

Nos. 13-896, 13-1044

IN THE
Supreme Court of the United States

COMMIL USA, LLC,
Petitioner,

v.

CISCO SYSTEMS, INC.,
Respondent.

CISCO SYSTEMS, INC.,
Cross-Petitioner,

v.

COMMIL USA, LLC,
Cross-Respondent.

ON PETITION AND CONDITIONAL CROSS-PETITION
FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**SUPPLEMENTAL BRIEF FOR RESPONDENT AND
CONDITIONAL CROSS-PETITIONER
CISCO SYSTEMS, INC.**

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CORPORATE DISCLOSURE STATEMENT

Cisco Systems, Inc., has no parent corporation. To Cisco's knowledge, no publicly held company owns 10 percent or more of Cisco's stock.

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The government's invitation brief, devoted almost entirely to rearguing the issue this Court squarely addressed and decided just three years ago in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060

(2011), effectively contends that *Global-Tech* was wrongly decided. The suggestion that this Court should reconsider *Global-Tech*, or was somehow unclear or unthinking in *Global-Tech*'s unequivocal articulation of the required state of mind for induced infringement, is without merit and should be rejected. The government also acknowledges the serious vehicle problems presented by the interlocutory posture of this case and the possibility that the questions presented will be mooted by proceedings on remand. In short, the government presents no persuasive reason why this Court should review the first question presented in Commil's petition in No. 13-896 and correctly recommends that the Court deny Commil's second question presented.

Furthermore, the government recognizes the erroneous Seventh Amendment standard articulated by the Federal Circuit, reinforcing that, if any part of Commil's petition is granted, the question presented in Cisco's conditional cross-petition in No. 13-1044 should be considered as well.

I. COMMIL'S FIRST QUESTION PRESENTED DOES NOT MERIT REVIEW, ESPECIALLY PRIOR TO FINAL JUDGMENT

A. The Court Should Reject The Government's Efforts To Re-litigate *Global-Tech*

The reasoning and holding of *Global-Tech* could not be clearer. The first line of the Court's opinion lays out in plain terms the issue under review: "We consider whether a party who 'actively induces infringement of a patent' under 35 U.S.C. § 271(b) must know that the induced acts *constitute patent infringement*." 131 S. Ct. at 2063 (emphasis added). The Court was similarly clear in articulating its resolution of that issue: "[W]e

now hold that induced infringement under § 271(b) requires *knowledge that the induced acts constitute patent infringement.*” *Id.* at 2068 (emphasis added). And the Federal Circuit has never suggested that *Global-Tech* means anything other than what it explicitly says. See Commil Pet. App. 9a (“A finding of inducement requires both knowledge of the existence of the patent and ‘knowledge that the induced acts constitute patent infringement.’” (quoting *Global-Tech*, 131 S. Ct. at 2068)); *Microsoft Corp. v. DataTern, Inc.*, 755 F.3d 899, 904 (Fed. Cir. 2014) (“To prove inducement of infringement, unlike direct infringement, the patentee must show that the accused inducer took an affirmative act to encourage infringement with the knowledge that the induced acts constitute patent infringement.” (citing *Global-Tech*)); *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1339 (Fed. Cir. 2012) (citing *Global-Tech* and observing that patentee must show that accused infringer “specifically intended their customers to infringe the ... patent and knew that the customer’s acts constituted infringement”).

Despite *Global-Tech*’s clear holding and uniform interpretation, the government contends that “*Global-Tech* does not clearly resolve ... whether the defendant must additionally possess actual knowledge that the induced conduct constitutes infringement.” U.S. Br. 9. Remarkably, the government characterizes the sentence in *Global-Tech* beginning with the words “*we now hold,*” 131 S. Ct. at 2068 (emphasis added), as simply a “suggest[ion].” U.S. Br. 9-10. Besides being irreconcilable with the clear language of this Court’s opinion, as uniformly understood and applied by the Federal Circuit since, the government’s position is also contrary to the reading of *Global-Tech* that the government itself has previously presented to this Court. See U.S. Br.

13-14, *Limelight Networks, Inc. v. Akamai Techs., Inc.*, No. 12-786 (U.S. Mar. 3, 2014) (“Under ordinary principles of inducement liability, if a vendor induces its customers to practice all of the steps in the patented process, *and does so with knowledge that the induced acts constitute infringement*, the vendor would be liable for actively inducing infringement under Section 271(b)[.]” (emphasis added; citing *Global-Tech*)).

In any event, contrary to the government’s assertions, the Court had the question of intent and specificity of knowledge squarely before it in *Global-Tech*.¹ Indeed, the Court considered the very “text, history, and purposes” (U.S. Br. 19) of Section 271(b) that the government suggests it overlooked. 131 S. Ct. at 2065 (beginning analysis “with the text of § 271(b)” and seeking dictionary guidance on textual meaning); *id.* at 2067 (noting Section 271(b) “was meant to codify” “pre-1952 case law”); *id.* at 2065-2067 (addressing “case law that predates the enactment of § 271 as part [of] the Patent Act of 1952”). With the issue fully briefed and considered, the Court held “that induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement.” *Id.* at 2068.

¹ Several amici in *Global-Tech* expressly urged the Court to adopt the specific intent standard the Court ultimately announced. See Comcast Corp. et al. Br. 4, *Global-Tech* (U.S. Dec. 6, 2010) (“In keeping with its common-law origins, inducement liability under 35 U.S.C. § 271(b) should be imposed only upon a showing that the defendant had actual knowledge that the acts it was encouraging infringed a patent.”); Yahoo! Inc. et al. Br. 8-9, *Global-Tech* (U.S. Dec. 6, 2010) (“The particular structure of Section 271 confirms that inducement in patent law also requires a specific intent to encourage legal violations, *knowing of the illegality*.” (emphasis added)).

Nothing about *Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964) (*Aro II*), undermines the import of this pronouncement. In *Aro II*, the Court considered whether the knowledge requirement of Section 271(c), governing contributory infringement, “require[s] a further showing that Aro knew that the tops were patented, and knew also that Ford was not licensed under the patent so that any fabric replacement by a Ford car owner constituted infringement.” *Id.* at 488. The Court answered that question in the affirmative: “On this question a majority of the Court is of the view that § 271(c) does require a showing that the alleged contributory infringer knew that the combination for which his component was especially designed *was both patented and infringing.*” *Id.* (emphasis added); *see id.* at n.8 (plurality opinion) (noting that a majority of the Court shared this view); *see also* 2 Matthews, *Annotated Patent Digest* § 10:44 (2008) (emphasizing that *Aro II* held that both knowledge of the patent and knowledge of infringement are required).

Though it appears reluctant to state it so explicitly, the government’s argument is, in effect, that *Global-Tech* was wrongly decided. In addition to not being presented by Commil’s petition, this argument is without merit. Accepting the government’s position would not only require the Court to overrule *Global-Tech*, but would also have a chilling effect on innovation by dramatically expanding infringement liability to parties who do not even practice the patent themselves, simply because they are generally aware of the patent’s existence—even where they have reason to believe in good faith that the patent is invalid and/or not infringed. Such a conception of inducement liability extends far beyond the language of the statute, was correctly re-

jected in *Global-Tech*, and should not be entertained now. See U.S. Br. 18 (“Construing Section 271(b) to require knowledge of actual infringement would reflect a more straightforward reading of the statutory text.”).

B. A Good-Faith Belief That A Patent Is Invalid Or Not Infringed May Negate The Intent Required For Induced Infringement

To the extent it addresses Commil’s first question presented other than through its attempt to reargue *Global-Tech*, the government advances no more persuasive arguments than Commil. Like Commil, the government fails to appreciate the crucial distinction between *direct* infringement and *induced* infringement: the alleged infringer’s state of mind. *Global-Tech*, 131 S. Ct. at 2068. This difference distinguishes the direct infringement authorities cited by the government (at 12-13), which mimic those cited by Commil and are unpersuasive for the same reasons. See Cisco Opp. 8-10.² This Court has made clear that induced infringement, unlike direct infringement, requires culpable action. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937 (2005) (emphasizing that liability standard for inducement of copyright infringement is limited, targeting only “purposeful, culpable expression and conduct,” and explicitly tying its reasoning to similar decisions in context of induced patent infringement under § 271(b)); cf. *Aro II*, 377 U.S. at 488.

² The government’s attempt (at 13) to refute the axiom that one cannot infringe an invalid patent by reciting a single sentence of dicta from Judge Rich, made in passing while addressing an unconnected jury verdict issue, is no more persuasive and does not inform the analysis here.

The policy arguments advanced by the government (at 14-16), like Commil's, also miss the mark. Contrary to the government's and Commil's predictions, the lower courts have applied the good-faith belief of invalidity defense with no ill effect on patent rights. *E.g.*, *Ultratec, Inc. v. Sorenson Commc'ns, Inc.*, 2014 WL 4265847, at *41 (W.D. Wis. Aug. 28, 2014) (denying summary judgment of no induced infringement despite grant of inter partes review because it is for "the jury to assess whether defendants' invalidity defenses were held in good faith and whether they negate the specific intent to induce infringement"); *Clouding IP, LLC v. Rackspace Hosting, Inc.*, 2014 WL 495752, at *3 (D. Del. Feb. 6, 2014) (concluding that good-faith belief of invalidity is not "a pleading requirement" and that evidence of good-faith belief of invalidity is only relevant "on the merits at trial"); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 2013 WL 4458754, at *6 (D. Nev. Aug. 16, 2013) (refusing to set aside verdict of induced infringement notwithstanding asserted defense of good-faith belief of invalidity because, while relevant, "evidence of a good-faith invalidity belief does not preclude a finding of induced infringement"), *aff'd*, 2014 WL 5352367 (Fed. Cir. Oct. 22, 2014). Indeed, several district courts had recognized that a good-faith belief of invalidity was a valid defense even before the Federal Circuit's decision in this case. *See, e.g.*, *VNUS Med. Techs., Inc. v. Diomed Holdings, Inc.*, 2007 WL 2900532, at *1 (N.D. Cal. Oct. 2, 2007); *Kolmes v. World Elastic Corp.*, 1995 WL 918081, at *10 (M.D.N.C. Sept. 18, 1995).

In fact, all of the government's policy arguments would equally undermine the defense of a good-faith belief in non-infringement, which neither Commil nor any judge on the Federal Circuit has questioned. *See* Cisco Opp. 10-11. Indeed, the Federal Circuit has up-

held findings of no induced infringement, “even though [the defendant’s] product was ultimately found to infringe,” where the jury had substantial evidence from which to conclude that the defendant lacked the intent required for induced infringement because the defendant “reasonably believed that the use of [its product] would not infringe.” *Ecolab, Inc. v. FMC Corp.*, 569 F.3d 1335, 1351, *amended on reh’g in part*, 366 F. App’x 154 (Fed. Cir. 2009). The government’s only response to this point is to posit (at 20) that this Court might reconsider *that* doctrine in another case as well. That would be a remarkable change in law. A good-faith belief that the asserted patent is not infringed is an established and widely accepted defense to induced infringement, and has existed for many years without detrimental effect on patent rights.

C. Additional Factors Counsel Against Granting Commil’s Petition

The government correctly recognizes the factors that make this case unsuitable as a vehicle for the Court to review Commil’s questions presented and that also commend further percolation in the district courts and Federal Circuit before any review by this Court.

First, as the government acknowledges (at 11 n.2), the Federal Circuit has done nothing more than announce the availability of the good-faith belief of invalidity as a defense. As the Federal Circuit noted (Commil Pet. App. 12a-13a & n.1), it did not rule that belief of the patent’s invalidity *precludes* a finding of induced infringement; rather, it simply recognized that a reasonable belief in the invalidity of the patent-in-suit is *relevant* in determining whether the accused infringer had the required specific intent to induce infringement. Until the lower courts have an opportunity to

apply the Federal Circuit’s decision, any review by this Court would be premature.

In addition, the government acknowledges (at 15-16) that because Commil’s second question presented does not merit this Court’s review (*infra* Part II), there will be a third trial whether or not the Court takes up Commil’s first question. After that trial, the district court—and perhaps the Federal Circuit—will have to review actual liability for induced infringement. *See* Commil Pet. App. 32a (O’Malley, J.) (“If we send this matter back for a new trial on induced infringement without resolving these issues, we likely will see the case return in much the same posture.”). Cisco will have “additional available arguments” on remand (U.S. Br. 16 n.4), including substantial non-infringement arguments that were not passed upon by the Federal Circuit. Commil Pet. App. 31a-32a (O’Malley, J.). As a result, there may be no need for a jury to hear evidence of Cisco’s good-faith belief of invalidity because the case can be decided on non-infringement grounds before verdict. *See id.* 31a; Cisco C.A. Br. 31-35. In that instance, this Court’s review would have no impact on the parties’ dispute. And if there is a third trial in which a jury considers Cisco’s good-faith belief of invalidity, then the question will arise again in this very case and will be better suited for review on a full record after final judgment, rather than in this interlocutory posture.

II. THE FEDERAL CIRCUIT’S CASE-SPECIFIC APPLICATION OF *GLOBAL-TECH* TO REVERSE THE DISTRICT COURT’S ERRONEOUS JURY INSTRUCTION IS CORRECT AND DOES NOT MERIT REVIEW

The Federal Circuit’s unanimous conclusion that the jury instruction concerning the required culpability for a finding of induced infringement was erroneous

and required a new trial is a correct application of this Court's holding in *Global-Tech*. Even were it not, Commil's second question presented would not merit this Court's attention. As the government recognizes, once *Global-Tech* is accepted as governing the level of intent needed to induce patent infringement—which it plainly does (*supra* Part I.A)—Commil's remaining argument consists only of “a case-specific challenge to the court of appeals' interpretation of the particular instructions given in this case.” U.S. Br. 18.

While the government is correct that Commil's second question presented is unworthy of this Court's review, it is incorrect to suggest (at 20) that the question might warrant review in another case. The Court already reviewed and resolved Commil's second question in *Global-Tech* and held that specific intent, including actual knowledge of infringement, is needed. *Supra* Part I.A.

III. THE GOVERNMENT PROVIDES NO MEANINGFUL ARGUMENTS FOR DENYING THE CONDITIONAL CROSS-PETITION IF COMMIL'S PETITION IS GRANTED

The government acknowledges (at 22-23) that the Federal Circuit's discussion of Cisco's Seventh Amendment argument incorrectly invoked the mandamus standard rather than the standard articulated by this Court in *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931), but attempts to avoid the obvious implications of this error by suggesting that the rote articulation of the correct standard earlier in the decision was sufficient. But the Federal Circuit's *holding* on Cisco's Seventh Amendment challenge clearly depended on applying the mandamus standard (Commil Pet. App. 20a), which the government recognizes would

“permit a partial retrial more readily than the *Gasoline Products* standard.” U.S. Br. 23.

The government fails to explain how, under the correct Seventh Amendment standard, the issues of invalidity and induced infringement are “distinct and separable” from each other as required by *Gasoline Products*. See Cross-Pet. 16-19; Commil Pet. App. 37a (O’Malley, J.) (noting the “potential for confusion because of the interwoven nature of the invalidity claims and Cisco’s good faith defense to induced infringement”); *id.* 63a (Newman, J., joined by Rader, C.J., Reyna & Wallach, JJ., dissenting from denial of rehearing) (concluding that “the issues of infringement and validity are interwoven”). Instead, the government asserts (at 22) that this error did not affect the outcome because the third jury may assess Cisco’s good-faith belief of invalidity defense without “re-deciding” or “revisiting” the first jury’s invalidity verdict. But a partial retrial violates the Seventh Amendment not only if it requires a revisiting of the first jury’s verdict, but also if it invites jury confusion—as the panel majority’s partial remand clearly does. See *Anderson v. Siemens Corp.*, 335 F.3d 466, 476 (5th Cir. 2003) (partial retrial prohibited when the issue “subject to retrial [is] so interwoven with other issues in the case that [it] cannot be submitted to the jury ... without confusion and uncertainty” (internal quotation marks omitted)).

Finally, the government asserts (at 23) that Cisco’s Seventh Amendment rights should be disregarded because of the grounds on which a new trial was ordered. That is simply absurd. Neither this nor any other court has ever suggested that the Constitution somehow ceases to apply depending on the reason for granting a new trial. See Cisco Reply Br. 7-8. Once a new trial is ordered, the Constitution requires a full retrial *unless*

the issues are clearly distinct and separable; otherwise the jury right prevails. In any event, the Federal Circuit recognized that “Cisco was not alone in its attempt to curry favor with the jury through the use of religious references.” Commil Pet. App. 15a n.2 (Prost, J.); *id.* 30a n.1 (O’Malley, J.) (“[C]ounsel for both parties made improper comments during the trial.”).

As with the questions presented in Commil’s petition, Cisco’s Seventh Amendment argument can be taken up by this Court (if necessary) after a final judgment, which is why the Court should deny both petitions. The interrelatedness of the two petitions, however, reinforces the fact that if the Court grants any part of Commil’s petition, it should also grant Cisco’s cross-petition.

CONCLUSION

The Court should deny Commil's petition for a writ of certiorari in No. 13-896. If that petition is granted, the Court should also grant Cisco's conditional cross-petition in No. 13-1044.

Respectfully submitted.

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