No. 26-392

In the Supreme Court of the United States

CENTRIPETAL NETWORKS, LLC, PETITIONER

v.

CISCO SYSTEMS, INC., RESPONDENT

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

REPLY BRIEF OF PETITIONER

MATTHEW J. DOWD
Counsel of Record
ROBERT J. SCHEFFEL
ELLIOT A. GEE
MORRIS D. YOUNG
DOWD SCHEFFEL PLLC
1717 Pennsylvania Ave., NW
Suite 1025
Washington, DC 20006
(202) 559–9175
mdowd@dowdscheffel.com

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ARGUMENT

I. Notice of an Adversary's Argument is Not Notice of a Court's New Claim Construction

At base, Cisco's response conflates notice of an opponent's argument with notice of a court's new claim construction. Cisco assumes that a construction "the defendant proposed through written briefing and at oral argument"—all after the adoption of the plain-and-ordinary-meaning construction—is proper notice of a later new, post-closed-record construction. BIO i. The petition presents the correct legal question, which is not fact-bound. The Rule 63 court commented that "some claim construction" might be needed, Dkt. 754 at 436:20-21, but it never gave Centripetal the briefing or witness recall it requested if the court would be construing the claims differently. Centripetal thus had every reason to rely on Judge Morgan's undisturbed *Markman* order.

A. Centripetal Relied on the Governing Claim Constructions and Had No Notice of the New Constructions

Centripetal reasonably expected that the Rule 63 proceeding would apply Judge Morgan's governing claim constructions when Judge Hanes did not invoke the *Markman* process to reconstrue the claims. Judge Hanes viewed Cisco's non-infringement arguments as encroaching on "the terms that Judge Morgan interpreted," Dkt. 754 at 436:15-18, and the earlier constructions remained in force after the Federal Circuit's vacatur ruling. Judge Hanes even asked counsel, "How do you propose we proceed…?" *Id.* at 436:19-22.

Centripetal's answer: "[A]t the very least," there must be "a briefing schedule" and the opportunity "to recall some witnesses" "if this [new claim construction] is

going to affect us negatively." *Id.* at 437:1-24. In other words, if the court were to revisit Judge Morgan's undisturbed claim-construction rulings, the standard *Markman* process must apply, and Centripetal must be afforded an opportunity to introduce new evidence responsive to the redefined legal scope. The court never granted Centripetal's request, instead announcing its new constructions in its merits opinion and then changing one construction again on reconsideration. Pet.App. 34a-35a, 89a-90a.

The error was more than mere lack of notice because Centripetal had reason to affirmatively rely on Judge Morgan's February 2020 *Markman* order. The Federal Circuit's 2022 vacatur left the *Markman* order in place. Pet.App. 167a. Centripetal thus agreed to proceed on the existing factual record without recalling witnesses precisely because the *Markman* order governed. Pet. 8-9 (citing C.A.J.A. 18611-18620, 18834, 18849-18856). Under that order, the parties agreed that "particular type of data transfer" carried its plain and ordinary meaning, C.A.J.A. 22130, and neither party identified the '806 term as disputed. The new constructions thus did not fill a gap. They instead displaced the constructions under which the case had been tried, decided, and preserved on remand. That is the "unfair surprise" this Court's "cases have long warned" in analogous contexts. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012).

The Federal Circuit and Cisco erroneously rely on Cisco's repeated non-infringement arguments that Judge Morgan had rejected under the parties' agreed plain-and-ordinary-meaning constructions. As counsel told the panel, "Cisco certainly has made that argument all along.… What we weren't on notice of was that the court was going to construe the claim for the first time." C.A. Oral Arg. 13:12-13:24. The Federal Circuit's affirmance rests on notice about the wrong issue. Correcting that

legal error requires no reevaluation of the factual record, as Cisco concedes that the court adopted the new claim construction for the first time after the Rule 63 hearing. *See* §II, *infra*.

Cisco's record citations confirm the lack of notice to Centripetal. Each citation concerns Cisco's unsuccessful non-infringement arguments. All but one postdate the 2020 trial. Pet.App. 16a-17a. The lone pre-trial citation, C.A.J.A. 9813, came from briefing on a different term ("one or more packet-filtering rules") and offered "e.g." examples of what "a particular type of data transfer" might include. Cisco did not ask the court to re-construe "particular type of data transfer," instead only reiterating non-infringement arguments that were recycled from its first appeal. C.A.J.A. 19450-19454. To the extent Cisco's contentions were veiled claim-construction arguments, Cisco was trying to "chang[e] the rules after the game has been played," Centripetal explained. Dkt. 754 at 435:18-436:7, 437:14-24.

The new construction for the '806 patent is a more extensive "elaboration." At the Rule 63 hearing, the court observed that one of Cisco's '806 claim-language arguments "was raised on Friday"—in closing—and had not been discussed at the *Markman* hearing or addressed in Judge Morgan's opinion. Dkt. 754 at 437:25-438:6. Judge Hanes then shifted from the plain meaning to a requirement that the signal cause each individual step and that processing cease entirely throughout reconfiguration. Pet.App. 101a-108a, 112a-113a. The Federal Circuit applied a causation requirement of its own. Pet.App. 18a-21a. Those "elaborations"—not any change in factual evidence of Cisco's infringement—are the sole differences between Judge Morgan's "not a close call" infringement ruling and the Federal Circuit's noninfringement affirmance.

Moreover, a patentee cannot forfeit an objection to a new claim construction first announced in a subsequent ruling when an earlier, operative *Markman* order applied the plain meaning. Centripetal's reading came straight from the plain claim language. At argument, Judge Taranto recognized that what must be "responsive to the signal" is "the collection of five steps in the process, not any individual element like the ceasing," a reading "partly confirmed" because the final step "specifically adds the word responsive … and that's missing from … the ceasing step." C.A. Oral Arg. 14:42-15:20. While those remarks are not in the panel's decision, *see* BIO 19, they highlight the panel's overall error with the lack of notice of the new claim constructions, Pet.App. 18a-19a.

B. The Federal Circuit's "Elaboration" Practice Has No Standard

The panel's approach also conflicts with Federal Circuit decisions requiring an opportunity to be heard before a court adopts a construction that changes the scope of a tried case. *See Wi-LAN, Inc. v. Apple Inc.*, 811 F.3d 455, 466 (Fed. Cir. 2016); *Eon-Net LP v. Flagstar Bancorp*, 249 F. App'x 189, 194-95 (Fed. Cir. 2007). Other decisions treat a post-trial change as a mere "clarification" or "elaboration" requiring no opportunity to respond. Pet. 21-22.

Cisco's attempt to distinguish between jury trials and bench trials falls short. BIO 20-21. There is no reason the notice requirement should differ depending on the factfinder's identity. Under Cisco's rule, a bench-trial judge could change a dispositive construction without notice, even though a jury-trial judge could not. And Cisco is correct that *Markman* does not "bar a judge from construing a disputed term for the first time in a final decision after hearing the parties' positions." BIO 22. In those instances, however, the parties present evidence before a *Markman* order, with the understanding that the

court will adopt one of the proposed claim constructions. That did not occur here. *Cf. Intercontinental Great Brands LLC v. Kellogg N. Am. Co.*, 869 F.3d 1336, 1360 (Fed. Cir. 2017) (Reyna, J.) (dissenting because "[t]he district court changed its construction of the claim term … between its *Markman* order and summary judgment order" and the patentee "did not have an opportunity to respond to the midstream change"); *Galderma Labs., L.P. v. Sun Pharm. Indus. Ltd.*, 411 F. Supp. 3d 271, 293 (D. Del. 2019) (Stark, J.) (ordering supplemental briefing on a claim-construction issue arising after a bench trial).

Further, in adversarial proceedings before the Patent Office, the Federal Circuit requires notice and an opportunity to respond to a new construction. *Qualcomm Inc. v. Intel Corp.*, 6 F.4th 1256, 1263 (Fed. Cir. 2021) (vacating and remanding because the Board departed from the parties' agreed construction). A party that tried its case to judgment in district court should receive the same notice.

Nor is review foreclosed because Centripetal did not seek rehearing en banc or because the decision below is nonprecedential. BIO 20. Federal Circuit judges have expressed their disfavor of granting rehearing. *See* Perry Cooper, *Full Court Patent Review Bids Often 'Waste of Time,' Judge Says*, Bloomberg L. (Feb. 23, 2021) (Judge Hughes stating that most rehearing petitions "are a waste of time and a waste of money").[1] And the court's increasing use of non-precedential opinions over the past few years should not shield from review its standardless practice of sometimes treating new post-trial claim constructions as mere "elaborations" or "clarifications." One of this Court's most consequential cases in contemporary patent law reversed a decision the Federal

[1] https://news.bloomberglaw.com/ip-law/full-court-patent-review-bids-often-waste-of-time-judge-says.

Circuit designated "non-precedential." *See KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007).

II. The Courts Below Re-Construed the Claims After the Evidentiary Record Closed

Cisco does not dispute that the courts resolved the scope of the disputed terms for the first time after the evidentiary record closed. BIO 24 (Judge Hanes "resolved, for the first time, a claim-scope dispute"); BIO 24-25 (the Federal Circuit "decided the construction for itself"). The legal question presented rests on this undisputed fact.

A. Cisco Acknowledges that the Disputed Terms Were First Construed Only After the Record Closed

Cisco concedes the new-claim-construction position when relying on the fact that Judge Morgan employed the plain-and-ordinary-meaning construction instead of an express construction for the two terms. BIO 22-24. The plain-and-ordinary-meaning construction was the settled legal scope throughout the 2020 trial. Judge Morgan "adopted the plain and ordinary meaning of 'particular type of data transfer.'" C.A.J.A. 96. When the plain meaning was displaced by the later Rule 63 "elaboration," the elaboration became a new construction adopted after the record closed. Resolving a dispute about claim scope is claim construction. *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1361-62 (Fed. Cir. 2008) (cited at BIO 17).

Here the court "elaborated" twice. First, it required the claimed rules to "drop some, but not all, packets sent between two different network destinations." Pet.App. 89a-90a. Then, on reconsideration, it added a requirement of "the specific technique, or method, associated with the data transmission." Pet.App. 34a-35a. The Federal Circuit acknowledged that "the claim language itself is

less than clear," divided the claim into two stages, confined source-and-destination filtering to the first, and referred to "any shift in the original construction." Pet.App. 12a-17a. Those changes to claim scope converted the same accused functionality from infringing to non-infringing on the same factual record. Nor did the Federal Circuit's own construction cure the problem. BIO 24-25. An appellate court cannot take evidence. Construing the claims anew on appeal and applying that construction to a record built under a different construction only compounds the error.

Judge Morgan's revision of a different construction shows what fair process looks like: he announced it during trial, heard both parties, and let the trial continue under it. Pet.App. 218a-221a; Dkt. 521, Tr. 1646:11-1650:20.

Cisco's waiver argument fares no better. BIO 23, 27. Counsel's statement that the court could "consider" claim construction came alongside an objection that it was "too late" to raise a new construction. Dkt. 753 at 323:12-19. Counsel endorsed rolling construction only when it comes "early enough in trial to give a party the opportunity to consider the new constructions and adjust its arguments." Dkt. 754 at 435:9-23. Centripetal then requested briefing and witness recall, *id.* at 437:1-24; renewed its objection after judgment, C.A.J.A. 22133-22135; and pressed it on appeal, C.A. Oral Arg. 13:24-13:41 (rolling construction requires that "you have to give an opportunity to respond"). The issue is preserved.[2]

[2] Notably, Cisco does not attempt to defend the Federal Circuit's erroneous reliance on *Hamilton Beach Brands, Inc. v. f'real Foods, LLC*, 908 F.3d 1328 (Fed. Cir. 2018), and *Google LLC v. EcoFactor, Inc.*, 92 F.4th 1049 (Fed. Cir. 2024). *See* Pet. 26-27.

B. The New Claim Construction Rested on Evidence First Admitted During the Rule 63 Hearing

The Rule 63 decision and the Federal Circuit's affirmance relied on new evidence (Centripetal's IPR Preliminary Response) to re-define the claims and to exclude source-and-destination filtering from the second stage. Pet.App. 13a-15a, 85a, 89a-91a. The Federal Circuit called the IPR statements "[s]ignificant[]" after viewing the claim language as "less than clear." Pet.App. 12a-14a. This was a classic narrowing of claim scope based on prosecution-history evidence. *See Aylus Networks, Inc. v. Apple Inc.*, 856 F.3d 1353, 1360-61 (Fed. Cir. 2017); *Shire Dev., LLC v. Watson Pharms., Inc.*, 787 F.3d 1359, 1367 (Fed. Cir. 2015).

But the court's reliance on this incomplete evidence, over Centripetal's objection, led to the new, narrower claim construction. The cited evidence describes "exemplary embodiments" and the specification's permissive language, which in no way limited the scope of the claims. *See* C.A.J.A. 19013-19014; '193 patent col. 8. The panel's quotation omits that "a particular transfer protocol" is included in the first category. *Compare* Pet.App. 13a-14a, *with* C.A.J.A. 19014. The Board denied institution because the prior art lacked the claimed operator, not on any two-stage distinction. C.A.J.A. 5683-5684. And a member of the panel, reading the same passage, observed that it "doesn't say that identifying a particular computer destination must be in stage one and can never be in stage two." C.A. Oral Arg. 9:29-9:55. Centripetal never had the opportunity to make that showing below because the construction was first announced in the decision.

The Rule 63 decision relied on two pages—11 and 17—not admitted during the trial before Judge Morgan. Only pages 7, 18, and 21 were admitted. Dkt. 692

at 2. Pet.App. 67a. Cisco's quibble is that some pages were "made available" during the first trial, but Cisco does not dispute that Judge Hanes admitted and relied on new portions of the document for the first time and that the Federal Circuit affirmed based in part on that new evidence. BIO 26-27.

C. Notice Must Come While the Patentee Can Still Build a Record

Contrary to Cisco's contention, BIO 22, 27, Centripetal does not argue that *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), imposes a strict deadline for claim construction. Instead, *Markman*, together with basic due-process principles, requires a court to resolve claim construction such that parties can develop their evidence under the adopted construction. A court of course may revise a construction as further evidence develops. But adopting a narrower construction after the record is closed deprives parties—plaintiffs and defendants alike—of the opportunity to respond to the new construction.

The need for notice follows naturally from this Court's precedents governing summary judgment. A court may enter judgment on its own "so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986); *see* Fed. R. Civ. P. 56(f); *cf. Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Cisco's assertion that Centripetal cites no authority, BIO 28, overlooks this long-settled law. And Cisco's forfeiture argument, BIO 27, misses the mark because Centripetal argued below precisely what it argues here—a rolling construction requires notice and an opportunity to respond. C.A. Oral Arg. 13:24-13:41.

In patent cases, the claim construction "defines the scope of the patentee's rights," *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996), and "the limits

of a patent must be known," *id.* at 390 (citation omitted). The parties choose their experts, testimony, and infringement theories under the governing construction. When a new construction is adopted in a subsequent merits decision, the patentee receives no notice. The error is more egregious when the new construction rests on new extrinsic evidence, here, a technical dictionary no party cited. Pet.App. 34a-35a; *cf. Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 331-32 (2015).

Cisco's rolling-construction cases confirm only that a construction may evolve, as long as parties have notice. *Pressure Products* approved a change made "early enough in the trial" for the affected party to adjust. *Pressure Prods. Med. Supplies, Inc. v. Greatbatch Ltd.*, 599 F.3d 1308, 1316 (Fed. Cir. 2010). And Rule 63 permits a successor judge to proceed only "without prejudice to the parties" and requires the judge, on request, to recall witnesses whose testimony is material and disputed. These protections are destroyed when a new claim construction emerges only later, especially only after the Rule 63 hearing. Neither a plaintiff nor a defendant can know which evidence is probative before it knows the legal boundary of the patent claims.

III. Centripetal Identified the Evidence It Would Have Presented if Given an Opportunity to Respond to the New Claim Constructions

Cisco's contention that Centripetal identified no evidence, BIO 29-31, is wrong. Centripetal identified Cisco source code, expert testimony that the accused rules operate on suspicious HTTP GET or POST traffic, and Cisco-engineer testimony concerning suspicious GET or PUT activity. C.A.J.A. 1503-1518. It also proffered evidence that Cisco's switches and routers use network segmentation and micro-segmentation to limit traffic by protocol, including HTTP GET, PUT, and POST—the very "method" of transfer the courts later required.

C.A.J.A. 22134-22135, 22165-22166. The Federal Circuit rejected the first category because the cited testimony did not show that the quarantine rule filters by "particular type of data transfer," Pet.App. 16a-17a—faulting Centripetal for supposedly lacking a record under a new construction of which it had no notice. The panel never addressed the proffer.

Cisco's reliance on Centripetal's decision not to recall witnesses misreads the timing and content. On January 25, 2023, Centripetal agreed to proceed on the existing record given that Judge Morgan's *Markman* order adopting the plain-and-ordinary-meaning constructions governed. C.A.J.A. 18849-18851. That was before the Rule 63 hearing (June 22-26) and before the merits decisions (December 11, 2023, and June 14, 2024) applying the new "elaborated" constructions. As noted, Centripetal asked for, but did not receive, briefing and witness recall if the court would materially depart from Judge Morgan's *Markman* order. Dkt. 754 at 437:1-24.

On the so-called "concession," counsel made none. Counsel explained that Centripetal had "evidence that actually shows … that we actually could satisfy [the new claim scope] if we pointed her to it." C.A. Oral Arg. at 13:51-14:23. Counsel also explained that the new construction reads unasserted claims 16 and 17 "out of the patent." *Id.* at 7:11-8:18. Neither statement concedes that Centripetal could not prove infringement given notice and an opportunity to do so.

CONCLUSION

The petition should be granted.

Respectfully submitted.

MATTHEW J. DOWD
Counsel of Record
ROBERT J. SCHEFFEL
ELLIOT A. GEE
MORRIS D. YOUNG
DOWD SCHEFFEL PLLC
1717 Pennsylvania Ave., NW
Suite 1025
Washington, DC 20006
(202) 559–9175
mdowd@dowdscheffel.com

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