No. 19-101

IN THE

Supreme Court of the United States

IMPERIUM IP HOLDINGS (CAYMAN), LTD.,

Petitioner,

v.

SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS AMERICA, INC., SAMSUNG SEMICONDUCTOR, INC.,

Respondents.

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

BRIEF OF TECHNOLOGY INDUSTRY LEADERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

This Brief *amici curiae* is filed on behalf of twelve senior executives, entrepreneurs and venture capitalists who have devoted their careers spanning decades to founding, investing in and managing businesses whose livelihood is cutting-edge technology. These companies, centered in California's "Silicon Valley," focus on inventing, developing and commercializing technology that, in some cases, literally creates new industries and ways of life. Protection of intellectual property through patents and trade secret process knowhow is absolutely critical to the success and continued creation and expansion of these businesses. *Amici,* several of whom are inventors themselves, bring a unique perspective on the practical impact of patent litigation at the intersection of innovation and economic development. Relevant background and experience of each of the signatories is described in the Appendix to this Brief.

SUMMARY OF ARGUMENT

This is a patent infringement case. The jury determined that the plaintiff's patent was valid and was not anticipated by the defendant's prior art claims. The jury further determined that the defendant willfully infringed the patent at issue, and the district court awarded treble

1. Pursuant to Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part, and that no person other than Petitioner has made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for Petitioner and Respondent received at least ten days' notice of the intent to file this brief and have consented to its filing.

damages based on the defendant's trial misconduct. Following both inter partes review and ex parte review, the Patent and Trademark Office ("Patent Office") re-affirmed on each occasion the validity determination that it made in issuing the patent. Notwithstanding the Patent Office's repeated findings of validity, and the jury verdict to the same effect upheld by the district court, the Federal Circuit, based on a cold reading of the trial transcript, awarded defendant judgment as a matter of law.

Amici are concerned that the Federal Circuit's decision in this case – made by three unelected judges – usurps the Constitutionally-mandated role of juries to find the facts and decide issues of witness credibility. In so doing, the Federal Circuit continues an unfortunate pattern of improper appellate fact-finding that destabilizes our patent system to the severe detriment of entrepreneurial invention. *Amici* urge this Court to step in and restore the proper roles of the jury and appellate review in patent litigation by granting *certiorari* in this case.

ARGUMENT

1. The Constitution Protects the Right of Inventors to Jury Determination of Patent Claims

Part of the reason that such incredible innovation has flourished in this country is our system of patent protection, as ordained in the United States Constitution. U.S. Const. Art. I, Sec. 8, Cl. 8 ("The Congress shall have power. . . [t]o promote the progress of science and useful arts, by securing for limited times to . . . inventors the exclusive right to their respective . . . discoveries. . . ."). In implementing the Patent Clause, Congress has been

particularly emphatic in protecting inventors' right. In the Patent Act, Congress declared that "[a] patent shall be presumed valid." 35 U.S.C. § 282(a). As a result, a "defendant raising an invalidity defense" bears "'a heavy burden of persuasion,' requiring proof of the defense by clear and convincing evidence." *Microsoft Corp. v. i4i Ltd. Partnership*, 564 U.S. 91, 102 (2011) (quoting *Radio Corp. of Am. v. Radio Eng'g Labs.*, 293 U.S. 1, 8 (1934)). *Amici* have experienced first-hand the paramount importance of the patent system, as governed by this standard, in maintaining our nation's position at the forefront of entrepreneurial innovation in an ever more competitive world.

An important attribute of our patent system – and one equally enshrined in the Constitution – is the right of inventors to have patent disputes, no matter how complex and technical they may be, determined in Federal court by a duly-empaneled jury. As the Seventh Amendment provides: "[T]he right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States . . . ." U.S. CONST. AMEND. VII.

So important was the right to a jury trial that assurance of its inclusion in the Bill of Rights became a key argument in securing ratification. *See* P. Maier, *Ratification: The People Debate the Constitution, 1787-1788*, at 196-97 (2010). Indeed, Alexander Hamilton wrote that both sides in the ratification debate actually had reached consensus on this issue:

> The friends and adversaries of the plan of the Convention, if they agree on nothing else, concur at least in the value they set upon trial by jury; if there is any difference between them, it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.

The Federalist No. 83, at 426 (M. Beloff ed. 1987).

The Seventh Amendment, moreover, does not simply protect the constitutional right to a jury trial in civil cases. It is also a *limitation* on a reviewing court's power to disturb a jury's determination as to the weight and credibility that should be afforded to evidence at trial. That evidence emphatically includes the opinions of expert witnesses. This Court has enforced this principle in numerous decisions throughout our nation's history. As the Court held in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986): "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Among other things, in reviewing a jury verdict, the court of appeals "should review all of the evidence in the record" and "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (citations omitted): *see* 19 J.W. Moore, *et al., Moore's Federal Practice: Civil* §206.02 (3rd ed. 2016) (collecting cases).

These principles are especially important with respect to the Federal Circuit, because that court has exclusive appellate jurisdiction over patent matters. The Federal Circuit's decision in this case is not an isolated incident, but rather the latest in a number of cases in which the court has imposed its own view of the facts in place of the considered determination of a duly-empaneled jury. *See* Brief of US Inventor, Inc. as *Amicus Curiae* in Support of Petitioner in No. 19-101, at 7-9. This approach is weakening our patent system by limiting the rights and protections that innovative entrepreneurs need in order to continue to promote, foster and develop new technologies.

2. The Decision Below Gravely Weakens Patent Protection and Threatens Innovation

The Federal Circuit's decision in this case, if not reversed, will create a dangerous crack in the wall of patent protection that is essential to protect innovation and entrepreneurial investors. It will chill innovation by allowing a panel of judges, reading a cold record, to arbitrarily invalidate patent rights that were upheld by a jury that heard the evidence and observed the witnesses and expert testimony in a week-long trial – the very same rights that were vindicated by the Patent Office as well, in issuing the patents, in *inter partes* review initiated by defendant here after the trial and yet again in an *ex parte* "third-party" review proceeding.

Included in the evidence that the jury heard and considered was the testimony of defendants' engineering expert, who explained his opinion that certain of the claims in plaintiff's patents were anticipated in the prior art. The expert was cross-examined at length, raising

questions about his credibility and veracity generally. Plaintiff's expert testified to his own opinion that the prior art was not anticipatory and did not cover the claims at issue. He testified, among other things, that defendant's expert analysis of the patent's limitations did not make any sense because it would result in a non-functional camera. Considering this, and all the other evidence, the jury concluded that the patent was valid because defendant had failed to meet its heavy burden of proving anticipation by clear and convincing evidence; and the jury further found that defendant's infringement was willful. The district judge, who also heard and observed the witnesses, upheld the jury's finding as supported by the evidence, and entered a $22 million judgment.

Yet on appeal, looking only at the cold record, the Federal Circuit addressed the prior art issue by dissecting the competing evidence like a pathologist. It discussed the testimony of both parties' experts in detail, and concluded that "the jury's finding lacks any reasonable basis" because the "jury was *required* . . . to find the claims . . . at issue to be anticipated by prior art." Petition at 8a-11a, 13a-14a (emphasis added). In reaching this decision, the court used descriptions that rang of prototypical fact-finding – that defendant's expert testimony was "strong," "straightforward," "not contradicted," and not "impeached." Petition at 13a.

This fact-finding by the Federal Circuit flies in the face of the Seventh Amendment. The court flatly failed to view the evidence, inferences and credibility issues in the light most favorable to the verdict. *See* p. 3 above. Indeed, it did just the opposite, thereby violating the precept that "[t]rial by jury is a fundamental guaranty of the rights

of the people, and judges should not search the evidence with meticulous care to deprive litigants of jury trials." *Galloway v. United States*, 319 U.S. 372, 407 (1943) (Black, J., dissenting) (citation omitted).

Even if the Federal Circuit were correct that the defense expert's testimony was "uncontradicted" and "unimpeached," that is no basis for overturning a verdict. Nor is there any requirement that a patentholder must introduce testimony to support the patent's validity, since the Patent Office has already made that determination in granting patent rights. "There are many circumstances in which testimony need not be accepted even though formally uncontradicted. 'The jury is instructed that it is completely free to accept or reject an expert's testimony, and to evaluate the weight given such testimony in light of the reasons the expert supplies for his opinion.'" *Powers v. Bayline Mariners, Corp.*, 83 F.3d 789, 797-98 (6th Cir. 1996) (internal quotations omitted) (citing *Quock Ting v. United States*, 140 U.S. 417, 420 (1891)). *See, e.g.*, *Strickland v. Francis*, 738 F.2d 1542, 1552 (11th Cir. 1984) (finder of fact can reject uncontested expert testimony); *Grenada Steel Industries v. Alabama Oxygen Co.*, 695 F.2d 883, 889 (5th Cir. 1983) ("It was for the jury to decide which of the experts was more credible, which used the more reliable data, and whose opinion – if any – the jury would accept."); *United States v. Woodson*, 526 F.2d 550, 551 (9th Cir. 1975) (finder of fact can disbelieve uncontested expert testimony); *United States v. Coleman*, 501 F.2d 342, 346 (10th Cir. 1974) ("The credibility and weight of expert testimony are matters within the jury's province and need not be accepted as conclusive even though uncontradicted by counter-medical expertise."); *Hassan v. Stafford*, 472 F.2d 88, 96 (3d Cir. 1973) ("a trier

of fact is not bound to accept an expert's opinion merely because it is uncontradicted").

Moreover, the effective result of the Federal Circuit's reasoning was that plaintiff could avoid judgment against it as a matter of law only by fulfilling, to the court's satisfaction, an affirmative obligation to rebut or contradict defendant's expert testimony concerning invalidity. But this turns the Patent Act upside down, by forcing the plaintiff to carry a burden that by express statutory enactment rests on the defendant. *See* 35 U.S.C. § 282(a); *Microsoft Corp.*, 564 U.S. at 102. Expert testimony merely involves "expressions of opinion by [witnesses] familiar with a subject," and those opinions "have no such conclusive force that there is error of law in refusing to follow them." *Dayton Power & Light Co. v. Pub. Utils. Comm'n of Ohio*, 292 U.S. 290, 299 (1934). As with any other kind of evidence, "even if such testimony be uncontradicted," the jury may "exercise [its] independent judgment" not to credit it. *The Conqueror*, 166 U.S. 110, 131 (1897). Thus, even if plaintiff had offered no evidence at all on invalidity, the jury was empowered to find that defendant had not carried its high burden of proof by clear and convincing evidence. By ignoring the burden of proof in patent cases, and the proper role of appellate courts, the Federal Circuit has invited mischief into the judicial system. It has given the losing party – whether plaintiff or defendant – a disruptive tool to change jury outcomes based on the fact-finding of appellate judges.

Under our constitutional system, as implemented by the Patent Act, inventors are entitled to rely on the good judgment of a lay jury of citizens, duly empaneled from the court's venue, to determine whether the exacting legal

standard for proof of invalidity by clear and convincing evidence has been met. That system, though criticized from time to time, has produced the most creative and dynamic economy the world has known. *Amici* are gravely concerned that the effective result of the Federal Circuit's decision is to reallocate the burden of proof for invalidity that Congress has deliberately placed squarely on the party attacking a patent.

By substituting its judgment for the jury's (and trial judge's) on quintessential questions of fact, the court below threatens to upend that carefully constructed system. In overturning the validity determinations of both the jury and the Patent Office, the decision below, if allowed to stand, means there can be no assurance that the intellectual property rights of any U.S. inventor will remain intact even after withstanding multiple challenges at the Patent Office and at trial. The decision is particularly pernicious because patent appeals, rather than going to one of the twelve geographically-defined courts of appeals, are universally funneled to the exclusive jurisdiction of the Federal Circuit. This, the Federal Circuit's law, which now includes a gravely erroneous standard for review of patent verdicts, will control all future patent appeals.

Innovation has thrived because of our nation's comment to and enforcement of strong rights and protections for intellectual property. Generations of inventors have relied on these protections. Yet the decision below diminishes the value of all intellectual property rights and weakens the protections that are essential for continued innovation in the face of intense worldwide competition.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for Certiorari should be granted.

August 19, 2019

Respectfully submitted,

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APPENDIX

APPENDIX — SIGNATORIES

Mark Ain has had a distinguished career as the founder, Chairman and CEO of Kronos, Inc., a multibillion dollar software company, having led it through its initial public offering in 1992 to its current size with over 5,500 employees. He received his undergraduate degree from Massachusetts Institute of Technology in Electrical Engineering.

Gil Amelio has had a distinguished career as an entrepreneur and senior executive in emerging technologies companies. Dr. Amelio's career has included service as President of Rockwell International, Chief Executive Officer of National Semiconductor and Chief Executive Officer of Apple, Inc. He has worked with such Silicon Valley firm as Sienna Ventures, Advanced Communications Technologies, and founded Acquicor with Steve Wozniak. He has served on a number of boards, including Interdigital, Inc., Galactin Therapeutics and AT&T, and is Chairman of Petitioner's board of directors. He is an IEEF Fellow, has been awarded 16 patents and is the receipt of numerous awards.

Edward Arrendell is a leading management consultant in the arts, music and entertainment. He represents numerous musicians and performers through his company, The Management Ark, Inc. He is a graduate of Harvard Business School and is a leading advocate of innovation.

Rob Chess is a serial entrepreneur in the life sciences field. He is Chairman of Nektar Therapeutics,

(NASDAQ:NKTR), a health care biotechnology company of which he was formerly CEO; and Biota Technologies, a company he co-founded which has pioneered the use of DNA sequencing for optimizing oil and gas production. He serves as lead director of Twist Biosciences (NASDAQ:TWST), which produces synthetic genes using an innovative high-throughput silicon-based manufacturing process. Mr. Chess co-founded and was President of Penederm, a dermatology company that went public and was acquired by Mylan Laboratories; and he was the start-up CEO and later Chairman of OPX Biotechnologies, a renewable chemicals company acquired by Cargill. Mr. Chess served in the administration of President George H.W. Bush as a White House Fellow and Associate Director of the White House Office of Economic and Domestic Policy. He is a lecturer at the Graduate School of Business at Stanford University.

Ronald Drucker spent much of his career at CSX Corporation, as President and CEO of CSX Rail Transport and in other capacities including Chairman and CEO of CSX Technology, President of Baltimore and Ohio Railroad and President of Chesapeake & Ohio Railway. A civil engineer by training, Mr. Drucker is active in community matters, and was Chairman of the Board of The Cooper Union for the Advancement of Science & Art and Chairman of the Board of the National Defense Transportation Association.

Carly Fiorina forged a distinguished career as a senior executive in the technology industry, culminating in her tenure as Chief Executive Officer of Hewlett-Packard

Company, where she was the first woman to lead a Top-20 company. Ms. Fiorina oversaw HP's acquisition of Compaq, making it the world's largest seller of personal computers. In 2004, she was included in the Time 100 ranking of "most influential people in the world." In 2016, Ms. Fiorina was a candidate for the Republican nomination for President of the United States.

Cliff Jernigan served as a senior executive with Advanced Micro Devices, Inc., including as its Director of Taxes, General Tax Counsel, and Worldwide Head of Government Affairs. He also has devoted significant portions of professional career to public policy issues, having in-depth experience with the U.S. Congress, the European Commission,; the California Legislature, and federal agencies including the Internal Revenue Service, the Treasury and Commerce Departments and the United States Trade Representative.

John Kispert is a long-time senior technology executive. He spent over a decade at KLA-Tencor, growing its semiconductor business into a multi-billion dollar publicly traded company. He is currently the Executive Chairman of ESS Technology, Inc., the Chairman of Spin Memory, Inc., and a member of Petitioner's board of directors. He served as President and Chief Executive Officer of Spansion, Inc. prior to its merger with Cypress Semiconductors. He is a guest lecturer at the Hass School of Business at the University of California Berkeley and the Anderson Graduate School of Management at the University of California Los Angeles.

George Lauro has spent over 25 years as a technology entrepreneur, operating executive, and venture capitalist, including as a Board member at seven public and 26 private companies. He is former Managing Director and Partner at Wasserstein Perella, where he opened the Silicon Valley office and headed the West Coast technology investment group. He was IBM's Managing Director of Technology Commercialization, launching spinout from the Watson Research Lab in sectors ranging from advanced materials to wireless, artificial intelligence, and natural language interfaces. He has been awarded 23 patents for inventions relating to semiconductors and energy storage technologies.

Kenneth Levy has been involved in technology in Silicon Valley for over forty years. He is Chairman Emeritus of KLA-Tencor Corporation, having founded KLA Instruments in 1974 and serving as CEO for 25 years and Chairman until his retirement in 2006. KLA-Tencor is publicly traded (KLAC) and one of the five largest semiconductor capital equipment companies in the world, and is the leading company in inspection, metrology and yield management systems serving the semiconductor industry. Mr. Levy is a member of the National Academy of Engineering and has received numerous awards. He is currently a Board member of several publicly-traded companies including Ultratech Stepper (UTEK), Extreme Networks (EXTR) and Juniper Networks (JNPR), and a member of Petitioner's board of directors.

Denis Nayden has had a long career as an investor and innovative business leader. A former protégé of Jack

Welch, Mr. Nayden served as Chairman and CEO of GE Capital Corporation, growing it into one of General Electric's most profitable business units. He also has served as a Managing Director of Oak Hill Capital Partners, leading the firm's investments in numerous innovative companies.

Jon Saxe has served as a director of over 25 companies and at present is a director of two public companies, Durect Corporation (NASDAQ: DRRX) and VistaGen (NASDAQ:VTGN), and of private companies Arbor Vita, Arcuo Medical, Cancer Prevention Pharmaceuticals. Epalex, Lumos Pharma and Trellis Bioscience. He was President and CEO of Synergen, Inc., a biotechnology company purchased by Amgen. Prior to that, Mr. Saxe was Vice President, Licensing and Corporate Development, and Head of Patent Law for Hoffmann-LaRoche Inc.