

No. 2012-1014

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LIGHTING BALLAST CONTROL LLC,

Plaintiff-Appellee,

v.

PHILIPS ELECTRONICS NORTH AMERICA CORPORATION,

Defendant,

and

UNIVERSAL LIGHTING TECHNOLOGIES, INC.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
IN CASE NO. 09-CV-0029, JUDGE REED C. O'CONNOR

REHEARING EN BANC REPLY BRIEF OF DEFENDANT-APPELLANT

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July 9, 2013

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel of record for the Defendant-Appellant Universal Lighting Technologies, Inc. (“ULT” or “Universal”) certifies the following:

1) The full name of the party represented by counsel of record for Appellant is Universal Lighting Technologies, Inc.

2) The name of the real party in interest is Universal Lighting Technologies, Inc.

3) Universal Lighting Technologies, Inc. is a wholly owned subsidiary of ULT Holdings, Inc. ULT Holdings, Inc. is a wholly owned subsidiary of Panasonic Electric Works Co., Ltd. Panasonic Electric Works Co., Ltd. is a wholly owned subsidiary of Panasonic Corporation. There is no parent corporation or publicly held corporation that owns 10% or more of the interest of Panasonic Corporation.

4) The names of all law firms and the partners and associates that have appeared for Universal in the proceeding before the United States District Court for the Northern District of Texas or who are expected to appear for the party in this Court are:

- Orrick, Herrington & Sutcliffe LLP – Steven J. Routh, Sten A. Jensen, John R. Inge, Diana M. Szego, and T. Vann Pearce, Jr.
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LBC	Plaintiff-Appellee Lighting Ballast Control LLC
LBC Panel Br.	Panel Brief of LBC filed Mar. 16, 2012, ECF No. 34
OBr	En Banc Opening Brief of ULT, ECF No. 122
Panel Op.	Panel Opinion entered Jan. 2, 2013, ECF No. 51
RBr	En Banc Response Brief of LBC, ECF No. 236
ULT	Defendant-Appellant Universal Lighting Technologies, Inc.
ULT Panel Br.	Opening Panel Brief of ULT filed Feb. 10, 2012, ECF No. 27
___ Br.	Brief of Amicus Curiae [Lead Amicus Name or Abbreviation]

INTRODUCTION

The positions taken in the Response Brief of Plaintiff-Appellee LBC are, to say the least, extreme. As LBC concedes, for the district court's "voltage source means" construction to stand, the Court must "ALTER THE JURISDICTIONAL PARADIGM" for claim construction appeals, RBr 2, not only by reversing *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448 (Fed. Cir. 1998) (en banc) 180 degrees but also by ignoring or abandoning many other precedents.

In contrast, Defendant-Appellant ULT and every amicus in this appeal agree: a patent claim's construction ultimately is a legal issue over which this Court should exercise plenary review. The only question is which subsidiary determinations (if any) should be reviewed for clear error. Regardless where the Court draws that line, the district court's construction of "voltage source means" must be reversed.

LBC thus stands alone in proposing a complete reversal of *Cybor's* purely de novo review that has governed for the past fifteen years to a purely clear error review (except for "a district court's statements of the legal canons" RBr 1). That proposal contradicts *Markman II's* teaching that "construing the patent," like determining the legal effect of other documents, "is a question of law," *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 384 (1996), even when an underlying subsidiary issues may involve a "mongrel practice." *Id.* at 378.

Yet the upheaval does not end there; LBC further urges this Court to ignore or contradict settled law, including by:

- (1) turning *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc) on its head, in arguing for a two-step process of claim “interpretation” followed by claim “construction” (RBr 17-20, 24);
- (2) asserting that “indefiniteness is a question of ultimate fact” (RBr 18), despite settled precedent that it is a question of law;
- (3) positing that “[t]he proper review standard” for obviousness rulings is “unsettled” but should be purely clear error (RBr 32 & n.11), when this Court has held that obviousness ultimately is reviewed de novo;
- (4) criticizing the Panel’s straightforward application of this Court’s precedents on construing “means” limitations and implicitly urging changes to those precedents (RBr 43-44);
- (5) mischaracterizing the district court’s Amended Order as “non-final” (RBr 37), even though the district court twice said it would not revisit that Order (A21 n.2, A19 n.2), and arguing that ULT should have presented evidence “at trial” to rebut the district court’s erroneous claim construction (RBr 41); and
- (6) resurrecting an array of waiver arguments that the Panel soundly rejected and that the en banc Court specifically refused to review.

The district court misapplied controlling precedent on how to construe claims written in means-plus-function format. The Panel correctly applied that same precedent to the undisputed record and reversed the erroneous ruling and judgment below. That same outcome is required under any standard of review. That is why LBC argues for an altered “jurisdictional paradigm” in which a party’s “failure” “to put forth an expert to declare that [a claim limitation] does not connote sufficient structure”—i.e., to opine on the claim’s ultimate scope and validity—would be “fatal” to its case. RBr 48. That “paradigm” is at odds with *Phillips*, which focuses on claim language and the intrinsic record, rather than on the opinions of dueling litigation experts. The Court should dismiss LBC’s extreme arguments and reverse the district court’s erroneous construction.

I. LBC’S PROPOSED STANDARD OF REVIEW CONFLICTS WITH PRECEDENT AND LACKS SUPPORT IN POLICY AND LOGIC.

A. Claim Constructions Ultimately Should Be Reviewed De Novo, Contrary to LBC’s Proposal.

Claim construction ultimately is a question of law reviewed de novo, as ULT and *all twenty-one* amicus briefs acknowledge. *Only* LBC proposes pure clear error review. LBC’s proposal conflicts with binding precedent, as does LBC’s proposed clear error standard for reviewing indefiniteness rulings.

1. LBC ignores Supreme Court precedent.

“[T]he Supreme Court has repeatedly held that the construction of a patent claim is a matter of law exclusively for the court.” *Markman v. Westview*

Instruments, Inc., 52 F.3d 967, 978 (Fed. Cir. 1995) (“*Markman I*”), (citing nine decisions). *Markman II* continued this practice by emphasizing that claim construction is “an issue of law,” notwithstanding that it may have “evidentiary underpinnings.” 517 U.S. at 386, 390-91; U.S. Br. 6 (“*Markman* amply supports *Cybor*’s holding that ... the ultimate question of claim construction is a legal issue”). LBC does not address this precedent but merely cites *Markman II*’s “mongrel practice” statement (RBr 21, 24, 31), which fully accords with its holding that claim construction ultimately is a legal issue.¹ Thus, Supreme Court precedent counsels against pure clear error review of claim constructions. *Markman I*, 52 F.3d at 984 n.13 (“*de novo*” is the “long-recognized appellate review standard for issues of law”). Even when claim construction involves subsidiary fact-finding or mixed fact/law questions, the trial court’s ultimate construction still must receive *de novo* review.²

¹ LBC cites to *Bischoff v. Wethered*, 9 Wall. 812, 815 (1870), but, as *Markman II* explained, *Bischoff* addressed expert testimony used for “product identification,” *not* for “document interpretation.” 517 U.S. at 386. Even if *Bischoff* had “recogniz[ed] a trial court’s role in finding facts about claim meaning” (RBr 22), that would be no different than calling aspects of some claim construction a “mongrel practice.”

² LBC further errs in inferring that claim construction *always* involves fact-finding from *Markman II*’s statement that a judge *could* receive extrinsic evidence when construing claims. 517 U.S. at 387-90. Trial courts often construe claims without receiving extrinsic evidence or finding facts, and in those cases claim construction is purely legal. *See* OBr U.S. Br. 6, 14.

2. Claim construction is not fact- or case-specific, but rather an objective determination of the legal effect of text.

The two justifications LBC advances for deferential review (RBr 25) do not apply to a trial court’s ultimate claim construction.

First, trial courts are not best positioned to construe patent claims, except for resolving subsidiary disputed historical facts (if any). *Markman II* rejected LBC’s premise, noting that fact-specific determinations, like credibility and community standards cited by LBC (*see* RBr 26-27) “are much less significant” to claim construction than maintaining the patent’s “internal coherence.” 517 U.S. at 389-390. Thus, even when a claim construction presents a “mixed” question, it is not the type of fact-driven inquiry where “special capabilities of trial courts” like “record development” (RBr 26) take center stage. The cases cited by LBC where rulings on mixed questions received deferential review, by contrast, involved highly fact- and case-specific inquiries. *See* RBr 26-28, 32.

Moreover, claim construction does not hinge on any individual’s state of mind—it is *objective*, not *subjective*. *Compare* RBr 27 with *Howmedica Osteonics Corp. v. Wright Med. Tech., Inc.*, 540 F.3d 1337, 1346-47 (Fed. Cir. 2008) (intent of inventor is irrelevant). Claims are construed with the meaning they “would have to a person of ordinary skill in the art.” *Phillips*, 415 F.3d at 1312-13 . How such a hypothetical person—a legal “ghost” —would interpret a patent “partakes more of the nature of law than of fact” (*Panduit Corp. v. Dennison Manufacturing*

Co., 810 F.2d 1561, 1566 (Fed. Cir. 1987)) and should be reviewed de novo, like other determinations of how legal ghosts would think or act. *See, e.g.*, Cisco Br. 28 (discussing “reasonable person” standard in negligence).³

Trial courts also do not enjoy a “luxury of time” compared to this Court. *See* RBr 26. “Trial judges often must resolve complicated legal questions without benefit of extended reflection or extensive information.” *Salve Regina College v. Russell*, 499 U.S. 225, 232 (1991) (internal quotation marks omitted). Courts of appeal are “structurally suited” to “permit reflective dialogue and collective judgment.” *Id.*

Second, LBC erroneously dismisses that plenary appellate review of claim constructions is essential to this Court’s purpose of unifying patent law. Because this Court was *created* to ensure uniformity in patent law, it must retain plenary review over the law’s application. *Markman II*, 517 U.S. at 390; OBr 29, 36-37. Amici agree. *E.g.*, U.S. Br. 15 (“de novo review is appropriate where an issue turns on concepts that acquire meaning through case-by-case application, a description that applies with great force to the legal principles of claim construction”); IPO Br. 9 (“consistent application of claim construction jurisprudence is of great value to patent owners”); Google Br. 20-22. Indeed, in

³The briefs and other references cited by LBC at RBr 28-29 argue that the trial court is best positioned to *find facts*, *not* conduct all aspects of claim construction.

construing patent claims, a court must always apply the legal canons of construction “because factual findings, even when relevant, do not themselves resolve claim-construction disputes.” U.S. Br. 3, 16 (citing *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582-83 (Fed. Cir. 1996)). Most claim construction disputes turn on competing arguments about how those canons apply. Here, the parties’ dispute centers on how the “voltage source means” limitation fits into the Court’s precedent on means-plus-function claiming. Clear error review would give little guidance to trial courts on how to apply 35 U.S.C. § 112(f) in future cases, leaving the law unsettled.

Consistent with this principle, this Court reviews de novo other rulings applying the law to facts. OBr 28 (citing cases). LBC ignores these cases, except for those that address obviousness. There, LBC takes a remarkable position. It argues that the standard of review is “unsettled,” citing *Dennison Manufacturing Co. v. Panduit Corp.*, 475 U.S. 809, 811 (1986), and suggests that the Court should review the obviousness conclusion for clear error. RBr 32 n.11. The Supreme Court remanded *Dennison* to this Court for its “informed opinion on the complex issue of the degree to which the obviousness determination is one of fact.” 475 U.S. at 811. On remand, this Court reaffirmed that obviousness is a legal conclusion subject to independent review, albeit one based upon underlying factual questions. *Panduit*, 810 F.2d at 1565-66. “Perhaps the most important part of its

opinion was the observation that treating the question as one of law would ‘facilitate a consistent application of [the patent] statute in the courts and in the Patent and Trademark Office (PTO).’” Kevin Casey et al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 Fed. Cir. B.J. 279, 320 (2001) (citing *Panduit*, 810 F.2d at 1567). The same holds true for claim construction.

3. Claim construction and indefiniteness rulings should be subject to the same standard of review.

Reviewing claim construction for clear error, while reviewing indefiniteness de novo, would create an irreconcilable conflict. Indefiniteness and claim construction are closely linked and usually decided together by the trial court. *E.g., Intel Corp. v. VIA Techs., Inc.*, 319 F.3d 1357, 1365 (Fed. Cir. 2003). LBC’s response is to rewrite the indefiniteness standard, positing that it too is a “question of ultimate fact.” RBr 18-19. This Court consistently had held, even in cases cited by LBC, that indefiniteness is a question of law. *E.g., Ultimex Cement Mfg. Corp. v. CTS Cement Mfg. Corp.*, 587 F.3d 1339, 1351 (Fed. Cir. 2009). Like claim construction, indefiniteness may have “evidentiary underpinnings” (*see* RBr 19), but the overall inquiry remains legal. Because LBC did not seek en banc consideration of the indefiniteness standard of review, Pet. Reh’g, ECF 55 at 1-2, the Court should not entertain LBC’s request to change the standard.

B. ULT’s Brief Correctly Identifies the Limited Subsidiary Determinations Entitled to Formal Deference.

To everyone except LBC, the real question is which subsidiary aspects of claim construction (if any) should be afforded deference. *See* U.S. Br. 13 (this question is the “hard part”). ULT’s opening brief addressed four categories of subsidiary issues: (1) disputed historical facts; (2) determinations on the intrinsic record; (3) the application of law to fact; and (4) consideration of extrinsic evidence that does not involve fact-finding, such as general background or an expert’s subjective opinion on claim construction. The first category should receive clear error deference under Rule 52; the second, third, and fourth do not do not require deference. LBC’s response on each category falls short.

1. LBC misstates ULT’s position on the scope of deference; ULT’s proposal comports with Rule 52.

ULT does not dispute that only certain findings should receive deference. *Compare* RBr 22-24 *with* OBr 24-26. But LBC questions ULT’s position that undisputed facts are reviewed *de novo*; of course, an undisputed fact is by nature established and non-appealable. ULT also already noted that fact disputes may arise even if only one party presents evidence. OBr 25. Further, historical facts, *i.e.*, events or understandings outside the patent, are the only facts that exist in this context. There are no “nonhistorical facts” in claim construction (*see* RBr 23), and LBC does not identify any. Determinations regarding the intrinsic record are not

factual in nature, as discussed below. Finally, LBC is wrong in suggesting that ULT seeks to vary the standard of review depending on sources of extrinsic evidence. *See* OBr 25-26 (and cases cited) (while ease of establishing clear error may depend on the type of evidence relied on by the district court, the standard of review remains the same). Far from “bizarre” and “unworkable” (RBr 24), ULT’s framework makes sense and is consistent with the standard advocated by the United States. *See* U.S. Br. 9-20.

2. LBC’s proposed distinction between “claim interpretation” and “claim construction” does not justify clear error review of determinations based on the intrinsic record.

In an effort to justify clear error review for determinations based on the intrinsic record LBC seeks to recast the entire claim construction inquiry.

According to LBC, claim “interpretation” based on the intrinsic record is “an ultimate fact” that is central to “claim construction.” RBr 19. But such “claim interpretation” is nowhere found in this Court’s claim construction precedent.

Moreover, while LBC and some amici argue that the meaning a person of ordinary skill would give to a claim term is “factual,” none explain *why*. RBr 19; Conn IPLA Br. 3-5; AIPLA Br. 2-3,10-12; ABA Br. 5-10. This inquiry cannot be factual because it simply restates the test for the ultimate *legal* conclusion on claim construction. *Phillips*, 415 F.3d at 1312-13 (claim terms are construed with the meaning they “would have to a person of ordinary skill in the art at the time of the

invention”); *see supra* Section I.A. How the *hypothetical* “person of ordinary skill” would read a claim is objective and legal in nature, not subjective and factual. *See supra* Section I.A.2.

These same considerations mandate de novo review of conclusions based on the intrinsic record. *See* OBr 21-24 and cases cited therein. Further, the trial court holds no advantage over this Court in analyzing an integrated legal instrument like the patent itself; the trial court does not develop that record nor assess credibility in reading it. *See supra* Section II.A.2; U.S. Br. 20; IPO Br. 5-6; *see also* Austin IPLA Br. (discussing the similarities between patent, contract, and statutory construction).

3. LBC is wrong that this Court should limit its review of the application of law to facts.

For the reasons discussed *supra* in Section II.A.2 and OBr 27-29, this Court should review de novo the application of law, including application of the canons of construction and principles derived from this Court’s case law. This point reinforces why deference need not be given to a trial court’s reading of the intrinsic record, the contents of which LBC admits are “undisputed.” RBr 27. Disputes about the intrinsic record thus focus on how legal principles should apply to give meaning and effect to text, for instance, whether a statement in the patent amounts to a clear disclaimer.

4. Deference should not automatically extend to cases where extrinsic evidence is proffered.

Trial courts may receive extrinsic evidence in construing claims, but that does not mean that the courts can or should rely on such evidence in every case. This Court retains plenary power to correct claim constructions based on expert testimony that merely opines on how the patent itself should be read or given effect. *See* OBr 30-35. The United States’ amicus brief makes the point well: “when confronted with an alleged factual dispute over the meaning of claim terms, the trial court must exercise care to distinguish relevant and probative expert testimony (e.g., testimony about the accepted meaning of a claim term in the relevant art at the time of the invention) from irrelevant opinion (e.g., an expert’s present, subjective understanding of a patent claim).” U.S. Br. 20; *see also* NYC Bar Assoc. Br. 24-25; AIPLA Br. 14; Chicago IPLA Br. 23-26; FCBA Br. 11 (concurring).

C. LBC Side-Steps Important Policy Considerations that Weigh in Favor of ULT’s Proposed Standard of Review.

1. Inconsistent lower court constructions are a real danger under an overly deferential standard.

In *Markman II* the Supreme Court emphasized “the importance of uniformity in the treatment of a given patent.” 517 U.S. at 390. The Court noted that claim constructions would be “subject to interjurisdictional uniformity under the authority of the single appeals court.” *Id.* at 391. The greater the deference to

trial court constructions, beyond the weight this Court believes they deserve based on the strength of their reasoning, the greater the threat to uniformity. *Cybor* effectively solved that problem by adopting de novo review for all aspects of claim construction. This promoted uniformity but deprived trial courts leeway on historical fact issues that they are best suited to decide.

LBC dismisses the importance of uniformity in a given patent's construction but cites nothing supporting its view that finality is more important than uniformity. *See* RBr 33. Nor does LBC explain how its focus on finality over uniformity squares with the contrary focus on uniformity in *Markman II* and in Congress' establishment of this Court. LBC also disregards the effect a claim construction ruling has on non-parties. *See* RBr 30-31, 33-34 (arguing that claim constructions "extend[] only to the parties"). A claim construction notifies the entire public of the patent's scope. *E.g., Markman I*, 52 F.3d at 978-79. Thus, it is exactly the type of "society-centered issue" that LBC elsewhere posits should receive de novo review. *See* RBr 27.

Moreover, a significant and growing number of patents are now litigated in multiple actions, often before multiple district courts and judges, which inevitably may lead to differing constructions of the same claim terms. *See* IPO Br. 9. Far from "the rarest of situations ever to face this Court" (RBr 33), it happened just two years ago. *Am. Piledriving Equip., Inc. v. Geoquip, Inc.*, 637 F.3d 1324, 1326-

27 (Fed. Cir. 2011). LBC itself filed serial cases asserting the ‘529 patent. *Lighting Ballast Control LLC v. American Ballast Corp. et al*, Case No. 7:11-cv-00114-O (N.D.T.X.). This will be more common under the America Invents Act prohibition on joinder of unrelated defendants, 35 U.S.C. § 299, which already has led to patents being litigated in multiple cases in different courts around the country.

LBC’s proposed “solutions” reveal just how unworkable LBC’s proposed standard would prove in practice. *See* RBr 33-34. LBC posits that the Court could merely “choos[e] the earlier ruling over the later one.” This would arbitrarily grant deference to one trial court decision, regardless of thoroughness or reasoning of the decisions. Alternatively, LBC suggests switching to de novo review only in this “tiebreaker” scenario. There is no precedent anywhere in the law for an appellate court applying different standards of review to the same issue.

More coherently, but no more satisfactorily, the ABA (at 14) suggests that stare decisis could resolve inconsistent constructions. This raises serious Due Process concerns if the Court defers on a wide swath of subsidiary issues (as the ABA itself proposes). An alleged infringer in a second lawsuit would find itself bound by a largely factual finding that it had no opportunity to address.

While ULT’s proposal allows for deference consistent with Rule 52, and thus does not foreclose the possibility of inconsistent and uncertain constructions,

the risk is vanishingly small. *See Markman II*, 517 U.S. at 389 (“doubtful” that many claim constructions will turn on a credibility determination).

2. There is a real, increased danger of forum shopping under an overly deferential standard.

While this Court’s mandamus decisions on venue are welcome (as LBC notes at 34), forum-shopping remains a significant concern. Indeed, in this case, LBC filed its Complaint in the Wichita Falls division of the Northern District of Texas, far from the most convenient forum for *any* of the parties, counsel, or witnesses, and where LBC was assured it would be assigned to a particular judge. *See* OBr 7. Whatever advantages LBC thought its forum selection might provide in litigating the ’529 patent against ULT and other defendants, LBC did not file its case in the nearest or most patent-savvy court of competent jurisdiction.

Under a deferential review, the final outcome (post-appeal) of a claim construction and a case could vary with the proclivities of “different trial judges.” *See Ornelas v. United States*, 517 U.S. 690, 697 (1996)). Claim construction could depend on forum choice, by the plaintiff in the first instance and then possibly by a defendant on a motion to transfer. Congress created this Court to prevent such occurrences. OBr 37-38. Amici from industry have stated deep concern with increased deference leading to increased forum shopping. Google Br. 21-22, 25-26; Cisco Br. 17-18. Appropriate plenary review over most claim construction issues will mitigate this concern and promote public confidence in the patent

system.

3. LBC misapprehends the difference between deference and weight.

This Court can and should reaffirm that it carefully considers district court decisions and gives due weight to claim constructions, even when applying de novo review. That weight is an inherent feature of de novo review, not a “substitute” standard. *Compare* RBr 35. This is hardly a “novel” idea (RBr 35), as the Supreme Court and this Court have acknowledged it (OBr 15-17). Properly understood, this approach to appellate review should encourage clearer and sharper district court reasoning to assist de novo appellate review.

4. Undue deference would increase litigation costs and uncertainty.

Finally, when considering how the standard of review affects litigation expense, the Court should give particular attention to those amici who pay legal bills. Google Br. 27-28; Cisco Br. 15-16. Overbroad deference would encourage delay in claim construction until after discovery,⁴ exacerbate the problem of “strike suits” and abusive discovery to pressure settlements, and increase ex ante uncertainty, leading to more litigation. *Id.*

The standard of review is not the reason why patent litigation is too often too

⁴ Even the ABA (at 14-15), who favors deference to many aspects of claim construction, acknowledges that this could “tempt[.]” district courts to eschew summary judgment.

costly; a major problem is vague, functional claim language without any anchor in the intrinsic record. Google Br. 17-19,24-27; Cisco Br. 20-24. Parties may propose whatever construction meets their litigation objectives of proving infringement and avoiding invalidity. Affording undue deference to district court claim constructions will worsen the problem. Here, LBC supplied an expert's bare declaration on how he (like the party who hired him) would construe the "voltage source means" limitation. Similarly, during trial, LBC filled a hole in its evidence by eliciting testimony from its expert that he would read "connected to" in the patent expansively as "for connection to." The district court relied on this testimony to render a new claim construction post-trial and deny one of ULT's grounds for JMOL. *See* ULT Panel Br. 17-18, 43-51. If parties (patentees and alleged infringers alike) believe that this Court will defer to district court "findings" based on such improper expert testimony, they will have incentive to litigate unreasonable positions, knowing that a misguided trial court construction will be "stickier."

ULT has litigated this case for over four years, instead of settling to avoid litigation costs as the three other defendants jointly sued by LBC did, because ULT understood that this Court could and would ultimately correct any district court claim construction error. *See* OBr. (setting forth five separate grounds for invalidity and non-infringement). Broad clear error review of claim constructions

will encourage more litigation on bad patents, and will discourage defendants from standing up to a “bully” who “distort[s] a patent claim far beyond its plain meaning and precedent.” *See* Hon. Randall R. Rader et al., Op-Ed., *Make Patent Trolls Pay in Court*, N.Y. Times, June 4, 2013.

II. LBC PROVIDES NO BASIS FOR AFFIRMING THE DISTRICT COURT’S “VOLTAGE SOURCE MEANS” CONSTRUCTION

A. LBC Misstates the Record to Defend the District Court’s “Voltage Source Means” Construction.

1. LBC misstates the district court’s ruling; the Panel correctly summarized that ruling.

LBC asserts that the Panel “misstated” the Amended Order and that the district court instead found that “the claimed voltage source is a rectifier, and *only* a rectifier.” RBr 40-41. That assertion is wrong for at least three reasons:

First, the words “and *only* a rectifier” do not appear anywhere in the district court’s orders. *See* A16-24, 33. Nor are those words a logical inference from what the district court did say. The district court’s statement that the “voltage source means” limitation “connotes” a rectifier (A22) does not logically imply that it connotes “*only* a rectifier.” A term or phrase may connote (i.e., suggest) more than one thing. Observing that a limitation connotes one structure in no way excludes that it also may connote other structures for different applications—in this case, a battery, a DC generator, a solar cell, and other DC voltage sources, according to LBC’s own evidence.

Second, the Amended Order makes clear that the district court understood the “voltage source means” limitation did not connote *only* a rectifier in all contexts. The district court relied on LBC’s litigation expert’s declaration, quoting from it at length. A21-22. Therein, the expert declared that “the ‘voltage source means’ limitation, when read in the context of the specification and claims, suggests to me ... a rectifier (if converting AC from a ‘power line source’ to DC for a ‘DC supply voltage’) or ... a battery (if providing the DC supply voltage directly to the DC input terminals).” *Id.* The Amended Order further noted that a rectifier would be understood as an appropriate structure “in common uses,” i.e., when an AC power supply is used. A23. Finally, the Amended Order stated, “it is clear to one skilled in the art that to provide a DC voltage *when the source is a power line, which provides an AC voltage*, a structure to rectify the line is required.” *Id.* (emphasis added).

Third, LBC’s brief ignores the August 2010 Claim Construction Order, which was based on exactly the same record as the later Amended Order. In the August 2010 Order, the district court expressly found, *inter alia*:

- “Lighting Ballast admits that a rectifier is not the only structure capable of providing a DC voltage;” and

- “[t]here is no indication that ‘voltage source’ is often used synonymously with the term ‘rectifier’ by those of ordinary skill in the art, . . . in fact, the opposite would seem to be the case.”

A808. Given those clear record-based findings, which it never disclaimed, the district court plainly did *not sub silentio* reverse itself and implicitly rule in its Amended Order that “voltage source” connotes a rectifier “and *only* a rectifier.”

2. LBC’s current “*only a rectifier*” argument conflicts with its description of the patent throughout the case.

It is no surprise that the Panel understood that the “voltage source means” limitation connotes a rectifier as well as other structures, because that is what LBC has argued from day one of this litigation. During claim construction, LBC argued that “voltage source means” suggests *either* a rectifier for an AC power source *or* a DC source (like a battery). *See e.g.* A347-48; SA97. LBC maintained that position in opposing ULT’s summary judgment motion. A2906 (“sources that could directly supply DC, such as a battery or a DC generator” are “additional structures that would make up a ‘class of structures’” associated with the limitation). And LBC maintained this position before the Panel, arguing that “two subtypes of devices can be a ‘voltage source’ in precise functional context: a rectifier in the case of the vast majority of application, which rely on an AC power source; or a battery or the like (such as a DC generator or solar cell).” LBC Panel

Br. 39. That position again was consistent with, and indeed required by, evidence proffered by LBC itself. A22; *see also* A480; A659-60; SA 37-38.

That position allowed LBC to assert the '529 patent broadly against any ballast, including ballasts that operated from various different types of power sources. Ballasts used in hospital and commuter buses, for example, use a direct DC source. A660-61. But now, belatedly recognizing that this broad functional claiming invokes the quid pro quo of §112(f), which the specification cannot satisfy, LBC argues that the '529 patent is *limited* to AC power line applications. RBr 41, 47-49, 51-52, 53 n.16. Likewise, LBC misrepresents its expert's opinion by selectively quoting from his declaration, omitting all references to a battery. *Compare* RBr 39 with SA29-30. LBC cannot disclaim its own previous arguments as well as the record evidence in favor of a new, narrower reading of the '529 patent designed to avoid the quid pro quo required by §112(f).

B. LBC Fails in Its Assaults on the Panel's Legal Reasoning.

1. LBC repeats arguments based on a misreading of §112(f) precedent that the Panel already has corrected.

Much of LBC's argument has nothing to do with the standard of review. At bottom, LBC's disagreement is with this Court's longstanding precedents that limit functional claiming.

As the Panel pointed out, the cases relied on by LBC are inapposite because the "limitations at issue did not include the word 'means.'" Panel Op. 10-11. Yet

LBC continues to rely on those same cases. *See e.g.* RBr 43, 47, 49. The Panel, not LBC, started with the proper presumption that “voltage source *means*” invokes § 112(f), as the cases cited by LBC make clear. *Linear Tech. Corp. v. Impala Linear Corp.*, 379 F.3d 1311, 1319 (Fed. Cir. 2004).

As the Panel also explained, LBC’s evidence that the voltage source limitation suggests rectifiers *plus* DC power sources merely confirms “a lack of a defined class of structures” “amount[ing] to impermissible functional claiming.” Panel Op. 10-13. Thus, contrary to LBC’s criticism (RBr 44-45), the Panel correctly understood and applied the evidentiary presumption that arises from use of the word “means.” The Panel ruled that “implicit” disclosure of structure, as argued by LBC (RBr 54-55), does not satisfy the requirement that structure be identified in the claim itself to avoid §112(f). Panel Op. 9; *Biomedino LLC v. Water Techs. Corp.*, 490 F.3d 946, 950-53 (Fed. Cir. 2007).

Remarkably, LBC does not squarely address the Panel’s key observation that the evidence did *not* show that “voltage source” was “used synonymously with a defined class of structures at the time the invention was made.” Panel Op. 9-10 (citing *Rembrandt Data Techs., LP v. AOL, LLC*, 641 F.3d 1331 (Fed. Cir. 2011)). It instead criticizes ULT’s arguments based on *Rembrandt* that track the Panel Opinion. RBr 42-43. But the cases cited by LBC undercut its argument and confirm that a term must have “reasonably well-understood meaning as a name for

a structure” in the art. *E.g., Mass. Inst. of Tech. (“MIT”) v. Abacus Software*, 462 F.3d 1344, 1354 n.5 (Fed. Cir. 2006). As with “colorant selection” in *MIT*, “there is no suggestion that [“voltage source”] has a generally understood meaning in the art. *Id.* at 1354.

Absent evidence that “voltage source” was a “term of art” known to skilled artisans, LBC’s expert’s and the inventor’s statements about that term are nothing more than individual opinions on how to read the patent. Such statements do not address “historical fact,” i.e., what did the term mean in the art at the time of invention. Instead, they seek to substitute the views of litigants and their experts for those of the Court on how the patent should be construed, *e.g., Markman I*, 52 F.3d at 983, and this Court need not defer to the district court’s legal error in crediting these statements (*supra* Section I.B.4; OBr. 51-53).

LBC repeatedly criticizes ULT for not offering any expert opinions on how to read the “voltage source means” claim limitation. *See* RBr 39, 41, 44, 48, 55. This lays bare the true consequence of LBC’s proposals. Under LBC’s view, every time a party offers expert testimony on a claim term’s construction, even if (as here) that testimony contradicts the intrinsic record and has no basis in historical fact, the opposing party would be required to submit its own expert testimony offering the opposite legal opinion. The Court should decline this invitation to overrule *Phillips*, *Vitronics*, and a host of other precedents.

2. The claimed invention is not limited to an “AC power line” context.

Contrary to LBC’s newfound suggestion, the claimed invention cannot be construed as one that operates only with an “AC power line.” Nor did the district court so construe the asserted claims. LBC acknowledges that the claim language does not specify an AC power source. RBr 48 n.15. The recited function is “providing a constant or variable magnitude DC voltage...”; it does not mention “rectifying” AC to DC. The only passage from the patent that LBC identifies that actually references an AC voltage (“voltage of 120 VAC”) relates to the particular “construction of the device” described in a prior art patent. *See* A194, col. 1, l. 60-67. LBC also points to the use of the terms “power line,” “power source” and “DC supply voltage” in the patent’s specification. RBr 49, 54. But those references do not specify an AC power source, as opposed to a DC power source, nor do they limit the claim language to any particular voltage source. As the Panel observed, the specification does not describe a rectifier or any other voltage source, and expert testimony “cannot supplant the total absence of structure.” Panel Op. 12 (quoting *Default Proof Credit Card Sys., Inc. v. Home Depot U.S.A., Inc.*, 412 F.3d 1291, 1302 (Fed. Cir. 2005)).

During his deposition, moreover, the inventor explained that the references to the power line voltage in the ’529’s summary of the invention “suggests all types of power supplies from power line AC to DC,” and testified that the ’529

circuit is a “universal application” that “applies also to battery-type operation.” A480; SA 37-38. LBC’s expert agreed in his declaration, SA29-30, as well as in his deposition. A1623-24 (“Q. Is there anything in the ’529 patent that you believe limits the patent to use with an AC power line? A. Limits it, no.”)

3. LBC improperly relies upon new evidence and arguments that, in any event, are irrelevant.

In its en banc Response Brief, LBC for the first time relies on the prosecution history to support its arguments that “voltage source means” connotes a rectifier and it is disclosed as corresponding structure. RBr 50, 55. Note that this is effectively arguing for the de novo review LBC is seeking to overturn in this en banc proceeding; LBC is not asking this Court to approve the district court’s ruling and reasoning but instead is asking it to review the issue anew (including by looking at new evidence). In any case, this argument is a non sequitur. The fact that a rectifier is explicitly disclosed in cited prior art does not satisfy §112(f)’s requirement that corresponding structure be disclosed in the specification.

Biomedino, 490 F.3d at 950.

Similarly, LBC misconstrues the “technical tutorial” submitted with ULT’s opening claim construction brief (Response at 50). That document referenced an “ordinary domestic power supply” in the context of discussing a “common incandescent light bulb,” not a gas discharge lamp of the ’529 patent. LBC also improperly relies on Bobel’s inventor notebook as purportedly showing drawings

of the '529 circuit that depict a rectifier. An inventor's subjective understanding of his invention, if not expressed in the public intrinsic record, is irrelevant.

Howmedica, 540 F.3d at 1346-47.

4. The Panel properly considered the deposition testimony of LBC's expert, which confirmed the other record evidence.

The Panel was free to consider LBC's expert's deposition. ULT submitted the relevant deposition excerpts into the district court record in support of ULT's motion for summary judgment. A997-99. ULT appeals the final judgment and all rulings affecting the judgment, including the district court's ruling on summary judgment. ECF No. 1-2. As such, the testimony can be considered under any standard of review. LBC cites no authority suggesting otherwise. *See* RBr 52-53.

ULT did not mislead Dr. Roberts into assuming that "voltage source means" reads on structures besides a rectifier. *See* RBr 52-53. Instead, Roberts' own declaration supporting LBC's earlier claim construction brief stated as much. SA30, ¶ 22. The Court can read the deposition questions and answers: Dr. Roberts was clear that he was talking about the claim language in context. A1618-A1624; Panel Op. at 10 ("Q: Are all of the power sources, DC solar cell, DC generator, DC battery, and an AC power supply with a rectifier, are those all sources of DC -- of voltage source means that can be used with the '529 patent? A. Yes.") Even setting aside Roberts' deposition testimony, the record requires the

same outcome. Both Roberts and Bobel freely admitted that structures other than a rectifier could serve as the “voltage source means.” *See e.g.*, A21-22; A659-60.

III. LBC’S WAIVER ARGUMENTS ARE IMPROPERLY RAISED AND WITHOUT MERIT.

LBC petitioned for rehearing en banc on *two* points: (1) *Cybor* should be overruled, and (2) ULT waived its indefiniteness defense under *Ortiz v. Jordan*, 131 S. Ct. 884 (2011). Pet. Reh’g 1-2, 4-5, ECF 55. The Court granted rehearing on the *first* point only and directed that “[b]riefing should be limited to claim construction and related issues set forth above.” Order, Mar. 15, 2013, ECF 84. LBC’s Brief nonetheless focuses on re-arguing waiver. RBr 2-17. Because the Court directed the parties *not* to address the issue, our response is brief. *See also* ULT Panel Reply Br. 3-16.

As the Panel correctly observed, “[t]he dispute surrounding the ‘voltage source means’ became fully litigated” through the district court’s pre-trial rulings. Panel Op. 6. The Amended Order definitively rejected ULT’s defense and stated that the parties should not expect “any further revisions to any of the Court’s claim constructions.” A21 n.2. When it later obtained deposition testimony from Roberts that elaborated on his earlier declaration to further confirm its indefiniteness position, ULT relied on it to seek summary judgment. The district court again rejected ULT’s position and summarily refused to address the issue “a

third time.” A62. Neither the court nor LBC identified any disputed fact or issues that remained to be resolved; the issue was decided fully and finally for LBC.

ULT did not need to re-argue its claim construction and indefiniteness positions further to preserve them. The district court’s Amended Order and later Summary Judgment Order (*see* A62) left no issue for trial; ULT was not free to “contradict the court’s construction to a jury.” *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1321 (Fed. Cir. 2009). And those rulings left no opening for ULT to press for a fourth consideration of the issue.

LBC’s *Ortiz* argument fails for three reasons:

First, under Fifth Circuit precedent “[i]t is a well-settled rule of law that an appeal from a final judgment raises all antecedent issues previously decided,” Panel Op. 7 (quoting *Exxon Corp. v. St. Paul Fire & Marine Ins. Co.*, 129 F.3d 781, 784 (5th Cir. 1997)). Under *Markman II*, the district court had to decide the construction of “voltage source means” pretrial, and it did. It also effectively decided the issue again in denying ULT’s summary judgment motion. Nothing required ULT to raise the same issue again and again at *every* subsequent stage to preserve its appeal argument. That same outcome pertains regardless of the standard of review applied. Indeed, LBC raised precisely the same waiver arguments to the Panel under *Cybor*’s purely de novo standard. LBC Panel Br. 30, 37-38.

Second, the trial court rulings effectively granted summary judgment for LBC on ULT’s indefiniteness defense. *Cf.* RBr 11 (acknowledging that the district court’s initial ruling of indefiniteness “was a *de facto* summary judgment in ULT’s favor”). Even courts that decline appeals from orders denying summary judgment *will* hear appeals from such orders that, like the district court’s order here, “effectively granted partial summary judgment” to the non-movant. *Owatonna Clinic v. Med. Prot. Co.*, 639 F.3d 806, 810-11 (8th Cir. 2011). *Ortiz* does not preclude this practice. *Id.*

Third, even if deemed merely denials of summary judgment, the district court ruled against ULT on legal, not factual, grounds (*see* OBr 41-56), and in this Court and the Fifth Circuit, such orders are appealable; no JMOL motion is required. *Revolution Eyewear, Inc. v. Aspex Eyewear, Inc.*, 563 F.3d 1358, 1366 n.2 (Fed. Cir. 2009); *Becker v. Tidewater, Inc.*, 586 F.3d 358, 365 n.4 (5th Cir. 2009); *Advanced Display Sys., Inc. v. Kent State Univ.*, 212 F.3d 1272, 1281 (Fed. Cir. 2000) (applying Fifth Circuit law to review jury instruction for legal error). *Ortiz* did not overrule these cases. “Despite summarizing its ruling in unfortunately broad language, the opinion in *Ortiz* was actually limited to cases where summary judgment is denied because of factual disputes.” *In re Amtrust Fin. Corp.*, 694 F.3d 741, 750 (6th Cir. 2012).

Finally, LBC's claim of jury charge waiver (RBr 8-11) is exactly the same argument the Panel properly rejected. *See* Panel Op. 7 (citing *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1359 (Fed. Cir. 2008)); *see also* Fed. R. Civ. P. 51(d)(1)(B). LBC did not even petition for en banc rehearing of this ruling (ECF 55), and the Court should not reconsider it sua sponte.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court judgment and remand for entry of judgment for ULT.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2013, I caused the Defendant-Appellant's Rehearing En Banc Brief to be filed with the court using CM/ECF which will automatically serve counsel who are registered for CM/ECF.

Dated: July 9, 2013

/s/ Steven J. Routh
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General Information

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