

## Litigator of the Week: Wilmer's Mark Fleming Knocks Out a Multi-Billion Dollar Patent Judgment Against Cisco

By Ross Todd

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Putting an asset in a blind trust doesn't amount to divesting it.

That seemingly simple conclusion had an enormous impact in a patent dispute between Centripetal Networks and Cisco Systems. Last week the U.S. Court of Appeals for the Federal Circuit [reversed a patent infringement win](#) for Centripetal that had resulted in a damages and royalties bill of more than \$2.75 billion for Cisco — and [Litigator of the Week honors](#) for Centripetal's counsel at **Kramer Levin Naftalis & Frankel**.

Gulp.

How come?

U.S. Senior Judge Henry Morgan Jr. of the Eastern District of Virginia discovered that his wife held 100 shares of Cisco stock valued at \$4,687.99 while he was working on an opinion after a bench trial in the case. The Federal Circuit found that the trial court judge, who has since retired and died while the case's appeal was pending, failed to satisfy the requirement of 28 U.S. Code § 455 (b), which requires that investments by federal judges' families discovered in such circumstances be divested. This week's Litigator of the Week — **Mark Fleming** of vice chair of the appellate and Supreme Court litigation practice at **Wilmer Cutler Pickering Hale and Dorr** — effectively argued the case to the Federal Circuit that placing stock in a blind trust doesn't amount to divesting it and that the case should reset to where it was when the judge first discovered his wife's stock holding.



Courtesy photo

**Mark Fleming of Wilmer Cutler Pickering Hale and Dorr.**

**Litigation Daily: Who was your client and what was at stake?**

Mark Fleming: We represent Cisco Systems Inc., a leading U.S. innovator and a longstanding WilmerHale client. Centripetal sued Cisco alleging infringement of 11 patents, though claims of six patents were held unpatentable in inter partes reviews. The case went to trial over Zoom in May and June 2020, in the depths of the COVID-19 lockdown. The district court entered what was reported to be one of the largest patent judgments in history, so our task on appeal was clear.

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

It's a terrific and highly collaborative team. **Tom Sprankling, Heath Brooks, Annaleigh Curtis, Courtney Merrill, Sofie Brooks** and I each took responsibility for drafting different sections of the brief, and **Bill Lee, Tom Saunders** and I reviewed the whole draft several times. Our senior counsel **Judge**

Arthur Gajarsa provided critical advice regarding judicial recusal considerations. Our appellate paralegal Patrick Montgomery is unbelievably talented. We consulted with trial counsel Woody Jameson and Matt Gaudet and their colleagues at Duane Morris, with Dabney Carr at Troutman Pepper, and Josh Rosenkranz and several attorneys from his team at Orrick. And we also worked very closely with the sharp minds of Cisco's in-house team, who had the patience and courage to fight this verdict.

**It's easy to see what's important to Cisco here: A \$2.75-plus billion award of damages and royalties was vacated. But what's important about the guidance the Federal Circuit gave in its decision to judges and parties in other cases?**

The Federal Circuit's opinion provides important guidance about how to handle financial interests that only arise in the middle of a case. As the Court explained, the short answer is that a judge should divest or recuse, and a "blind trust" does not qualify as divestiture.

**The Wall Street Journal's reporting on failures to recuse in cases where federal judges or their family members hold stock in a party came after the underlying events of this case. Still, the Federal Circuit mentioned those developments in its analysis of whether there was "harmless error" here. How did all that affect your case?**

It didn't affect the recusal question, which was driven by the plain language of the judicial disqualification statute, but it was relevant to the remedy. Centripetal argued that vacating the affected rulings would somehow have undermined public confidence in the judiciary. The Federal Circuit explained that, on the contrary, in the circumstances of this case, vacating various decisions was essential to preserve public confidence.

**Everything that happened in the case up until the**

**time Judge Morgan learned of his wife's Cisco stock ownership still stands, correct?**

Correct, the District Court's earlier rulings have not been vacated. Of course, the new district judge can always reconsider any prior rulings, if appropriate.

**How do you work to assure that once the case is back below you don't end up with a similar outcome? You raised a number of substantive challenges to the judgment that the Federal Circuit didn't rule on. What is the game plan for persuading the next district judge that you're right about them?**

According to the Federal Circuit, the remand will be governed by Federal Rule of Civil Procedure 63, which gives the district judge the ability to decide the case on the existing record, and to recall certain witnesses if there is a material dispute of fact or if credibility issues are present. We have every confidence that the new judge assigned to the case will give Cisco's arguments a fair hearing.

**What happens next here? Do you know yet which judge will be hearing the case on remand?**

The Federal Circuit mandate has not issued, so the case isn't back in the district court yet.

**What will you remember most about this matter?**

For me, this appeal defined, and was defined by, the pandemic. I watched the trial from home in the spring of 2020 while my daughters attended online school or watched movies (sometimes crashing my Wifi connection). I took most calls about the case from my front porch. We wrote our opening appeal brief in the summer of 2021, when the vaccines were gradually allowing us to reemerge into the open. We briefed the whole appeal remotely, without a single in-person team meeting. But when it came time for oral argument, I was able to appear in person in the Federal Circuit courthouse, standing at the lectern just a few feet from the bench, with my colleague Sofie Brooks with me at counsel table. It was great to be back.