id. at 18a. The Majority Opinion’s Seventh Amendment analysis was properly focused on the standard set forth in *Gasoline Products*. Cisco, in fact, articulates the same standard that the Majority Opinion applied:

A partial retrial “may not be resorted to *unless*” it is clear that the issue to be retried is “separate and distinct” from the other issues decided in the first trial. *Gasoline Prods.*, 283 U.S. at 500 (emphasis added). This is consistent with this Court’s Seventh Amendment jurisprudence more generally

Cisco Cross-Petition at 13. As Cisco recognizes in its Cross Petition, “the Constitution is concerned, not with form, but with substance[.]” Here, the substance of the Majority Opinion’s constitutional analysis is consistent with Seventh Amendment jurisprudence and this Court’s standard in *Gasoline Products*.

V. The Federal Circuit’s Holding Is Consistent With The Other Court of Appeals

The majority’s holding does not create a circuit split. The Majority Opinion correctly articulated this Court’s Seventh Amendment test

and applied that test to arrive at a holding consistent with the jurisprudence of the other courts of appeals. Cisco zeroes in on the disembodied phrase “clear and indisputable,” ignoring the context and reasoning of the Majority Opinion’s holding.

The Majority Opinion correctly articulates the Seventh Amendment test of *Gasoline Products*. See *supra* Part IV. This is the same test used by circuit courts across the country; in fact, every single case in Part II of cross-petitioner’s brief cites *Gasoline Products* with approval. Cisco Cross-Petition at 21-22 & n.7. The Majority Opinion also explains that the “prohibition is not against having two juries review the same evidence, but rather against having two juries decide the same essential issues.” *Commil*, 720 F.3d at 1371 (quoting *In re Innotron Diagnostics*, 800 F.2d 1077, 1086 (Fed. Cir. 1986)). This statement of the law has been adopted (verbatim) by other circuit courts of appeals. *Houseman v. United States Aviation Underwriters*, 171 F.3d 1117, 1128 (7th Cir. 1999); *Brown v. SEPTA*, 113 F.3d 444, 452 n.5 (3d Cir. 1997). Accordingly, the Majority Opinion invokes the same legal standard used by the other courts of appeals; there is no disagreement.

Moreover, the Majority Opinion applies the legal standard to the facts in a way that fully accords with the ostensibly conflicting cases cited by cross-petitioner. The Majority Opinion observes that “patent infringement and invalidity are *separate and distinct issues*.” *Commil* Pet. App. 18a. (quoting *Pandrol USA, LP v. Airboss Ry. Prods., Inc.*, 320 F.3d 1354, 1365 (Fed. Cir. 2003)) (emphasis added). Likewise, “the issue of whether Cisco possessed a

good-faith belief of invalidity is *distinct and separate* from the issue of whether the patent claims are invalid” because “although the two juries will review the same evidence of invalidity, they will not decide the same essential issues.” Commil Pet. App. 20a. (emphasis added); *see also id.* at 19a. (citing *Voda v. Cordis Corp.*, 536 F.3d 1311, 1329 (Fed. Cir. 2008)). Thus the majority’s affirmance of a partial new trial is completely consistent with the out-of-circuit decisions cited in Cisco’s brief—those cases hold that a court may order a partial new trial when the issues are distinct and separate. *See, e.g., Rice v. Community Health Ass’n*, 203 F.3d 283, 290 (4th Cir. 2000) (granting plaintiff’s request for a partial new trial because the issues were “distinct and separable”); *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 774 (9th Cir. 1981) (remanding for a partial new trial where the issues were “distinct and separable”).

Cisco’s focus on the words “clear and indisputable” is a red herring. This language serves to emphasize the deferential abuse of discretion standard under which the Federal Circuit was required to review the lower court’s decision. Commil Pet. App. 16a. Just like the Federal Circuit, other courts of appeals often emphasize the deferential nature of this standard when discussing Seventh Amendment issues. *See, e.g., Vizzini v. Ford Motor Co.*, 569 F.2d 754, 761 (3d Cir. 1977) (“We are most reluctant to disturb the trial judge’s ruling on the limited new trial.”); *Houseman*, 171 F.3d at 1128 (Seventh Amendment review of a district court’s decision to bifurcate a trial is “deferential,” and so “[w]e need not decide whether this was the best or even the only good method of trying this case.”).

CONCLUSION

For the reasons set forth above, Commil respectfully requests that the Court deny Cisco's Condition Cross-Petition for Writ of Certiorari.

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