

18-1120

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In The  
United States Court Of Appeals  
For The Federal Circuit

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PARALLEL NETWORKS LICENSING, LLC,

*Plaintiff-Appellant,*

v.

MICROSOFT CORPORATION,

*Defendant-Appellee.*

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Appeal from United States District Court for the District of Delaware,  
Case No. 1:13-cv-02073-KAJ-SRF, Judge Kent A. Jordan

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**COMBINED PETITION FOR REHEARING AND REHEARING  
EN BANC FOR PLAINTIFF-APPELLANT  
PARALLEL NETWORKS LICENSING, LLC**

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July 29, 2019

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## CERTIFICATE OF INTEREST

Counsel for Appellant Parallel Networks Licensing, LLC certify the following:

1. The full name of every party represented by me in this case is:  
Parallel Networks Licensing, LLC
2. The names of the real parties in interest represented by me are:  
None
3. All parent corporations and publicly held companies that own 10 percent or more of the stock of the parties represented by me are:  
None
4. The names of all law firms and attorneys that appeared for the parties represented by me in the trial court or are expected to appear in this Court are:  
**McKool Smith, P.C.:** Douglas A. Cawley, Christopher T. Bovenkamp, John B. Campbell, Leah B. Buratti, Eric S. Hansen, Dustin M. Howell (no longer with the firm), Avery R. Williams, Justin W. Allen (no longer with the firm), Angela Vorpahl (no longer with the firm), Kevin P. Hess, Jennifer Trillsch (no longer with the firm), Todd Bellaire (no longer with the firm), and Cory McAnelly (no longer with the firm)  
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5. The titles and numbers of any cases known to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal are:

Case Numbers IPR2015-00483, IPR2015-00484, IPR2015-00485, IPR2015-00486, IPR2015-01729, IPR2015-01731, IPR2015-01732, and IPR2015-01734, *Microsoft Corp. & Int'l Bus. Mach. Corp. v. Parallel Networks Licensing, LLC*, pending before the Patent Trial and Appeal Board, on remand from this Court, may directly affect or be directly affected by this Court's decision in the pending appeal.

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## STATEMENT OF COUNSEL

Based on my professional judgment, I believe the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedent(s) of this court:

- *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993);
- *Arthur A. Collins, Inc. v. Northern Telecom*, 216 F.3d 1042 (Fed. Cir. 2000); and
- *Vita-Mix Corp. v. Basic Holding*, 581 F.3d 1317 (Fed. Cir. 2009).

Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance:

- (1) under *Vita-Mix*, which holds that an expert (testifying that certain conditions can result in direct infringement) may supplement a customer-use survey (establishing those conditions exist in the marketplace) to raise a genuine issue of material fact, must the expert testify that those conditions “necessarily” result in infringement to establish a genuine issue of material fact; and
- (2) under *Arthur A. Collins*, which recognizes that all “reasonable inferences” must be drawn in favor of the nonmovant in a motion

for summary judgment, must a nonmovant's expert witness eliminate all inferences from his report to establish that a genuine issue of material fact remains in the case?

/s/ Douglas A. Cawley

ATTORNEY OF RECORD FOR Plaintiff-Appellant Parallel Networks  
Licensing, LLC

## **POINTS OF LAW MISAPPREHENDED BY THE PANEL**

1. Under *Daubert*, whether expert evidence is helpful is primarily a question of relevance. Under *Vita-Mix*, a customer-use survey need not establish the ultimate question of infringement to be relevant. The Panel contravened *Daubert* by ratcheting up the helpfulness requirement well beyond what is required by the primary inquiry of relevance. It then contravened *Vita-Mix* by using its new standard to affirm exclusion of the customer-use survey because it did not establish the ultimate question of infringement.

2. Under *Arthur A. Collins*, the nonmovant's expert must set forth sufficient factual foundation for his opinion to support a judicial finding that a genuine issue of material fact remains at summary judgment. But that judicial finding is made with all reasonable inferences drawn in favor of the nonmovant. The Panel failed to draw reasonable inferences in favor of Parallel Networks ("Parallel") when it analyzed Dr. Jones's testimony on the issue of Dell.com's direct infringement.



## ARGUMENT

In December 2013, Parallel brought its indirect infringement claim against Microsoft to address the systematic and widespread direct infringement of Parallel’s patents—U.S. patents 5,894,554 and 6,415,335 (the “patents-in-suit”)—by Microsoft’s customers. Appx1000-1017. On February 22, 2017, Judge Kent Jordan of the Third Circuit Court of Appeals (sitting by designation) issued orders granting Microsoft’s *Daubert* motion and granting in part Microsoft’s summary judgment motion. Appx12476-12507; Appx15-30; Appx33-42.

Parallel Networks, post-trial, appealed these rulings to this Court. On June 28, 2019, a Panel of this Court issued a non-precedential opinion affirming Judge Jordan’s orders. *Parallel Networks Licensing v. Microsoft Corp.*, No. 2018-1120, slip op. at 5–9 (Fed. Cir. June 28, 2019).

But the Panel’s opinion makes two legal errors. First, the Panel erroneously ratcheted up the bar for Federal Rule of Evidence 702’s (“Rule 702”) helpfulness requirement—in conflict with this Court’s decision in *Vita-Mix*. Second, the Panel effectively applied a novel rule that a nonmovant’s expert may not benefit from reasonable inferences at summary judgment—in conflict with this Court’s decision in *Arthur*

*A. Collins.* These misapprehensions of the law warrant rehearing by the Panel. Because they further threaten the uniformity of this Court’s decisions and raise questions of exceptional importance, rehearing en banc is also appropriate.

**I. The Panel set the helpfulness bar too high in affirming exclusion of the customer-use survey because it did not establish the ultimate question of infringement—thus creating conflict with *Vita-Mix*.**

The Panel erroneously affirmed the District Court’s exclusion of the customer-use survey. To do so, it contravened *Vita-Mix*’s holding that a customer-use survey need not establish the ultimate question of infringement to be admissible. It further set the bar for Rule 702 helpfulness well above what any source of law supports. And finally, in setting the helpfulness bar where it did it concluded that expert-testimony, supplementing a customer-use survey, cannot establish a genuine issue of material fact unless that expert testifies the infringing conditions found in the survey “necessarily” infringe: thus improperly importing the Court’s standard for post-trial judgment as a matter of law into the summary judgment context.

**A. *Vita-Mix* held that a customer-use survey need not establish the ultimate question of infringement to be admissible.**

The Panel silently abrogated *Vita-Mix* in concluding that a customer-use survey cannot be helpful under Rule 702 unless it establishes the ultimate question of infringement to be admissible. According to the Panel, the customer-use survey was not helpful, and thus not admissible, because: (1) it “did not provide enough information to determine whether any respondent performed each step of the claimed methods”; and (2) it “contained broad language that did not distinguish between infringing and non-infringing uses.” Slip op. at 5–6.

But these reasons are just another way of saying that the customer-use survey did not establish the ultimate question of infringement and should, therefore, be excluded: the *precise* argument that this Court rejected in *Vita-Mix* when it was tried under the label of relevancy. 581 F.3d at 1326. If this Court does not correct this back-door imposition of more stringent criteria for relevance—accessible by the mere expedient of a change in evidentiary labels from “relevant” to “helpful”—then it will open the door to dangers of unworkability that the Notes of Advisory Committee cautioned against when Federal Rule of Evidence

401 (“Rule 401”) was adopted. FED. R. EVID. 401 notes of advisory committee on proposed rules.

Helpfulness is also a procedural question, subject to regional circuit law. The Panel pointed to no Third Circuit authority to support that helpfulness imposes some materially higher standard than relevance that requires a customer-use survey to establish the ultimate question of infringement. And the case the Panel cites to—*Daubert*—points the other way. *Daubert* does not even explicitly draw a *substantive* distinction between helpfulness and relevance, let alone a material one. It describes each in terms of the other. *See* 509 U.S. at 591; *see also id.* (“Expert testimony which does not relate to any issue in the case is not relevant and, *ergo*, *non-helpful*.” (quoting 3 Weinstein & Berger P702[02], pp. 702–18 (emphasis added))). That this Court, in *Vita-Mix*, also failed to see a material distinction between the two cuts against the Panel’s distinction as well. *Cf.* 581 F.3d at 1326.

Since the Panel would allow parties to avoid *Vita-Mix* by framing their objections to customer-use surveys on helpfulness grounds, in-lieu of relevancy grounds, it silently abrogates binding precedent without any basis in law. Rehearing is appropriate. FED. R. APP. P. 40(a)(2).

**B. Even if there is a material distinction between helpfulness and relevance, the Panel’s “necessarily’ standard” sets the bar too high.**

When the Panel treated the *Vita-Mix* expert’s testimony that the accused-blender “necessarily’ infringed the claimed method” as a dispositive fact in establishing whether the customer-use survey was helpful, slip op. at 6–7 (emphasis added), it erroneously ratcheted up the bar for helpfulness. In fact, this new “necessarily’ standard” requires an expert supplementing a customer-use survey to testify that the conditions identified in the survey result in infringement in 100% of cases before the survey can be helpful. *See id.* This high bar is a misapprehension of the Federal Rules, Supreme Court precedent, and the precedent of this Court. When the proper standard is applied, Dr. Isaacson’s customer-use survey is helpful, relevant, and admissible.

The Panel’s “necessarily’ standard” finds no support in the Federal Rules. Rule 702 governs helpfulness. It fails to mention that helpfulness is a materially higher standard than relevance. *See* FED. R. EVID. 702(a). The Supreme Court, in giving content to Rule 702, provides scant support either. As far as the Supreme Court was concerned in *Daubert*, the inquiry “goes primarily to *relevance*.” 509 U.S. at 591

(emphasis added). And Rule 401 sets such a low-bar in that primary inquiry that evidence can be admitted if it has “*any tendency* to make a fact more or less probable than it would be without the evidence.” FED. R. EVID. 401(a) (emphasis added). And, as this Court taught in *Vita-Mix*, for a customer-use survey to have a tendency to make infringement more probable than it would have been without the evidence merely requires it show infringing conditions “were present at least a small percentage of the time.” 581 F.3d at 1326.

So for the Panel to ratchet up the helpfulness bar so high that a customer-use survey must go from merely showing infringing conditions in a small percentage of cases (the *primary* inquiry) to having to also show infringement occurs 100% the time when those conditions are present (the “necessarily’ standard” addition) is an *extraordinary* leap. Not only because Third Circuit precedent establishes that whatever else helpfulness adds to relevance “is not that high” a bar. *Lauria v. AMTRAK*, 145 F.3d 593, 600 (3d Cir. 1998) (quoting *Daubert*, 509 U.S. at 591). But also because it undermines *Vita-Mix*’s holding—that a customer-use survey need not establish the ultimate question of

infringement to be relevant, 581 F.3d at 1326—so completely that it reduces that case to the point of irrelevancy.

Dr. Isaacson designed his survey to measure customer use and configuration of Windows Server, and in particular whether it was being used in a manner that can infringe the patents-in-suit: results of which were never challenged. Appx8275-8276. This makes his customer-use survey relevant under *Vita-Mix*, 581 F.3d at 1326, and, “ergo,” helpful under *Daubert*, 509 U.S. at 591. The Panel’s contrary conclusion warrants rehearing. FED. R. APP. P. 40(a)(2).

**C. En banc review is necessary to decide whether an expert must formalistically testify that certain conditions “necessarily” infringe before a customer-use survey showing those conditions can establish there is a genuine issue as to infringement.**

While the Panel’s “‘necessarily’ standard” lacks a basis in law, *see supra* subparts I(A)–(B), the Panel’s error may be traceable to a lack of precedent on that issue. This Court has never clarified that *Vita-Mix* does not require experts to formalistically recite the magic word “necessarily” in their testimony to raise a genuine issue of material fact. This dearth of precedent means that the Panel’s decision—even as an unpublished opinion—will have the practical effect of abrogating *Vita-*

*Mix*. It is the only other Circuit case on point. And, as a matter of law, the Panel's opinion on this issue is faulty.

The dispositive weight that the Panel gave to the word "necessarily" erroneously imports this Court's standard for a post-trial motion for judgment as a matter of law. For instance, this Court in *ACCO Brands v. ABA Locks Mfr. Co.* held that for a plaintiff to sustain a jury verdict for indirect infringement when the accused device is capable of both infringing and non-infringing uses, he must either "*prove* specific instances of direct infringement or that the accused device *necessarily* infringes the patent in suit." 501 F.3d 1307, 1313 (Fed. Cir. 2007) (emphasis added).

A motion for summary judgment, however, takes place pre-trial: before anything is "proven." And so if this Court allows the Panel's decision on this issue to stand it will not only effectively abrogate *Vita-Mix*. It may also foreclose plaintiffs in these circumstances from *proving*, to the jury, specific instances of direct infringement. Instead, to survive summary judgment, they will need to hire an expert to testify that the accused devices *necessarily* infringe. But this is not the law. And its potential impact on numerous indirect-infringement patent



cases raises a question of exceptional importance that merits this Court's en banc review. FED. R. APP. P. 35(a)(1).

**II. The Panel effectively applied a novel rule that a nonmovant's expert may not benefit from reasonable inferences at summary judgment—thus creating conflict with *Arthur A. Collins*.**

The Panel erroneously affirmed the District Court's finding that Dr. Jones had failed to establish that a genuine issue of material fact existed as to Dell.com's direct infringement of the patents-in-suit. It could only reach its holding by declining to apply black-letter law that nonmovants are entitled to reasonable inferences at summary judgment. And the Panel compounded this error by effectively holding that nonmovants' experts may *never* benefit from reasonable inferences in referring back to prior analyses opining on infringement—and requiring an expert infringement report to repeat a full limitation-by-limitation analysis for each accused user and each accused product, even when the analysis, provided at least once, is the same for multiple users and multiple products. These errors warrant rehearing.

**A. The Panel misapplied *Arthur A. Collins* in holding that Dr. Jones was not entitled to a reasonable inference.**

Under *Arthur A. Collins*, all a nonmovant's expert need do to raise a genuine issue of material fact is to “set forth the factual foundation for his opinion . . . in sufficient detail for the court to determine whether that factual foundation would support a finding of infringement.” 216 F.3d at 1047–48. The Panel recognized as much. *Cf.* Slip op. at 8 (quoting *Arthur A. Collins*, 216 F.3d at 1046). But the Panel failed to apply the second part of the *Arthur A. Collins* standard: in making that determination, all “reasonable inferences” must be “drawn in favor of the nonmovant.” 216 F.3d at 1047–48.

Dr. Jones set forth the factual foundation of his opinion in *extensive* detail. In 25 pages of expert report, Dr. Jones described how Windows Server operates, and then described—limitation by limitation and over another 36 pages—how its operations could be configured and implemented to infringe Parallel's patents-in-suit (the “Infringing Configuration”). Appx8638-8687; Appx8731-8733; Appx8735-8742; Appx8751-8754; Appx8757-8780.

Dr. Jones then opined that Dell.com fit the Infringing Configuration. In doing so he, for example, pointed to an infringing load-balancing algorithm used by Dell.com. Appx8794; Appx8798; Appx8655. He showed that Dell.com’s Windows Server routes requests to a plurality of page servers. Appx8798. And he explained that Dell.com’s web pages are generated dynamically. *Id.*

Even so, the Panel held that, “[f]or example,” because Dr. Jones purportedly failed “to explain how Dell’s use of Windows Server satisfies the ‘concurrently processes’ limitation,” he had failed to sufficiently set forth the factual foundation of his opinion under *Arthur A. Collins*. Slip op. at 9. But even assuming, *arguendo*, that the Panel’s characterization of Dr. Jones’s testimony is correct,<sup>1</sup> the Panel still erred—as a matter of law—because it rejected Dr. Jones’s syllogism:

(1)(“Major Premise”) Windows Server can be configured into the Infringing Configuration;

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<sup>1</sup> The Panel’s characterization overlooks important testimony by Dr. Jones. For instance, Dr. Jones explained that a high volume of page-request traffic is indicative of concurrent processing. Appx8751-8752. Other unchallenged evidence in the Record establishes that Dell.com uses only Windows Servers, Appx8795, which process 3.2 billion page requests per quarter, Appx8596 n.7; Appx9087. That translates to approximately 406 requests *per second*. It is not just a reasonable inference that Dell.com “concurrently processes.” It is beyond cavil.

(2) (“Minor Premise”) Dell.com’s Windows Server uses the Infringing Configuration;

(3) (“Conclusion”) Dell.com infringes the patents-in-suit.

As explained above, Dr. Jones extensively set forth the factual foundation for both the Major and Minor Premises of his syllogism. His conclusion, therefore, was nothing more than a reasonable inference. And if the conclusion to a syllogism is no longer a reasonable inference, then nothing is.

Nonmovants are entitled to reasonable inferences under binding precedent, and so Dr. Jones was entitled to his inference. *E.g.*, *Arthur A. Collins*, 216 F.3d at 1047–48. The Panel’s contrary conclusion conflicts with *Arthur A. Collins* and warrants rehearing. FED. R. APP. P. 40(a)(2).

**B. En banc review is necessary to correct the Panel’s novel rule that a nonmovant’s expert may not benefit from reasonable inferences in a motion for summary judgment.**

Dr. Jones’s syllogistic reasoning was not good enough for the Panel. In the process of rejecting Dr. Jones’s syllogism though, the Panel compounded its error. Without citation to any authority, the Panel effectively crafted a new rule: that a nonmovants’ expert may not refer back to a prior analysis, but must repeat the limitation-by-limitation

analysis in its entirety for each infringing customer's use of each accused product—even when the analysis does not change. *See Slip op.* at 9. In short, a nonmovants' expert report may no longer benefit from reasonable inferences, and may not simply cite back to a prior section of the report. But that is not the law. It makes an unwise rule. And it implicitly creates what advocates of civil litigants' Constitutional right to jury trials have always feared: paper trials. It is therefore appropriate for this Court to review the Panel's decision en banc.

The Panel's approach must be corrected, first, because it ignores black-letter law that in a motion for summary judgment the nonmovant benefits from "reasonable inferences." *E.g., Arthur A. Collins*, 216 F.3d at 1047–48. Syllogistic reasoning is on the table for the nonmovant.

Second, the Panel's new rule is unwise. If experts can no longer benefit from reasonable inferences and logical linkages between analyses of different users and products, experts will need to formalistically increase the page counts of their reports to show a limitation-by-limitation analysis for each accused product. That should give this Court pause.

In many patent cases the plaintiff accuses *multiple* products of infringing the patent-in-suit. And those products are often used by *multiple* customers. It took Dr. Jones 36 pages to perform a limitation-by-limitation analysis for the Infringing Condition. The Panel is therefore demanding plaintiffs' experts multiply that number—*at least*—by the number of accused products in the case. And then multiply again by the number of customers using each product. That does not bode well for judicial economy.

Finally, the Panel's new rule strips from juries their function in "drawing of legitimate inferences from the facts." *Cf. Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). For the contents of an expert's report to make it to the jury, it must survive a motion for summary judgment. And it cannot do that, according to the Panel, if it contains inferences. Without inferences, the jury no longer needs to draw them at trial, calling into question the need to ever move past the motion for summary judgment stage. Thus the Panel's new rule encroaches into territory Justice Brennan warned of decades ago: "full-blown paper trial[s] on the merits," giving rise to "grave concerns . . . concerning the

constitutional right of civil litigants to a jury trial.” *Id.* at 267 (Brennan, J., dissenting).

Because the Supreme Court and this Court have already held that nonmovants are entitled to reasonable inferences, and the Panel’s rule would strip them of such, the Panel’s opinion threatens the uniformity of this Court’s decisions. Rehearing en banc is therefore appropriate as it is “necessary to secure . . . uniformity of the court’s decisions.” FED. R. APP. P. 35(a)(1).

### **CONCLUSION**

For these reasons Parallel Networks asks that a panel rehearing or a rehearing en banc be granted.

Respectfully submitted,

/s/ Douglas A. Cawley

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# **ADDENDUM**

NOTE: This disposition is nonprecedential.

**United States Court of Appeals  
for the Federal Circuit**

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**PARALLEL NETWORKS LICENSING, LLC,**  
*Plaintiff-Appellant*

v.

**MICROSOFT CORPORATION,**  
*Defendant-Appellee*

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2018-1120

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Appeal from the United States District Court for the District of Delaware in No. 1:13-cv-02073-KAJ-SRF, Judge Kent A. Jordan (sitting by designation).

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Decided: June 28, 2019

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JOEL LANCE THOLLANDER, McKool Smith, PC, Austin, TX, argued for plaintiff-appellant. Also represented by JOHN BRUCE CAMPBELL, LEAH BURATTI; DOUGLAS AARON CAWLEY, CHRISTOPHER THOR BOVENKAMP, ERIC SORENSEN HANSEN, Dallas, TX.

JUANITA ROSE BROOKS, Fish & Richardson, PC, San Diego, CA, argued for defendant-appellee. Also represented by JASON W. WOLFF, CRAIG E. COUNTRYMAN; MARTINA

TYREUS HUFNAL, NITIKA GUPTA FIORELLA, Wilmington, DE.

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Before HUGHES, SCHALL, and STOLL, *Circuit Judges*.

HUGHES, *Circuit Judge*.

This is a patent case involving web pages. Parallel Networks Licensing, LLC sued Microsoft Corporation in the United States District Court for the District of Delaware, asserting direct and indirect infringement of claims of U.S. Patent Nos. 5,894,554 and 6,415,335. The district court granted Microsoft's motion for summary judgment of no indirect infringement; at trial the jury found no direct infringement by Microsoft. Parallel appeals, contending that the district court erred in (1) granting Microsoft's motion to exclude Parallel's customer-use survey under Rule 702 of the Federal Rules of Evidence; (2) granting Microsoft's motion for summary judgment of no indirect infringement; and (3) denying Parallel's post-verdict motion for judgment of direct infringement as a matter of law. We have jurisdiction under 28 U.S.C. § 1295(a)(1). Because we find no reversible error in the district court's orders, we affirm.

## I

The '554 and '335 patents disclose systems and methods for efficiently managing dynamic web page requests from a web client.<sup>1</sup> '554 patent col. 2 ll. 15–31. When a web client requests a dynamic web page,<sup>2</sup> the server must

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<sup>1</sup> The '544 and '355 patents share the same specification. Citations to the shared specification refer to the '544 patent unless otherwise noted.

<sup>2</sup> A dynamic web page is one that contains content that changes or updates automatically, as opposed to static web pages, which must be updated manually. '554 patent col. 1 ll. 38–55.

generate the content on-the-fly from one or more data sources. *Id.* col. 1 ll. 46–55. According to the patents, conventional web server environments were not equipped to process multiple dynamic web page requests simultaneously. *Id.* col. 2 ll. 1–12, col. 4 ll. 32–53. Prior art systems traditionally processed all requests on a single web server machine, which could “slow down significantly and become highly inefficient” when processing multiple requests at the same time. *Id.* col. 4 ll. 48–51.

To address this problem, the ’554 and ’335 patents disclose a “partitioned architecture” for managing dynamic web page requests, comprising a “web server” and a plurality of “page servers.” *Id.* col. 4 ll. 51–53, col. 5, ll. 49–51, col. 6 ll. 20–31. The claimed methods aim to lighten the processing demands on the web server by off-loading dynamic web page requests from the web server to the page servers. *Id.* col. 6 ll. 20–31. This is accomplished by “intercepting” a request for a “dynamic [w]eb page” at the web server and routing it to one of the page servers, thereby “releasing” the web server to “concurrently process[]” other requests. *See, e.g., Ex Parte* Reexam. Cert. No. 5,894,554 C1, claims 12 and 20 (as corrected by Oct. 2, 2012 Cert. of Correction). By allowing the web server and the page servers to “simultaneously process different requests,” the claimed methods increase processing efficiency. ’554 patent col. 6 ll. 24–27.

Claim 30 of the ’335 patent, reproduced below, is representative of the asserted claims<sup>3</sup> for the purposes of this appeal.

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<sup>3</sup> At summary judgment, Parallel asserted direct and indirect infringement of claims 12, 15, 17, 20, 27, 41, 46, 48, and 49 of the ’554 patent and 30, 43, 46, 48, 66, 78, 82, 83, and 85 of the ’335 patent. At trial, Parallel asserted

30. A computer-implemented method for managing a dynamic Web page generation request to a Web server, said computer-implemented method comprising the steps of:

routing a request from a Web server to a selected one of a plurality of page servers that can each process the request, said selected page server receiving said request and releasing said Web server to process other requests wherein said routing step further includes the steps of:

intercepting said request at said Web server; and

selecting said selected page server from among said plurality of page servers that can each process said request based on dynamic information maintained for each of said plurality of page servers; and

routing said request to said selected page server;

processing said request, said processing being performed by said selected page server while said Web server concurrently processes said other requests; and

dynamically generating a Web page at said selected page server in response to said request, said Web page including data dynamically retrieved from one or more data sources.

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direct infringement of claims 20, 41, and 49 of the '554 patent and claims 43 and 78 of the '335 patent.

*Ex Parte* Reexam. Cert. No. 6,415,335 C1, claim 30 (as corrected by Sept. 11, 2012 Cert. of Correction).

## II

### A.

Parallel first argues that the district court erred in excluding its customer-use survey and related expert testimony under Rule 702 of the Federal Rules of Evidence. We review procedural questions that are not unique to patent law under the law of the regional circuit. *Microsoft Corp. v. GeoTag, Inc.*, 817 F.3d 1305, 1310 (Fed. Cir. 2016). The Third Circuit reviews a district court's decision to exclude evidence for abuse of discretion. *In re Zolofit Prod. Liab. Litig.*, 858 F.3d 787, 792 n.22 (3d Cir. 2017). We are not persuaded that the district court abused its discretion by excluding Parallel's survey evidence.

The district court determined that the survey failed to satisfy Rule 702 and *Daubert* because it was not adequately tied to the asserted claims. Rule 702 requires that expert testimony "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. To help the trier of fact, expert testimony must adequately "fit" the factual issue for which it is proffered. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993).

Here, Parallel submitted its survey as evidence that Microsoft customers use Windows Server to directly infringe the claims. The district court reasonably found that the survey evidence would not assist the trier of fact on the issue of infringement because the survey results do not provide enough information to determine whether any respondent performed each step of the claimed methods. For example, the survey did not ask whether respondents' systems were configured to perform concurrent processing. Additionally, the survey questions contained broad

language that did not distinguish between infringing and non-infringing uses.<sup>4</sup>

Parallel argues that the expert testimony of Dr. Jones remedies the survey's deficiencies and that this case is analogous to *Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317 (Fed. Cir. 2009). We disagree.

The patent claim in *Vita-Mix* recited a method of preventing the formation of an air pocket around the blades of a blender by inserting a “plunger” into the blender without stirring. *Id.* at 1321. A customer-use survey showed that a certain percentage of customers using the accused product inserted a “stir stick” into the blender without actively stirring. *Id.* at 1325. The district court excluded the survey evidence as irrelevant because the expert who conducted the survey only testified about how survey respondents used their stir sticks and did not address air pocket formation. *Id.* In reversing the district court, we noted the testimony from a second expert, who opined that the accused device “necessarily” infringed the claimed method when a stir stick was inserted into the blender but not actively stirred. *Id.* at 1326. Because the survey addressed

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<sup>4</sup> For example, the survey asked about respondents' use of Windows Server to manage “web (e.g., HTTP) requests.” But the claims address the management of “dynamic [w]eb page[s],” and the district court construed “web page” to mean “[w]eb content on the World Wide Web, displayable by a Web browser.” *Parallel Networks Licensing, LLC v. Int'l Bus. Machs. Corp.*, No. 13-cv-2073, slip op. at 1 (D. Del. Apr. 9, 2015). Parallel does not dispute the district court's finding that “web (e.g., HTTP) requests” covers “far more than just dynamic web page requests,” including “requests for, among other things, static web pages, FTPs, and information on a local network.” *Parallel Networks Licensing, LLC, v. Microsoft Corp.*, No. 13-cv-2073, slip op. at 5 n.3 (D. Del. Feb. 22, 2017); *see also id.* at 6.

whether respondents used their stir sticks in this manner, we determined that the survey was relevant to infringement. *Id.*

In this case, however, there is no evidence that the survey respondents used Windows Server in a manner that *necessarily* infringes the claimed methods. Dr. Jones merely opined, without explanation, that “[a]ppropriate answers to survey questions . . . provide evidence that the respondent has likely configured and is using the relevant product in an infringing manner.” J.A. 8469 ¶ 231; *see also* J.A. 8470 ¶ 236 (Dr. Jones stating that the survey results provide “sufficient evidence” that Microsoft customers infringe). The district court reasonably found that this testimony does not bridge the gap between the survey results and the question of infringement.

Accordingly, we conclude that the district court properly exercised its discretion in excluding Parallel’s customer-use survey and expert testimony relying on the survey.<sup>5</sup>

#### B.

Parallel next argues that the district court erred in granting summary judgment of no indirect infringement. The Third Circuit reviews a grant of summary judgment *de novo*, applying the same standard as the district court. *Gonzalez v. Sec’y of Dep’t of Homeland Sec.*, 678 F.3d 254,

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<sup>5</sup> The district court found that “[t]he lack of fit between the survey and the asserted claims is, in and of itself, sufficient to exclude the survey as unreliable and prejudicial under *Daubert*.” *Parallel Networks Licensing, LLC v. Microsoft Corp.*, No. 13-cv-2073, slip op. at 8 (D. Del. Feb. 22, 2017). Because we find no error in this determination, we do not address the district court’s additional findings regarding the survey’s “serious methodological flaws.” *See id.*



257 (3d Cir. 2012). Summary judgment is appropriate when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). We conclude that Parallel failed to establish a genuine issue of material fact sufficient to preclude summary judgment of no indirect infringement.

To establish indirect infringement, a patentee must show that the defendant’s actions led to direct infringement. *Dynacore Holdings Corp. v. U.S. Philips Corp.*, 363 F.3d 1263, 1274 (Fed. Cir. 2004). “In order to prove direct infringement, a patentee must either point to specific instances of direct infringement or show that the accused device necessarily infringes the patent in suit.” *ACCO Brands, Inc. v. ABA Locks Mfr. Co.*, 501 F.3d 1307, 1313 (Fed. Cir. 2007). At best, Parallel’s evidence shows that certain Microsoft customers have configured the accused Windows Server product in a way that makes it *capable* of infringing the asserted claims. But when an accused product has non-infringing uses and the claims require more than the capacity to perform a particular function, “it is not enough to simply show that a product is capable of infringement.” *Fujitsu Ltd. v. Netgear Inc.*, 620 F.3d 1321, 1329 (Fed. Cir. 2010).

Parallel asserts that the district court improperly dismissed Dr. Jones’s expert opinion that Dell, Inc. used Windows Server in an infringing manner. We disagree. “[I]t is well settled that an expert’s unsupported conclusion on the ultimate issue of infringement is insufficient to raise a genuine issue of material fact.” *Arthur A. Collins, Inc. v. N. Telecom Ltd.*, 216 F.3d 1042, 1046 (Fed. Cir. 2000). While Dr. Jones *concluded* that Dell infringed some of the asserted claims,<sup>6</sup> he did not “set forth the factual foundation

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<sup>6</sup> Claims 12, 20, 27, 41, 48, and 49 of the ’554 patent and 30, 43, 78, 82, and 85 of the ’335 patent.

for his opinion . . . in sufficient detail for the court to determine whether that factual foundation would support a finding of infringement.” *Id.* at 1047. For example, Dr. Jones did not explain how Dell’s use of Windows Server satisfies the “concurrently processes” limitation.

Because Parallel did not provide evidence of any instance in which a Microsoft customer used Windows Server to perform all the steps of the claimed methods, the district court correctly granted summary judgment of no indirect infringement.

### C.

Finally, Parallel argues that the district court erred in denying its post-verdict motion for judgment of direct infringement as a matter of law. The Third Circuit reviews *de novo* a district court’s denial of a motion for JMOL. *Graboff v. Collieran Firm*, 744 F.3d 128, 134 (3d Cir. 2014). Applying the same standard as the district court, we consider “whether, viewing the evidence in the light most favorable to sustaining the verdict, a reasonable jury could have found for the prevailing party.” *Id.* (citation omitted). We conclude that the jury reasonably could have found that Microsoft’s MSN and Bing services do not infringe the asserted claims because they do not satisfy the “intercepting” limitation.

During claim construction, the parties agreed that the “intercepting” limitation means “diverting the handling of [the dynamic web page] request before the request is processed by the Web server[.]” *Parallel Networks Licensing, LLC v. Int’l Bus. Machs. Corp.*, No. 13-cv-2073, slip op. at 6 (D. Del. Sept. 30, 2014). At summary judgment, the district court declined to hold that the agreed-upon construction precludes *any* handling, or processing, at the web server. The court noted that Figure 5 of the patents discloses an embodiment in which “*at least some processing takes place before the request is intercepted.*” *Parallel Networks Licensing, LLC v. Microsoft Corp.*, No. 13-cv-2073,

slip op. at 10 (D. Del. Feb. 22, 2017) (emphasis added). At trial, Microsoft argued that the accused services do not infringe the “intercepting” limitation because they involve a *substantial amount of processing* at the web server before requests are diverted. In denying Parallel’s motion for JMOL, the district court determined that Microsoft’s non-infringement theory was consistent with the parties’ agreed-upon construction and supported by sufficient evidence.

Parallel does not challenge the sufficiency of the evidence under Microsoft’s theory of non-infringement. Rather, Parallel contends that Microsoft’s theory is based on an improper interpretation of the parties’ agreed-upon construction. According to Parallel, the “intercepting” limitation prohibits generating the requested web page at the web server, but does not limit the amount of processing that can occur before the request is diverted. In other words, Parallel argues that the limitation only requires diverting requests before processing *is complete*. We are not persuaded that this is a reasonable interpretation of the agreed-upon construction, much less the *only* reasonable interpretation. *See Avid Tech., Inc. v. Harmonic, Inc.*, 812 F.3d 1040, 1048–49 (Fed. Cir. 2016). Indeed, the plain language of the construction requires “diverting the *handling* of [the] request,” not merely diverting the request.

We agree with the district court that, based on the plain language of the parties’ agreed-upon construction, the jury could have reasonably found that the “intercepting” limitation is not satisfied where the web server performs substantial processing before diverting a request. Accordingly, the district court did not err in denying Parallel’s motion for JMOL.

### III

We have considered Parallel’s remaining arguments and find them unpersuasive. For the foregoing reasons, we affirm the district court’s orders.

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**AFFIRMED**

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was served on this 29th day of July, 2019, by operation of the Court's CM/ECF system per Fed. R. App. P. 25 on the following counsel:

Dated: July 29, 2019

/s/ Leah B. Buratti  
Leah B. Buratti

## CERTIFICATE OF COMPLIANCE

I certify that the foregoing Plaintiff-Appellant's Brief,

1. Complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A). This petition contains 3,165 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), Fed. Cir. R. 32(b), Fed. Cir. R. 35(c)(2), and Fed. Cir. R. 40(c)(1). Microsoft Word was used to calculate the word count.

2. Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Century Schoolbook type style.

Dated: July 29, 2019

/s/ Leah B. Buratti

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