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Litigators of the Week: A Directed Verdict Win for Cisco in a West Texas Patent Case

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Our Litigators of the Week are Brian Rosenthal, Stuart Rosenberg and Audrey Yang of Gibson, Dunn & Crutcher. This past week, they helped Cisco Systems Inc. secure a rare directed verdict before closing arguments in a patent infringement trial with $120 million in damages on the line. U.S. District Judge Alan Albright in Waco has only granted rule 50(a) motions three times. Rosenthal now has been lead counsel in two of those cases.

Lit Daily: What was at stake for Cisco here?

Brian Rosenthal: This was an important victory for Cisco, not just because of what was at issue in the case itself—over $375 million of claimed damages—but also because of the broader context of the dispute. The plaintiff is one of a larger set of non-practicing entities who all acquired patents from the same Orckit-Corrigent portfolio, obtained litigation funding from professional funders and came after Cisco in separate cases. Of that broader set of cases, this is the first to reach trial, and Cisco's win here validates its commitment to defend its products and innovations against sustained litigation campaigns.

Who all was on your team and how did you divide the work?

Stuart Rosenberg: We had an all-star team for this trial. Brian Rosenthal was our lead counsel and presented our opening argument and our directed verdict argument. Brian also cross-examined the plaintiff's technical expert and a key fact witness and presented Cisco's first witness. I was second-chair, I cross-examined the plaintiff's corporate representative and presented our technical expert, and I argued summary judgment motions before trial. Audrey Yang presented Cisco's corporate representative and, before trial, she argued and won our Rule 12(c) motion that invalidated two of the asserted patents, ran the case day-to-day and was deeply involved in everything. Emily Whitcher presented our damages expert and, before trial, she led the development of our damages positions and equitable defenses. Mike Jones at Potter Minton led voir dire, cross-examined the plaintiff's damages expert and argued key motions in limine. Libby Moulton at Orrick handled jury instructions and our written Rule 50(a) motion and, before trial, she argued our Daubert motions. And we all got fantastic support throughout the case from our Gibson Dunn colleagues Kate Dominguez, Allen Kathir, Ron Lee, Jaclyn Hellreich and Erin Kim.

Tell me about the initial complaint that Cisco was facing. How were you able to trim the number of patents down before this matter made it to trial?

Audrey Yang: The initial complaint was filed in 2022, asserting five patents against a wide range of Cisco products. We knocked out four of those patents before trial by taking a strategic approach where we focused on the strongest arguments first and did not overload the court with alternative arguments. For example, when we filed our Rule 12(c)

Related People

Brian Rosenthal

Stuart M. Rosenberg

Audrey Yang

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motion, we focused on the two patents that we knew we had the best shot at defeating at the pleading stage under Section 101, rather than trying to challenge all the patents. That strategy was successful, because the court agreed with us on both patents and granted our motion in full. We also won summary judgment of non-infringement of another patent by leveraging the claim construction that the plaintiff itself had proposed and won earlier in the case—we showed that the plaintiff's infringement theory violated its own construction. Finally, for the fourth patent, we developed evidence that the Cisco feature accused of infringement had actually been in Cisco's products since before the patent's priority date, so we filed an amended pleading adding a prior-user defense under Section 273, which prompted the plaintiff to drop that patent. With four patents down, there was only one left for trial.

Shortly before trial, you withdrew your patent invalidity defense and went forward with only a noninfringement defense. What was behind that decision? How did it help hone your presentation?

Rosenberg: That was a really hard decision. We had a strong invalidity defense, and in many ways it dovetailed with our noninfringement defense. But we knew we had to focus our trial presentation, and we knew that if we went ahead with the invalidity defense, then the plaintiff would have the right to present a rebuttal case after our case-in-chief, and the last witness the jury would hear before closing arguments would be the plaintiff's expert rather than our experts. After a lot of thought, and with the benefit of excellent advice from our local counsel Mike Jones, we decided that the right approach for this trial would be to drop the invalidity defense, stop the plaintiff from presenting a rebuttal case and focus our merits presentation on the relentlessly clear and simple message that Cisco does not use the plaintiff's patent, period. We are grateful that Cisco trusted us to make that hard decision here and supported us in seeing it through at trial.

What were your key trial themes? How did you drive them home for jurors and the court?

Rosenthal: As Stuart mentioned, our key message at trial was simple: Cisco does not use the plaintiff's patent. It was the first and last thing I said in our opening statement, and every single one of our witnesses repeated it. Our themes were all based around that core message. One theme was that Cisco is an innovator who designs its own products, so it makes sense that Cisco does not use the plaintiff's patent. We drove that theme home by bringing physical examples of Cisco's products into the courtroom, both the accused products and Cisco's older products pre-dating the patent, and by having Cisco's corporate representative—who has been at Cisco for 25 years, since before the plaintiff's patent was filed 20 years ago—step out of the witness box and demonstrate how they worked in key respects during his direct testimony. Another theme was that the patented idea isn't a very good idea, regardless of whether it was new and deserved to be patented, so again it is no surprise that Cisco is not using it. We drove that point home by showing that the plaintiff had no evidence that anyone anywhere has ever used this patent, not even the company that filed for the patent and that actually made networking products. Yet another theme was that the plaintiff was overreaching in its allegations, not only on infringement but also on damages, where the plaintiff tried to take credit for the value of things it didn't invent, including things we showed that Cisco invented and patented itself. All of those themes worked together to reinforce the core message that Cisco simply does not use this patent and so is not liable for infringement.

You had a couple of associates present witnesses. Is that typical of your approach? How did they do?

Rosenberg: Yes, we had two associates present witnesses, and they were amazing! Audrey Yang presented Cisco's corporate representative, who was also our key technical fact witness and had never testified at a trial before. Audrey defended his deposition before trial and knew the issues extremely well, and she had already argued motions successfully in this court, plus she is great on her feet in general. So it was clear to us that

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Audrey should stand up and present this witness notwithstanding that it was the witness's first trial. When the time came, both Audrey and the witness knocked it out of the park. It was also clear that Emily Whitcher should present our damages expert. Emily had been working on damages throughout the case, including working closely with our expert through reports and depositions, and Emily is fearless on her feet and has great attention to detail. She delivered a powerful, concise direct exam that amplified our themes and helped us finish strong with our damages expert as the last witness at trial. While we don't always have the opportunity for associates to present witnesses, we do consider and aim for that when possible, and in this case it was not only possible (thanks to Cisco), but exactly the right call.

Brian, this is the second time that you've won a directed verdict on a Rule 50(a) motion in Judge Albright's courtroom—something that's only happened three times. What are the keys for laying the groundwork for that kind of win?

Rosenthal: In my experience, the keys to this kind of win are the same three keys to any win. Focus, simplicity and discipline. We won this directed verdict, as we did in the prior case, by first picking our battle. We found the one critical, substantive point we thought the plaintiff couldn't prove and couldn't win without proving. That's not easy to do when there are a lot of different issues swirling around in a case, and it's not always even possible to begin with, depending on the case. In this case, we focused on one limitation of the claims that required encoding a physical port number in a data label. Cisco's products don't do that. Then we had to find a way to make that point as simply and crisply as possible. We worked hard to explain the patent and the requirements in simple terms and explain simply why we would never do what the patent requires and that doing so would make our products worse, not better. Finally, and most challenging, we had to have the discipline to stay on message. At the outset of the trial, we instituted a "no chasing rabbits" rule for all witnesses. We made sure that at every turn, and with every witness, we were focused on the singular message of non-infringement. Anything that was off-message ended up on the cutting room floor. That rule was one of the reasons we ultimately decided to drop our invalidity case. Once we had our simple, focused message, we previewed the key issue for the court early and often. By the time the motion came at the close of the plaintiff's case, everyone in the courtroom—including the judge—knew the motion was coming and exactly what the issue was. With the pump primed, we had the best chance of getting the court to focus on the one key deficiency in the plaintiff's case.

Of course, all the focus and discipline in the world won't get a favorable verdict, let alone a directed verdict, unless you are right! We have been fortunate to be involved in two cases in Waco where the evidence came in as we expected it to on the key issue we had previewed for the court, allowing us to win our Rule 50(a) motions for directed verdicts. But directed verdicts will continue to be rare in patent cases, and we always try our case with an eye toward the jury verdict first. In those rare cases where a directed verdict is the right outcome, it is very likely because the same point that is being made to the jury also resonates with the Court.

What can other patent defendants take from what you were able to accomplish here?

Yang: I think other defendants can see our win as an example of how a strategic approach, focusing on your best arguments instead of all possible arguments, can really pay off in a trial and in a multi-patent case. I also think other parties and counsel can take some comfort in how smoothly this trial was run by the court and through cooperation between counsel on both sides. We really appreciated the professionalism of our opposing counsel and the opposing party's corporate representative, which allowed everyone to minimize disputes over things that can drag down a trial, like objections to demonstratives and disputed jury instructions, and allowed everyone to focus instead on developing the key facts that determined the outcome.

What will you remember most about this matter?

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Rosenthal: What I will remember most about this trial win is the teamwork that made it happen. I got to watch Audrey and Emily take their first trial witnesses. I got to see Stuart expertly conduct an incredibly simple and straightforward direct examination of our expert. I got excellent counsel from Mike Jones, not to mention the front-row seat he gave me to a pitch-perfect voir dire. And at every turn, we had the support and input of Cisco's in-house lawyers, who not only trust us with their most important cases but who also live and breathe the issues with us in the war room. I will take with me the great feeling of pride and gratitude I had watching such an incredible team work together so collaboratively and effectively.

Rosenberg: The moment when the court granted our Rule 50(a) motion from the bench after the close of evidence. It was a bittersweet moment, because I was looking forward to Brian's closing argument the next day, and I thought we were very well-positioned to win before the jury. But it sure was exciting to win the case!

Yang: Getting to take my first witness at trial! But also, how everyone on the team worked together. We really could not have tried this case without everyone's help and support at all levels—partners, associates, paralegals, trial tech and our on-site support, and it was just amazing to see how willing the entire team was to lend a hand whenever someone needed it. From the day-to-day logistics to all of the substantive work on preparing witnesses and drafting motions, it was a pleasure working with every single person on this team.

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