

No. 2023-1715

IN THE
United States Court of Appeals
FOR THE FEDERAL CIRCUIT

JIAXING SUPER LIGHTING ELECTRIC APPLIANCE, CO., LTD., OBERT, INC.,
Plaintiffs-Appellees,

v.

CH LIGHTING TECHNOLOGY CO., LTD., ELLIOTT ELECTRIC SUPPLY, INC.,
SHAOXING RUISING LIGHTING CO., LTD.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas
No. 6:20-cv-00018, Hon. Alan D. Albright

**REPLY BRIEF FOR DEFENDANTS-APPELLANTS
CH LIGHTING TECHNOLOGY CO., LTD., ELLIOTT ELECTRIC
SUPPLY, INC., AND SHAOXING RUISING LIGHTING CO., LTD.**

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INTRODUCTION

Unable to defend the decision below, Super goes on offense with a lengthy list of irrelevant and unsupported grievances. But that tactic cannot obscure the multiple legal errors below—each independently requiring reversal or vacatur.

Super cannot salvage JMOL on invalidity. Super identifies no authority supporting the district court’s theory that expert testimony cannot constitute substantial evidence unless underlying facts and data are themselves admitted into evidence. That theory defies Rule 703 and an array of precedent. Super pivots to the contention that CH’s expert’s opinions were insufficiently supported, ignoring ample supporting facts and data. Nor can Super defend the exclusion of CH’s other invalidity evidence, from the exact physical tubes the expert considered, to Super’s teardown of prior-art products.

Super leaves its contradictory invalidity and infringement theories on the ’140 patent unreconciled. Super previously distinguished the prior-art Ono reference as relying on detection of impedance. But so do the accused products. Super now argues that Ono did not turn on the main switch *before* testing proper installation. But Claim 1 requires no such thing. If it did, that would defeat infringement: Super’s expert admitted that the switch in accused products “stay[s] off” until *after* proper installation is detected.

Super's damages theory fares worst of all. Its expert utterly failed to apportion damages to the value of the patented technology. She awarded a one-size-fits-all royalty for *any one* patent that *far exceeded* what Super ever received for its *entire portfolio*. She made no effort to address the value of *thirteen* other patents that, by her testimony, allegedly drove prior license negotiations. Super disputes none of that. It instead insists that the prior licenses were sufficiently comparable to be admissible. But Super ignores that experts must *account for differences* between admissible prior licenses and the technology covered by the patents-in-suit. Its expert did not.

Nor can Super's litany of grievances obscure those errors. They are irrelevant to any issue before the Court. And proper inspection shows them to be insubstantial. For example:

- Super complains that CH's CEO did not respond to its emails. Super.Br.10. But it omits that she does not use email and that the emails were in English—a language she cannot read. Appx10102(213:13-215:25).
- Super invokes a privileged document to argue CH sought to delay or avoid litigation. Super.Br.31; *see* CH.Br.22-23. But the district court found nothing untoward: Prior counsel merely recommended that CH insist on proper service, and there was “no evidence” CH “adopted that recommendation.” Appx32.
- Super alleges that CH obtained “confidential” Super documents. Super.Br.4. But the employee it accuses of taking those documents worked with fluorescent tubes, not LEDs. Appx10139(126:18-22). He left Super in 2014, Appx10069(81:12-14), before the patents' priority dates, CH.Br.3. And the documents are irrelevant to

whether CH infringed Super’s patents—*public* documents that must enable skilled artisans to implement them. *See* 35 U.S.C. § 112(a).

- Super asserts CH withdrew its inequitable-conduct defenses because they were “baseless.” Super.Br.11. It omits that CH withdrew those defenses as part of an agreement in which *Super* dropped five patents it originally asserted, avoiding the defense for the claims most powerfully implicated. Appx1107.

Super goes so far as to say that “CH engineers feared ‘large claims’ from *Super Lighting’s* ‘quality patents,’ including *those asserted here*.” Super.Br.31 (emphasis added). But the cited document is a generic risk assessment that never even mentions Super or the asserted patents. Appx10291-10293.

Super’s drumbeat of accusations represents a regrettably familiar pattern. Throughout this case, Super has accused *every one* of CH’s three sets of counsel of misconduct. *See, e.g.*, Appx22146 (“repeatedly broke the rules”); Appx22148 (“blatantly attempted to mislead the jury”); Appx11283 (“unprecedented panoply of misconduct”); Appx11300 (“lied to Super Lighting, lied to this Court, and lied to the public”); Appx11300 (“courtroom misconduct”). When appellate counsel joined the case post-verdict, Super accused the undersigned of (among other things) trying to “manufacture new ‘facts’ and generate procedural ‘gotchas,’” Appx23289, “deliberate[ly] misreading” orders, Appx19979, and “wish-casting and self-serving mischaracterizations,” Appx21571. Whatever the effect of that strategy below, it has no place here and cannot distract from the errors before this Court.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY GRANTED JMOL ON INVALIDITY

A. Dr. Lebby's Testimony Was Substantial Evidence of Invalidity

The district court granted JMOL because, in its view, the testimony of CH's expert was not substantial evidence unless the underlying facts and data were themselves "admitted" "in evidence." Appx10217(76:17-18); *see* Appx10217-10219(73:18-82:1); Appx10210-10212(48:24-53:9); Appx66-67 (demanding "document in evidence"). That was legal error: The materials an expert relies on need not be "admissible," much less *actually admitted*. Fed. R. Evid. 703. And expert testimony is itself evidence that can sustain a jury finding. CH.Br.29-36.

1. Super concedes that experts may rely on materials that are not admissible, Super.Br.54, as Rule 703's text makes clear, CH.Br.32. Super identifies no case holding that the materials underlying expert testimony must be admitted for the testimony to support a jury finding. There is none: This Court and the Fifth Circuit have repeatedly held expert testimony itself sufficient to defeat JMOL. *See ActiveVideo Networks, Inc. v. Verizon Commc'ns, Inc.*, 694 F.3d 1312, 1321 (Fed. Cir. 2012); *Bio Tech. Gen. Corp. v. Genentech, Inc.*, 267 F.3d 1325, 1330-31 (Fed. Cir. 2001); *Fonar Corp. v. Gen. Elec. Co.*, 107 F.3d 1543, 1551 (Fed. Cir. 1997); *Melancon v. Western Auto Supply Co.*, 628 F.2d 395, 399 (5th Cir. 1980). Super's lead case is not to the contrary: It involved testimony "unsupported" by anything

and “later contradicted” by the expert himself. *Guile v. United States*, 422 F.3d 221, 227 (5th Cir. 2005); *see* CH.Br.34-35.

Seeking to evade CH’s precedents, Super implicitly invokes the argument it will not defend—that materials underlying the expert’s opinion must be admitted into evidence. It asserts that, in *ActiveVideo*, “the expert’s testimony was *not* the only evidence in the record.” Super.Br.53. But the cited portion of *ActiveVideo* mentions no other admitted evidence: It describes what “ActiveVideo’s expert testified at trial” and declares “[t]his is substantial evidence from which the jury could reasonably” find the relevant fact. 694 F.3d at 1321. It then cites *Fonar*’s holding that “expert testimony was substantial evidence to support [a] jury’s” finding, *id.*, again without any hint that the facts and data underlying that testimony must be admitted.

Super observes that the expert in *Fonar* “‘relied upon the technical literature, specifications, and drawings.’” Super.Br.53 (quoting 107 F.3d at 1551). So did Dr. Leby. CH.Br.32; pp. 6-8, *infra*. And while Super discerns “no indication that this evidence was absent from the record” in *Fonar*, Super.Br.53, neither is there any indication such evidence *was admitted*. More important, Super identifies nothing holding that such evidence *must* be admitted for expert testimony to defeat JMOL. Little wonder: Such a holding would defy Rule 703. CH.Br.31-33. Super offers no response to that Rule’s clear text.

Super's distinction of *Melancon* likewise fails. The Fifth Circuit held it was "error for the trial court to direct a verdict" given "the testimony of appellant's expert witness" that a particular danger would not be obvious to lawnmower users. 628 F.2d at 399. Super responds that "the owners' manual" was (apparently) admitted at trial. Super.Br.54. But the Fifth Circuit held the expert's testimony sufficient *despite* that manual, which disclosed a related danger. *Melancon*, 628 F.2d at 399.

2. Unable to defend the district court's theory that evidence underlying an expert's opinion must be "admitted" at trial, Appx10217(76:17-18), Super pivots to the notion that Dr. Leby's testimony was not "based on sufficient facts or data," Fed. R. Evid. 702(b); *see* Super.Br.52-55. But Super never moved to exclude that testimony. And it was well supported regardless.

As Dr. Leby explained, his invalidity opinions—including that the Cree, MaxLite, and Philips tubes predated the priority date—were based on examination of "product specification sheet[s]," other documents, and product markings including a "Cree ©2014" copyright. Appx10186-10187(315:21-318:17); *see* Appx10177(278:16) ("dates on the circuit boards"); Appx10180(289:20-23) (referencing evidence discussed in "expert report"); Appx20052-20067; Appx20162-20163. Super nowhere denies that those are types of evidence on which "experts in the particular field would reasonably rely." Fed. R. Evid. 703; *see* CH.Br.32.

Super ignores that evidence. It asserts that Dr. Leby “never . . . provid[ed] ‘materials considered’ lists like other experts.” Super.Br.44. But he did, Appx20161-20163, and CH cited it already, CH.Br.32. Super’s complaint that Dr. Leby relied on “mysterious screenshots” ignores the extensive evidence, previously cited, showing Super knew exactly what documents were at issue. CH.Br.32; Appx1189-1190 (MaxLite 8/21/14 specification sheet); Appx20295-20296 (Philips 11/29/14 specification sheet and 2014 product sheet); Appx20052-20067.

Super cannot explain away the Cree tube’s 2014 date-stamp, which Dr. Leby specifically identified and showed to the jury. Appx10187(318:13-20); CH.Br.32. While “that stamp involved only the Cree T8-48-21L-40K,” Super.Br.45, that tube alone was enough to invalidate the asserted ’125 patent claims and defeat JMOL, Appx10178(282:25-283:5). Super’s speculation that the 2014 date-stamp might not have “belonged to a T8-48-21L-40K,” Super.Br.49, ignores photographs showing the date-stamped circuit as part of that tube, Appx21156, and that Dr. Leby directed a live examination of the tube before trial to confirm his conclusions, Appx10111(15:8-11); Appx10110(9:5-8). Super speculates that 2014-dated components might not have been incorporated into products sold before February 2015, Super.Br.45, but a jury could draw the contrary inference—especially absent any evidence or reason they would not have been.

If Dr. Lebbly's testimony about public availability was brief, Super.Br.43-44, that is only because the conclusions are straightforward: The materials he reviewed indicated the tubes were on sale in 2014. Super was able to test the basis for that conclusion. Appx10187(317:24-318:17). Indeed, while Super now asserts that "Dr. Lebbly never raised [the materials he consulted] on cross-examination," Super.Br.44, he did exactly that: In response to Super's cross-examination, Dr. Lebbly "particularly called out the Philips tube from the product specification sheet in [his] expert report that was dated 2014," Appx10186(315:19-23); *see* Appx11229, and the Cree "copyright of 2014," Appx10187(318:16-17). Super's own questioning confirmed Dr. Lebbly's factual support.

Super faults Dr. Lebbly for lacking "personal knowledge," examining prior-art tubes by video, and not taking the photographs on which he relied. Super.Br.45. Those contentions have no bearing on the sufficiency of his opinions. Experts may offer opinions "not based on firsthand knowledge or observation." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993); *see* Fed. R. Evid. 602; CH.Br.33. Even a lay witness authenticating a photograph "need not be the photographer" or "see the picture taken," so long as "he recognizes and identifies the object depicted." *United States v. Okulaja*, 21 F.4th 338, 345 (5th Cir. 2021). Dr. Lebbly easily met that standard. CH.Br.14.

Super’s failure to move to exclude Dr. Lebby’s testimony under Rule 702—before or at trial—belies its contention that the testimony was unsupported. Appx10176(273:22-25); CH.Br.9. Super dismisses that omission as a “red herring” because it challenges Dr. Lebby’s supposed “lack of sufficient evidentiary foundation, not his scientific methodology.” Super.Br.54. But whether “sufficient facts or data” support an expert’s testimony goes directly to *admissibility*. Fed. R. Evid. 702(b). If Dr. Lebby lacked facts and data supporting his opinions, that would be grounds for exclusion. *MLC Intell. Prop., LLC v. Micron Tech., Inc.*, 10 F.4th 1358, 1367-68 (Fed. Cir. 2021). Super’s failure to seek exclusion, in a fiercely litigated case with no shortage of motions practice, speaks volumes.

B. The District Court Erred in Excluding Other Invalidity Evidence

The dispute over sufficiency, moreover, arises only because the district court improperly excluded admissible materials on which Dr. Lebby relied.

1. *The Prior-Art Tubes*

The physical Cree, MaxLite, and Philips tubes—the exact specimens Dr. Lebby considered—were admissible. Dr. Lebby examined them by photo and videoconference, and they were self-authenticating under Federal Rule of Evidence 902(7). CH.Br.36-39.

Production and examination. Super abandons the district court’s erroneous view that the prior-art tubes should be excluded because they were “not produced”

or because Dr. Leby did not “physically examine” them. CH.Br.36-37. They *were* produced. CH.Br.37. And there was no requirement that Dr. Leby lay hands on them, rather than examine them by video, for them to be admissible. CH.Br.37.

Super instead contends, for the first time, that Dr. Leby did not disclose his reliance on the tubes in his report. Super.Br.47. Super never made that argument below, and the district court never adopted it. It is waived. *Stauffer v. Brooks Bros. Grp.*, 758 F.3d 1314, 1322 (Fed. Cir. 2014). It is also baseless. Dr. Leby’s report discloses pages of analysis about what the “MaxLite Direct Fit G Series Tubes disclose,” the “Philips InstantFit LED T8 discloses,” and the “Cree Tubes disclose.” Appx11213-11244. If there were doubt that Dr. Leby would rely on the tubes themselves, Super dispelled it at Dr. Leby’s deposition when it confirmed he had “performed a remote inspection” of the physical tubes. Super.Br.16 & n.3.

Insofar as Super seeks to distinguish remote inspection from in-person inspection, it does not explain—despite multiple opportunities—why that distinction should matter. Super’s invalidity expert *also* examined the tubes by video “because of COVID issues.” Appx10051(11:9-12).¹

¹ Super accuses CH of not arguing below that the pandemic caused Dr. Leby (like Super’s expert) to inspect the tubes remotely. Super.Br.16 n.3. But CH did exactly that. Appx10051(11:9-12). Super asserts that it “would have responded with Dr. Leby’s deposition transcript,” Super.Br.16-17 n.3, but that transcript (which Super has not sought to include in the record) *also* explains that the Zoom examination was due to the “pandemic” and “quarantining” restrictions.

Self-authentication. The tubes were also self-authenticating under Rule 902(7). Super abandons the district court’s waiver assertion. CH.Br.39. It contends CH “did not identify the supposed ‘trade inscriptions.’” Super.Br.48. Not so: A trade inscription is a mark “indicating origin,” “affixed in the course of business.” Fed. R. Evid. 902(7). The trade inscriptions indicating tube origins were plainly visible on the tubes, as exemplary photographs show:





Appx11230; Appx11241.

Nor are those trade inscriptions limited to the particular “component” on which they appeared. Super.Br.48. CH’s authority explained that “the *item* to which the trade inscription is affixed is also authenticated.” 31 C. Wright *et al.*, *Federal Practice & Procedure* §7141 (2d ed.) (emphasis added); see *Alexander v. Care-Source*, 576 F.3d 551, 561 (6th Cir. 2009). Super cites no contrary authority.

Super asserts the tubes were not themselves sufficient to show “any of them qualified as prior art.” Super.Br.49. But the district court stated it would not have granted JMOL had supporting evidence, such as the tubes or photographs, been admitted. Appx10211-10212(52:1-53:5). Regardless, evidence need not be dispositive to be admissible. The physical tubes were relevant to invalidity and admissible.

2. *MaxLite Documents*

The district court rescheduled the trial to coincide with a religious observance of Mr. Baheti, the MaxLite witness CH planned to use to authenticate MaxLite documents. Super does not dispute that the district court easily could have accommodated Mr. Baheti’s religious observance by having him authenticate documents shortly before or after trial, or through remote testimony. CH.Br.40. That unexplained refusal to accommodate religious observance itself was error.²

² Super argues CH played Mr. Baheti’s deposition. Super.Br.23. But *Super* deposed Mr. Baheti, not CH. Super.Br.21-22. And Super identifies no authority providing

The district court also could have permitted CH to call its alternative MaxLite witness to authenticate the documents. The court originally ruled that CH could call that witness, Mr. Marsh, to do so. Appx1200. But it then abruptly changed course and barred Mr. Marsh from authenticating documents based on a nonexistent requirement—that parties disclose, in advance, what documents a witness would authenticate—a requirement Super itself never met. CH.Br.41-44.

Before this Court, Super never defends that rationale, the actual basis for the district court’s decision. It cites no rule or order requiring parties to disclose which witness will authenticate particular documents; nor does it dispute that it made no such disclosures. CH.Br.41 (citing Appx21288-21325). Excluding evidence based on a nonexistent rule, selectively applied to one side, is an abuse of discretion.

Super attempts new justifications. It recites a litany of grievances leading up to Mr. Baheti’s unavailability, Super.Br.49-50, but the district court *rejected* those claims of prejudice when it ruled that CH could call Mr. Marsh to authenticate “a pre-identified set of documents,” Appx1983; *see* Appx1984-1988. Super asserts that CH later “tried to ambush Plaintiffs with new, undisclosed testimony,” Super.Br.50, but the document Super cites discloses that CH “reserve[d its] right to have [Mr. Marsh] testify as to other *MaxLite documents that are identified on Defendants’*

that deposition testimony on some subjects permits a district court to refuse any accommodation that would facilitate testimony on others.

exhibit list.” Appx1991 (emphasis added). Super’s suggestion that Mr. Marsh would do more than authenticate those documents is incorrect: CH was clear he would testify “literally just to prove up the documents.” Appx1208(9:21-24). There was no “ambush” and no prejudice to Super. Regardless, Super cannot substitute new rationales for discretionary decisions “unless . . . it would have been an abuse of discretion for the trial court to rule otherwise.” *Ashby v. McKenna*, 331 F.3d 1148, 1151 (10th Cir. 2003). Nor do those rationales change what the district court did—apply a nonexistent rule arbitrarily to exclude key invalidity evidence.

Super professes confusion about how the MaxLite documents “would have shown public availability,” Super.Br.51, but the documents are 2014-dated specification and sales sheets for the prior-art MaxLite tube. CH.Br.39 (citing Appx1188-1190). They showed the tube was publicly available in 2014, confirming Dr. Leby’s testimony that it was prior art. Appx20063; Appx20162.

3. *Super’s 2014 Presentation*

Super’s **2014** presentation showing its teardown of Cree and Philips tubes that were nearly identical to the ones Dr. Leby examined was plainly relevant: It tended to show the invalidating products were publicly available before the **2015** priority date. CH.Br.16, 44-46. Super abandons the district court’s initial theory that the teardown was relevant only to inequitable conduct. CH.Br.45. It argues the presentation lacks “probative value” because, while the tubes analyzed are from the

same product lines, they are not the *exact same models* Dr. Leiby examined. Super.Br.51.

But the fact these tubes are concededly from the same lines makes them probative of what the Cree and Philips tubes contained. The *only* identified difference is “wattages.” Super.Br.51. Super does not try to argue that difference is material to invalidity. CH.Br.46. It nowhere explains why different wattage tubes from the same line would differ with respect to accused features. Such trivial differences do not prevent Super’s presentation from satisfying the “low” bar for relevance. *Hicks-Fields v. Harris County*, 860 F.3d 803, 809 (5th Cir. 2017).

C. The ’125 and ’540 Patents Are Invalid

The asserted claims of the ’125 and ’540 patents are invalid. The trivial “improvements” they claim—disposing LED strips and diffusion film on lamp tubes—were prior art and would have been obvious to skilled electrical engineers regardless. CH.Br.46-47.

Super’s brief confirms the absence of invention. Super urges the ’125 patent innovated by replacing the “traditional combination of a metal rail and rigid circuit board” with a “flexible printed circuit board.” Super.Br.4-5. But the claims do not require a “flexible printed circuit board.” The specification discloses an embodiment where a “*hard circuit board* made of aluminum (or an elongated aluminum plate) is used *instead of a bendable circuit sheet.*” Appx258(37:9-11) (emphasis added);

see Appx264-265 (50:65-51:5) (“LED light strip may be . . . an elongated aluminum plate”). Super’s theory of inventiveness does not survive contact with the patent’s terms.

Unsurprisingly, both the U.S. Patent and Trademark Office and the Zhejiang Province Association of Lighting Industry—of which Super is a member—have concluded the asserted claims are invalid. Appx22046-22066; Appx22067-22106; CH.Br.17; ECF #21. Super protests that the PTO and the Association considered different prior art, Super.Br.46 n.9, but that confirms lack of originality. As the Association explains, “any differences in the citation of any particular prior art results from the abundance of prior art in this field, and the obviousness of the claimed inventions.” ECF #21-2 at 7.

Super argues that CH failed to show the jury ““an LED light strip”” directly ““disposed on an inner circumferential surface of the lamp tube.”” Super.Br.56-60. But Super did not move for JMOL on that ground at trial. Appx10210-10211 (48:22-49:14). The argument is “waived.” *i4i Ltd. P’ship v. Microsoft Corp.*, 598 F.3d 831, 845 (Fed. Cir. 2010), *aff’d*, 564 U.S. 91 (2011); *see Medism Ltd. v. BestMed, LLC*, 758 F.3d 1352, 1356-57 (Fed. Cir. 2014). It is also meritless. Dr. Lebbly testified each lamp satisfied the limitation, and explained how the photographs depicted a light strip disposed on the tube’s inner surface. Appx10177-10178(280:19-281:5); Appx10178-10179(284:15-285:10); Appx10179(287:5-17); CH.Br.10-11. Super

asks the Court to interpret the photographs differently, but a jury reasonably could credit Dr. Leby's account.

II. SUPER'S CONTRADICTORY VALIDITY AND INFRINGEMENT THEORIES ARE FATAL TO THE JUDGMENT

Prior-art reference Ono and the accused LT2600 chips employ the same shock-protection method: Both use voltage pulses to measure impedance, and control the switch circuit based on that measurement. CH.Br.53. Either Ono anticipates claim 1 of the '140 patent, or the LT2600 chips do not infringe. To avoid that result, Super twisted its claims one way to avoid invalidity, and another to assert infringement. CH.Br.47-53. Far from reconciling those theories, Super's brief confirms the inconsistency.

A. Super's "Order of Operations" Theory Cannot Distinguish Ono—and Would Defeat Infringement If Credited

Super attempts to distinguish Ono as lacking "pulse signals [that] control turning on and off of the switch circuit." Appx189(59:6-7); Appx10221(90:15-92:13). Super does not contest that Ono generated voltage "pulse" signals; assessed proper installation based on "the voltage detected" from those pulse signals; and "switch[ed] the switch" from "the OFF state to the ON state" if it detected the lamp was properly installed (or the "ON state to the OFF state" if not properly installed). Appx10012-10017(¶¶41-42, 47, 52, 61); *see* Super.Br.63. At trial, Super's expert attempted to distinguish Ono as using "'detection'" of "'impedance,'" obtained in

“‘response’” to the pulse, to assess installation. CH.Br.49-50 (quoting Appx10221 (91:6-19)). Super now abandons that argument, insisting it “never argued that systems practicing claim 1 may not detect impedance.” Super.Br.65.

Super instead argues that Ono does not anticipate because Ono did not use pulse signals to “*briefly turn on* the switch” *before* detecting whether installation is proper. Super.Br.64 (emphasis added). But claim 1 contains no such requirement. If it did, the accused LT2600 chips would not satisfy that requirement any more than Ono. CH.Br.50, 52 & n.10.

1. *The '140 Patent Does Not Require Super's Supposed Order of Operations*

Super's argument reduces to the contention that, under the claims, pulse signals must *first* “briefly turn on the switch,” and only *then* may the circuit detect whether installation is proper. Super.Br.64. As CH explained (Br.50), that order of operations appears nowhere in the patent. Super still cites nothing from the '140 patent to support it. Super instead cites trial testimony concerning a prototype, *not* the patented invention. Super.Br.64 (citing Appx10076); *see* Appx11305-11315.

Claim 1's actual language refutes Super's theory. It recites “control[ing] the switch circuit to *remain in an off state*” when improper installation is detected. Appx189(59:8-14) (emphasis added). The specification likewise describes an embodiment where the “pulse signal controls the switch circuit to *remain* in an off state” when the detection circuit “detects *during* the pulse signal that the LED tube

lamp is not properly installed.” Appx183(48:52-56) (emphasis added). The switch cannot “‘*remain* in an *off* state’” if, as Super urges, detection happens only *after* the pulse has “turn[ed] the switch *on*.” Super.Br.64 & n.10 (emphasis added).

Super offers no textual response. In a footnote, it asserts that accepting claim 1’s plain terms would “read out a preferred embodiment and defeat the central concept of the invention.” Super.Br.64 n.10. The argument, “‘made in passing only in a footnote,’” is waived. *Roche Diagnostics Corp. v. Meso Scale Diagnostics, LLC*, 30 F.4th 1109, 1116 (Fed. Cir. 2022). In any event, Super never identifies where that supposedly “preferred embodiment” appears in the patent. Nor does Super identify where the patent mandates the order of operations it now describes as the invention’s “central concept.”³

Super also appears to interpret the term “control” (not construed below, Appx1305-1311) to add yet another limitation—that switching must occur independent of what the pulse signal detects. Ono’s “‘pulse signal’ did not control the switch,” Super says, because its “switch depended *entirely* on the determination circuit.” Super.Br.63 (emphasis added); *see* Super.Br.64-66. That argument misunderstands both claim 1 and Ono.

³ Even if claim 1 required Super’s preferred order of operations, Ono would still anticipate: Ono’s control circuit can turn the switch “from the ON state to the OFF state” when it detects improper installation. Appx10013(¶42). That shows the invention in Ono can “turn on the switch” before checking installation, as Super contends claim 1 requires. Super.Br.64; *see* CH.Br.48-49.

Claim 1 does not require the pulse to control the switch independent of detection. To the contrary, it recites “control[ing] the switch circuit” “*when it is detected* during one of the one or more pulse signals” that the lamp is (or is not) “properly installed.” Appx189(59:10-20) (emphasis added). In other words, the claimed invention controls the switch *based on* what it “detect[s] during one of the one or more pulse signals.” Appx189(59:10-20). The role of detection explains how the pulse signals can “control turning on *and off* of the switch circuit.” Appx189(59:5-7) (emphasis added). Turning the switch off independent of the detection results would turn the lamp off for no reason and render it unusable.

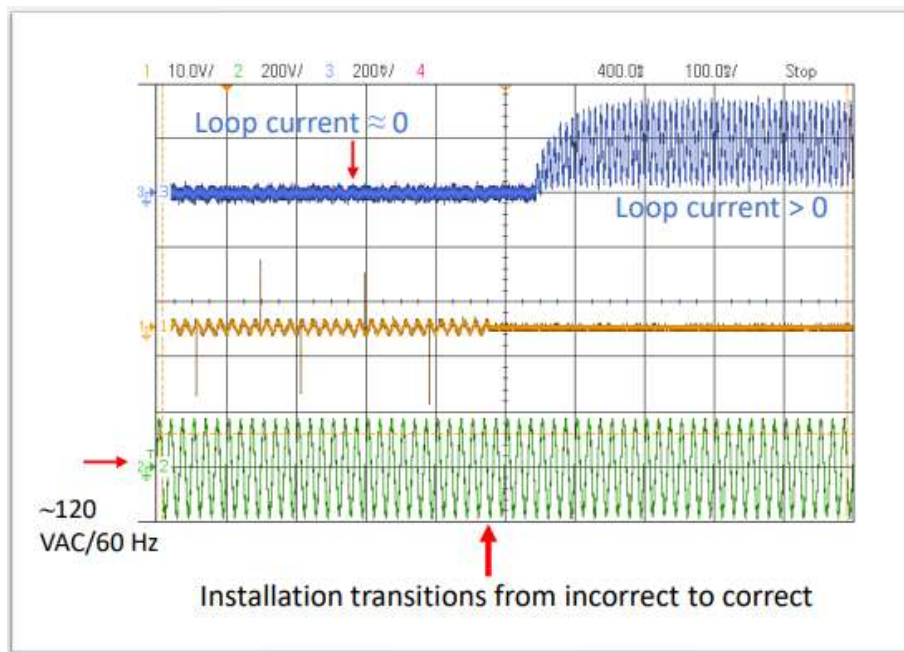
Ono disclosed controlling the switch circuit based on the detection produced by a pulse. In Ono, the determination circuit determined proper installation “on the basis of the voltage detected” from the pulse signal. Appx10014-10015(¶¶ 51-52). The determination circuit did not “alone control[] the switch,” as Super asserts (Super.Br.66)—control depended *on the pulse signal* the determination circuit received. Ono’s pulse signals thus controlled the switch: If the detection from those signals indicated proper installation, the switch turned on; if the detection from those signals indicated improper installation, the switch turned (or stayed) off.⁴ That use

⁴ Super cannot argue the mere presence of an intermediary prevents pulse signals from controlling the switch: It invokes an embodiment where a “detection result latching circuit,” not a pulse signal itself, “turns the switch on.” Super.Br.8-9.

of pulse signals to detect proper (or improper) installation, and control the switch accordingly, readily satisfies claim 1's terms.

2. *Super's Order-of-Operations Theory Defeats Infringement*

If the claim *required* pulse signals to turn on the switch *before* proper installation is detected, there would be no infringement under Super's own evidence. CH.Br.52 n.10. Super's assertion that the "pulses" in LT2600 chips "themselves turned on the switch," independent of any "detection result," Super.Br.67, is unsupported. Super's infringement expert conspicuously never said that. The demonstrative Super cites for that proposition refutes the theory:



Appx21650. It depicts pulse signals in orange (middle line) and "loop current" in blue (top line). Appx10094(183:1-14; 185:18-186:2). It shows that the "loop current" remains zero—meaning the switch has *not* been turned on—until *after*

“installation transitions from incorrect to correct” and the chip “detect[s] proper installation during [the] pulse.” Appx21650; Appx10094(183:15-184:8). It thus shows that LT2600 chips turn on the switch—sending current through the power loop—*after* proper installation is detected. Appx21650.

Super’s infringement expert so testified. Using Super’s demonstrative above, he testified that “there’s no light coming from the LEDs, and there’s no current,” until “the lamp is properly installed.” Appx10094(183:16-184:6). Only *after* proper installation is detected does the lamp “turn on.” Appx10094(183:25-184:6) (“once the lamp is properly installed . . . there’s non-zero current flowing through the lamp”).

Super now argues that Ono “changed the switch from off to on or vice versa only in response to the determination process,” Super.Br.64, but its expert repeatedly testified that LT2600 chips do the same. The “pulse has to do with detecting installation,” he testified, because “when the pulse turns on and off the switch” there “needs to be—*some detection is occurring*, it’s looking for an electrical characteristics [*sic*] on one of the wires inside of the . . . particular chip.” Appx10094(181:9-17) (emphasis added). “[I]t’s making a determination, is someone touching, *stay off*. If no one is touching, it’s properly installed, *turn on*.” Appx10095(186:21-187:6) (emphasis added). That testimony refutes Super’s infringement theory: If improper installation causes the LT2600 switch to “stay off,”

and proper installation causes it to “turn on,” *id.*, the switch is *off* at the time of detection. While Super dismisses that testimony as “related to the ‘detection determining circuit,’” Super.Br.66, that the circuit *stays off* means it is not turned *on* before detection.

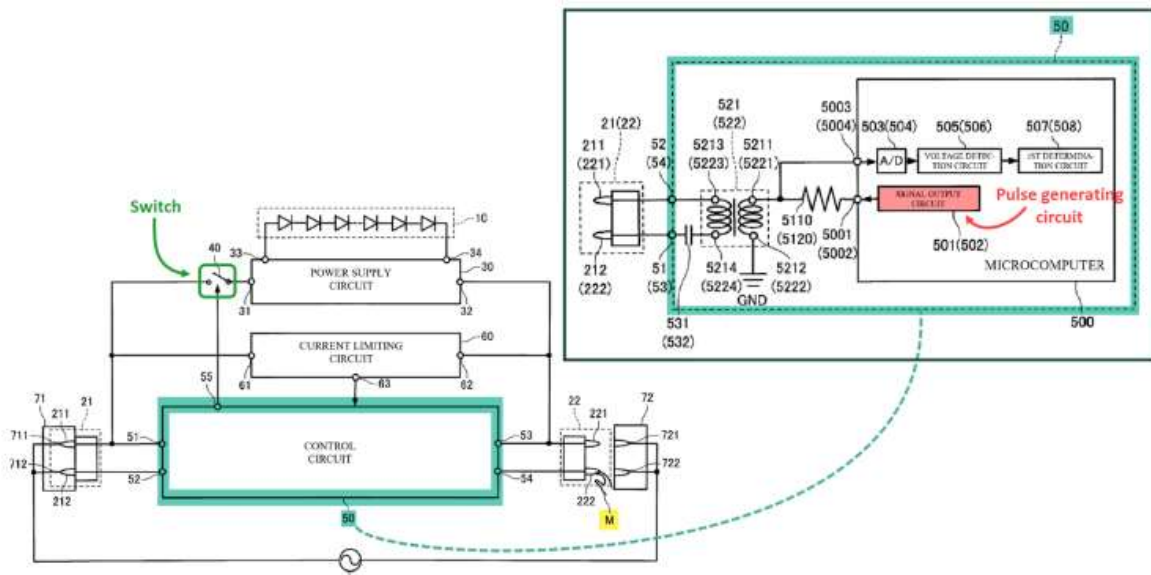
B. Super’s “Coupled to” Argument Confirms the Inconsistency of Its Positions

Super’s contention (Br.61) that Ono lacked claim 1’s “switch circuit *coupled to* the pulse generating circuit,” Appx189(59:5-7) (emphasis added), only exacerbates the conflict between its validity and infringement theories. Super asserts the “coupled to” requirement as its first ground for avoiding invalidity. Super.Br.61-62. But when arguing infringement, Super’s expert did not address that requirement—he *never* explained how the accused LT2600 chips’ pulse generating circuit was supposedly “coupled to” the switch circuit. *See* Appx10094(184:12-185:5); Appx21652.

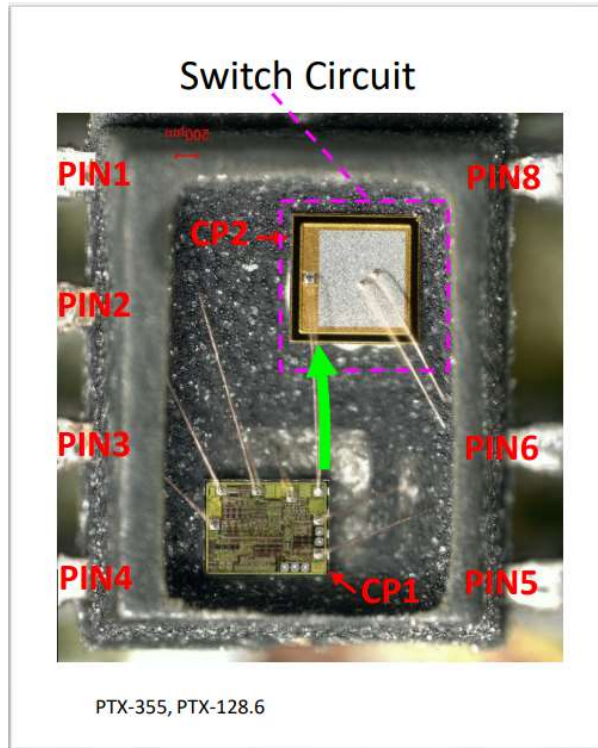
For invalidity, Super seems to argue that Ono’s switch circuit was not “‘coupled to’” its pulse generating circuit because the two appear separated in a schematic. Super.Br.61-62. But the patent indicates components are “coupled” if they are “electrically connected.” Appx183(47:17). Super never disputed that Ono’s pulse generating circuit was electrically connected to the switch circuit. Super admitted the pulse generating circuit was part of the control circuit that connected directly to the switch. Super.Br.62; Appx10012-10013 (¶¶40-44). That is why *both*

sides’ invalidity experts’ analysis of this limitation focused on the requirement that pulses *control* the switch circuit. Appx10221(91:9-92:2); Appx10157-10158(200:20-201:25).

If Super were right about the “coupled” limitation, that would defeat infringement for the LT2600 chips. Super apparently contends (Br.61-63) that Ono’s pulse generating circuit (its “signal output circuit,” labeled “501” below) was not “coupled to” its switch (labeled “40”) because the pulse generating circuit was a *component* of a larger “control circuit” (labeled “50”) that was, in turn, connected to the switch:

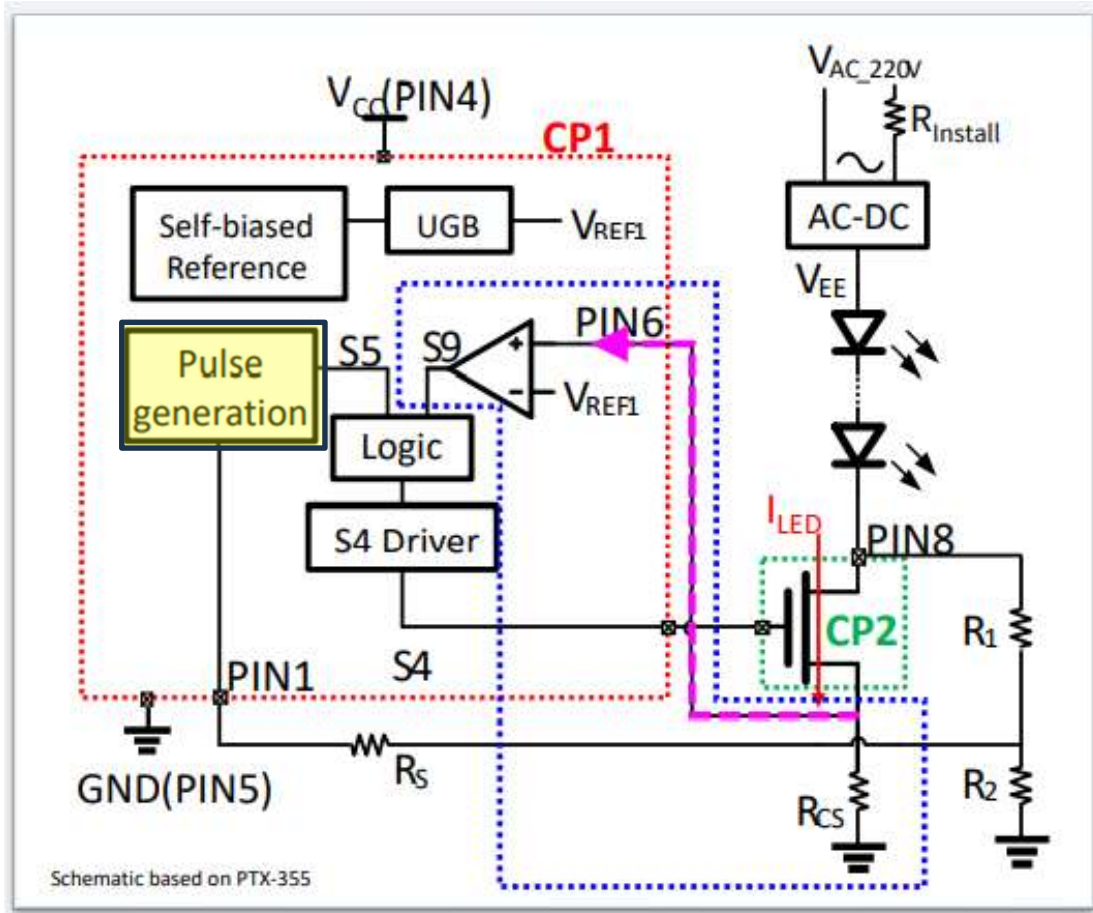


Appx21496. That is virtually identical to the LT2600 chips’ structure—which Super omits. As in Ono, the pulse generating circuit is a *component* of a larger chip (“CP1”) that is connected to a switch located on a separate chip (“CP2”):



Appx21652; *see* Appx21648; Appx10094(181:9-17).

Super's own schematic, if credited, tells the same story. It depicts the pulse generating circuit (highlighted in yellow) as not only on a different chip from the switch (outlined in green), but separated by the installation detection circuit (outlined in blue). Appx21648, Appx21652, Appx21657; Appx10094(181:9-17).



Appx21657. If anything, Super’s schematic shows the LT2600 chips’ pulse generating circuit as *less* “coupled” to the switch than Ono’s.

C. Super’s Remaining Arguments Fail

Super asserts waiver. Super.Br.60. But CH raised the issue, Appx20019-20020; Appx10132(100:14-24), and the district court found no waiver, *see* Appx60 n.3. The district court had ample “opportunity to rule.” *Pickett v. Texas Tech Univ. Health Scis. Ctr.*, 37 F.4th 1013, 1037 (5th Cir. 2022).

Super’s undeveloped argument in a footnote that invalidation of claim 1 would not require a new damages trial, Super.Br.67 n.12, is waived. *Roche*

Diagnostics, 30 F.4th at 1116. It also lacks merit: The other asserted claims of the '140 patent add only minor requirements, such as a “detection result latching circuit” that stores the last detection result. Appx189-192. Super offered no evidence of the value of *those additional limitations*, much less evidence that they possess *all* the value attributed to the '140 patent. *E.g.*, Appx10121 (55:1-17); *see Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1226 (Fed. Cir. 2014) (damages must “reflect the value added by the patented feature”). Because the verdict does not show how the jury calculated damages, it is “difficult, if not impossible” to know what the jury would have awarded based solely on other '140 patent claims. *Verizon Servs. Corp. v. Vonage Holdings Corp.*, 503 F.3d 1295, 1310 (Fed. Cir. 2007). Retrial is required.

At bottom, Super treated claim 1 as a “‘nose of wax’” to be twisted one way for validity and another for infringement. *CommScope Techs. LLC v. Dali Wireless Inc.*, 10 F.4th 1289, 1299 (Fed. Cir. 2021). Super’s theory of why Ono does not anticipate dooms its theory that LT2600 chips infringe. *Id.*

III. SUPER’S FLAWED DAMAGES METHODOLOGY REQUIRES REVERSAL

Super’s damages expert, Ms. Kindler, concededly applied rates from a 260-patent portfolio to the three patents-in-suit. She concededly inflated those portfolio rates. She made no effort to “account” for differences between prior licenses and the hypothetical negotiation. She concededly awarded identical royalties for patents claiming completely different technologies. In response, Super hides behind a

conclusory assertion that Ms. Kindler “cited documents and witness interviews” and the jury “agreed” with her. Super.Br.70-72. In Super’s view, whenever a damages expert “acknowledge[s] the need to adjust” and purports to identify “various counterbalancing factors,” Super.Br.68, she can award *far more for any one patent* than the plaintiff *ever received for the entire portfolio*. This Court’s precedents say otherwise.

A. Ms. Kindler Failed To Apportion

1. *The Portfolio Analysis Was Fatally Deficient*

Damages awards must “reflect the value attributable to the infringing features of the product, and no more.” *MLC*, 10 F.4th at 1373. This Court has repeatedly rejected simply applying *portfolio* license rates to *individual* patents-in-suit. *Id.* at 1375; *Apple Inc. v. Wi-LAN Inc.*, 25 F.4th 960, 972-74 (Fed. Cir. 2022); *Omega Patents, LLC v. CalAmp Corp.*, 13 F.4th 1361, 1381 (Fed. Cir. 2021); CH.Br.54.

Ms. Kindler’s testimony flouted that rule. She proposed a royalty for any one patent that exceeded rates in Super’s portfolio licenses with TCP and Lunera, which covered **260+** patents. CH.Br.20-22. Super now asserts Ms. Kindler “found” “the patents-in-suit drove those [prior-license] deals.” Super.Br.69. But they could not have driven the Lunera license, which—as Super nowhere denies—*predated* any patent-in-suit and expired before two of them issued. CH.Br.56-57. And while Ms.

Kindler referenced a “document” Super sent to TCP that supposedly showed the ’140 patent among the “subset of patents” that “drove” the TCP negotiations, that document—not admitted into evidence—listed *thirteen* additional patents. CH.Br.55-56 & n.11. Ms. Kindler did nothing to account for the value of those thirteen patents.

Wi-LAN makes the error especially clear. Like Ms. Kindler, the expert in *Wi-LAN* testified that a subset of key patents “drove” negotiation of a portfolio license. Compare Appx10121 (54:10-25); Appx21732, with *Wi-LAN*, 25 F.4th at 972-74. The *Wi-LAN* expert discounted the portfolio royalty by 25% to reflect that five of the six key patents were not asserted. 25 F.4th at 973. This Court found that insufficient, because the expert “failed to address the extent to which th[o]se other patents contributed to the royalty rate in the [prior] license.” *Id.* The expert’s “silence on th[o]se equally situated patents” made his opinion “untethered to the facts” and “unreliable.” *Id.* at 973-74.

Ms. Kindler’s opinion was even more “untethered to the facts.” Here, *thirteen* of the fourteen patents that supposedly “drove” the TCP negotiations were unasserted. Yet Ms. Kindler offered *no* discount from TCP’s portfolio rate. CH.Br.63. Nor did she address how those thirteen “equally situated patents” patents “contributed to the [TCP] royalty rate,” *Wi-LAN*, 25 F.4th at 973-74, much less explain why she attributed them essentially *no* value.

Super never reconciles Ms. Kindler’s failure to address the thirteen unasserted patents with *Wi-LAN*. Instead, Super describes *Wi-LAN* as concerning only whether prior licenses were comparable. Super.Br.70-71. But this Court’s decision in *Wi-LAN* was not about comparability. CH.Br.62. The Court **accepted** that the licenses there met the “threshold requirement” of “[s]ufficient comparability.” *Wi-LAN*, 25 F.4th at 971-72 & n.5. It rejected the expert’s testimony because of his “methodological and factual errors in **analyzing**” those comparable licenses—including his failure to adjust for the contributions of other patents that also concededly drove negotiations. *Id.* at 974 (emphasis added). Ms. Kindler’s testimony had precisely the same defect.

Super likewise cannot evade *MLC*. That case rejected an expert who—like Ms. Kindler—“conducted no assessment of the licensed technology versus the accused technology to account for any differences.” 10 F.4th at 1375. The Court’s comment that the licenses there were not “comparable,” Super.Br.73, encompassed both the licenses’ lack of built-in apportionment **and** the expert’s failure to “account for the differences between the accused technology and the licensed technology,” 10 F.4th at 1374.

Insofar as Super invokes Ms. Kindler’s cursory assertion that the thirteen unasserted patents included some unspecified “family members” of the ’125 and ’540 patents, Super.Br.72, Ms. Kindler admitted she was **not** a technical expert, and

Super presented *no* evidence from a competent witness about purported similarities in the claimed technologies or their value, CH.Br.56. And Ms. Kindler said nothing at all about the other unasserted patents.

Super’s “more pertinent” cases, Super.Br.73, are anything but. The license in *Pavo Solutions LLC v. Kingston Technology Co.*, 35 F.4th 1367, 1380 (Fed. Cir. 2022), was not a portfolio license; it was specific to the patent-in-suit and so had “‘already built[-]in apportionment.’” The plaintiff in *Bio-Rad Laboratories, Inc. v. 10X Genomics Inc.*, 967 F.3d 1353, 1375 (Fed. Cir. 2020), offered a “corporate witness” who “accounted for the difference in the number of patents in the [prior] agreement and the hypothetical negotiation.” Super did not. CH.Br.56.

2. *Ms. Kindler Inflated Portfolio Rates*

It is undisputed that Ms. Kindler proposed—and the jury awarded—a *greater* royalty for *any one* patent-in-suit than Super ever received for its *entire portfolio*. CH.Br.57-59. TCP’s portfolio rate was \$0.30/unit, while Ms. Kindler proposed \$0.45/unit. CH.Br.57-58. Lunera’s portfolio rate was 5% of its wholesale prices, while Ms. Kindler’s royalty was 13.9% of CH’s wholesale prices. *Id.* at 58-59.

Super fails to justify that inflation. It urges that TCP’s royalty “potentially rose [to] 60¢.” Super.Br.68. But the 60¢ rate was a *penalty* if TCP failed to “timely” report sales or make payments. Appx21344. “[P]enalties for accounting lapses,” *Wordtech Sys., Inc v. Integrated Networks Sols., Inc.*, 609 F.3d 1308, 1320 (Fed. Cir.

2010), cannot “support a damages award,” *Pavo*, 35 F.4th at 1379 (discussing *Wordtech*).

Super contends a lower royalty would allow “Defendants to pocket over \$30 million in profit from their infringement.” Super.Br.69. But that was CH’s profit from accused *products*, not from the *claimed technologies*. Appx10124(67:10-19); Super.Br.37. Under the entire-market-value rule, “revenues or profits attributable to the entire product” cannot support damages unless the “patented feature drives the demand.” *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012); *see Omega*, 13 F.4th at 1376. Super made no such showing: The district court found no “record evidence showing that customers care about shock protection *particular to the patented features*.” Appx40-41; *see* Appx10196(354:22-355:4).

3. *Ms. Kindler Did Not Account for Counterbalancing Differences*

Ms. Kindler’s conclusory invocation of “counterbalancing differences” could not justify inflating the royalty. Ms. Kindler could not “merely identif[y]” such differences; she had to “‘account’” for their impact. *Omega*, 13 F.4th at 1381. She did not. CH.Br.59-60.

Ms. Kindler’s testimony about purported “counterbalancing differences” was also factually erroneous. CH.Br.59-60. Super invokes “price fluctuations,” Super.Br.68-69, but the district court found those fluctuations had nothing to do with infringement, Appx34-37. CH and TCP were both Super’s “competitor.”

Appx10129(85:10-13). Ms. Kindler’s “generic” and counterfactual testimony provided no “‘basis in fact’” for the jury to conclude that those supposed differences more than offset the portfolio licenses’ inclusion of hundreds of additional patents. *Omega*, 13 F.4th at 1381.

Super points to CH’s rebuttal expert, Mr. Mooney. Super.Br.69-70, 71-72, 73. But Super’s expert was required to comply with precedent—and avoid presenting inflated estimates that defy it. *Enplas Display Device Corp. v. Seoul Semiconductor Co.*, 909 F.3d 398, 411-12 & n.1 (Fed. Cir. 2018). Mr. Mooney’s testimony does not support Super’s damages estimate or the jury’s verdict. And far from presenting testimony “remarkably similar” to Ms. Kindler’s, Super.Br.69, Mr. Mooney accounted for the difference between 260-patent portfolio licenses and the three patents-in-suit—while Ms. Kindler increased the portfolio rates to nearly seven times what Mr. Mooney proposed. *See* Super.Br.70.

4. *Ms. Kindler Improperly Awarded a One-Price-for-All Royalty*

The asserted patents claim vastly different technologies, from the ’140 patent’s shock-protection circuit, to the ’125 patent’s placement of LED strips and the ’540 patent’s use of diffusion film. Yet Ms. Kindler awarded the same per-unit royalty regardless of which patent was infringed. That “‘one price for all’” approach improperly “avoid[s] the task of apportionment.” *Omega*, 13 F.4th at 1379.

Super observes that the plaintiff in *Omega* relied on its “licensing program.” Super.Br.72. But the problem in *Omega* was not absence of support for a “patent/claim-independent approach”; it was that such an approach fails to “account[] for apportionment.” *Omega*, 13 F.4th at 1379. So too here. Ms. Kindler’s one-price-for-all approach does not “reflect the value attributable to the infringing features . . . and no more.” *MLC*, 10 F.4th at 1373.

B. The Verbatim Copying Warrants Reassignment

CH explained to the district court how Ms. Kindler’s opinions defied *MLC*, *Omega*, and *Wi-LAN*. Appx20042-20047. Super’s original brief did not address those cases. CH.Br.23-24. The district court then ordered supplemental briefing on *Wi-LAN*. Rather than analyze the arguments, its opinion copied *verbatim* Super’s supplemental brief. CH.Br.61-62. As a result, it never addressed *MLC* or *Omega*.

Super neither denies nor defends that copying. It distinguishes one case CH cited because the district court here did not ask Super, “in private conversation, to draft the court’s opinion.” Super.Br.74 n.13. But “[j]udicial opinions are the core work-product of judges.” *Bright v. Westmoreland County*, 380 F.3d 729, 732 (3d Cir. 2004). “They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments.” *Id.* The verbatim copying of Super’s brief deprives CH, and this Court, of “tangible proof” the district court considered binding

precedent and CH's arguments. It "vitiates the vital purposes served by judicial opinions." *Id.*

Reassigning this case on remand would preserve the appearance of justice. CH.Br.66. That request is not a "desperate" attempt to avoid a "judge [who] witnessed a wide range of misbehavior." Super.Br.74. Super's claims of misconduct are misplaced, *see* pp. 2-3, *supra*; the district court denied Super's motion for exceptional-case fees, Appx33. Whatever frustration the district court may have had, it was no excuse for legal error, much less copying Super's brief verbatim.

CONCLUSION

The judgment should be reversed.

November 16, 2023

Respectfully submitted,

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

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 2023-1715

Short Case Caption: Jiaxing Super Lighting Electric Appliance, Co., Ltd. v. CH Lighting Technology Co., Ltd.

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