

Nos. 2020-1685, -1704

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

SRI INTERNATIONAL, INC.,

Plaintiff-Appellant,

v.

CISCO SYSTEMS, INC.,

Defendant-Cross-Appellant.

Appeal from the United States District Court for the District of Delaware,
No. 1:13-cv-01534-RGA-SRF, Judge Richard G. Andrews

**DEFENDANT-CROSS-APPELLANT CISCO SYSTEMS, INC.'S
COMBINED PETITION FOR PANEL REHEARING
AND REHEARING EN BANC**

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November 29, 2021

CERTIFICATE OF INTEREST

Counsel for Cross-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).

WILMER CUTLER PICKERING HALE AND DORR LLP: Joseph M. Levy, Janine M. Lopez (former), Thomas G. Sprankling

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DUANE MORRIS LLP: Stephanie Hansen (former)

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).

None.

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: November 29, 2021

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STATEMENT OF COUNSEL

Based on my professional judgment, I believe the panel decision is contrary to the following precedents of the Supreme Court and this Court: *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923 (2016); *Apple Inc. v. Samsung Electronics Co.*, 839 F.3d 1034, 1039 (Fed. Cir. 2016) (en banc); *Advanced Software Design Corp. v. Fiserv, Inc.*, 641 F.3d 1368, 1381-1382 (Fed. Cir. 2011); and *Durango Associates, Inc. v. Reflange, Inc.*, 912 F.2d 1423, 1425 (Fed. Cir. 1990).

/s/ William F. Lee

WILLIAM F. LEE

INTRODUCTION

The district court determined that Cisco's infringement was not "wanton, malicious, and bad-faith." Appx7. That should have been dispositive of enhanced damages. Indeed, the panel acknowledged that the standard applied by the district court "refers to 'conduct warranting enhanced damages'" under *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923 (2016) (Op. 9), and the panel never found an abuse of discretion in the district court's conclusion that the *Halo* standard is not met here.

The panel nevertheless awarded \$23.66 million in enhanced damages. There was no proper basis for that ruling. The district court judgment from which this appeal arose awarded *no* enhanced damages, and the only permissible outcomes in that posture would have been to affirm or to vacate and remand for further consideration of enhancement.

The panel did neither. It instead reached back to reinstate an award of enhanced damages that this Court vacated during a prior appeal. That original enhancement decision never addressed whether Cisco engaged in egregious infringement behavior under *Halo*. Rather, that prior decision was based on factors such as Cisco's litigation conduct and size that are unrelated to the egregiousness of Cisco's infringement and are already the basis for a separate award of attorneys'

fees. Moreover, this Court lacked jurisdiction to address that original enhancement decision, which was not part of the final judgment from which this appeal arose.

The panel's decision to enhance without any predicate finding of egregious infringement behavior will have sweeping consequences. The panel upheld the jury's willfulness verdict based upon factors that will be present in essentially every case where a defendant loses at trial and is found liable for inducement. The *Halo* threshold of egregious infringement behavior requires much more than that before awarding enhanced damages.

This Court should grant panel rehearing or rehearing en banc to restore *Halo*'s requirement of egregious infringement behavior as a necessary predicate to enhancement.

BACKGROUND

A. Proceedings Before The Trial Judge

This case does not involve any conduct that could support enhanced damages. Cisco undisputedly did not copy from SRI. Cisco independently developed and sold the accused products and services years before learning of SRI's patents. *SRI Int'l, Inc. v. Cisco Sys., Inc.*, 930 F.3d 1295, 1309 (Fed. Cir. 2019). When SRI notified Cisco of its patents, Cisco told SRI why Cisco did not infringe and why it viewed the patents as invalid. Appx20694(400:18-22); Appx21527-21528(1233:15-1234:1).

At trial, SRI's willfulness arguments focused on the evidence it offered to support inducement, including the testimony of two Cisco engineers who stated that they did not review the patents-in-suit before their depositions. Appx22259-22260(1965:22-1966:18); *SRI*, 930 F.3d at 1309 (addressing engineer testimony).

At the close of evidence, Cisco moved for JMOL of no willfulness. In deciding that motion, the trial judge acknowledged that "this case in terms of infringement has been like virtually every other case. There's nothing remarkable about this case when it comes to infringement." Appx22195(1901:11-13). She nevertheless let willfulness go to the jury while the Supreme Court was then reconsidering *In re Seagate Technology, LLC*, 497 F.3d 1360 (Fed. Cir. 2007) (en banc). Appx22186(1892:1-5); Appx22217(1923:6-11).

The jury found willful infringement (Appx17474), and the trial judge denied Cisco's renewed motion for JMOL of no willfulness (Appx28381-28383). Despite acknowledging that Cisco had presented objectively reasonable defenses that "would have been sufficient for the court to grant a JMOL of no willfulness" under "the prior *Seagate* standard," the trial judge held that substantial evidence supported the jury's willfulness finding because (1) "key Cisco employees did not read the patents-in-suit until their depositions" and (2) "Cisco designed the products and services in an infringing manner and ... instructed its customers to use [them] in an infringing manner." Appx28382-28383.

The trial judge originally awarded enhanced damages (Appx28389-28393), but did not apply the *Halo* standard of egregious infringement behavior. Instead, she viewed the factors from *Read Corp. v. Portec, Inc.*, 970 F.2d 816, 826-827 (Fed. Cir. 1992) (en banc), as the “obligatory series of factors that a court should review in determining how to exercise its discretion” to enhance damages. Appx28389-28390. The trial judge identified certain litigation conduct by Cisco that she deemed “crossed the line.” Appx28390-28393. She then explained that “some enhancement is appropriate given Cisco’s litigation conduct, its status as the world’s largest networking company, its apparent disdain for SRI and its business model, and the fact that Cisco lost on all issues during summary judgment and trial, despite its formidable efforts to the contrary.” Appx28393. Based upon those factors, the trial judge concluded “that a doubling of the damages award is appropriate”—awarding \$23.66 million in enhanced damages. *Id.* The trial judge also relied upon that same litigation conduct to award \$8 million in attorneys’ fees. Appx28390-28393.

B. Cisco’s Prior Appeal

Cisco appealed. A divided panel affirmed on all liability issues, but vacated as to willfulness and enhancement. 930 F.3d at 1302-1310. Judge Lourie dissented and would have found the asserted claims invalid under 35 U.S.C. § 101. *Id.* at 1312-1313.

The panel majority rejected the grounds on which the trial judge upheld willfulness. As to the testimony of Cisco’s engineers, the majority held that “[g]iven Cisco’s size and resources, it was unremarkable that the engineers—as opposed to Cisco’s in-house or outside counsel—did not analyze the patents-in-suit themselves.” *Id.* at 1309. The majority similarly rejected the trial judge’s “other rationale” for upholding willfulness as “nothing more than proof that Cisco directly infringed and induced others to infringe the patents-in-suit.” *Id.*

The majority also addressed “additional evidence” raised by SRI, including evidence from before Cisco knew of SRI’s patents, even though SRI had never previously presented this evidence as part of its willfulness case. *Id.* The majority rejected SRI’s willfulness arguments based upon Cisco’s pre-notice conduct, vacated the willfulness judgment, and remanded for further consideration of whether there was substantial evidence of willfulness after Cisco had notice of SRI’s patents. *Id.* at 1309-1310. The majority instructed that the district court on remand “should bear in mind the standard for willful infringement,” which the majority described as whether “Cisco’s conduct rose to the level of wanton, malicious, and bad-faith behavior required for willful infringement.” *Id.*

Because the majority vacated willfulness, it did “not reach the propriety of the [trial judge’s] award of enhanced damages,” which it instead vacated and remanded “for further consideration along with willfulness.” *Id.* at 1310.

C. Remand Proceedings

On remand, SRI moved to amend the judgment to reinstate willfulness and award enhanced damages. Appx28657. The district court¹ recognized that this Court's opinion from the first appeal incorporated *Halo's* enhancement standard when discussing what is "required for willfulness" and that it was bound by that opinion. Appx2; Appx29296(10:12-11:12). When asked to articulate the appropriate willfulness standard to apply on remand, SRI's counsel stated that "wanton, malicious, and bad faith" was the correct standard in light of this Court's prior opinion. Appx29296-29297(10:12-11:12). Cisco explained that willfulness and enhancement are different, but acknowledged that what this Court said in the prior appeal is the law of the case. Appx29314-29315(28:18-29:18).

The district court thoroughly reviewed the trial record and concluded there was "no substantial evidence that Cisco's infringement was 'wanton, malicious, and bad-faith.'" Appx7. On that basis, the court refused to reinstate the willfulness verdict and declined to award enhanced damages. *Id.*

D. The Current Appeal

SRI appealed. The same panel reversed the district court's remand decision regarding willfulness and enhanced damages. Op. 6-12.

¹ Judge Robinson presided over the trial but retired during the first appeal. The case was reassigned to Judge Andrews on remand. For clarity, this petition refers to Judge Robinson as "the trial judge" and Judge Andrews as "the district court."

The panel recognized that the decision in the prior appeal had caused “confusion.” Op. 9. It sought to “clarify” that willfulness and enhancement are governed by different standards. *Id.* The panel concluded that a reasonable jury could have found deliberate and intentional conduct sufficient for willful infringement. It based that determination on the supposed weakness of Cisco’s trial defenses and the jury’s inducement finding. Op. 6-9.

As to enhancement, the panel explained that its discussion of “wanton, malicious, and bad-faith behavior” in the first appeal referred to the *Halo* standard for “conduct warranting enhanced damages.” Op. 9. The panel nevertheless refused to credit the district court’s remand finding of no “wanton, malicious, and bad-faith” infringement on the issue of enhanced damages because the district court—adopting the discussion from this Court’s prior opinion—characterized its analysis as part of willfulness, rather than enhancement. Op. 12.

Aside from that, the panel never addressed the threshold question of whether Cisco engaged in egregious infringement behavior under *Halo*. Instead, it reached back to the trial judge’s previously-vacated enhancement decision under the *Read* factors, found no abuse of discretion, and adopted the trial judge’s original decision to award double damages. Op. 11. The panel declined to vacate and remand so that the district court could address enhancement in the first instance, stating that it

believed a remand would “serve little purpose given that the [trial judge] already properly considered this issue” in her original, previously-vacated decision. *Id.*²

ARGUMENT

I. THE PANEL OPINION IS CONTRARY TO *HALO*.

A. The Panel Awarded Enhanced Damages Without Any Finding Of Egregious Infringement Behavior.

Willfulness and enhancement are separate legal concepts governed by different standards. “[W]illfulness requires deliberate or intentional infringement.” *Bayer Healthcare LLC v. Baxalta Inc.*, 989 F.3d 964, 988 (Fed. Cir. 2021). It is a factual issue for the jury. *Exmark Mfg. Co. Inc. v. Briggs & Stratton Power Prods. Grp., LLC*, 879 F.3d 1332, 1353 (Fed. Cir. 2018). By contrast, enhancement is reserved for “egregious cases of misconduct beyond typical infringement.” *Halo*, 136 S. Ct. at 1935. “The sort of conduct warranting enhanced damages has been variously described ... as willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant, or—indeed—characteristic of a pirate.” *Id.* at 1932. Enhancement is committed to the district court’s discretion. *Id.*

The district court on remand concluded that Cisco’s infringement was not “wanton, malicious, and bad-faith.” Appx7. That analysis addressed the *Halo* standard and should have been dispositive of enhancement absent an abuse of

² This Court also upheld the award of attorneys’ fees entered on remand. Op. 12-14. Cisco does not seek rehearing on that issue.

discretion. Indeed, the panel’s decision acknowledged that the “wanton, malicious, and bad-faith” standard applied by the district court on remand “refers to ‘conduct warranting enhanced damages.’” Op. 9.

The panel nevertheless disregarded the district court’s remand determination of no “wanton, malicious, and bad-faith” infringement because the district court characterized its analysis as part of willfulness, rather than enhancement. Op. 12. But the label that the district court on remand used to describe its analysis does not change the standard it applied or the conclusion it reached. Indeed, the district court on remand only used willfulness nomenclature because that is how both this Court and SRI had previously described the analysis in this case. *See SRI*, 930 F.3d at 1309 (“[W]e conclude that the record is insufficient to establish that Cisco’s conduct rose to the level of wanton, malicious, and bad-faith behavior required for willful infringement.”); App29296(10:13-24) ([District Court]: “So in terms of a standard for willfulness that I should be using in deciding this, what adjectives would you use at this point in this case?” [SRI’s Counsel]: “... [W]e can go back to the *Halo* standard here, you know, willful, wanton.” [District Court]: “... [T]hat’s not actually the standard for willfulness, is it? That’s the standard for enhanced damages?” [SRI’s Counsel]: “No, that’s the standard for -- well, no, I think it’s both, I guess is the way I would characterize it.”).

The panel in this appeal sought to “clarify” the “confusion” created by its statement in the prior appeal regarding what is “required for willful infringement.” Op. 9. But by recharacterizing its prior statement as addressing enhancement—and then failing to credit the district court’s remand analysis applying that aspect of this Court’s prior decision on the issue of enhancement—the panel eliminated the requirement of assessing the egregiousness of the defendant’s infringement behavior before awarding enhanced damages. The trial judge never addressed that threshold question in her original enhancement decision, and the panel’s decision cites nothing else from the district court on this issue. Op. 10-11; *infra* pp. 13-14. The *only* time the *Halo* threshold for enhanced damages was ever addressed in this case was when the district court on remand determined that Cisco’s infringement was *not* “wanton, malicious, and bad-faith.” Appx7.

The panel’s decision to enhance without any predicate finding of egregious infringement behavior is contrary to *Halo*. The Court should grant panel or en banc rehearing to restore the requirement of finding egregious infringement behavior before awarding enhanced damages, as *Halo* mandates.

B. The Panel Compounded Its Error By Reinstating The Trial Judge’s Previously-Vacated Enhancement Decision.

1. The trial judge’s original decision is not a proper basis for enhancement.

Enhancement under *Halo* is committed to the district court’s discretion. 136 S. Ct. at 1934. In the current posture of the case—where the district court on remand declined to award enhanced damages—the only permissible outcomes are affirmance of the district court’s determination that Cisco’s infringement was not “wanton, malicious, and bad-faith” or vacatur and remand for further consideration of enhancement. The panel did neither. It instead reached back to reinstate the trial judge’s original enhancement decision that was vacated during the first appeal. Op. 10-11. As explained below, that was improper because that original enhancement decision was outside this Court’s jurisdiction in the second appeal. *Infra* pp. 17-19. The panel’s reinstatement of that original enhancement decision was also substantively incorrect for at least two reasons.

First, the trial judge’s original enhancement decision rested in part on her understanding that the jury could have found willfulness because Cisco’s engineers failed to review SRI’s patents before their depositions and Cisco was found liable for inducement. Appx28382-28383. This Court squarely rejected those grounds for willfulness in the prior appeal. 930 F.3d at 1309. The primary basis on which this Court upheld willfulness in the second appeal (*i.e.*, the supposed weakness of

Cisco's trial defenses) was never considered by the trial judge. Appx6 nn.5-6 (district court on remand explaining that SRI had not argued the supposed weakness of Cisco's trial defenses as a basis for willfulness before the trial judge). The trial judge's understanding of the basis for willfulness informed her original decision to award enhanced damages; she even described enhanced damages as "the willfulness award under § 284." Appx28393. Given the new rationale for willfulness adopted in this appeal, this Court cannot simply reinstate the trial judge's original enhancement decision. The trial judge did not exercise her discretion based on the understanding of willfulness reflected in the panel's decision, which at minimum warrants a remand to reassess enhancement. Indeed, this Court granted panel rehearing in the prior appeal for similar reasons after vacating the willfulness predicate for attorneys' fees. *SRI Int'l, Inc. v. Cisco Sys., Inc.*, 773 F. App'x 620, 620-621 (Fed. Cir. 2019).

Second, the trial judge's original enhancement decision never applied the *Halo* standard to determine whether Cisco had engaged in egregious infringement behavior. Appx28389-28393. Instead, the trial judge's original decision rested on several *Read* factors that have nothing to do with the egregiousness of Cisco's infringement behavior—*i.e.*, "Cisco's litigation conduct, its status as the world's largest networking company, its apparent disdain for SRI and its business model, and the fact that Cisco lost on all issues during summary judgment and trial, despite

its formidable efforts to the contrary.” Op. 11 (quoting Appx28393). While the *Read* factors can inform whether and by how much to enhance, *Halo* makes clear that the enhancement decision should focus on whether the “*infringement behavior*” at issue is egregious. *Halo*, 136 S. Ct. at 1932. Cisco’s litigation conduct, size, views on SRI, and trial loss say nothing about the egregiousness (or lack thereof) of its *infringement behavior*. Moreover, that same litigation conduct was also the basis for awarding attorneys’ fees (Op. 13-14)—making Cisco pay twice for the same conduct.

To make matters worse, this Court has never addressed Cisco’s arguments concerning the errors in the trial judge’s original enhancement decision. Cisco challenged that original enhancement decision in the first appeal. *See* No. 2017-2223, Dkt. 23 at 49-58. But this Court did not reach Cisco’s arguments after vacating willfulness. 930 F.3d at 1310. Cisco’s arguments could not have been addressed in this appeal because the trial judge’s original decision was not part of the judgment under review. *Infra* pp. 17-19.

2. The panel’s rationales for reaching the trial judge’s original enhancement decision are incorrect.

The panel sought to justify its reinstatement of the trial judge’s original enhancement decision because, in its view, vacatur and remand “would serve little purpose given that the [trial judge] already properly considered this issue.” Op. 11. But that original enhancement decision did *not* address whether Cisco had engaged

in egregious infringement behavior under *Halo*. *Supra* pp. 13-14. By contrast, the district court on remand found the *Halo* threshold of “wanton, malicious, and bad-faith” infringement *not* met here. Appx7. If there is no reason to remand, it could only be because the district court already decided after the first appeal that the *Halo* threshold is not met here. The panel cannot avoid that ruling by reaching back to an earlier, previously-vacated decision that did not address the question. At a minimum, the Court should vacate and remand so that the district court can address this issue committed to its discretion in the first instance. *Cf. Apple Inc. v. Samsung Elecs. Co.*, 839 F.3d 1034, 1039 (Fed. Cir. 2016) (en banc) (granting en banc review and reversing panel decision that exceeded the Court’s proper appellate function).

The panel acknowledged that “[i]t may seem inappropriate to reinstate” the trial judge’s original award of enhanced damages. Op. 11 n.2. The panel nevertheless sought to justify that result because the trial judge’s original enhancement decision applied only to post-notice conduct.³ *Id.* But that does not cure the substantive flaws with that decision, which rested on an understanding of willfulness that this Court expressly rejected and which never addressed whether

³ Any confusion on this issue was created by SRI, which sought to rely upon Cisco’s pre-notice conduct during the prior appeal as “additional evidence that purportedly supports the jury’s willfulness verdict.” 930 F.3d at 1309. Cisco noted during the prior appeal that SRI’s arguments about Cisco’s pre-notice conduct were raised “[f]or the first time on appeal” and contrary to SRI’s trial presentation. No. 2017-2223, Dkt. 39 at 23-24.

Cisco engaged in egregious infringement behavior. *Supra* pp. 12-14. No court has applied the correct standard for enhancement and concluded that Cisco's infringement behavior warrants enhanced damages. Indeed, the only time that the *Halo* standard was applied in this case was when the district court on remand concluded that Cisco's infringement was *not* "wanton, malicious, and bad-faith." Appx7.

C. Unless Corrected, The Panel's Decision Will Have Sweeping Consequences.

The panel reinstated the jury's willfulness verdict based upon the supposed weakness of Cisco's trial defenses and the finding of induced infringement. Op. 6-10. That is an extremely low threshold for willfulness. Indeed, under the panel's reasoning, a willfulness verdict could be sustained in practically any case where inducement is found under the theory that the jury must have found the losing party's defenses to be weak. *See* Appx2 n.1 ("If the standard for willfulness is deliberate or intentional, it is hard to see how a finding of indirect infringement would not usually be enough for willfulness.").

While a willfulness verdict is necessarily limited to the issues presented during trial, there are often issues that are not presented to the jury but are still relevant to enhancement. For example, Cisco had a § 101 defense that was decided against it as a matter of law before trial, but that presented a substantial legal issue and drew a dissent from Judge Lourie in the first appeal. 930 F.3d at 1312-1313.

Cisco similarly raised non-infringement defenses before trial that caused SRI to “significantly narrow[] the categories of products that it contends infringe the Patents-in-Suit.” Appx19536 (letter from SRI’s counsel).

Those issues outside the jury’s consideration should be considered before awarding enhanced damages—particularly where, as here, the rationale for willfulness reflects only a subset of the issues in the case. *Halo*, 136 S. Ct. at 1933 (“As with any exercise of discretion, courts should continue to take into account the particular circumstances of each case in deciding whether to award damages, and in what amount.”). By skipping the prerequisite finding of egregious infringement behavior, the panel’s decision conflicts with the broad discretion provided to district courts under *Halo* and will greatly expand the availability of enhanced damages by divorcing that determination from an assessment of the case as a whole.

II. REINSTATING THE TRIAL JUDGE’S PREVIOUSLY-VACATED ENHANCEMENT DECISION EXCEEDED THIS COURT’S JURISDICTION.

Putting aside the substantive issues discussed above, the panel’s reinstatement of the trial judge’s original enhancement award exceeded this Court’s jurisdiction for at least two reasons. Cisco raised these jurisdictional issues in its opening brief (*see* Dkt. 25 at 1, 57-58), but the panel never addressed them.

First, the judgment entered on remand did not award enhanced damages (Appx10), and the trial judge’s original enhancement decision did not (and could not) resolve the merits of any issue on remand. The panel therefore did not have

jurisdiction to address that decision in this appeal. *See Advanced Software Design Corp. v. Fiserv, Inc.*, 641 F.3d 1368, 1381-1382 (Fed. Cir. 2011) (final judgment rule forecloses appellate jurisdiction over decisions that do not resolve the merits).

Second, the trial judge's original enhancement decision was not specified in SRI's notice of appeal and is thus outside this Court's jurisdiction in this appeal. A notice of appeal must "designate the judgment, order, or part thereof being appealed." Fed. R. App. P. 3(c)(1)(B). Once the appellant specifies the judgments and orders on appeal, the scope of the appeal cannot expand beyond those. *Durango Assocs., Inc. v. Reflange, Inc.*, 912 F.2d 1423, 1425 (Fed. Cir. 1990). SRI's notice of appeal here addressed only the April 1, 2020 final judgment entered on remand. Appx29368. That notice could incorporate prior interlocutory orders from after the first final judgment, but not orders from before the first final judgment or that judgment itself. *See* 20 Moore's Federal Practice - Civil § 303.21[3][c][vi] (2021) ("[I]f more than one judgment is involved, a notice of appeal that refers to only one judgment cannot raise issues that were decided in any other judgment."). Indeed, as a matter of logic, the trial judge's original decision awarding enhanced damages could not have merged into the April 1, 2020 judgment that awarded no enhancement. Moreover, SRI only purported to appeal orders "adverse to SRI," which the trial judge's original enhancement decision was not. Appx29368. The trial judge's original decision was beyond the scope of the appeal that SRI noticed

and therefore was outside this Court's jurisdiction to review. *See Artrip v. Ball Corp.*, 735 F. App'x 708, 712 (Fed. Cir. 2018) (earlier final orders not identified in notice of appeal are outside scope of the appeal).

CONCLUSION

Cisco respectfully requests that the Court grant panel or en banc rehearing and uphold the district court's remand determination under *Halo* that Cisco's infringement was not "wanton, malicious, and bad-faith" or, alternatively, vacate and remand for further consideration of enhancement.

Respectfully submitted,

/s/ William F. Lee

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November 29, 2021

ADDENDUM

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

SRI INTERNATIONAL, INC.,
Plaintiff-Appellant

v.

CISCO SYSTEMS, INC.,
Defendant-Cross-Appellant

2020-1685, 2020-1704

Appeals from the United States District Court for the District of Delaware in No. 1:13-cv-01534-RGA-SRF, Judge Richard G. Andrews.

Decided: September 28, 2021

FRANK SCHERKENBACH, Fish & Richardson, PC, Boston, MA, argued for plaintiff-appellant. Also represented by ROBERT COURTNEY, Minneapolis, MN; HOWARD G. POLLACK, Redwood City, CA; JOHN WINSTON THORNBURGH, San Diego, CA.

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Before LOURIE, O'MALLEY, and STOLL, *Circuit Judges*.

STOLL, *Circuit Judge*.

SRI International, Inc. appeals the United States District Court for the District of Delaware's denial of its motion to reinstate the jury's willfulness verdict and to reinstate the district court's award of enhanced damages. Cisco Systems, Inc. cross-appeals the district court's award of attorney fees and expenses. Because substantial evidence supports the jury's finding of willful infringement, we reverse the district court's denial of SRI's motion to reinstate the willfulness verdict. Having restored the jury's willfulness finding, we also restore the district court's award of enhanced damages. Finally, we affirm the district court's award of attorney fees.

BACKGROUND

This is the second appeal in this case. SRI filed suit in the District of Delaware alleging that Cisco infringed certain claims of U.S. Patent Nos. 6,711,615 and 6,484,203 (the "asserted patents"). The '615 patent is titled "Network Surveillance" and is a continuation of the '203 patent, which is titled "Hierarchical Event Monitoring and Analysis." A jury trial was held on validity, infringement, willful infringement, and damages. *See SRI Int'l, Inc. v. Cisco Sys., Inc. (SRI I)*, 254 F. Supp. 3d 680 (D. Del. 2017). The jury found that the accused Cisco products infringed certain claims of the asserted patents and awarded a 3.5% reasonable royalty for a total of \$23,660,000 in compensatory damages. The jury also found that Cisco's infringement was willful.

After trial, Cisco moved for judgment as a matter of law (JMOL) of no willful infringement and SRI moved for attorney fees and enhanced damages. Regarding the jury's willfulness finding, the district court determined that substantial evidence—including that certain Cisco employees did not read the asserted patents until their depositions,

that Cisco designed the products in an infringing manner, and that Cisco instructed its customers to use those products in an infringing manner—supported the jury’s willfulness finding. *Id.* at 716–17.

The district court also awarded SRI attorney fees and costs. *Id.* at 723. The district court noted that “Cisco pursued litigation about as aggressively as the court has seen in its judicial experience” and that this litigation strategy “created a substantial amount of work for both SRI and the court, much of which work was needlessly repetitive or irrelevant or frivolous.” *Id.* at 722–23 (footnotes omitted). In awarding fees, the district court also took into account “the fact that the jury found that Cisco’s infringement was willful.” *Id.* at 723.

With respect to enhancement of damages based on the jury’s willfulness finding, the district court doubled the damages award. *Id.* at 723–24. The district court explained that enhancement was appropriate “given Cisco’s litigation conduct, its status as the world’s largest networking company, its apparent disdain for SRI and its business model, and the fact that Cisco lost on all issues during summary judgment and trial, despite its formidable efforts to the contrary.” *Id.* at 723.

Cisco appealed the district court’s denial of JMOL of no willful infringement and its grant of enhanced damages and attorney fees. We vacated and remanded on each of those issues. *See SRI Int’l, Inc. v. Cisco Sys, Inc. (SRI II)*, 930 F.3d 1295, 1312 (Fed. Cir. 2019). First, we held that the jury’s verdict of willful infringement before May 8, 2012 was not supported by substantial evidence because it was undisputed that Cisco did not know of SRI’s patents until after that date. *Id.* at 1309–10. We stated that for the time period prior to May 8, 2012, “the record is insufficient to establish that Cisco’s conduct rose to the level of wanton, malicious, and bad-faith behavior required for willful infringement.” *Id.* at 1309. We also criticized the evidence

the district court identified as supporting the jury's willfulness verdict. For example, we explained that "it was unremarkable" that two Cisco employees identified in the appellate record merely as engineers did not review the patents until their depositions. *Id.* We vacated the district court's denial of JMOL of no willful infringement and remanded the case to the district court to decide in the first instance whether the jury's finding of willful infringement after May 8, 2012 (the date Cisco received notice) was supported by substantial evidence. *Id.* We likewise vacated the district court's enhanced damages award because it was predicated on the finding of willful infringement. In addition, we vacated the award of attorney fees because it was partly based on the finding of willful infringement.

On remand, the district court reasonably read our opinion to require a more stringent standard for willful infringement than our other cases suggest—conduct rising to "the level of wanton, malicious, and bad-faith behavior." *SRI Int'l, Inc. v. Cisco Sys., Inc. (SRI III)*, Civil Action No. 13-1534-RGA, 2020 WL 1285915, at *1 (D. Del. Mar. 18, 2020). Based on this standard, the district court in *SRI III* held that substantial evidence did not support the jury verdict of willful infringement after May 8, 2012.

The district court in *SRI III* also reviewed the jury instructions on willful infringement, which neither party ever challenged on appeal. The instructions directed the jury to consider whether Cisco "acted despite a high likelihood that [its] actions infringed a valid and enforceable patent." *Id.* at *2. The jury was further instructed that, if it answered this question affirmatively, it should also determine whether Cisco "actually knew or should have known that its actions constituted an unjustifiably high risk of infringement of a valid and enforceable patent." *Id.* To determine whether Cisco had this state of mind, the jury was instructed to consider the following factors:

One, whether or not defendant acted in accordance with the standards of commerce for its industry.

Two, whether or not defendant intentionally copied a product of plaintiff's that is covered by the patents-in-suit.

Three, whether or not there is a reasonable basis to believe that defendant did not infringe or had a reasonable defense to infringement.

Four, whether or not defendant made a good-faith effort to avoid infringing the patents-in-suit, for example, whether defendant attempted to design around the patents-in-suit.

And, five, whether or not defendant tried to cover up its infringement.

Id. at *2–3.

Regarding attorney fees, the district court noted that even though it removed the willfulness finding it had partially relied on in awarding fees, there was nevertheless sufficient reason to maintain the fees award. *Id.* at *4. It again found the case “exceptional” and accordingly granted the renewed motion for attorney fees and expenses. *Id.* at *5.

SRI appeals the district court's JMOL of no willful infringement and the denial of its motion to reinstate the jury's willfulness verdict and to reinstate the district court's award of enhanced damages. Cisco cross-appeals the district court's award of attorney fees. We have jurisdiction under 28 U.S.C. § 1295(a)(1).

DISCUSSION

We review a grant of JMOL of no willfulness under the same standard as the district court, for substantial evidence. *Johns Hopkins Univ. v. CellPro, Inc.*, 152 F.3d 1342, 1354, 1363 (Fed. Cir. 1998); *MobileMedia Ideas LLC*

v. Apple Inc., 780 F.3d 1159, 1164 (Fed. Cir. 2015) (citing *Pitts v. Delaware*, 646 F.3d 151, 155 (3d Cir. 2011)). We review a district court’s decision regarding the amount of enhanced damages for an abuse of discretion. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1934 (2016). Likewise, we review an award of attorney fees pursuant to 35 U.S.C. § 285 for an abuse of discretion. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 564 (2014).

I

A

In *SRI II*, we held that there was no willful infringement as a matter of law before Cisco had notice on May 8, 2012. We did not decide whether substantial evidence supported the jury verdict of willful infringement after May 8, 2012. Rather, we remanded for the district court to determine this issue in the first instance. We now hold that that substantial evidence supports the jury’s finding of willful infringement after May 8, 2012. We do not disturb *SRI II*’s holding that there was no willful infringement before May 8, 2012.

First, we presume, as we must, that consistent with the jury instructions, the jury found that Cisco had no reasonable basis to believe that it did not infringe or that it had a reasonable defense to infringement.¹ *See SSL Servs., LLC*

¹ *See* jury instructions, *supra*. The jury was instructed under the *Seagate* willful infringement standard, which required both (1) “clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent” and (2) that “this objectively-defined risk . . . was either known or so obvious that it should have been known.” *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007). Since that decision, the Supreme Court issued *Halo*

v. Citrix Sys., Inc., 769 F.3d 1073, 1082 (Fed. Cir. 2014) (generally, “[w]e presume that the jury resolved the underlying factual disputes in favor of the verdict and review those factual findings for substantial evidence” (citing *Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, 688 F.3d 1342, 1356–57 (Fed. Cir. 2012))).

SRI presented evidence that Cisco’s invalidity defenses were unreasonable. Cisco’s only assertion of invalidity over the prior art was based on anticipation by a reference that was twice considered and twice rejected by the Patent Office. *See SRI I*, 254 F. Supp. 3d at 722 n.52. SRI’s expert testified that this reference was lacking a key limitation of the claims—the requirement for multiple network monitors. Moreover, Cisco’s expert had not even seen (let alone distinguished) the Patent Office’s prior analysis rejecting this same prior art during the reexamination of the asserted patents before that expert opined that this prior art anticipated the claims.

SRI also presented evidence to the jury that Cisco did not have any reasonable basis for non-infringement. For example, as its only non-infringement argument for one of two sets of product groupings, Cisco maintained throughout trial that the claims required separate monitors, which its products did not have. *Id.* at 722. SRI countered that this non-infringement defense was untethered to the district court’s claim construction of a “network monitor,” which expressed no such requirement. *See* J.A. 22228 (Trial Tr. 1934:13–21) (stating that “during the entire time

Electronics, Inc. v. Pulse Electronics, Inc., 136 S. Ct. 1923 (2016), which rejected the objective recklessness requirement. Because *Halo* did not disturb the substantive standard for subjective willfulness, we have held that we may review the jury’s verdict for substantial evidence under that standard. *See Arctic Cat Inc. v. Bombardier Recreational Prods. Inc.*, 876 F.3d 1350, 1371 (Fed. Cir. 2017).

that Cisco was putting on its infringement case . . . you never once saw the Court’s construction of network monitor hit the screen, not once”). In *SRI I*, the district court noted this disconnect, explaining that although the court “had explained that ‘[t]he claim language and the parties’ constructions do not require that the “network monitor” and “hierarchical monitor” be separate structures’ [], Cisco maintained throughout trial that separate monitors were required.” 254 F. Supp. 3d at 722 (first alteration in original).

Likewise, as its only non-infringement argument for the second set of product groupings, Cisco asserted that while the claims require that the products correlate events, its products process events one at a time, i.e., they do not correlate events. At trial, SRI presented directly contradictory evidence. For example, SRI identified an internal Cisco document that shows a “Meta Event Generator” plainly depicting a hierarchical arrangement of monitors correlating multiple events. J.A. 38708. Cisco’s own technical witness similarly acknowledged that this “Meta Event Generator” functions to correlate events. J.A. 21813 (Trial Tr. 1519:3–5) (“Meta is specialized to combine events into a bigger event.”). Further combined with testimony from SRI’s expert that the accused products correlate events, Cisco-customer testimony that Cisco’s product correlates events, and third-party testing confirming the same, the jury had a reasonable basis to believe that Cisco did not have any reasonable defenses to infringement.

In addition, the jury found that Cisco induced infringement of the asserted claims, and Cisco does not challenge that finding on appeal. *See SRI I*, 254 F. Supp. 3d at 700. As explained in *SRI I*, the court instructed the jury that “Defendant is liable for active inducement only if plaintiff proves by a preponderance of the evidence” that, among other things, (1) “Defendant took some action intending to encourage or instruct its customers to perform acts that you, the jury, find would directly infringe”; and (2)

“Defendant was aware of the asserted patents at the time of the alleged conduct and knew that its customer’s acts (if taken) would constitute infringement of an asserted patent.” *Id.* at 719 (emphasis omitted). Based on these unchallenged jury instructions, we may presume that the jury found that Cisco knew of the patent, took action to encourage its customers to infringe, and knew that its customers actions (if taken) would infringe. Such unchallenged findings may support a jury’s finding of willful infringement.

To be clear, a finding of induced infringement does not compel a finding of willfulness. Indeed, the standard required for willful infringement is different than that required for induced infringement. Nonetheless, in this case, the jury’s unchallenged findings on induced infringement, when combined with Cisco’s lack of reasonable bases for its infringement and invalidity defenses, provide sufficient support for the jury’s finding of willful infringement for the period after May 8, 2012, when Cisco had notice of the patent.

Finally, we address the district court’s statement in *SRI III* that the Federal Circuit “made clear that the standard for willfulness” applicable on remand is “whether ‘Cisco’s conduct rose to the level of wanton, malicious, and bad-faith behavior required for willful infringement.’” *SRI III*, 2020 WL 1285915, at *1 (quoting *SRI II*, 930 F.3d at 1309). The district court also noted that “the Court of Appeals is not entirely consistent in its use of adjectives to describe what is required for willfulness.” *SRI III*, 2020 WL 1285915, at *1 n.1. To eliminate the confusion created by our reference to the language “wanton, malicious, and bad-faith” in *Halo*, we clarify that it was not our intent to create a heightened requirement for willful infringement. Indeed, that sentence from *Halo* refers to “conduct warranting enhanced damages,” not conduct warranting a finding of willfulness. *Halo*, 136 S. Ct. at 1932 (“The sort of conduct warranting enhanced damages has been variously described in our cases as willful, wanton, malicious,

bad-faith, deliberate, consciously wrongful, flagrant, or—indeed—characteristic of a pirate.”) As we said in *Eko Brands*, “[u]nder *Halo*, the concept of ‘willfulness’ requires a jury to find no more than deliberate or intentional infringement.” *Eko Brands, LLC v. Adrian Rivera Maynez Enters., Inc.*, 946 F.3d 1367, 1378 (Fed. Cir. 2020) (citing *Halo*, 136 S. Ct. at 1933).

Under the proper test for willfulness, and considering the presumed jury findings above, we conclude that substantial evidence supports the jury’s willful infringement finding. We thus reverse the district court’s JMOL of no willful infringement and reinstate the jury verdict of willful infringement.

B

We next turn to SRI’s request to reinstate the award of enhanced damages. Although willfulness is a component of enhancement, “an award of enhanced damages does not necessarily flow from a willfulness finding.” *Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, 875 F.3d 1369, 1382 (Fed. Cir. 2017) (first citing *Halo*, 136 S. Ct. at 1932; and then citing *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1341 n.13 (Fed. Cir. 2016)). Discretion remains with the district court to determine whether the conduct is sufficiently egregious to warrant enhanced damages. *WBIP*, 829 F.3d at 1341 n.13; *Halo*, 136 S. Ct. at 1934 (“Section 284 gives district courts discretion in meting out enhanced damages.”). We review the district court’s decision to award enhanced damages for an abuse of discretion. *Halo*, 136 S. Ct. at 1934. Thus, a decision of enhancement cannot stand if “it was based on a clear error of fact, an error of law, or a manifest error of judgment.” *Va. Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 867 (Fed. Cir. 1997) (quoting *Nat’l Presto Indus., Inc. v. W. Bend Co.*, 76 F.3d 1185, 1193 (Fed. Cir. 1996)); see *Halo*, 136 S. Ct. at 1934 (“That standard allows for review of district court decisions informed by ‘the considerations we have identified.’”

(quoting *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014)).

In this case, the district court in *SRI I* awarded double damages. The district court explained that enhanced damages were appropriate “given Cisco’s litigation conduct, its status as the world’s largest networking company, its apparent disdain for SRI and its business model, and the fact that Cisco lost on all issues during summary judgment and trial, despite its formidable efforts to the contrary.” *SRI I*, 254 F. Supp. 3d at 723–24. In doing so, the district court appropriately considered the factors laid out in *Read Corp. v. Portec, Inc.*, including at least “the infringer’s behavior as a party to the litigation,” the infringer’s “size and financial condition,” the infringer’s “motivation for harm,” and the “[c]loseness of the case.” 970 F.2d 816, 826–27 (Fed. Cir. 1992), *abrogated in part on other grounds by Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 116 (1996); *see SRI I*, 254 F. Supp. 3d. at 721. We discern no clearly erroneous factual findings, erroneous conclusions of law, or a clear error of judgment amounting to an abuse of discretion. We also conclude that vacating and remanding for the district court to decide the issue anew would serve little purpose given that the district court in *SRI I* already properly considered this issue.²

² It may seem inappropriate to reinstate the enhancement award in *SRI I* when we held in *SRI II* that the willfulness finding should have been limited to willfulness after May 8, 2012. But neither party makes this argument and for good reason. The parties informed this court for the first time in this appeal that the district court’s award of double damages in *SRI I* applied only to damages for infringing activity after notice was given to Cisco, i.e., after May 8, 2012. The jury did not award any pre-notice damages to SRI because it was only instructed to award damages after May 8, 2012.

We are unpersuaded by Cisco's arguments that SRI forfeited its right to enhanced damages by failing to challenge the district court's assessment of enhancement in *SRI III*. Notably, the district court in *SRI III* did not conduct an analysis of enhancement because it entered JMOL of no willful infringement. Though the court stated that it "will deny the motion to amend the willfulness judgment and award enhanced damages," that sentence must be read in context of the entire opinion. *SRI III*, 2020 WL 1285915, at *4. The district court began its analysis by pointing to what it believed was the standard for willfulness. *Id.* at *1. It then conducted its assessment of willfulness, repeatedly mentioning the jury's willfulness verdict and SRI's arguments with regard to willfulness; not once did the district court discuss enhancement in this assessment. Only after determining that substantial evidence did not support the jury verdict of willful infringement did the district court also, without analysis, deny enhanced damages. It is thus clear to us that the district court in *SRI III* denied the motion to reinstate the award of enhanced damages only because it denied the motion to reinstate the jury's willfulness finding. Because we reinstate the jury's willfulness verdict, we likewise restore the district court's award of double damages in *SRI I*.

II

We next turn to Cisco's cross-appeal challenging the district court's grant of SRI's motion for attorney fees. Under 35 U.S.C. § 285, a "court in exceptional cases may award reasonable attorney fees to the prevailing party." An "exceptional" case is "one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." *Octane Fitness*, 572 U.S. at 554. We review a district court's grant or denial of attorney fees for an abuse of discretion. *See Highmark*, 572 U.S. at 564; *Bayer CropScience AG v. Dow AgroSciences LLC*, 851 F.3d

1302, 1306 (Fed. Cir. 2017). A district court abuses its discretion when it “base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.” *Rothschild Connected Devices Innovations, LLC v. Guardian Prot. Servs., Inc.*, 858 F.3d 1383, 1387 (Fed. Cir. 2017) (alteration in original) (quoting *Highmark*, 572 U.S. at 563 n.2).

As we explained in *SRI II*, we see no error in the district court’s determination that this was an exceptional case. 930 F.3d at 1310–11. The district court’s initial findings remain persuasive:

There can be no doubt from even a cursory review of the record that Cisco pursued litigation about as aggressively as the court has seen in its judicial experience. While defending a client aggressively is understandable, if not laudable, in the case at bar, Cisco crossed the line in several regards.

SRI I, 254 F. Supp. 3d at 722. Moreover, the district court’s initial decision explained that “Cisco’s litigation strategies . . . created a substantial amount of work for both SRI and the court, much of which work was needlessly repetitive or irrelevant or frivolous.” *Id.* at 723 (footnotes omitted). Indeed, the district court conducted a thorough inventory of Cisco’s aggressive tactics, including maintaining nineteen invalidity theories until the eve of trial but ultimately presenting only two at trial, presenting weak non-infringement theories that were contrary to the district court’s claim construction ruling and Cisco’s own internal documents, exhaustive summary judgment and sanction efforts, over-designation of deposition testimony for trial, and asserting “every line of defense post-trial.” *Id.* at 722–23. We nonetheless vacated because the district court relied in part on the fact that the jury found that Cisco’s infringement was willful in its determination to award attorney fees.

Here, the district court reconsidered attorney fees in the absence of a willfulness finding, and again found this case to be “exceptional,” justifying a full award of attorney fees. *SRI III*, 2020 WL 1285915, at *4–5. Upon reconsideration, the district court explained that “Cisco’s entire case was weak, yet it pursued the case aggressively and in an unreasonable manner anyway.” *Id.* at *5. We see no abuse of discretion by the district court in this regard and affirm its award of attorney fees.

CONCLUSION

We have considered the parties’ remaining arguments and find them unpersuasive. For the foregoing reasons, we affirm the district court’s grant of attorney fees, reverse the district court’s JMOL of no willful infringement, reinstate the jury’s finding of willfulness, and reinstate the award of enhanced damages.

AFFIRMED-IN-PART AND REVERSED-IN-PART

COSTS

No costs.

CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of November, 2021, I filed the foregoing Defendant-Cross-Appellant Cisco Systems, Inc.'s Combined Petition for Rehearing and Rehearing En Banc 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.

/s/ William F. Lee

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