

No. 2021-1888

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**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

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CENTRIPETAL NETWORKS, INC.,

*Plaintiff-Appellee,*

v.

CISCO SYSTEMS, INC.,

*Defendant-Appellant.*

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On Appeal from the United States District Court for the Eastern District of Virginia in Case No. 2:18-cv-00094-HCM-LRL, Judge Henry C. Morgan, Jr.

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**NON-CONFIDENTIAL REPLY BRIEF FOR DEFENDANT-APPELLANT  
CISCO SYSTEMS, INC.**

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January 26, 2022

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## CERTIFICATE OF INTEREST

Counsel for Defendant-Appellant Cisco Systems, Inc. certifies the following:

**1. Represented Entities.** Fed. Cir. R. 47.4(a)(1). Provide the full names of all entities represented by undersigned counsel in this case.

Cisco Systems, Inc.

**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2). Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.

Not applicable.

**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3). Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.

None.

**4. Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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**5. Related Cases.** Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

Reexamination No. 90/014,476 (USPTO)

**6. Organizational Victims and Bankruptcy Cases.** Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None.

Dated: January 26, 2022

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**CONFIDENTIAL MATERIAL OMITTED**

The material omitted from page 26 contains a description of a confidential license agreement between Centripetal and a third party that was sealed in the district court.

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## INTRODUCTION

Centripetal did not patent network security, efficient rule updates, or threat detection. Centripetal's claims are far narrower and include specific limitations that Cisco's products do not practice, alone or in combination. As Cisco's opening brief demonstrated, the district court made legal errors, ignored uncontroverted evidence, and found infringement only by ignoring key claim elements.

On appeal, Centripetal retreats from the infringement and damages theories the district court adopted at its urging, instead venturing new arguments unsupported by its experts' testimony or the court's findings. Centripetal's arguments ignore the actual evidence concerning the accused products and, instead, rely on generic documents that say nothing about whether the accused product combinations practice the asserted claims. These new arguments cannot salvage the judgment.

Beyond numerous substantive errors, the district judge plainly violated 28 U.S.C. §455(b) by issuing post-trial and post-judgment opinions and an over \$2.6 billion judgment while knowing of a disqualifying financial interest. This Court should reverse or at least vacate and remand.

## ARGUMENT

### I. CENTRIPETAL IDENTIFIES NO ACTS OF DIRECT INFRINGEMENT

#### A. All Claims Require Combining At Least Two Separately-Sold Devices

Centripetal's infringement theory and the district court's infringement findings all depended on *combinations* of separately-sold devices. The district court did not find—and could not have found—that Cisco made, used, sold, or offered to sell the accused combinations. This compels judgment of non-infringement. Opening Br. 11-12, 16-21.

Centripetal concedes that its infringement theories for the '806, '856, and '176 patents required combinations of separately-sold devices. Br. 18. Centripetal's cursory effort to distinguish the '193 patent (Br. 17) fails. The '193 patent specifically claims a “determination” that packets comprise data corresponding to “criteria specified by one or more *packet-filtering rules* configured to prevent a particular type of data transfer.” Appx325(14:10-12, 17-20). The only “rules” Centripetal accused are quarantine rules created by the separately-sold Identity Services Engine (ISE) device. Appx1791-1792(791:14-792:24). Routers and switches by themselves—uncombined with ISE's quarantine rules—cannot and do not determine whether packet data corresponds to “criteria specified” by “packet-filtering rules” configured to prevent a “particular type of data transfer,” as Centripetal accused. Indeed, Centripetal admits that it is ISE that

“generate[s] network security rules used by Switches and Routers.” Br. 17.

Without ISE, switches/routers have no “criteria specified by ... packet-filtering rules” to make the claimed “determination.”

The district court’s ’193 patent infringement findings repeatedly emphasized ISE’s necessary role. Appx133 (finding Cisco practiced “packet-filtering” by “using [ISE]” and “the accused switches and routers have been aided with [ISE]”); *accord* Appx140; Appx258-259. Centripetal’s own expert recognized that the accused packet-filtering rules come from ISE. Appx1525(525:7-13) (“ISE ... communicates a change of authorization within the network device” and a user cannot “access the entirety of the network depending on the rules set up.”); Appx1527(527:6-8) (“network control using Cisco ISE” is “what we’ve been discussing” regarding the ’193 patent). Thus, routers and switches alone cannot practice the ’193 patent, even under Centripetal’s infringement theory.

**B. Centripetal Did Not Prove—And The District Court Did Not Find—Any Act Of Direct Infringement**

Centripetal failed to prove infringement because it did not show, and could not have shown, that Cisco made, used, sold, or offered to sell the accused product combinations. Opening Br. 19-20. Centripetal’s counterarguments fail.

*First*, Centripetal argues (Br. 18) that selling an invention’s uncombined “components” directly infringes. But a patent “covers only the totality of the elements in the claim and ... no element, separately viewed, is within the grant.”

*Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 344-345 (1961); see *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 523-524, 528 (1972); *Waymark Corp. v. Porta Sys. Corp.*, 245 F.3d 1364, 1366 (Fed. Cir. 2001) (patent “does not cover the manufacture or sale of separate elements capable of being, but never actually, associated to form the invention” (quotation marks omitted)).

Contrary to Centripetal’s argument (Br. 18), *Aro*’s principle is not limited to extraterritoriality cases. *Aro* held as a general matter that “one element of the patented combination” is not the “patented invention.” 365 U.S. at 344-345.

While selling uncombined components might sometimes support *indirect* infringement (which Centripetal expressly disavowed), it is not direct infringement. Centripetal’s sole appellate authority, *Paper Converting Machine Co. v. Magna-Graphics Corp.*, 745 F.2d 11 (Fed. Cir. 1984), did not address *Aro*, has been sharply criticized, and is properly limited to its facts.<sup>1</sup>

Cisco’s devices undisputedly can be and are bought and used separately. Appx2702-2704(1699:19-1701:6) (many customers with routers and switches do not buy ISE, which is built for “large enterprises,” and many ISE customers don’t have Stealthwatch); Appx2679(1676:13-15) (“The number of people that buy

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<sup>1</sup> *E.g.*, *Moy’s Walker on Patents* §§14:26-27 (4th ed. 2020) (*Paper Converting*’s reasoning is “strained,” “contrary to an extensive body of precedent,” and “limited to its facts”); see *Waymark*, 245 F.3d at 1367 (distinguishing *Paper Converting* as “address[ing] enforcement of a patent beyond its expiration”).

Stealthwatch compared to the number of people that buy Cisco routers and switches is fairly small.”). Selling these devices separately is not direct infringement.

**Second**, Centripetal argues that “market[ing]” products as “integrated systems” qualifies as “offers for sale” of accused combinations. Br. 19-20. The district court made no such finding, nor could it have. “[A]dvertisements are not considered offers for sale, but are instead merely solicitations for offers.” *Smith v. Garlock Equip. Co.*, 658 F. App’x 1017, 1028-1029 (Fed. Cir. 2016). And the marketing documents Centripetal cites do not show firewalls and FMC “as a package” (Br. 19) or Stealthwatch as “part of Switches and Routers” (Br. 20). Rather, they distinguish these separate devices from each other by stating that FMC “[d]elivers unified management over firewalls” (Appx5061) and depicting “Cisco Stealthwatch Enterprise” separately from “New Cisco Routers and Switches” (Appx5077). Moreover, the damages award rested on *sales* of individual components, not advertisements or even sales of accused combinations and certainly not offers for sale of combinations. Opening Br. 22-23; *see infra* pp. 7-8.

**Third**, Centripetal argues that routers, switches, and firewalls are “embedded with infringing software,” citing evidence of software allowing these products to interface with separate devices. Br. 20-21. But Centripetal’s own infringement

theories required that those products be combined with other physical devices (Stealthwatch, ISE, DNA Center, or FMC) to practice the claims. Centripetal insists that the post-judgment opinion “cited extensive evidence” to the contrary (Br. 20), but its cited pages either identify no specific information on this point (Appx228-231; Appx234) or observe only that ““*customers*””—not Cisco—could combine products together (Appx232).<sup>2</sup>

Nor is this a case where customers only need to “activate embedded features,” or where the products are “designed to be altered or assembled,” to practice the claims. Br. 20-22 (quotation marks omitted). Cisco’s routers, switches, and firewalls undisputedly can and do function without other accused devices, and vice-versa. *E.g.*, Appx2702-2703(1699:19-1700:13). And again, the district court made no finding that routers, switches, or firewalls *alone*—including any “embedded” or “activated” software—practice the claims. Centripetal’s loose usage of “embedded” does not show that any allegedly embedded software infringes.

Centripetal cites *Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197 (Fed. Cir. 2010), for its assertion that Cisco infringes the ’806, ’176, and ’856 (but not ’193) patents by “mak[ing]” components. Br. 22. But *Finjan* held only that a

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<sup>2</sup> Emphases added unless otherwise noted.

product directly infringes if it can practice the claims “*without having to modify the product.*” *Nazomi Commc’ns, Inc. v. Nokia Corp.*, 739 F.3d 1339, 1345-1346 (Fed. Cir. 2014) (emphasis in original). There is no such evidence here.

Centripetal’s infringement theories require modification, namely combination with other physically-separate devices.

*Finally*, Centripetal asserts that Cisco “uses and tests” devices. Br. 23. The court did not find any use or testing, much less *in the United States* involving the *accused combinations*. See *Waymark*, 245 F.3d at 1366. Testing unspecified “ETA functionality” (Appx5524) or Stealthwatch without reference to other devices (Appx2664(1661:6-8)) proves nothing. Moreover, Centripetal did not offer any damages theory regarding “use or testing” and certainly did not justify a billion-dollar royalty for it.

**C. The District Court Erred By Including Every Component Sale In The Royalty Base**

Even if Centripetal had shown acts of direct infringement—it did not—awarding damages on every sale of every accused component was legal error. Opening Br. 21-23.

The record is unequivocal: Cisco’s independently-sold devices *were* purchased outside the accused combinations. Opening Br. 17-19, 22-23; *supra* pp. 4-5. One of Centripetal’s experts admitted that “not everyone who buys a Cisco router or switch buys Stealthwatch or has Stealthwatch.” Appx1802-1803(802:25-

803:1). Another admitted ISE is “sold independently.” Appx2058(1058:3-9). But Centripetal’s damages expert admittedly based his calculation on every accused device sold, without considering whether any customer purchased all devices in an accused combination. Appx2530(1527:12-25); Appx2549-2550(1546:25-1547:3).

Against this failure of proof, Centripetal implies (Br. 24) that Cisco had the burden to present “rebuttal evidence” proving how many units of Centripetal’s inflated royalty base were non-infringing. But it was *Centripetal’s* burden to establish the number of accused product combinations that directly infringed. *Omega Patents, LLC v. CalAmp Corp.*, 920 F.3d 1337, 1350-1351 (Fed. Cir. 2019).

Finally, Centripetal argues (Br. 25) that the royalty base should include products that Cisco “made and used” but did not *sell*. But as explained above (at 6-7), Centripetal identifies no evidence or finding that Cisco made or used infringing combinations in the United States. And Centripetal undisputedly based its damages claim on *sales*, not Cisco’s manufacture or use.

## **II. CENTRIPETAL’S INFRINGEMENT ARGUMENTS FAIL**

### **A. ’806 “Rule Swap” Patent**

Centripetal overstates the ’806 patent’s coverage, as though it claimed “swapping rules without dropping packets.” Br. 30. But the claims require “ceas[ing] processing” and “cach[ing]” packets “*responsive to being signaled to*

process packets in accordance with the second rule set.” Appx288(11:40-44).

Centripetal points to no evidence of such functionality in Cisco’s devices, which do not cease processing or cache packets responsive to being signaled to use a new rule set. Rather, Cisco’s products process packets *precisely* the *same way* before, during, and after a rule change. Opening Br. 25-27. Centripetal ignores its own claim limitations and accuses actions that occur “during ... normal packet processing operation” (Appx152-153), *regardless* of whether rules are swapped.

At the outset, Centripetal does not deny that (1) the court made no finding that Cisco’s firewalls “cease processing” and “cache” packets at all and (2) the court’s conclusions regarding “cach[ing]” rest on structures in switches, not firewalls. Opening Br. 24-25. Centripetal urges this Court to make its own finding regarding firewalls. But Cisco established that firewalls do not “cease” processing packets, let alone do so responsive to being signaled to swap rule sets. *E.g.*, Appx3522-3524(2516:22-2518:3) (Cisco’s Mr. Shankar). “[A]ppellate courts may not make findings of fact in the first instance.” *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1373 (Fed. Cir. 2014).

Centripetal’s arguments fare no better for switches and routers. Centripetal does not deny that “responsive to” means “in reply or reaction to.” Opening Br. 26-27. And Centripetal admits that “the ‘cache and cease’ operation also occurs during normal packet processing.” Br. 32. That concedes non-infringement,

because the caching and ceasing do not occur *responsive* to a rule-swap signal, as the claims require. *Id.* 32-33. As Mr. Jones stated in the very passage Centripetal cites: “*the processing of packets continues*. Packets are processed at a maximum frequency of two to four clock periods. So *we don’t stop processing the packets*, there’s just an idle period between two packets.” Appx3578(2572:10-13). This “idle period” is simply the time between continuous processing of any two packets. Appx3579(2573:16-18); Appx3628(2622:20-22); Appx3528(2522:8-15).

Centripetal identifies no evidence that this normal period—which occurs regardless of whether rule sets are swapped—is “responsive to” a signal to process packets in accordance with a second rule set. Centripetal’s own summary of its best evidence—that the devices “*swap rules* in response to an appropriate signal, and only *after* caching packets and ceasing processing” (Br. 32-33)—conspicuously does *not* say that caching or ceasing processing occurs “responsive to” any signal.

Similarly, Centripetal presents no evidence that switches and routers *cache* packets “responsive to being signaled” to swap rule sets. As Cisco explained (Opening Br. 27) and Centripetal concedes (Br. 32), *all* packets are buffered (the accused “caching”), regardless of any rule-swap signal. Appx3569(2563:14-15); *see* Appx5867 (“All routers have packet buffers where packets are stored before processing.”). Centripetal cites 14 undifferentiated pages of expert testimony (Br.

32), but the expert nowhere stated that caching occurs *responsive to a signal* to process packets under the second rule set.

### **B. '856 “Packet Filtering” Patent**

Centripetal does not defend the district court’s misconstruction of “packets” or deny that filtering mere “representations” of packets does not infringe. Opening Br. 30-32. Instead, Centripetal abandons its trial theory for a new and meritless appellate theory.

Centripetal’s trial theory accused Stealthwatch of the claimed “filter[ing]” of packets. Appx2082-2083(1081:25-1082:9) (“The packet filter, that’s in the Stealthwatch Cloud with Cognitive Threat Analytics.”); *accord* Appx2092(1091:11-12). Centripetal now admits (Br. 39) that Stealthwatch does not receive “the packets themselves.” Centripetal tries to wave this fatal problem away, arguing that “[t]he claims only require making a determination ‘based on a portion of the unencrypted data’ of the packets identified as encrypted.” *Id.* (citing Appx358(29:3-7)). But that statement describes the separate “determine” limitation, not the “filter” limitation. Appx358(29:8-16). Centripetal does not—and cannot—explain how Stealthwatch can “filter” packets it never receives.

Instead, Centripetal changes theories entirely, arguing (Br. 39) that ISE and routers/switches—not Stealthwatch—perform the “filter” element. No evidence supports that theory, and the district court made no such finding. Appx78(¶20);

Appx99-100. This Court should not affirm on a factual premise not presented at trial, not supported by expert testimony, and not relied on by the district court. *See OSRAM Sylvania, Inc. v. American Induction Techs., Inc.*, 701 F.3d 698, 707 (Fed. Cir. 2012) (“It is not our role to scour the record and search for something to justify a lower court’s conclusions ....”).<sup>3</sup>

In any event, Centripetal’s new theory fails. Centripetal asserts that ISE and routers/switches filter a “flow” (Br. 40-41), a term that appears nowhere in the claims. Centripetal’s new assertion that those components filter a “flow” does not show filtering of “packets,” any more than the district court’s incorrect assertion that Stealthwatch filtered “flows.” Opening Br. 32-34. Centripetal once again asks this Court to ignore the claim language.

Centripetal’s discussion of the “filter” element (Br. 38-43) ignores its expert’s testimony on the subject (Appx1948-1958(948:21-958:8)) and the documents he discussed. Instead, Centripetal relies (Br. 40) on a conclusory statement that “this system does packet filtering” (Appx2120(1119:8-9)) and testimony that does not even mention filtering (Appx2120(1119:19-23);

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<sup>3</sup> Centripetal claims (Br. 40) its expert testified that “the entirety” of Cisco’s system—not just Stealthwatch—filters packets. Not so. The expert stated “the entirety of [Cisco’s] system ... *infringes*.” Appx2120(1119:5-7). Centripetal’s expert mapped the filtering element to Stealthwatch specifically. Appx2082-2083(1081:25-1082:9); Appx2092(1091:11-12).

Appx1910-1912; Appx2124). Centripetal also cites (Br. 39) the court's opinion at Appx75-80, but the opinion says only that "Stealthwatch filters the *representation* of packets in the form of *NetFlow*" (Appx78(¶20)), which is not filtering *packets*. Centripetal also cites an ETA presentation (Appx5195-5198), but correctly does not contend that it discusses filtering.

Centripetal's new theory also fails to show the separate requirement of filtering "the *determined* packets." Centripetal argues that "Stealthwatch sends the results to ISE, which provisions rules to Switches and Routers to filter the relevant packets and route them to a proxy system." Br. 39. But Centripetal does not dispute that the "determined" packets reach their intended destination in milliseconds, whereas a corresponding NetFlow record takes thirty seconds to five minutes to reach Stealthwatch. Opening Br. 34-35. Thus, the "determined" packets reach their destination before Stealthwatch or ISE could "filter" them or "route" them "to a proxy system," as the claims require. Centripetal suggests that a "flow" could still be filtered and re-routed (Br. 40-41), but fails to explain how that would practice the claims, which require filtering and re-routing the "determined packets." Centripetal then asserts (Br. 41) that "even if some of the initial packets arrive at their destination, blocking the flow prevents those packets from being reassembled into a malicious file," citing its expert's testimony at

Appx2065-2066. But the cited pages say nothing of the sort, and the claims do not recite “blocking the flow” or “preventing reassembly.”

Centripetal again falls back on generic marketing statements (Br. 42-43), but they cannot refute the technical evidence or broaden narrow claim requirements. Opening Br. 36. The marketing statements never mention “packets,” much less *filtering* packets that were “determined” to correspond to threat indicators. Stating that “a malicious encrypted flow can be blocked or quarantined by Stealthwatch” (Br. 40, 42)—without mentioning filtering packets—shows only the ability to block *future* flows (not “the determined packets”). Opening Br. 29-30. That capability does not infringe the ’856 patent. Centripetal did not patent every system that “detects” or “stops threats.”

### **C. ’176 “Correlation” Patent**

The ’176 patent requires correlating a “plurality of packets transmitted by the network device with the plurality of packets received by the network device” “based on” “log entries corresponding to” the plurality of packets. Appx309-310(17:6-35, 18:63-19:23). The district court ignored the specific correlation requirement and instead only found correlation between NetFlow and “global threat indicators,” which is not claimed. Appx120; Opening Br. 37-38.

Once again, Centripetal abandons the district court’s erroneous findings. Centripetal disclaims reliance on correlation of NetFlow to “global threat

indicators” (Br. 34-35) and on any correlation involving Syslog/WebFlow telemetry (Br. 38). Centripetal similarly abandons its expert’s direct testimony and the three documents he invoked for the “correlate” limitation—two discussing correlation with Syslog/WebFlow (Appx5182; Appx5210; Appx1995-1999(995:22-999:5)), the third discussing correlation of “threat behaviors seen in the enterprise with those seen globally” (Appx5222; Appx1994-1995(994:2-995:21)). Centripetal advances only new theories, and none has merit.

***Stealthwatch’s analysis of packet flows:*** Centripetal, citing a statement from the court, asserts that Stealthwatch performs the claimed correlation because it “correlate[s] NetFlow within the network between multiple devices in order to recognize normal traffic patterns.” Br. 35 (citing Appx120-121). But correlating NetFlow (not “packets”) vaguely “within the network” is not the same as correlating “packets received” by a network device with “packets transmitted” by that device based on their “log entries,” as the claims require. Appx309-310(17:19-25, 19:7-13). Moreover, the court’s statement relied on a document providing that Stealthwatch “correlates threat behaviors seen in the local environment with those *seen globally*”—which Centripetal does not argue practices the claims. Appx120-121 (quoting Appx5150). That Stealthwatch correlates local threat behaviors with those “seen globally” does not demonstrate that it correlates “packets received” by a device with “packets transmitted” by a

device, much less that it performs that correlation based on “log entries.” Even Centripetal’s expert did not contend that the court’s cited document showed the claimed correlation. Appx1993-1999(993:19-999:15).

Centripetal also cites the post-judgment opinion’s quotation of “a Stealthwatch document,” which explained that Stealthwatch “will correlate flows from multiple devices and perform stitching and de-duplication action to provide a single bidirectional flow of the traffic end-to-end.” Br. 35 (citing Appx248). The court’s quotation was improper, as the page (“PTX-568 at Bates No. 270,” Appx248) was not admitted into evidence. Had Cisco received notice and an opportunity to respond, Cisco would have explained that the “correlate[d] flows” referenced in the document are not “packets” (which are included in “traffic”), but rather “*accounting information* about the traffic,” which means the statement does not show correlating “packets received” with “packets transmitted” by a particular “network device.”

Centripetal further insists that Cisco’s engineer Danny Llewallyn “confirmed that Stealthwatch collects *and correlates* NetFlow records from multiple Switches and Routers within a network.” Br. 35 (citing Appx3152). Not so. Mr. Llewallyn merely agreed that the Stealthwatch flow collector can “get[] NetFlow records” from multiple routers/switches. Appx3152(2149:13-18). He did

not mention “correlat[ing]” received and transmitted packets or even correlating NetFlow records.

Centripetal also cites its expert’s assertions that Stealthwatch correlates NetFlow “among itself” or correlates “ingress and egress [NetFlow] data.” Br. 34-35 (citing Appx2110(1109:7-14), Appx2117(1116:16-20)). But correlating NetFlow—which Centripetal admits is “not packets” (Br. 39)—is not correlating received and transmitted “packets.” The expert’s unsupported “conclusory testimony” cannot establish infringement. *Yoon Ja Kim v. ConAgra Foods, Inc.*, 465 F.3d 1312, 1320 (Fed. Cir. 2006).

***Stealthwatch’s analysis of multiple devices:*** Centripetal argues (Br. 35) that “Stealthwatch can utilize *ingress* reports from multiple devices to correlate all of the packets transmitted and received by each individual device.” This new argument on appeal is also unsupported by Centripetal’s expert, who relied on comparing *ingress and egress* log entries for a network device, not ingress-only log entries across multiple devices. *E.g.*, Appx1975-1978(975:2-978:10); Appx1984(984:1-4, 19-24); Appx1991-1994(991:18-994:1); Appx2109(1108:1-18); *see also* Appx116 (district court stating that Centripetal’s expert assumed “that the claims required that *one network device* generate logs on a packet[’s] ingress and egress”). Nor did the district court make any such finding, and for good reason: the statement Centripetal quotes does not even mention packets, much less

correlating them. Appx5152 (“The Flow Collector usually only needs ingress export from all interfaces on the exporter to create interface traffic data for inbound and outbound traffic.”).

After noting that multiple devices transmit NetFlow logs, Centripetal ventures yet another new theory: that “[c]orrelating all of these logs *necessarily* results in the correlation of NetFlow logs corresponding to packets received by a network device with NetFlow logs corresponding to packets transmitted from that device.” Br. 36. This new theory fails. Centripetal cites only a generic NetFlow definition that says nothing about correlating logs, much less correlating received and transmitted packets. Appx5219. Centripetal essentially argues that “there are many logs; surely some must be correlated.” Conclusory and speculative attorney argument cannot prove infringement. *AquaTex Indus., Inc. v. Techniche Sols.*, 479 F.3d 1320, 1329 n.7 (Fed. Cir. 2007) (“[E]xpert infringement testimony is generally required in cases involving complex technology.”).

***Centripetal’s single v. multiple device red herring:*** Centripetal wrongly argues that Cisco seeks to limit the claims to a single device. Br. 36-37. But Centripetal’s expert pressed the single-device theory (and only that theory) at trial. Appx116; Appx1977-1978(977:13-978:10). Moreover, Cisco’s position is that its products do not practice the claimed correlation across *any number* of devices. Even if “the network device” comprises multiple devices, Stealthwatch does not

“correlate” “packets transmitted by the network device” with “packets received by the network device,” much less based on “log entries corresponding to” those packets.

**D. ’193 “Forward or Drop” Patent**

Centripetal again attempts to broaden its claims to cover “preventing potentially compromised computers from exfiltrating sensitive data without the productivity costs of taking those machines completely offline.” Br. 25. The ’193 patent claims are narrower and require forwarding or dropping packets based on two specific inquiries: (1) the packets’ source/destination (“from the first network to a second network” or “toward the third network”), *and* (2) whether the packets are “associated with [a] particular type of data transfer.” Appx325(14:13-20, 25-34).

A “first stage” inquiry into packets’ source/destination does not infringe by itself. Centripetal does not deny that such network-permission schemes blocking a source computer from communicating with a destination computer were long known. Opening Br. 45. In defending the claims’ validity, Centripetal thus relied on the “second-stage” inquiry, asserting that the patent “does not **only** disclose” blocking a packet based on source/destination, but “also introduced the concept of applying an operator that can determine whether the packet is associated with a particular type of data transfer.” Appx5682 (emphasis Centripetal’s); *see also*

Appx5680 (“[D]angerous exfiltrations can be prevented on the basis of (1) detecting communications between two identified resources ... and (2) using an operator to determine whether the rule allows for the ‘particular type of data transfer.’”).

As Cisco showed, the accused products only filter packets based on the first-stage inquiry, namely source/destination. A quarantined computer cannot communicate with a forbidden destination *at all*, regardless of the “particular type of data transfer” involved. Opening Br. 47-48. The district court made no contrary finding. Even Centripetal’s summary (Br. 26) mentions only the first-stage inquiry into a packet’s *destination*, differentiating between “transfers involving *networks* with sensitive information” and “transfers involving *other networks*, such as the Internet.”<sup>4</sup>

Centripetal does not defend the district court’s reasoning, which improperly read out the claims’ second-stage inquiry into a “particular type of data transfer.” Opening Br. 48. Centripetal instead insists that its expert testified that Cisco’s products blocked or allowed access “to certain types of data.” Br. 27 (citing

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<sup>4</sup> Centripetal tries to twist Cisco’s words to “concede[] infringement” (Br. 29), but Cisco’s position was always that ISE’s quarantine rule blocks a computer from accessing *all* data (sensitive or unsensitive) from one network, and allows it to access *all* data (sensitive or unsensitive) in a different network—the determination is based on source/destination only, not the “particular type of data transfer.”

Appx1547-1548). But the expert discussed access based only on *destination*, not type of data transfer: “while this supplier has been quarantined and so therefore cannot access *certain other networks* ... they’re allowed to go out to *another network*, out on the Internet.” Appx1541(541:18-25). The relevant exhibit (Appx5147; Appx134) likewise shows multiple internal blocked *destinations* (“Shared Server,” “High Risk Segment,” etc.) and one permitted external *destination* (“Internet”). Nowhere did Centripetal’s expert explain how the determination to drop a “first portion of packets” could be based on the claimed “particular type of data transfer.”

Centripetal cites (Br. 27) its expert’s discussion of a separate claim element (apart from first-stage and second-stage filtering) that a “*second* portion of packets” be forwarded “without applying those packet filtering rules that prevent *that type* of data transfer.” Appx1548(548:8-10). But as the immediately preceding testimony shows, the expert’s words “that type of data transfer” referred only to the first-stage inquiry into the packets’ destination. Appx1548(548:1-5) (packet allowed where “headed to a third network, a safe network instead of a second network, a dangerous network”). In other words, what Centripetal’s expert called “that type of data transfer” was simply communication with a forbidden destination. This passage confirms Cisco’s point: the expert improperly collapsed the second-stage inquiry into the first, as did the district court.

Contrary to Centripetal’s assertion (Br. 29), Cisco does not “import” limitations such as “GET” or “PUT” methods. Rather, Cisco seeks to enforce the limitations already recited, which require that packets be allowed or blocked based on a “particular type of data transfer”—if not GET/PUT methods, then some other “type.” Cisco’s products do not do that, and neither Centripetal nor the district court cited any contrary evidence.

Centripetal instead offers another brand-new argument, namely that Cisco’s devices “can *selectively* block network traffic between the same source and destination” based on “information that is included in the 5-tuple [information in the packet header],’ such as the port and protocol.” Br. 27 (quoting Appx130; emphasis and alteration Centripetal’s). The district court did not find infringement on that basis. The court discussed the “5-tuple” only as showing the packet’s *source and destination*. Appx134 (“the 5-tuple information in the header of the packet, *such as the source* of the packet’s origin and/or *the destination* to which it is being transmitted, is the operative data being used to determine the packet’s SGT”).

The patent itself defeats Centripetal’s effort to treat “5-tuple information” as bearing on the second-stage determination of a “particular type of data transfer.” The specification explains that the “5-tuple of IP packet header field values and transport protocol” is considered at the “*first* stage,” not the second.

Appx322(8:39-51). When opposing IPR, Centripetal confirmed that, for “each independent claim,” the 5-tuple’s “protocol” is part of the “*first*” stage. Appx5681 (emphasis Centripetal’s); *see also* Appx5680 (the first stage considers the “5-tuple,” and “**the second stage**” considers “the specific method or type of communication” (emphasis Centripetal’s)). Because Cisco’s devices only consider packets’ source/destination, not any “type of data transfer,” they cannot practice that limitation.

Even if Centripetal’s new contention were correct that “port and protocol” information from the 5-tuple could bear on the “particular type of data transfer,” this theory would still fail for a separate reason: Centripetal would have to show that Cisco’s devices use the first-stage source/destination determination to apply either a “first operator” “configured to drop packets associated with the particular type of data transfer,” or a “second operator” “configured to forward packets not associated with the particular type of data transfer.” Appx325(14:17-20, 32-34). Centripetal identifies no evidence that Cisco’s products drop or forward packets headed for a forbidden destination only after making a further port/protocol determination. Again, as the court repeatedly found (Opening Br. 44-45, 47-48), Cisco’s accused products block *all* traffic from an unpermitted source or to an unpermitted destination. Nothing else in the 5-tuple changes that. Accordingly,

Cisco's products do not practice the "first operator" or "second operator" limitations either—another reason they do not infringe.

### **III. THE DAMAGES AWARD SHOULD BE VACATED**

#### **A. Neither Centripetal Nor The District Court Adequately Apportioned The Royalty Base**

Centripetal does not deny that its expert, Dr. Striegel, included in his royalty base both non-infringing functions and generic components like processors that Centripetal did not invent. Br. 51-56. Centripetal fails to justify this lack of apportionment.

Centripetal leads with yet another new theory—that apportionment was "built in" to the Keysight settlement's rate such that it could apply to Cisco's entire product revenue without further adjustment. Br. 45-46. But such "built-in" apportionment requires the plaintiff to "*offer[] evidence* that ... principles of apportionment were effectively baked into" the license at issue, and that the hypothetical negotiation is "highly comparable" such that no further apportionment is required. *Vectura Ltd. v. GlaxoSmithKline LLC*, 981 F.3d 1030, 1040-1042 (Fed. Cir. 2020) (built-in apportionment applied to license that (1) the parties had negotiated prior to litigation and (2) defendant's expert admitted "was a very close comparable"). Here, Centripetal's expert conceded that the Keysight rate was *not* apportioned, and further apportionment "is appropriate." Appx2567(1564:9-10), Appx2568(1565:3-4), Appx2570(1567:2-6). Moreover, Cisco's damages expert

showed the Keysight settlement was *not* comparable. *See* Opening Br. 56-57; *infra* p. 26.

Centripetal also attempts to reframe the court’s (improperly) apportioned royalty base as a supposedly apportioned royalty rate, then argues no apportionment of the base was required. Br. 46. But that conversion reveals nothing about whether the “ultimate combination of [the] royalty base and royalty rate ... reflect[s] the value attributable to the infringing features of the product and no more.” *MLC Intellectual Prop., LLC v. Micron Tech., Inc.*, 10 F.4th 1358, 1373 (Fed. Cir. 2021) (quotation marks omitted).

Centripetal’s efforts to defend the district court’s actual reasoning fail. Centripetal does not dispute that the court awarded Centripetal the value of top-level functions even where the documents Dr. Striegel relied upon defined a function in terms of non-infringing subfeatures. Opening Br. 53 (discussing “Advanced Security”). Moreover, Centripetal admits that the court’s royalty base included generic components like processors that Centripetal did not invent or improve, do not infringe, and were not part of the Keysight royalty base. Br. 48; *see also* Opening Br. 53 (Centripetal’s expert also counted generic concepts of “routing capability” and “switching capability” in calculating royalty base). Centripetal’s expert conceded that the patents did not claim “a new and improved” type of processor, Appx2418(1415:16-21), or otherwise make the processor—or

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any other generic feature—“more valuable,” *AstraZeneca AB v. Apotex Corp.*, 782 F.3d 1324, 1338 (Fed. Cir. 2015). He contended only that the processor must be powerful enough to “deliver[] the benefits of the patent.” Appx2418-2419(1415:19-1416:8). Even if a conventional feature is a necessary part of an asserted claim, the patentee must still “adequately and reliably apportion[] between the improved and conventional features of the accused [product].” *Omega Patents, LLC v. CalAmp Corp.*, 13 F.4th 1361, 1377 (Fed. Cir. 2021) (quotation marks omitted).

Centripetal also parrots the district court’s misunderstanding of *Finjan, Inc. v. Blue Coat Systems, Inc.*, 879 F.3d 1299, 1313 (Fed. Cir. 2018); see Br. 46-47, 49. Finjan’s expert identified features that *actually infringed*, whereas (as Centripetal tacitly admits) Dr. Striegel pointed only to “functions” he said “related to” (Br. 49) or “play[ed] a role in” infringement (Br. 50).

**B. The Royalty Rate Was Improperly Based On A Single, Inapposite License**

It is undisputed that the district court’s 10% royalty rate came directly from the Keysight settlement agreement, which involved a different company, a different accused product, different trial circumstances, and far more patents ( [REDACTED] license details [REDACTED] ) than the four at issue here.

Opening Br. 56-57.

Centripetal asserts (at 44-45) that the court “accounted for” the Keysight settlement’s higher number of patents, but cannot deny that the court did not *adjust* the rate. Appx173; Appx185. Beyond “merely identif[ying]” that a prior license included more patents, the patentee must “*account* for [that] distinguishing fact[.]” by adjusting the royalty accordingly. *Omega*, 13 F.4th at 1381. This Court recently reversed a similar “glaring[.]” error and should do likewise here. *Id.* at 1380-1382.

**C. Reversal Or Vacatur On Infringement Compels Remand On Damages And Other Awards**

As Cisco explained—and Centripetal does not deny—(1) if any underlying patent is held not infringed, the normal practice is a new damages trial, and (2) if there is a new damages trial, the ongoing royalty and prejudgment interest awards must be vacated. Opening Br. 57-58. Centripetal contends (Br. 51-52) that the royalty *base* could be subdivided patent-by-patent. But that misses the key point—the parties would not have agreed to a 10% *rate* for, *e.g.*, the ’193 patent alone. *See supra* pp. 26-27; Opening Br. 23 n.5.

**IV. THE WILLFULNESS AND ENHANCEMENT FINDINGS SHOULD BE VACATED**

The district court wrongly collapsed willfulness and enhancement, which are separate legal inquiries. Opening Br. 58-59. It erroneously believed that “there is no requirement that the court find egregious conduct to award enhanced damages.” Appx196. In fact, the law “limit[s] the award of enhanced damages to egregious

cases of misconduct beyond typical infringement,” *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1935 (2016), and enhancement requires finding “egregious *infringement* behavior,” *id.* at 1932. Only *after* “infringement behavior,” not other conduct, is found egregious can the *Read* factors inform the enhancement amount. But the court’s egregiousness finding relied on considerations wholly irrelevant to “infringement behavior,” such as Cisco’s size, financial condition, and trial presentation. Appx199-204. That legal error—which Centripetal does not defend—requires reversal.

**A. Cisco Did Not Copy**

Centripetal does not address the numerous instances in which the district court read documents out of context in making its “copying” finding. Opening Br. 59-62. Instead, Centripetal adopts the same strategy, referring generally to “functionalities” and “algorithms” (Br. 55-56) without identifying *anything specific* of Centripetal’s that ever made its way into Cisco’s products. For example, Centripetal asserts that it gave Cisco information on, and algorithms specifically implementing, each asserted patent at a February 2016 meeting. Br. 7. Centripetal’s record citations belie its argument.

Jonathan Rogers, who claimed to have “describe[d] Centripetal’s patented filter algorithms,” confirmed that this meant providing only high-level information. Appx2222-2225(1220:9-1223:22). He stated that he discussed the RuleGATE

“system’s functions” with Cisco, admitted that no “source code” changed hands, and did not identify any actual algorithms provided. Appx2281-2283(1279:17-1281:16). Two other witnesses—both former Centripetal employees—confirmed that no “confidential information,” Appx5897-5898(33:4-34:25), or core filtering algorithms, Appx5877(81:14-18), were shared. Merely stating that Centripetal had patented “algorithms” or discussing high-level functions is not the same as *providing* source code or algorithms to Cisco. Centripetal did not do either.

This is confirmed by the February 2016 meeting materials, which provided no details about the patented technology, but instead focused on RuleGATE’s ability to quickly apply millions of rules inline. Appx5127 (Centripetal describing its solution as “I/O of 30 million packets per second” and “[f]ilter against 5 million+ complex IOCs”). Cisco attendees described Centripetal’s presentation similarly. Appx5055 (“[M]ost of their intellectual property lays in the claim that given ‘n’ amount of signatures (they call them rules) they are able to instrument them in an inline device.”). But Cisco is not accused of copying that technology or infringing any patents on it. Appx3824-3825(2816:22-2817:25); Appx5053-5056. The court’s disregard of this uncontroverted evidence was clear error.

The court also erred by ignoring Cisco’s un rebutted testimony about its own technical development long before meeting Centripetal. Appx2762-2783(1759:7-1780:23). David McGrew testified without contradiction that ETA is “directly

based on” his research and development. Appx2785(1782:6-15). Multiple documents—unaddressed by the court—corroborate ETA’s development before any Cisco-Centripetal interaction. Appx5052; Appx5694-5698; Appx5699-5701; Appx5797-5798; Appx5832. By contrast, Centripetal still cannot articulate *what* in ETA was supposedly copied from Centripetal.<sup>5</sup>

### **B. The Case Was Close**

As in *Polara Engineering Inc v. Campbell Co.*, 894 F.3d 1339, 1355 (Fed. Cir. 2018), the district court devoted a single paragraph to the closeness of the case. Appx202. The court did not consider, much less “weigh” (Br. 59), Cisco’s success at trial and in IPRs on seven of the eleven originally-asserted patents.<sup>6</sup> At minimum, the court did not sufficiently explain why the factor “weighs heavily in favor of enhanced damages.” Appx202; *Polara*, 894 F.3d at 1355.<sup>7</sup>

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<sup>5</sup> Contrary to Centripetal’s assertion (Br. 54-55), Cisco did “dispute” the other *Read* factor findings, which revolved around the copying claims. Opening Br. 59; Appx200-203. This requires at least a remand to reconsider the issue without unsupported copying accusations.

<sup>6</sup> Further confirming the reasonableness of Cisco’s positions, a German court, finding the district court’s reasoning “not convincing,” recently held that Cisco did not infringe patents related to the ’806 and ’176 patents, on grounds indistinguishable from Cisco’s arguments here. *Centripetal Networks, Inc., v. Cisco Sys. Inc.*, Regional Court of Düsseldorf, Nos. 4b O 33/20, 4b O 76/20 (Dec. 10, 2021).

<sup>7</sup> Centripetal’s waiver suggestion (Br. 57) lacks merit. Cisco was not required to move under Rule 52(b) on an issue the district court decided against it. The *Polara* defendant did not file a Rule 52(b) motion at all. See *Polara Eng’g Inc. v. Campbell Co.*, 8:13-cv-7 (C.D. Cal.).

**V. THE JUDGMENT SHOULD BE VACATED BECAUSE THE DISTRICT JUDGE WAS STATUTORILY DISQUALIFIED**

Centripetal trivializes behavior recognized at the profession’s highest levels as a breach of a judicial officer’s ethical requirements. *See* Chief Justice John G. Roberts, Jr., 2021 Year-End Report on the Federal Judiciary at 3 (“[F]ederal judges [who] participated in ... matters involving companies in which ... their families owned shares ... violated an ethics rule[.]”).

This is not a situation in which the court took immediate measures upon discovering a financial interest. The judge initially disclosed the stock ownership only “for the information of both counsel,” without proposing or taking any steps. Appx18320. Centripetal encouraged inaction by stating the same day that it had no objection. Appx18323. Only after Cisco moved for recusal did the judge announce placing the stock in a blind trust. Appx18576-18578. Allowing a multibillion-dollar judgment to stand in these circumstances would send the message that statutory violations trigger no consequence—an outcome that would “produce injustice in other cases” and “undermin[e] the public’s confidence in the judicial process.” *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988).

Centripetal does not deny that, once the judge learned of the stock ownership, 28 U.S.C. §455(b) required recusal unless the interest was “divest[ed]” under §455(f). No divestiture ever occurred, because the judge’s wife was never

“deprive[d] or dispossess[ed]” of the financial interest. *Webster’s New World Dictionary* 400 (3d ed. 1988). While *control* over the stock was relinquished by placing it in a blind trust, the ownership interest remained. Cisco cited multiple sources showing that a blind trust is not a divestment. Opening Br. 65-66. Centripetal’s sole contrary citation (Br. 60) is an unsupported assertion in a law review article.

Centripetal insists (Br. 61) that a blind trust qualifies as divestment under §455(f), even though it does not deny that a blind trust violates the §455(c) obligation to keep informed about financial interests (Opening Br. 66).

Centripetal’s reading of the statute is nonsensical. Congress did not allow the safe-harbor provision to be satisfied by violating a different provision. Rather, §455(f) applies only when the interest is “divest[ed].” A blind trust is a form of *investment*, not a divestment.

Nor can Centripetal manufacture an atextual safe harbor by arguing that the judge possessed “insider information,” such that selling the stock before ruling in Centripetal’s favor would have looked suspicious. Br. 12, 61, 63. Congress created no such exception. Rather, it expected that judges would avoid such situations by obeying §455(c) and keeping informed about their families’ financial

interests, which the court failed to do. If circumstances make divestment undesirable or impossible, the statute mandates recusal. There is no other option.<sup>8</sup>

Centripetal tries to avoid vacatur by misstating the facts. Br. 62-63. This case is more extreme than *Shell Oil Co. v. United States*, 672 F.3d 1283 (Fed. Cir. 2012), where this Court vacated the judgment due to “the risk of injustice and risk of undermining the public’s confidence in the judicial process” even though the judge discovered the disqualifying interest only as “he was entering final judgment” and immediately severed the party creating the conflict. *Id.* at 1286, 1294. Here, the judge discovered the financial interest when, by his account, he had not yet “decided 100 percent of” the case. Appx18580. He went on to write at least 30 more pages of the post-trial opinion, entered an initial judgment, received post-judgment briefing, issued a 49-page post-judgment opinion, and entered final judgment. And as described above (p. 31), he took no remedial action until after receiving Cisco’s motion, and even then took insufficient action. Appx18574-18595. These facts warrant vacatur even more than *Shell* did.

Centripetal’s characterization of 100 shares as “*de minimis*” is irrelevant. Br. 62. Any interest, “however small,” is disqualifying. 28 U.S.C. §455(d)(4);

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<sup>8</sup> Compare Notice of Grounds for Judicial Disqualification, *Tec Sec, Inc. v. International Bus. Mach. Corp.*, No. 10-cv-00115-PTG-TCB (E.D. Va. Jan. 19, 2022) (ECF No. 1711) (spouse’s stock ownership left “no option” but recusal).

*United States v. Stone*, 866 F.3d 219, 229 (4th Cir. 2017). The judge’s refusal to divest or recuse compels vacatur. *See* Chief Justice Roberts, 2021 Year-End Report at 3-4 (stressing importance of “promoting a culture” of respecting ethics rules, “because public trust is essential, not incidental, to [the judicial] function”).

### CONCLUSION

The judgment should be reversed or vacated and remanded.

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### **CERTIFICATE OF SERVICE**

I hereby certify that, on this 26th day of January, 2022, I filed the foregoing Non-Confidential Reply Brief for Brief for Defendant-Appellant Cisco Systems, Inc. with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

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