

Nos. 22-1769, 22-2261

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

LONE STAR TECHNOLOGICAL INNOVATIONS, LLC,
Plaintiff-Appellee,

v.

ASUS COMPUTER INTERNATIONAL,
Defendant

ASUSTEK COMPUTER, INC.,
Defendant-Appellant.

*Appeals from the United States District Court for the
Eastern District of Texas
in case no. 6:19-cv-00059-RWS, Judge Robert W. Schroeder III*

COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Vinay V. Joshi
Andrew T. Oliver
AMIN, TUROCY & WATSON LLP
160 West Santa Clara Street
Suite 975
San Jose, CA 95113
(650) 618-6481

March 20, 2025

*Attorneys for Defendant-Appellant
AsusTek Computer, Inc.*

Certificate of Interest

Counsel for Appellant AsusTek Computer, Inc. certifies the following:

1. The full name of every Party represented by me is:
 - AsusTek Computer, Inc.

2. The name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:
 - AsusTek Computer, Inc.

3. Parent corporations and publicly held companies that own 10% or more of stock in the party:
 - None

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

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47.4(a)(5) and 47.5(b).
 - None.

6. 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: March 20, 2025

/s/ Vinay V. Joshi
Vinay V. Joshi
Attorney for Appellant
AsusTek Computer, Inc.

Table of Contents

I.	STATEMENT OF RELATED CASES.....	5
II.	CIRCUIT RULE 40(c) STATEMENT	6
III.	Fed. R. App. P. 40(b)(1)(A) STATEMENT.....	8
IV.	ARGUMENT.....	10
A.	Statutory Standing	10
1.	The Panel Misstated the Law	10
2.	Regardless of the Law, Asus Never Waived Nor Forfeited Its Statutory Standing Argument.....	14
B.	Article III Standing.....	15
1.	Factual Background	17
2.	Proceedings After the Rule 50(a) Motion.....	19
V.	The Secret Claim Construction.....	21
VI.	CONCLUSION.....	24

TABLE OF AUTHORITIES

Cases

<i>Arsement v. Spinnaker Expl. Co.</i> , 400 F.3d 238 (5th Cir. 2005).....	8, 10, 12
<i>Core Optical Techs., LLC v. Nokia Corp.</i> , 102 F.4th 1267 (Fed. Cir. 2024)	11
<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555 (1992).....	11, 19
<i>Miraglia v. Bd. of Supervisors of the La. State Museum</i> , 901 F.3d 565 (5th Cir. 2018)	12, 13, 15
<i>Pacific Indem. Co. v. Broward County</i> , 465 F.2d 99 (5th Cir. 1972)	9, 11, 13

Statutes

35 U.S.C. §261	17, 19, 21
----------------------	------------

Rules

<i>Fed. R. Civ. P. 16</i>	11
<i>Fed. R. Civ. P. 26</i>	21
<i>Fed. R. Civ. P. 26(a)(1)(A)(ii)</i>	17

I. STATEMENT OF RELATED CASES

AsusTek Computer, Inc. (“Asus”) is aware of case no. 2022-2261 (*Lone Star Technological Innovations, LLC v. Asus Computer International*) that is pending before this Court and that will directly affect or be directly affected by the Court’s decision in this appeal. Case no. 2022-2261 and this appeal both arise from the same district court case and have been consolidated.

II. CIRCUIT RULE 40(c) STATEMENT

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

- I. Whether patent ownership can be proven without a written document?
- II. Whether the alleged infringer can waive its patent ownership challenge by not raising that issue explicitly in the pre-trial order.
- III. Whether the alleged infringer's assertion in the pre-trial order that it does not owe damages -- even if infringement is found -- implicitly and sufficiently raises a challenge to patent ownership.
- IV. Whether plaintiff's mere oral testimony that it owns the patent-in-suit is sufficient proof of ownership?
- V. Whether plaintiff's mere oral testimony that it owns the patent-in-suit can shift the burden of proof to the accused infringer to disprove that the plaintiff owns the patent-in-suit?
- VI. Whether it is proper for a district court to have a two-part claim construction for a claim term and prohibit the parties from sharing one part of the claim construction with the jury?

Dated: March 20, 2025

/s/ Vinay V. Joshi
Vinay V. Joshi
Attorney for Appellant
AsusTek Computer Inc.

III. Fed. R. App. P. 40(b)(1)(A) STATEMENT

Below is each point of law or fact that the petitioner believes the panel has overlooked or misapprehended.

1. In deciding a challenge to standing, the panel misapprehended *Arsement v. Spinnaker Expl. Co.*, 400 F.3d 238, 245 (5th Cir. 2005). The panel's decision states: "It goes without saying that a pre-trial order controls the scope and course of trial; a claim or issue not included in the order is waived, unless presented at trial without objection." *Arsement v. Spinnaker Expl. Co.*, 400 F.3d 238, 245 (5th Cir. 2005)." ECF No. 76. The panel misapprehended the law in that "claim or issue" language in the quote applies only to the party that has the burden of proof at trial. Asus did not have the burden of proof on standing. Also, the panel overlooked the fact that the issue of patent ownership was "presented at trial without objection." *Id.* Indeed, the panel acknowledged the presentation in its written decision.
2. The panel misapprehended whether Asus challenged plaintiff's trial testimony that plaintiff owned the patent-in-suit. Asus challenged this testimony on cross-examination, and the witness conceded that plaintiff had not offered written proof of ownership at trial. The only document showing patent ownership at trial did not identify plaintiff as the owner.

3. The panel misapprehended the Fifth Circuit law regarding pre-trial orders in the panel's reliance upon *Pacific Indem. Co. v. Broward County*, 465 F.2d 99, 103 (5th Cir. 1972). Contrary to the panel decision, in the Fifth Circuit, a party cannot forfeit, waive, or admit an issue as to which its opponent has the burden of proof by failing to raise the issue in the pre-trial order.
4. The panel misapprehended the adverse impact of the secret claim construction on Asus.
5. The panel misapprehended that Asus only provided skeletal evidence of the harm that had occurred to Asus because of the secret claim construction. Asus provided a full explanation of the harm.

IV. ARGUMENT

A. Statutory Standing

1. The Panel Misstated the Law

The panel opinion relies on a misstatement of the applicable Fifth Circuit law to find that “Asus’s statutory standing argument is forfeited.” ECF No. 76 at 2. The panel quotes the Fifth Circuit as follows: “‘It goes without saying that a pre-trial order controls the scope and course of trial; a claim or issue not included in the order is waived, unless presented at trial without objection.’ *Arsement v. Spinnaker Expl. Co.*, 400 F.3d 238, 245 (5th Cir. 2005).” ECF No. 76 at 2. The very next sentence in that Opinion refers to the allegedly waive challenge under “Chapter 95” of the relevant law. It states: “Chapter 95 was not cited in the pre-trial order, but each of its elements were present.” *Arsement*, 400 F.3d at 245. The court then applied Chapter 95 in its *de novo* review; the Chapter 95 challenge was not waived despite not explicitly appearing in the pre-trial order. *Id.* at 248. Here, the panel acknowledges that the issue of statutory standing was presented at trial without objection. ECF No. 76 at 3 (“Lone Star’s witness, Mr. Rice, testified under oath at trial that Lone Star owns the ’435 patent.”). Asus respectfully disagrees with the panel that Asus allowed Mr. Rice’s testimony to stand uncontroverted. In fact, Mr. Rice conceded that he did not provide any documentary proof of ownership. Appx2012-2013.

Also, importantly, the *Arsement* statement quoted by the panel only applies to claims or issues on which the party bears the burden of proof. And it is undisputed that Lone Star, not Asus, bore the burden of proving standing. *See, e.g., Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Core Optical Techs., LLC v. Nokia Corp.*, 102 F.4th 1267, 1272-73 (Fed. Cir. 2024) (“[I]n a patent infringement action, ‘the plaintiff must demonstrate that it held enforceable title to the patent at the inception of the lawsuit’ to assert standing.”).

As Asus did not have the burden of proof on standing, a different Fifth Circuit standard applied to Asus regarding the pre-trial order. Specifically, the Fifth Circuit does not require a party to raise, in the pretrial order, issues as to which the opponent has the burden of proof:

“[T]he pre-trial order is drafted with a view as to what the proof will be at trial. In preparing the stipulation which forms part of the order each party sets forth the facts which are agreed and the issues which remain. Nothing in [Fed. R. Civ. P. 16] nor in the local rule involved here suggests that a party waives or admits an issue as to which his opponent has the burden of proof by failing to include the issue in his pre-trial stipulated list of remaining issues.”

Pacific Indem. Co. v. Broward County, 465 F.2d 99, 103 (5th Cir. 1972). This standard, stated in 1972, remains in effect today. The Fifth Circuit recently stated,

“[N]othing in Federal Rule of Civil Procedure 16 suggests that a party waives or admits an issue as to which his opponent has the burden of proof by failing to include the issue in his pre-trial stipulated list of remaining issues.”

Miraglia v. Bd. of Supervisors of the La. State Museum, 901 F.3d 565, 573 (5th Cir. 2018) (cleaned up). The rule of *Pacific Indem.* and *Miraglia* controls here, not the statement of *Arsement* that was stripped of its context by the panel. Asus cited this case law to the panel. ECF No. 32 at 28. Because Lone Star bore the burden of proof of statutory standing, under the relevant Fifth Circuit law, Asus could not waive or forfeit the statutory standing challenge by not raising that issue in the pretrial order.

Exploring the facts in the relevant cases further explicates this. In *Arsement*, plaintiff Arsement was an independent contractor engaged by defendant Spinnaker and injured while working for Spinnaker. 400 F.3d at 242. Spinnaker attempted to avoid liability by relying upon “Chapter 95” of the relevant law in its post-trial Rule 50(b) motion. *Id.* at 245. Spinnaker did not reference Chapter 95 in the pre-trial order, during trial, or at any point until Rule 50(b) motions. *Id.* at 245-246. Yet, the Fifth Circuit found that Spinnaker had not waived its assertions of no liability due to Chapter 95 because Arsement had the burden to prove liability under Chapter 95. *Id.* at 248.

Applying *Arsement*’s conclusion to this appeal, the panel acknowledges that the issue of statutory standing was presented by Lone Star at trial without objection. ECF No. 76 at 3 (“Lone Star’s witness, Mr. Rice, testified under oath at trial that Lone Star owns the ’435 patent.”). And Asus challenged the statutory

standing evidence by obtaining Mr. Rice's concession that he did not provide any documentary "in writing" proof of patent ownership that is required by 35 U.S.C. §261. ECF No. 32 p. 21 (citing Appx2012-2013). Asus did not allow Lone Star's insufficient evidence to go unchallenged.

Turning to *Pacific Indem.*, plaintiff Airmotive bore the burden of proof that "statutory notice had been given." 465 F.2d at 104. Airmotive pleaded that notice had been given, and defendant Broward County denied the allegation. *Id.* at 101. Neither Airmotive nor defendant Broward County included the allegation of notice in the pre-trial order as a stipulated fact or issue to be determined. *Id.* The Fifth Circuit held that defendant did not waive or admit the "notice" issue by "failing to include the issue in [the] pre-trial" order. *Id.* at 103.

In *Miraglia*, plaintiff Miraglia had the burden to prove "intent" by defendant Museum. 901 F.3d at 573. The issue of "intent" was not raised in the pre-trial order by either party. *Id.* The Fifth Circuit held that the Museum had not waived its argument that Miraglia failed to prove intent. *Id.* The Court stated that Fifth Circuit law, "creates a default rule that unless a party specifically stipulates to an element of liability, the party with the burden of proof must prove it." *Id.* The Court continued, "Failure to include the issue in a pre-trial order does not waive the issue absent some special circumstance." *Id.*

In each of these cases, the Fifth Circuit held that the party without the burden of proof did not and could not waive an issue by not including it in the pre-trial order. Applied to Asus, Asus did not have the burden of proof regarding statutory standing and could not waive or forfeit a challenge to standing through not raising standing as an issue in the Joint Pretrial Order.

The panel's opinion relies on a misstatement of the applicable Fifth Circuit law.

2. Regardless of the Law, Asus Never Waived Nor Forfeited Its Statutory Standing Argument

Regardless of the legal standard, Asus never stipulated that Lone Star had standing. In fact, both Asus and Lone Star raised standing as an issue to be tried. In the pretrial order, each party set forth contested contentions. Lone Star contended, "1. Lone Star is the owner of the '435 patent and possesses all rights of recovery ..." ECF No. 32 p. 29 (citing Appx1446). Asus countered this stating, "6. ASUS denies that Lone Star is entitled to any damages from ASUS." *Id.* (citing Appx1448). The parties also provided "Contested Issues of Fact and Law." Both parties contested standing, with Lone Star stating that it contested both "1. Whether ASUS has infringed ... [and] 2. Whether Lone Star is entitled to damages ... and (if so) the amount of such damages." *Id.* (citing Appx1450).

Lone Star's item 2 acknowledges that standing is contested, because under 35 U.S.C. §284, where infringement is found, damages "shall" be awarded. Thus,

item 2 acknowledged that standing was contested because otherwise the answer would always be “yes, if infringement is found.” Asus contested, “1. Whether ASUS has infringed ...[and] 4. Whether Lone Star is entitled to any damages for alleged infringement...” *Id.* (citing Appx1450). Under the same logic, Asus’s item 4 is necessarily a statement that standing was contested.

Regardless of whether the panel applies the correct or incorrect law, the question of “whether” Lone Star is entitled to damages is a challenge to standing. *See, e.g., Miraglia*, 901 F.3d at 573 (“[W]hen the parties said they disputed whether Miraglia was ‘entitled to any damages,’ they signaled that intent was a disputed issue.”).

B. Article III Standing.

The panel’s ruling on Article III standing disregards the facts; it places defendants in a Catch-22 that will encourage plaintiffs to hide and continue hiding unfavorable evidence regarding patent ownership and encourage plaintiffs to proffer untrue testimony at trials. Here, Lone Star did not disclose any non-verbal evidence of owning the ‘435 patent before or during trial. This permitted Lone Star’s witness, Mr. Rice, to testify to whatever purported set of facts he wished. Mr. Rice did so. And both the district court and the panel relied upon that testimony. When Asus challenged his testimony, Lone Star eventually (months after trial) provided the district court with documents proving that Lone Star

actually did not own the asserted patents. Rather, the documents confirmed that the same Mr. Rice purported to assign the patents to Lone Star without any authority to do so. And Asus was not permitted to know the contents of Lone Star's purported ownership documents until after the district court ruled on standing.

The panel stated, "Lone Star's witness, Mr. Rice, testified under oath at trial that Lone Star owns the '435 patent. Asus never controverted that testimony, so on the facts of this case, Lone Star has satisfied Article III standing." ECF No. 76 p.

3. This is not entirely true, because the sole documentary evidence of patent ownership at trial was the cover of the '435 patent, showing ownership by a company named "Oplus Technologies Ltd.", not Lone Star. Appx109. Beyond this evidence, of course Mr. Rice was uncontroverted at trial, because Lone Star refused to disclose the purported ownership documents until months later. But when those documents were finally made available, they plainly contradicted Mr. Rice's untrue sworn testimony. The documents showed that Mr. Rice spun an ownership story out of whole cloth.

This cannot be the result that this Court wishes to encourage, i.e., that plaintiffs should hide ownership documents that contradict trial testimony to permit their witnesses to testify falsely (or erroneously) and benefit from that untrue testimony.

1. Factual Background

With respect to the standing issue, this case unfolded as follows. In the original complaint, Lone Star pled that it owned the '435 patent. Appx165. In the answer, Asus disputed Lone Star's ownership. Appx402.

Asus knew that Lone Star was required to prove its ownership and knew that 35 U.S.C. §261 required written proof of ownership. Thus, Asus knew that Fed. R. Civ. P. 26(a)(1)(A)(ii) required Lone Star to produce this written proof of ownership without awaiting a discovery request. Lone Star never produced the ownership materials during discovery. *See* ECF No. 32 at 25-26.

Based upon this, in the pretrial order, Asus disputed Lone Star's entitlement to damages, knowing that Lone Star never produced the required evidence to prove standing. *Id.* at 29. Lone Star listed the unproduced documents purporting to show ownership on its initial exhibit list but withdrew those exhibits before trial. Appx1475 at P-3 through P-9.

At trial, Lone Star presented untrue, sworn testimony about the ownership of the '435 patent. Lone Star's witness, Mr. Rice, testified that (1) the '435 patent was purchased from Intel, (2) a Washington LLC that was not Lone Star purchased the '435 patent, (3) that the '435 patent was transferred from the Washington LLC to Lone Star, and (4) that he transferred the patent from the Washington LLC to Lone Star. ECF No. 32 p. 23. All of items 1-4 are not the truth. Even if they were

true, there would be a gap in the chain of ownership because there is no evidence about how the ‘435 patent was transferred from Oplus Technologies Ltd. to Intel. *Id.* at 24; *see also* ECF No. 32 at 30 (showing that Mr. Rice later submitted a “sworn” declaration almost completely contradicting his trial testimony).

Outside of obtaining Mr. Rice’s admission that he provided no ownership documents at trial (ECF No. 32 p. 31), Asus could not contest this testimony at trial, because Lone Star never provided any documents related to ownership during discovery, pretrial proceedings, or trial. The only publicly available document was an assignment to Lone Star that was signed by none other than Mr. Rice, on behalf of a company that was not in the chain of ownership about which Mr. Rice testified. *Id.* at 25.

All that Asus could do at trial was challenge the absence of any ownership documentation that would comply with 35 U.S.C. §261. The ‘435 patent introduced into evidence at trial showed ownership by a company named “Oplus Technologies Ltd.”, not Lone Star. Appx109. The only contradictory evidence was Mr. Rice’s self-serving testimony that Lone Star owned the ‘435 patent. *See* ECF No. 32 at 21-22.

Based on this set of facts, the panel held that Lone Star established Article III standing by giving untrue testimony at trial. This cannot be what Article III demands. Under the panel’s logic, any person could come into trial, declare

himself the owner of a patent and satisfy Article III standing, despite written evidence to the contrary.

Article III standing, however, explicitly includes the requirement that assignments be “in writing” as required by 35 U.S.C. §261. The Supreme Court confirms this requirement, stating that “the plaintiff must have suffered an ‘injury in fact’” and that the plaintiff “bears the burden of establishing these elements.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Supreme Court clarified, “Since they are not mere pleading requirements but rather an indispensable part of the plaintiff’s case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.” *Id.* at 561. “[A]t the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.” *Id.* (cleaned up).

That is, the Supreme Court incorporated the statutory requirement into Article III for purposes of standing. By requiring “support in the same way as any other matter on which the plaintiff bears the burden of proof,” the Court required proof “in writing” as mandated by 35 U.S.C. §261.

2. Proceedings After the Rule 50(a) Motion

After Asus moved for judgment under Rule 50(a), based on lack of standing, Lone Star still did not provide any patent ownership documents to support its

standing argument, at trial or in any manner during Rule 50(a) briefing.

Eventually, months later, Lone Star provided certain documents to the district court without permitting Asus to see those documents. ECF No. 32 pp. 31-32. The district court ruled on standing. *Id.* And only after the ruling was entered in the docket was Asus permitted to see Lone Star's documents. *Id.*

Lone Star's documents proved the opposite of Lone Star's assertions. The documents showed that Mr. Rice's purported assignment of the patents to his own company was made without authority.

Problems with the alleged purchase agreement were identified in Asus's briefs (confidential version). ECF No. 31 at 31-35; ECF No. 49 at 19. The alleged patent purchase agreement shows an entirely different alleged chain of title than Mr. Rice's trial testimony. Asus was not permitted to challenge this evidence or cross-examine any witness about it when Asus finally received this evidence well after trial. This is the evidence that the district court and the panel of this Court must necessarily ignore to reach the faulty conclusion that Lone Star demonstrated that it had Article III standing through untrue trial testimony.

If this Court is satisfied that Article III standing can be demonstrated by a party proffering untrue trial testimony while the same party improperly hides documents that would disprove the testimony, then the Court should allow the panel decision to stand. If the Court believes that Article III standing should be

established by truthful evidence supported by proper compliance with the disclosure requirements of Fed. R. Civ. P. 26 and compliance with the “in writing” requirement of 35 U.S.C. §261, then the Court should review the panel’s decision en banc.

V. The Secret Claim Construction

The panel erred in discarding Asus’s argument regarding the harm encompassed in the district court’s secret claim construction. ECF No. 76 p. 4. The panel stated, “Asus has not raised any meaningful argument showing how it was harmed by the purported ‘secret construction.’” *Id.* In so ruling, the panel appears to have overlooked the argument provided by Asus that shows the harm, i.e., that the infringement verdict would need to be reversed if the secret claim construction was removed.

To set the stage, the district court issued a two-part claim construction of a single claim term, in which one portion of the construction was provided to the jury and the other portion of the construction bound the parties and experts, yet both parties and experts were prohibited from revealing that secret construction to the jury. This directly contradicts the intent of claim construction, i.e., to inform the jury of the meaning of terms in the patent. Despite this, the panel did not vacate or correct the construction. This Court should review the panel decision *en banc* to correct it.

In evaluating the district court’s claim construction decision and the secret construction therein (ECF No. 76 p. 4), the panel appears to have missed approximately 7 pages of analysis and argument in the opening brief (ECF No. 32 pp. 73 et seq.) and approximately 4 pages of argument in the reply brief (ECF No. 49 pp. 36 et seq.). The panel appears to state that Asus’s sole argument regarding the district court’s claim construction was a “skeletal” argument that the district court’s error is “not harmless, because it directly affects the infringement verdict.” ECF No. 76 p. 4. The panel decision, however, does not note that this statement is a summary statement, prefacing 7 pages of argument that explain the reasoning. Nor does the panel decision note that an additional 4 pages of argument were provided in the reply brief.

Asus’s argument (explained following this paragraph) is anything but skeletal, it plainly shows that there is a material difference regarding infringement between the district court’s public claim construction that was given to the jury and the secret claim construction that neither experts nor attorneys were permitted to reveal to the jury. The public claim construction meant, in essence, that “an individual color” was a single color. ECF No. 32 p. 68. The secret claim construction that bound the experts and counsel, but could not be revealed to the jury, meant, in essence, that “an individual color” was any number of hundreds, thousands, or millions of colors. *Id.*

Thus, Asus devoted 7 pages to explain why and how the error affected the infringement verdict immediately following the statement quoted by the panel, that “[t]his error is not harmless, because it directly affects the infringement verdict” (at ECF No. 32 p. 72). *Id.* pp. 73-79. Asus prefaced that section, stating, “...the evidence supports non-infringement when the claim is properly construed.” *Id.* p. 73.

Without repeating that argument unnecessarily in this petition, it can be summarized as follows. The ‘435 patent’s claims relate to controlling colors in a computer display by changing the way color is displayed in specific pixels in the display. The infringed claims required selecting an “individual color,” then identifying and changing pixels having the “selected individual color.” *Id.* The claims require that the change be made “without affecting the hue or the saturation of any other individual color.” *Id.* After explaining this, Asus pointed out that Asus’s products cannot make the claimed changes, but rather that thousands or millions of colors are changed when the allegedly infringing act is performed. *Id.* at 74. Asus then provided a multi-page explanation of pixels and how colors are generated by pixels. *Id.* at 74-77.

Asus followed this by explaining that, “When this Court corrects the erroneous [claim] construction... it will be apparent that” a step of the patent claims cannot be performed in Asus products. *Id.* at 77-78. Asus explained that

the trial testimony showed that in 98% of the accused products, the color of every pixel is changed when the allegedly infringing method is performed. *Id.* at 78; *see id.* at 74 n. 9 (showing that 98% of products are in this category). Asus also pointed out the failure in Lone Star’s evidence of infringement, i.e., that Lone Star only showed that “two of three” or “a few of [] six” colors did not change, but did not provide any evidence regarding the thousands or millions of colors that do change. *Id.* at 79.

The panel erred in disregarding Asus’s arguments while ruling against Asus on the premise that Asus only provided a skeletal statement that Asus would be harmed.

VI. CONCLUSION

Under the panel’s decision, a plaintiff can simply allege that it owns the patent, without providing documentary proof of ownership, and that would be sufficient to shift the burden of disproving ownership to the accused infringer. The panel’s decision must not be allowed to stand. *En banc* or panel rehearing should be granted.

Dated: March 20, 2025

/s/ Vinay V. Joshi
Vinay V. Joshi
Attorney for Appellant
AsusTek Computer Inc.

ADDENDUM

NOTE: This disposition is nonprecedential.

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

**LONE STAR TECHNOLOGICAL INNOVATIONS,
LLC,**
Plaintiff-Appellee

v.

ASUS COMPUTER INTERNATIONAL,
Defendant

ASUSTEK COMPUTER, INC.,
Defendant-Appellant

2022-1769, 2022-2261

Appeals from the United States District Court for the Eastern District of Texas in No. 6:19-cv-00059-RWS, Judge Robert Schroeder, III.

Decided: December 20, 2024

JENNIFER ISHIMOTO, Banie & Ishimoto LLP, Palo Alto, CA, argued for plaintiff-appellee.

VINAY VIJAY JOSHI, Amin Turocy & Watson, LLP, San Jose, CA, argued for defendant-appellant. Also represented by ANDREW TIMOTHY OLIVER.

Before DYK, CHEN, and CUNNINGHAM, *Circuit Judges*.

CHEN, *Circuit Judge*.

Lone Star Technological Innovations, LLC, (Lone Star) sued Asus Computer International and AsusTek Computer, Inc., (collectively, Asus) in the Eastern District of Texas, alleging Asus induced its customers to infringe certain claims of U.S. Patent No. 6,724,435 ('435 patent). A jury found the asserted claims were infringed and not proven to be invalid and awarded damages of \$825,000. The district court ordered a new trial on damages, and the jury found that Asus owed \$659,106.40. The district court denied Asus's motions for judgment as a matter of law. Asus appeals, and we have jurisdiction under 28 U.S.C. § 1295(a)(1). We address each of Asus's arguments in turn, and none is persuasive. We therefore *affirm*.

First, Asus argues that Lone Star lacks standing because, at trial, Lone Star failed to prove with written evidence that it owned the '435 patent. We interpret this argument as a statutory standing argument. *See* 35 U.S.C. § 261; *Lone Star Silicon Innovations LLC v. Nanya Tech. Corp.*, 925 F.3d 1225, 1235 (Fed. Cir. 2019) ("whether a party possesses all substantial rights in a patent does not implicate [Article III] standing").

Asus's statutory standing argument is forfeited. Standing was not raised as an issue in the Joint Pretrial Order. "It goes without saying that a pre-trial order controls the scope and course of trial; a claim or issue not included in the order is waived, unless presented at trial without objection." *Arsement v. Spinnaker Expl. Co.*, 400 F.3d 238, 245 (5th Cir. 2005).

To the extent Asus raises an Article III standing challenge, that argument "cannot be waived or forfeited." *Virginia House of Delegates v. Bethune-Hill*, 587 U.S. 658,

LONE STAR TECHNOLOGICAL INNOVATIONS, LLC v.
ASUS COMPUTER INTERNATIONAL

3

662–63 (2019). Lone Star’s witness, Mr. Rice, testified under oath at trial that Lone Star owns the ’435 patent. Asus never controverted that testimony, so on the facts of this case, Lone Star has satisfied Article III standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (“And at the final stage, those facts [to establish standing] (if controverted) must be ‘supported adequately by the evidence adduced at trial.’” (citation omitted)).

Second, Asus asks us to reduce or vacate the damages award because there was no evidence about the extent of use of the infringing feature. But Asus’s own expert witness provided survey testimony that 16.2% of all survey responders indicated that they practiced the claimed method using Asus’s products. We thus reject Asus’s argument.

Third, Asus contends that the damages award included non-accused products. This argument is also meritless. During discovery, Asus produced a spreadsheet in response to interrogatories seeking sales information regarding accused products. Both sides’ expert witnesses on damages relied on that spreadsheet to calculate damages. More specifically, both experts used the same royalty base (i.e., the number of infringing products), which came from Asus’s spreadsheet. Thus, the experts agreed on the number of accused products. These facts comport with the district court’s determination that Lone Star did not request damages for non-accused products and with Lone Star’s expert’s testimony that all products on the spreadsheet were infringed.

Fourth, Asus argues that the district court construed the claim term “individual color” inconsistently within the claims. The court, however, provided only one construction for “individual color” to the jury, and that construction was the construction that Asus proposed. Thus, the jury was given only one, consistent construction for the claim term “individual color.”

Asus raises another variant of its claim construction argument: even though one claim construction was provided to the jury, there was “a secret construction that bound” the parties and their witnesses. Appellant’s Reply Br. 37. It would be a misnomer to refer to this argument as raising a claim construction issue because Asus agrees that the construction provided to the jury “is correct.” Appellant’s Br. 63. Rather, Asus appears to be challenging the effect that the “secret construction” may have had on the presentation of the evidence. But even if we accept that a “secret construction” bound the parties, Asus has not raised any meaningful argument showing how it was harmed by the purported “secret construction.” Asserting, without more, that the alleged error is “not harmless, because it directly affects the infringement verdict” is simply too skeletal of an argument. Appellant’s Br. 72.

Fifth, Asus argues that substantial evidence does not support the jury’s finding of infringement. Asus challenges only claim limitation 1(e). This argument is forfeited because it was not raised in Asus’s Rule 50(b) brief before the district court.

Last, Asus contends that substantial evidence does not support the jury’s finding of induced infringement. “[W]e have affirmed induced infringement verdicts based on circumstantial evidence of inducement (e.g., advertisements, user manuals) directed to a class of direct infringers (e.g., customers, end users) without requiring hard proof that any individual third-party direct infringer was actually persuaded to infringe by that material.” *Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 843 F.3d 1315, 1335 (Fed. Cir. 2016). Lone Star adduced evidence of how Asus’s website and product manuals instruct users how to perform the infringing method. That evidence is sufficient to support the jury’s finding.

LONE STAR TECHNOLOGICAL INNOVATIONS, LLC v.
ASUS COMPUTER INTERNATIONAL

5

We have considered Asus's remaining arguments and do not find them persuasive. For the foregoing reasons, we *affirm*.

AFFIRMED

Certificate of Compliance

This petition complies with the type-volume limitation of Federal Rules of Appellate Procedure 40(d)(3) because it contains 3,896 words, excluding parts that do not count toward the type-volume limitation under Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2).

This petition complies with the type-face and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5), 32(a)(6), and 32(c)(2). This petition has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman.

Dated: March 20, 2025

/s/ Vinay V. Joshi
Vinay V. Joshi
Attorney for Appellant
AsusTek Computer Inc.

Certificate of Service

I certify that, on March 20, 2025, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Federal Circuit using the CM/ECF System and served on all counsel of record via electronic mail.

Dated: March 20, 2025

/s/ Vinay V. Joshi
Vinay V. Joshi
Attorney for Appellant
AsusTek Computer Inc.