

Nos. 18-2338 (Lead), -2339, -2395, -2396

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NETWORK-1 TECHNOLOGIES, INC.,

Plaintiff - Appellant,

v.

HEWLETT-PACKARD COMPANY,
HEWLETT PACKARD ENTERPRISE COMPANY,

Defendants - Cross-Appellants.

On Appeal from the United States District Court for the Eastern District of Texas
in Nos. 6:11-cv-00492-RWS-KNM & 6:13-cv-00072-RWS
Judge Robert Schroeder, III

**CORRECTED REPLY BRIEF FOR HEWLETT-PACKARD COMPANY
AND HEWLETT PACKARD ENTERPRISE COMPANY**

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**NETWORK-1 TECHNOLOGIES, INC. v. HEWLETT-PACKARD COMPANY AND HEWLETT
PACKARD ENTERPRISE COMPANY**

Appeal Nos. 18-2338, -2339, -2395, -2396

CERTIFICATE OF INTEREST

Counsel for the Appellees/Cross-Appellants hereby certifies the following:

1. The full name of every party or amicus represented by me is:

HP Inc. f/k/a Hewlett-Packard Company and Hewlett Packard Enterprise Company.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None.

During the course of this litigation, Hewlett-Packard Company underwent a corporate reorganization in which Hewlett Packard Enterprise Company was spun off as a separate company and the remaining company was renamed Hewlett Packard Inc.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

Bartlit Beck Herman Palenchar & Scott LLP: Mark E. Ferguson, Mark S. Ouweleen, and Faye E. Paul

Haltom & Doan: Jennifer Haltom Doan, Joshua R. Thane, Catherine Maness (no longer with Firm), and Kyle R. Akin

McDermott Will & Emery: David H. Dolkas (no longer with Firm), Robert J. Walters (no longer with Firm) Jodi Benassi

The Heartfield Law Firm: J. Thad Heartfield

5. The title and number of any case known to counsel 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:

Counsel is unaware of any pending case that will directly affect or be directly affected by this Court's decision in the pending appeal and cross-appeal.

Dated: June 17, 2019

/s/ Mark A. Perry

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TABLE OF ABBREVIATIONS

Term	Definition
'930 patent	U.S. Patent No. 6,218,930 B1
AIA	Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011)
Akhteruzzaman	U.S. Patent No. 5,754,644
BB	Opening Brief of Network-1 Technologies, Inc.
Chang '885	U.S. Patent No. 5,991,885
Chang Patents	Chang '885 and International Publication No. WO 98/57248
De Nicolo	U.S. Patent No. 6,115,468
Fisher '998	U.S. Patent No. 5,994,998
Fisher Patents	Fisher '998, U.S. Patent No. 6,710,704, and International Application Publication No. WO 98/54843
Fisher Patents Ground	Invalidity ground based on the Fisher Patents, the Chang Patents, and Woodmas
Fisher System Ground	Invalidity ground based on the system developed by David Fisher, the Chang Patents, and Woodmas
IEEE	Institute of Electrical and Electronics Engineers
IPR	Inter partes review
HP	Hewlett-Packard Company and Hewlett Packard Enterprise Company
Lamb	U.S. Patent No. 6,449,348
Lehr '608	U.S. Patent No. 6,473,608
Lehr Patents	Lehr '608, and U.S. Patent Nos. 6,643,566 and 7,466,819
Matsuno	Japanese Unexamined Patent Application Publication No. H10-13576
Network-1	Network-1 Technologies, Inc. (formerly Network-1 Security Solutions, Inc.)
POP	Precedential Opinion Panel
POSITA	Person of ordinary skill in the art
PTAB	Patent Trial and Appeal Board
RB	Principal Brief of HP
Smith	U.S. Patent No. 5,982,456
Whittaker	Ron Whittaker, <i>Television Production</i> (1993)
Woodmas	U.S. Patent No. 5,345,592
YB	Response and Reply Brief of Network-1

ARGUMENT

The jury correctly found the Asserted Claims invalid as obvious. The district court set aside that verdict on the ground that HP was estopped from asserting the invalidating prior art, a ruling that Network-1 barely attempts to defend. Instead, Network-1 argues that no reasonable jury could have found the patent obvious on the trial evidence. That argument is meritless, and was forfeited in any event.

The Asserted Claims are independently invalid because Network-1 amended the patent during reexamination in an effort to overcome a previous claim construction, adding claims that had the effect of enlarging (broadening) the scope of the Asserted Claims. The district court's ruling that this conduct is not invalidating contravenes both 35 U.S.C. § 305 and this Court's precedent.

In seeking to preserve the judgment of no invalidity, Network-1 repeatedly misrepresents both the facts and the law. As just a few examples:

- Network-1 mischaracterizes its own Rule 50(a) motion as having challenged the sufficiency of the evidence, when the motion itself shows that Network-1 made no such challenge. Part I.B.2., *infra*.
- Network-1 asserts that the inadmissibility of the Fisher System is “undisputed,” whereas HP maintains that the court below committed no error in admitting this evidence. Part I.C.1.a., *infra*.
- Network-1 literally rewrites this Court's precedents in an effort to make them say things they do not. *See* Part II., *infra*.

The actual evidence, in light of the applicable law, establishes that the Asserted Claims are invalid. The district court's contrary judgment should be reversed.

I. The District Court Erred in Setting Aside the Obviousness Verdict.

The district court's ruling that HP was estopped from asserting the Fisher Patents Ground as the result of a previous IPR proceeding (Appx91) was legally erroneous: HP could not reasonably have raised the Fisher Patents Ground in the IPR, and therefore cannot be estopped from presenting it to the jury. RB at 51-69. Network-1 makes only a cursory effort to defend the estoppel ruling, devoting most of its brief instead to challenging the jury verdict on evidentiary grounds; but those challenges are without merit in addition to being procedurally barred.

A. HP Is Not Estopped by the Avaya IPR.

The AIA's estoppel provision, 35 U.S.C. § 315(e)(2), does not apply here because HP could not reasonably have raised the Fisher Patents Ground during the Avaya IPR (RB at 56-61); in addition, all but one of the Asserted Claims were not challenged in the Avaya IPR (*id.* at 61-62).

1. HP Could Not Reasonably Have Raised the Fisher Patents Ground.

The PTAB made abundantly clear that it would *not* grant joinder and institution for any petitions filed after the one-year bar had expired if they included grounds not already pending in the Avaya IPR, and thus HP could not reasonably have raised the Fisher Patents Ground. RB at 57-59. HP is not here criticizing the PTAB for how it exercised its discretion. But when the PTAB takes that approach to joinder, estoppel as to the joinder parties should not extend beyond the grounds on which the

proceeding was initially instituted because the joinder party—like HP here—could not reasonably have raised any other grounds. Network-1’s inability to dispute that fundamental point compels reversal. Network-1’s other defenses of the district court’s estoppel ruling, tepid as they are, should be rejected.

First, Network-1 accuses HP of rewriting the statute to cabin the scope of estoppel to grounds the petitioner “reasonably could have raised *and that reasonably would have succeeded* during that inter partes review.” YB at 45 (emphasis in original); *see also id.* at 47. HP has never argued that estoppel should be limited to the grounds that would *ultimately have been successful, i.e.*, grounds that would have proved the challenged claims unpatentable. Instead, HP contends that where the PTAB limits joinder parties to grounds previously instituted, estoppel cannot bar litigation of other grounds—whether or not they would have succeeded.

Second, Network-1 suggests (*see* YB at 47) that HP could have “raised” the Fisher Patents Ground during the Avaya IPR by including that ground in its second joinder IPR petition. Network-1 is wrong because the *filing* of a joinder petition that includes an additional ground does not “raise” that ground “during that inter partes review” under Section 315(e)(2)—to be “raised,” the PTAB must institute review on that ground. *See Shaw Indus. Grp., Inc. v. Automated Creel Sys., Inc.*, 817 F.3d

1293, 1300 (Fed. Cir. 2016) (emphasis omitted). Here, the Board declined to institute any grounds other than those in the Avaya petition, and thus no other grounds were (or reasonably could have been) “raised.”

Contrary to Network-1’s intimation (*see* YB at 47-48), the PTAB here cast doubt on whether it would partially institute on a joinder petition even if the petition included a previously instituted upon ground. In the Avaya IPR, the PTAB instituted on a ground asserting anticipation by the “Matsuno” reference. Appx373. HP’s first joinder petition also included a ground asserting anticipation by the Matsuno reference (Appx5449), and yet the Board refused to grant joinder and partial institution (Appx5452; Appx5463). And Network-1’s argument is irrelevant in any event—the estoppel question is whether HP could reasonably have raised the Fisher Patents Ground, not whether HP was required to engage in a futile act for preservation purposes.

Third, Network-1 cites two district court decisions for the proposition that a “petitioner ‘reasonably could have raised’ a ground if (i) it was within the scope of permitted grounds, 35 U.S.C. § 311(b), and (ii) it was known to, or reasonably could have been discovered by, the petitioner.” YB at 45, 47. It may well be that the “diligent searcher” standard articulated in these cases is properly applied, in appropriate circumstances, to an original petitioner. But with respect to a joinder party,

the question is not knowledge (or diligence), but rather whether the PTAB was willing to entertain any additional grounds. Because the PTAB was not so willing with respect to the IPR at issue, the “diligent searcher” standard is entirely inapplicable here. Indeed, neither of the cases that Network-1 cites (*id.* at 45) addresses the scope of estoppel for petitioners seeking joinder after the expiration of the one-year bar.

Fourth, Network-1 argues that it was HP’s “tactical choice” to join the Avaya IPR and that “it was eminently fair that HP pay the price of estoppel.” YB at 48. HP does not dispute that by joining the IPR, it became estopped from asserting in litigation the grounds on which the Board had previously instituted review. Where Network-1 goes astray is in asserting that this estoppel extends to *all* “grounds that were known but not raised” by HP. *Id.* Unlike an original petitioner, which selects the grounds to present in the first instance, HP filed its joinder petitions only *after* the Board had instituted on some of the grounds presented by Avaya, and thus it is neither just nor fair to preclude HP from asserting grounds that were not the subject of the pre-existing institution decision. And as Network-1 points out, an accused infringer may feel compelled to join an instituted IPR to preserve the administrative challenge if the original petitioner settles. *Id.* at 48 n.7.

Fifth and finally, Network-1 argues that applying IPR estoppel here would not violate the Due Process Clause because IPR estoppel is “analogous to claim preclusion,” which (according to Network-1) “certainly does not violate Due Process.” YB

at 48-49. Even assuming this to be true, the Due Process Clause *constrains* both issue and claim preclusion—most importantly, by ensuring that a party be given a “full and fair opportunity to litigate” before preclusion attaches. *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 481 n.22 (1982); *see also Duffie v. United States*, 600 F.3d 362, 381-82 (5th Cir. 2010). Indeed, the decision that Network-1 cites (YB at 48) held that claim preclusion barred a party’s argument where that party was afforded the opportunity to raise that argument in a prior proceeding. *Carson v. Dep’t of Energy*, 398 F.3d 1369, 1376-77 (Fed. Cir. 2005). HP, on the other hand, did not have the opportunity to raise the Fisher Patents Ground in the Avaya IPR; its first such opportunity came at the trial in this action. The Due Process Clause does not permit preclusion in these circumstances.

Network-1’s fallback argument is that HP waived its due process challenge. YB at 48-49. But HP invokes the Due Process Clause not as an independent argument, but rather in support of its argument that estoppel cannot apply. *See, e.g., Warner-Lambert Co. v. Teva Pharm. USA, Inc.*, 418 F.3d 1326, 1337 n.11 (Fed. Cir. 2005); *Interactive Gift Express, Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1347 (Fed. Cir. 2001). In any event, all statutes must be construed to avoid constitutional difficulty (*Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988)), and the construction of the AIA estoppel provision applied by the district court (and defended by Network-1 on appeal) is unconstitutional.

The Court could not affirm that construction without confronting the constitutional problem.

A fundamental tenet of American jurisprudence is that a litigant gets the chance to make its case once in a fair forum (judicial or administrative). *See, e.g., B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1310 (2015). Applying IPR estoppel to overturn the jury’s invalidity verdict when HP had no opportunity to raise that ground during the Avaya IPR takes away that chance from HP. There is no basis for invoking or applying estoppel here.

2. HP Cannot Be Estopped From Litigating Claims Not Challenged in the IPR.

The AIA’s estoppel provision is limited on its face to “inter partes review of *a claim* in a patent.” 35 U.S.C. § 315(e)(2) (emphasis added). The Avaya IPR involved only claims 6 and 9 (the latter of which is not asserted here). All the other Asserted Claims were not at issue in the IPR—indeed, claims 13, 14, 17, 20, and 22 did not even exist at the time of the Board’s final written decision because they were later added during reexamination. Therefore, HP *cannot* be estopped from challenging the validity of the Asserted Claims other than claim 6. RB at 61-62.

IPR estoppel does not (indeed, by definition cannot) extend to claims not challenged before the Board—a fundamental point that Network-1 does not dispute. *See* YB at 49-50. Instead, Network-1 argues that HP “waived” this argument by not presenting it to the district court. *Id.* But having opposed JMOL on the basis that

estoppel could not apply in any respect (Appx9332-9334), HP preserved its challenge to the application of estoppel to *any* of the Asserted Claims. *See, e.g., Dallas Gas Partners, L.P. v. Prospect Energy Corp.*, 733 F.3d 148, 157 (5th Cir. 2013) (argument is preserved for appeal if it is a necessary conclusion from an argument made at trial); *In re Liljeberg Enters.*, 304 F.3d 410, 428 n.29 (5th Cir. 2002) (similar). There is no waiver on this record.

In any event, this Court has the discretion to overlook any waiver concerns. *See Harris Corp. v. Ericsson Inc.*, 417 F.3d 1241, 1251 (Fed. Cir. 2005). The Court has articulated considerations relevant to exercising such discretion (*see Icon Health & Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034, 1040 (Fed. Cir. 2017)), which favor resolution of HP's argument that the AIA's estoppel provision does not apply to claims that were not challenged in the IPR:

- There is no doubt that IPR estoppel cannot apply to non-challenged claims. *Credit Acceptance Corp. v. Westlake Servs.*, 859 F.3d 1044, 1052 (Fed. Cir. 2017); 35 USC § 315(e)(2). Indeed, Network-1 does not even dispute this point on the merits.
- Refusal to resolve this purely legal issue would result in a miscarriage of justice, permitting Network-1 to improperly retain the monopolies granted by the non-challenged claims even though they were not at issue in the IPR.
- This issue is one of general impact because the scope of IPR estoppel is often litigated in district courts and before the PTAB. Neither litigants nor courts should be under the misapprehension that estoppel can extend to non-challenged claims.

Simply put, the Court can and should decide whether the district court erred in applying IPR estoppel to claims that were not even challenged in the IPR.

All of the Asserted Claims are, as the jury found, obvious. Appx71. If the Court were to conclude that HP was estopped by the Avaya IPR from asserting the Fisher Patent Grounds in this litigation, it should also conclude that this estoppel extends only to claim 6—the only claim considered by the Board. None of the other Asserted Claims were considered by the Board, and thus the jury’s verdict should be reinstated as to all of them.

B. The Invalidity Verdict is Supported by Substantial Evidence.

The jury’s verdict that the Asserted Claims are invalid as obvious must be affirmed if it is supported by “substantial evidence” (*Apple Inc. v. Samsung Elecs. Co.*, 839 F.3d 1034, 1040 (Fed. Cir. 2016) (en banc)), even if the reviewing court “might have reached a different conclusion had the matter been presented to it in the first instance.” *Standard Fittings Co. v. NLRB*, 845 F.2d 1311, 1314 (5th Cir. 1988). Network-1 has not come close to making the showing that no reasonable jury could have found obviousness. Indeed, Network-1 procedurally defaulted its ability even to try.

1. HP Presented Legally Sufficient Evidence As to All Claim Elements.

Network-1 primarily argues that HP failed to present at trial sufficient *testimony* regarding two of the claim elements—“secondary power source” and “low level current.” That is incorrect.

a. “Secondary Power Source.”

As HP established in its principal brief, Chang ’885 teaches a “secondary power source” under the district court’s construction. RB at 65-67. Other than an erroneous “teaching away” argument (addressed below), Network-1 does not dispute that Chang ’885 teaches a “secondary power source.” Instead, Network-1 argues that HP’s expert Dr. Neikirk did not adequately *explain* at trial how Chang ’885 teaches a “secondary power source.” Specifically, Network-1 asserts that Dr. Neikirk did not identify Chang ’885’s power supply 640 as teaching the “secondary power source,” and that Dr. Neikirk did not explain how power supply 640 meets the requirement that its driving point be physically separate from that of the “main power source.” YB at 36-37.

Dr. Neikirk provided all the explanation that the jury needed to find that Chang ’885 teaches the “secondary power source.” Using a series of demonstrative exhibits, Dr. Neikirk explained the operation of the system disclosed in Chang ’885 in detail and explained how Chang ’885 teaches the “controlling” limitation (*see* Appx2350-2353(28:2-31:1)), which claim 6 requires to be performed by the “secondary power source” (Appx331(4:65-67)).

The cases that Network-1 cites (YB at 35-36) confirm that Dr. Neikirk’s testimony is more than sufficient. In *Koito Manufacturing Co. v. Turn-Key-Tech, LLC*, 381 F.3d 1142 (Fed. Cir. 2004), the patent challenger “did not even mention the

[prior art reference] after introducing it into evidence.” *Id.* at 1151. This Court thus held that the invalidity challenge was insufficient because it “needed some explanatory testimony or other evidence to compare [the prior art] with the patent at issue.” *Id.* at 1152 n.4. Dr. Neikirk did much more than “mention” Chang ’885. He explained its operation in detail, and with his demonstratives, he explained how Chang ’885 teaches the “secondary power source” limitation. And in *Fresenius USA, Inc. v. Baxter International, Inc.*, 582 F.3d 1288 (Fed. Cir. 2009), this Court faulted a challenger for not “clearly identifying the corresponding structure in the prior art.” *Id.* at 1300. Again, Dr. Neikirk clearly identified power source 640 as the structure that teaches the “secondary power source” limitation.

In a footnote, Network-1 argues that Dr. Neikirk could not have identified the driving point of the claimed “main power source” because it allegedly was Dr. Neikirk’s opinion that “his asserted combination did not disclose a power source that met the requirements of the claim for a ‘main power source.’” YB at 36 n.6. That is false. Dr. Neikirk unequivocally testified that the combination meets *all of the elements* of the Asserted Claims. Appx2358(36:3-12). Dr. Neikirk further testified that Fisher ’998 teaches a “main power source” (Appx2349(27:16-21)), and that this “main power source” performs all of the required functions in the combination of the Fisher Patents Ground (*see* Appx2357-2358(35:3-36:5)).

Network-1 also argues that the jury could not have concluded that Chang '885 teaches the “secondary power source” because Chang '885 teaches away from “a key inventive aspect” of the “secondary power source,” namely that it “provide[s] power ‘via said data signaling pair.’” YB at 37-38. Whether a reference teaches away is a subsidiary factual issue that this Court reviews for substantial evidence on appeal. *Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, 688 F.3d 1342, 1360-61 (Fed. Cir. 2012). Network-1 does not even acknowledge, let alone carry, this burden. The passages of Chang '885 that Network-1 refers to do not “‘criticize, discredit, or otherwise discourage’ investigation into the invention claimed,” as is required to establish a teaching away. *DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 567 F.3d 1314, 1327 (Fed. Cir. 2009) (quoting *In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004)). The first passage describes the purported failures of a prior art patent—it does not discourage investigation into the idea of providing power via a signaling pair. *See* Appx5357(2:49-53). The second passage states that the “presence detector” does not “connect to the signal lines” (Appx5361(10:3-7)), which at most expresses a “general preference,” not discouragement, and thus is similarly insufficient. *DePuy*, 567 F.3d at 1327. Accordingly, the verdict is supported by substantial evidence.

b. “Low Level Current.”

Network-1 argues that Dr. Neikirk admitted that the prior art references do not disclose a “low level current” and that, given this alleged admission, the Fisher System “solved a fatal problem” in HP’s case by teaching the allegedly “missing ‘low level current.’” YB at 3, 42-43, 56. That is simply incorrect: HP did not need the Fisher System to solve any “fatal problem” because Dr. Neikirk never made such an admission. Network-1 misleadingly states that “when asked, ‘does Woodmas disclose or teach a low level current,’ [Dr. Neikirk] testified, ‘I don’t think it’s present.’” YB at 43 (quoting Appx2365(43:13-22)). What Network-1 leaves out is that Dr. Neikirk conditioned his answer on a counterfactual—that the construction of “low level current” be “take[n] ... out of the context of the infringement analysis.” Appx2365(43:18-22). Network-1’s other citations (*see* YB at 43) similarly reference testimony in which Dr. Neikirk conditions his testimony on it being divorced from Network-1’s infringement arguments. But because claims must be interpreted identically for invalidity and infringement (*e.g.*, *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1330 (Fed. Cir. 2003)), the supposed “admission” on which Network-1 premises this argument simply does not exist.

The real question on appeal is whether the jury was presented with substantial evidence to reasonably conclude that the prior art teaches a “low level current,” a standard that Network-1 does not even attempt to meet. *See* YB at 42-43. Network-

I cannot meet that standard because the trial evidence provides ample basis for the jury to conclude that Woodmas teaches a “low level current.” For example, the jury heard Dr. Neikirk’s testimony that Woodmas teaches “a great deal about low level currents” (Appx2354-2355(32:22-33:3)) and that the combination of prior art in the Fisher Patents Ground teaches all of the claim elements (Appx2357-2358(35:19-36:5)). The jury also heard Dr. Neikirk’s testimony that when the claims are applied identically for infringement and invalidity, Woodmas teaches a “low level current.” Appx2388-2389(66:11-67:20). The verdict is supported by substantial evidence.

2. Network-1 Forfeited Any Challenge to the Sufficiency of the Evidence.

While the jury’s obviousness verdict is supported by substantial evidence, as summarized above and in HP’s principal brief, the Court need not even reach that question because Network-1 failed to preserve its sufficiency-of-the-evidence challenge for appellate review by not making such a challenge at the Rule 50(a) stage. “[A] party that fails to move for judgment as a matter of law under Rule 50(a) on the basis of insufficient evidence at the conclusion of all the evidence waives its right to file a post-verdict Rule 50(b) motion, and also waives its right to challenge the sufficiency of the evidence on appeal.” *Moss v. Princip*, 913 F.3d 508, 522 (5th Cir. 2019); *cf. Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 402 (2006).

In its Rule 50(a) motion, Network-1 argued that it was entitled to a judgment of non-obviousness because (1) there was no evidence of public use of the Fisher

System, (2) Dr. Fisher's testimony was not corroborated, (3) HP was estopped from contesting validity, and (4) HP's expert allegedly admitted non-obviousness. Appx2501-2502(179:21-181:3). Critically, Network-1 did *not* argue at the Rule 50(a) stage that the trial evidence was insufficient to support a verdict of invalidity. It therefore may not do so on appeal.

In an effort to escape this straightforward conclusion, Network-1 misrepresents its own Rule 50(a) motion as having been based on the argument that "there's not sufficient evidence for which any reasonable jury could conclude that the patent is obvious." YB at 39-40. As Network-1's Rule 50(a) motion establishes, this statement was made in the context of the specific argument that the *alleged admission* of HP's expert Dr. Neikirk established non-obviousness, not that the prior art failed to teach or suggest any limitation of the Asserted Claims. Appx2502-2503(180:21-181:3). Given the specificity of the arguments Network-1 actually made at the Rule 50(a) stage, it cannot now argue that it made a general sufficiency-of-the-evidence challenge.

Effectively admitting that its Rule 50(a) motion was deficient, Network-1 insists that the Fifth Circuit construes such motions "liberally." YB at 39 (quoting *Orion IP, LLC v. Hyundai Motor Am.*, 605 F.3d 967, 973 (Fed. Cir. 2010)). In reality, the Fifth Circuit allows departure from the *form* of a Rule 50 motion but not its *substance*. *Delano-Pyle v. Victoria Cty.*, 302 F.3d 567, 572-73 (5th Cir. 2002);

Foreman v. Acceptance Indem. Co., 730 F. App'x 191, 195 (5th Cir. 2018). No amount of liberal construction can make Network-1's Rule 50(a) motion include an argument that was not made.

Papering over the substantive inadequacy of its motion, Network-1 invokes (ostensibly as "context") things like expert reports, various briefs and orders filed prior to trial, and Network-1's cross-examination of HP's expert. *See* YB at 40-41. But neither of the decisions that Network-1 cites (YB at 39) supports the notion that such far-flung materials can rehabilitate a deficient Rule 50(a) motion. In *Orion*, the "context" was "the parties' preceding arguments over jury instructions relating to anticipation and obviousness and the district judge's immediate denial of the motion." 605 F.3d at 973. And in *Blackboard, Inc. v. Desire2Learn, Inc.*, 574 F.3d 1371 (Fed. Cir. 2009), the "context" was "an extended discussion of the evidence relating to anticipation and obviousness" made "shortly" before the Rule 50(a) motion. *Id.* at 1380. No such context is present here.

Network-1 maintains that notwithstanding its forfeiture, the sufficiency of the evidence should be reviewed for plain error, and that HP "failed to present any evidence on the 'secondary power source' element." YB at 42 (emphasis in original). That argument does not pass the straight-face test. The Chang '885 reference, which was admitted, is "evidence" with respect to the "secondary power source" limitation. That reference, alone, is sufficient to defeat Network-1's "no evidence" challenge;

and together with Dr. Neikirk's explanatory testimony, Chang '885 is more than enough to provide substantial evidence to support the jury's verdict of obviousness. Network-1's argument that the verdict is against the great weight of the evidence (YB at 51-52) should be rejected for the same reason.

C. Network-1 Is Not Entitled to a New Trial.

1. The District Court Properly Admitted the Fisher System Evidence.

Network-1 argues that it is entitled to a new trial primarily because the district court erroneously admitted evidence regarding the Fisher System. YB at 52. Network-1's argument should be rejected for two independent reasons, either of which is sufficient to uphold the jury's verdict: (a) the district court's decision to admit the Fisher System was well within its discretion and (b) Network-1 has failed to show any prejudice even if the district court abused its discretion in admitting the evidence.

a. Evidence Regarding the Fisher System Is Admissible.

Under controlling Fifth Circuit law, an appellate court reviews a district court's evidentiary rulings for an abuse of discretion. *See Williams v. Manitowoc Cranes, L.L.C.*, 898 F.3d 607, 615 (5th Cir. 2018); *Summit 6, LLC v. Samsung Elecs. Co.*, 802 F.3d 1283, 1294 (Fed. Cir. 2015) (admissibility reviewed under regional circuit law). Network-1 has not even tried to meet that standard, nor can it. *See* YB at 50-53. Instead, Network-1 presumes (with no supporting authority) that status as

prior art is determinative of admissibility. Network-1 states, for example, that “[a]fter trial, the district court ruled that the Fisher System was inadmissible because it was uncorroborated and was not prior art,” (YB at 2) and goes so far as to say that it is “*undisputed* that evidence of the Fisher System was *inadmissible*” (*id.* at 53 (emphases added)).

But as this Court has long recognized, admissibility and status as prior art are distinct concepts. For example, evidence that is not relied upon as prior art may be relevant to the state of the art, *e.g.*, learned treatises and textbooks. *See, e.g., Thomas & Betts Corp. v. Litton Sys., Inc.*, 720 F.2d 1572, 1581 (Fed. Cir. 1983) (“Thus, the M & E criteria, though not technically prior art, were, in effect, properly used as indicators of the level of ordinary skill in the art to which the invention pertained”). Conversely, evidence regarding a reference or system that is prior art may be inadmissible—for example, because the evidence itself is hearsay.

The dispute at trial was whether the Fisher System was prior art. The district court answered that question on JMOL, determining that the total evidence was not sufficient to establish public use and corroboration. *See* Appx83; Appx87. The district court did not, however, rule the evidence inadmissible. And while HP is not challenging the district court’s JMOL ruling (RB at 62 n.2), that certainly does not mean that HP concedes that evidence of the Fisher System was inadmissible.

Nor is there any basis to conclude that admitting the Fisher System was an abuse of discretion. The evidence of the Fisher System overcomes the “low” bar of relevance as it has at least a “tendency” to make a consequential fact (presence of certain limitations in the prior art) more probable. *Hicks-Fields v. Harris Cty*, 860 F.3d 803, 809 (5th Cir. 2017); Fed. R. Evid. 401. The district court later ruled that the Fisher System evidence did not establish that fact (because it was not corroborated and not proven to be in public use), but that does not mean the evidence was not both relevant and probative when presented at trial. The Fisher System was also relevant as explaining the state of the art and the operation of the systems described in the Fisher Patents. *See* Appx5753-5755(126:12-128:12) (state of the art); Appx5760(133:13-17) (same); Appx5757-5758(130:1-131:19) (operation of Fisher Patents); Appx5761-5762(134:1-135:23) (same).

b. Network-1 Suffered No Prejudice.

Because the district court did not abuse its discretion in admitting the evidence regarding the Fisher System, the question of whether that decision caused Network-1 “prejudice” is inapposite. But even if Network-1 could establish an abuse of discretion, Network-1 has not made the further showing that the verdict of invalidity would have been different.

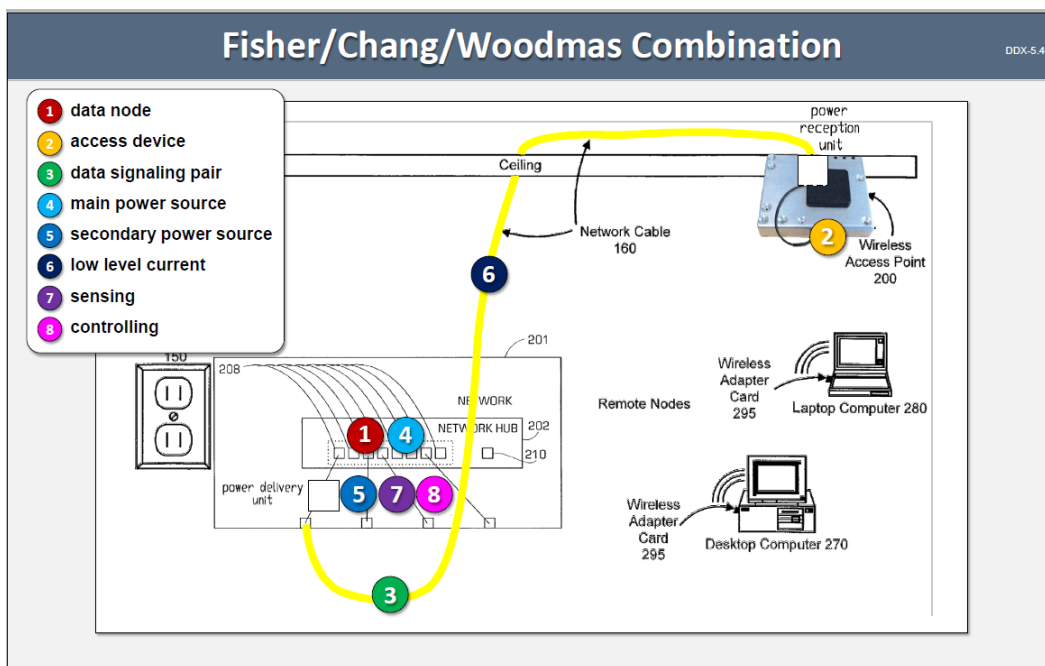
First, Network-1 argues that the jury “certainly” relied on the Fisher System because HP relied on the combination of the Fisher System, the Fisher Patents, the

Chang Patents, and Woodmas. YB at 55-56. But there is no way to know what prior art the jury relied on because the jury indicated its obviousness finding on a general verdict form that the parties *jointly submitted*. See Appx5623-5627. Under the general verdict rule, any uncertainty in what the jury relied on is resolved in favor of the verdict. In particular, an alleged “failure of proof with respect to any single item of evidence does not justify a grant of either JMOL or a new trial; even if some of the proposed factual grounds for liability are not legally sufficient to support a verdict, that is not fatal, because the critical question is whether the evidence, taken as a whole, was sufficient to support the jury’s verdict.” *Northpoint Tech., Ltd. v. MDS Am., Inc.*, 413 F.3d 1301, 1311 (Fed. Cir. 2005). As established above, the evidence taken as a whole, particularly the evidence regarding the Fisher Patents Ground, provides more than sufficient evidence to support the jury’s invalidity verdict, even if the evidence regarding the Fisher System were excluded from consideration.

Contrary to Network-1’s assertion, HP did not tell the jury that it was relying solely on a combination of the Fisher System, the Fisher Patents, the Chang Patents, and Woodmas. Three of Network-1’s five citations (*see* YB at 55-56) are to discussions between the district court and counsel when the jury was not present. Appx9157-9158(94:18-95:4); Appx9149(86:9-16); Appx9164(101:16) (jury brought back in); *see also* Appx1932-1933(9:25-10:3); Appx1943(20:3-4) (jury brought back in). Network-1 next cites the jury instructions, which merely state that

“HP contends that the Fisher patents, the Fisher system, Woodmas, and Chang are prior art.” Appx2572(63:15-17). Lastly, Network-1 selectively quotes testimony from Dr. Neikirk (Appx2356 (34:2-6)), but as explained below, Dr. Neikirk testified that the teachings of the Fisher Patents are coextensive with that of the Fisher System. Thus, nothing HP (or the district court) told *the jury* required it to consider the Fisher System in determining obviousness.

Second, Network-1 erroneously argues that the Fisher System was the “primary focus” of HP’s invalidity case. YB at 54-55. HP did not need the Fisher System to make its invalidity case—the evidence that HP presented apart from the Fisher System, particularly the Fisher Patents Ground, rendered the Asserted Claims obvious. In testimony that HP referenced in its principal brief (RB at 62) and for which Network-1 apparently has no answer, HP’s expert Dr. Neikirk testified that the Fisher Patents taught everything the Fisher System did. Appx2349(27:16-21). Dr. Neikirk further illustrated that the Fisher Patents Ground, by itself, meets all of the claim limitations through the following demonstrative:



Third, Network-1 argues that the Fisher System “made the difference between winning and losing” because the Fisher System taught the “missing ‘low level current’ detection method.” YB at 56. This argument erroneously presumes that a “low level current” detection method was “missing” from the Fisher Patents Ground. As established above, the prior art—Woodmas in particular—teaches a “low level current” detection method. *See* Appx2357-2358(35:15-36:5).

2. Network-1’s Other Bases for a New Trial Should Be Rejected.

Network-1 half-heartedly contends that statements regarding the “Cummings reference” (U.S. Patent No. 5,406,260) and “testimony from HP’s expert [Mr. God-ici] on Patent Office procedure” were improper. YB at 51. This Court should reject both arguments because Network-1 failed to object at trial and does not attempt to

argue plain error. *Peaches Entm't Corp. v. Entm't Repertoire Assocs., Inc.*, 62 F.3d 690, 694 (5th Cir. 1995).

Network-1 argues that the testimony of HP's expert Dr. Davis regarding the Cumming reference's teaching of a "low current power" and the subsequent reference to this testimony in HP's closing was improper, because "low current power" is similar to "low level current." *See* Appx9262-9264. But Network-1 did not object to Dr. Davis's testimony (*see* Appx2199-2200(16:13-17:5)), and it did not object during closing argument (*see* Appx2640-2641(131:20-132:1)).

Network-1 further appears to argue that the reference in HP's closing argument to the statement of HP's Patent Office expert Mr. Godici regarding "how much" prior art there is to the '930 patent was improper. *See* Appx9264-9265. But again, Network-1 did not object to this statement at trial (*see* Appx2632(123:14-18)).

II. Network-1 Impermissibly Broadened the Asserted Claims.

Network-1 does not dispute the *facts* on which HP's claim broadening argument rests. Before the reexamination, the *Cisco* and *D-Link* courts had held that the "secondary power source"—a limitation of independent claim 6 and others—"must be *physically separate* from the main power source." *See* RB at 69 (emphasis in original). During reexamination, Network-1 added dependent claims 15 and 16, which (respectively) require the secondary and main power sources to be the "same

source of power” or in the “same physical device.” *Id.* at 70. The clear, and intended, effect of this amendment was to override the “physically separate” construction given to claim 6, and thus to broaden the scope of that claim. *Id.* And Network-1 concedes that if claim 6 is invalid for improper broadening, then claims 13, 14, 17, 20, and 22 are also invalid. *See id.* at 71.

Rather than engaging on the merits, Network-1 seeks to divert the Court’s attention from the broadening effect of its amendment. These diversionary tactics fail as a matter of law.

First, Network-1 asserts that the statutory prohibition on claim broadening does not apply to “unamended claim[s],” such as independent claim 6. YB at 57. That assertion finds no support in the statutory language, which prohibits “enlarging the scope of *a claim* of the patent” during reexamination. 35 U.S.C. § 305 (emphasis added). Claim 6 is “a claim” that was broadened by the amendments added during reexamination.

Network-1’s principal authority for its assertion that the prohibition against claim broadening does not apply to unamended claims—*MBO Labs., Inc. v. Becton, Dickinson & Co.*, 602 F.3d 1306, 1309 (Fed. Cir. 2010)—did not involve claim broadening or Section 305. In its brief, Network-1 uses bracketed language to misrepresent this Court’s analysis in *MBO*. *Compare* YB at 57 (“Original patent claims will always survive [improper broadening challenges] ...”), *with MBO*, 602 F.3d at

1309 (“Original patent claims will always survive a recapture challenge under the first step of our rule-against-recapture analysis.”). Given that *MBO* is by its terms limited to the rule against recapture (which is not at issue in this appeal), it is no surprise that HP “ignored” and did “not . . . distinguish” this case in its principal brief. YB at 57.

Relatedly, Network-1 argues that “dependent claims cannot broaden an independent claim from which they depend.” YB at 58 (quoting *Enzo Biochem, Inc. v. Applera Corp.*, 780 F.3d 1149, 1156-57 (Fed. Cir. 2015)). While the quoted statement may generally hold true in the context of independent and dependent claims that issued simultaneously, it says nothing about the situation where—as here—the patentee adds dependent claims *later* to broaden the scope of an extant independent claim after receiving an unfavorable construction in litigation. An independent claim must be broader than its dependent claims under 35 U.S.C. § 112(d). By adding dependent claims 15 and 16 in reexamination, which encompass subject matter outside of claim 6’s pre-reexamination scope, Network-1 effectively broadened the scope of claim 6 to cover the subject matter encompassed by those claims.

Second, Network-1 contends that “[t]his Court never held that a dependent claim added in a reissue (or reexamination) broadens an underlying independent claim.” YB at 60. Network-1 misreads *ArcelorMittal France v. AK Steel Corp.*, 786

F.3d 885 (Fed. Cir. 2015) (*ArcelorMittal II*), which held that it was improper broadening to add a dependent claim that had “the practical effect of expanding the scope of [the independent claim] to cover claim scope expressly rejected by a previous claim construction ruling.” *Id.* at 890. “Based on this prior construction,” the Court continued, “the district court correctly found that claims 1 through 23 of the reissue patent impermissibly broadened the original claims and are invalid.” *Id.* Claim 1 of the reissue patent was identical to claim 1 of the original patent, and thus *ArcelorMittal II* stands for precisely the conclusion that Network-1 denies this Court has ever reached.

Network-1 never engages with the *holding* of *ArcelorMittal II*—which compels reversal of the district court’s determination in this case that the amendments did not improperly broaden the asserted claims. *See* RB at 70-71. Instead, Network-1 pretends that *ArcelorMittal II* is distinguishable based on the Court’s discussion of “prosecution history.” YB at 59-60. But there is no issue regarding prosecution history in this case—the broadening effect of the dependent claims added during reexamination is clear from the face of the claims. The *holding* of *ArcelorMittal II* is that the claims broadened by amendment are invalid.

Third, Network-1 makes a cursory attempt to deny that the dependent claims added during reexamination broadened the asserted claims. *See* YB at 60-61. This argument is premised on the *Cisco* court’s observation that its construction “does

not require ‘separate identifiable physical elements’ for each of the power sources.” *Id.* at 61 (quoting Appx349-350). But whether or not the two power sources may share components (which is what the *Cisco* court was referring to), the power sources themselves must be “physically separate”—as the *Cisco* court clearly held. Appx352. By adding dependent claims 15 and 16, which require the two power sources to be the “same source of power” or “the same physical device,” Network-1 improperly attempted to override this judicial construction and thereby impermissibly broadened independent claim 6 (and the other Asserted Claims) by allowing them to cover the configurations recited in claims 15 and 16.

Fourth and finally, Network-1 makes the last-ditch argument that by disclaiming dependent claims 15 and 16, it “eliminated” any concern regarding claim broadening. YB at 62. That was undoubtedly what Network-1 hoped to do. *See* RB at 72. But this disclaimer is really just a concession that these dependent claims have the broadening effect ascribed to them by HP—why else would Network-1 disclaim them? And since the Patent Act prohibits “enlarging the scope of a claim” during reexamination, Network-1’s amendment requires invalidation of independent claim 6 (and the other asserted claims) regardless of any subsequent disclaimer. Any other outcome would allow patentees to avoid both Section 305 and this Court’s ruling in *ArcelorMittal II*. *See* RB at 72-73. Gamesmanship is the only word that fits here.

CONCLUSION

The judgment of no invalidity should be reversed.

Dated: June 17, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mark A. Perry, hereby certify that I caused the foregoing to be filed via the Court's CM/ECF system and served on counsel of record who have registered for such service on June 17, 2019.

Dated: June 17, 2019

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e). This brief contains 6,648 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman, 14-point.

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