

**No. 18-1765**

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

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FORUM US, INC., a Delaware corporation,

Plaintiff-Appellee,

v.

FLOW VALVE, LLC, an Oklahoma limited liability company,

Defendant-Appellant.

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On Appeal from the United States District Court  
for the Western District of Oklahoma  
Case No. 17-495-F  
The Honorable Stephen P. Friot

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**ANSWER BRIEF OF APPELLEE FORUM US, INC.**

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July 13, 2018

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**CERTIFICATE OF INTEREST**

Counsel for Appellee Forum US, Inc. states the following:

1. The undersigned attorneys represent Appellee Forum US, Inc., and Forum US, Inc. is the real party in interest.
2. There is no real party in interest represented by the undersigned not named in the caption.
3. Forum US, Inc. is a wholly-owned subsidiary of Forum Energy Technologies Holdings, LLC, which is itself a wholly-owned subsidiary of Forum Energy Technologies, Inc. Forum Energy Technologies, Inc. is a publicly traded company.
4. The names of all law firms and the partners or associates that appeared for the party in the lower court who are not listed on the docket of this case are as follows: Tynia A. Watson, Crowe & Dunlevy, P.C., Braniff Building, 324 N. Robinson Ave., Suite 100, Oklahoma City, Oklahoma 73102.
5. There are no cases 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.

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**STATEMENT OF RELATED CASES**

Appellee is aware of no other appeal in or from the same civil action in the lower court that was previously before this or any other appellate court.

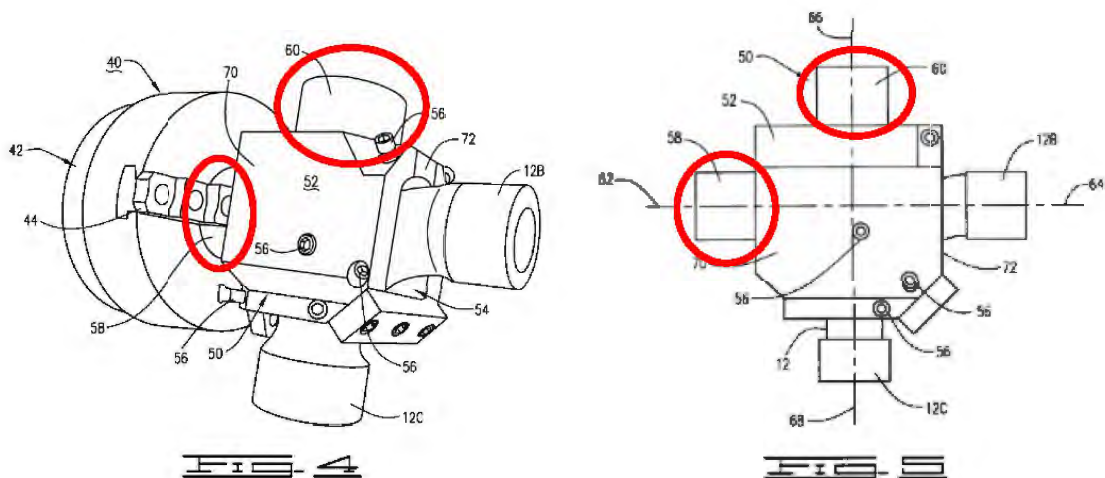
Appellee is aware of no case pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal.

### STATEMENT OF THE ISSUES

Did the trial court properly grant summary judgment invalidating the new claims of the reissue patent, where it was undisputed that the specification did not explicitly and unequivocally describe the invention covered by those new claims?

### STATEMENT OF THE CASE

Appellant Flow Valve's original patent, patent number 8,215,213, issued on July 10, 2012 ("the Original Patent"), based on an application filed on June 5, 2009. Exhibit 1. The patent covers making and using particular types of workpiece supporting assemblies, or "fixtures," to machine the ends of pipe elbows for use in "swivels joints" and other products used by the oil industry. The Original Patent claims all contained limitations requiring "a plurality of arbors," such as 58 and 60 in Figures 4 and 5 of the Original Patent and Reissue Patent pictured below, which are used to attach the fixtures to a lathe so that they can be rotated and the elbows can be machined. Appx17-18.





The specification of both the Original Patent and the Reissue Patent explains that “the multiple arbors of the workpiece supporting assembly provides means for machining the ends of the unfinished elbow member 12 by a single setup and only a change from one arbor to one of the other arbors allows rapid and accurate machining of the workpiece in a machine turning machine.” Appx20 (Col. 3, ll. 42-47). The specification of the Original Patent does not suggest, let alone state in an explicit and unequivocal manner, that the invention described therein can be practiced without a plurality of arbors. Appx147-148, Appx151-157, Appx182-183.

In 2013, Appellant Flow Valve brought suit for infringement of the Original Patent against Appellee in *Flow Valve, LLC v. Forum Energy Technologies, Inc. et al.*, Case No. 5:13-cv-01261-F, before the United States District Court for the Western District of Oklahoma (Friot, J.) (“the First Patent Suit”). Appx102.<sup>1</sup>

While the First Patent Suit was pending, Flow Valve sought to broaden the claims of the Original Patent when it realized that a fixture used by one of Forum’s vendors was not covered by the claims of the Original Patent. Appx137-139. On July 10, 2014, Flow Valve filed for a reissue of its patent, which issued as the Reissue Patent on February 2, 2016. Appx15-21. The Reissue Patent added

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<sup>1</sup> That case resulted in a summary judgment in favor of the defendants on Appellant’s trade secret misappropriation claims and the settlement of the patent infringement claims. Appx37-38. The resolution of that case is not germane to this appeal.

claims 14-20 to the original claims 1-13 from the Original Patent. Appx20-21. Claims 1-13 of the Reissue Patent, Appx20, are virtually identical to Claims 1-13 of the Original Patent. Appx27. Claims 14-20 of the Reissue Patent are new claims, which do not include the “plurality of arbors” limitation contained in Claims 1-13. Claims 14-17 and 20 generally focus on a “workpiece supporting assembly” for machining an elbow with a “body having an internal surface defining a channel” for receiving an elbow and supports (bolts) that are positionable to support the elbow in the channel, in which an elbow can be secured once and both ends of the elbow can be machined without repositioning the elbow. Appx20-21. Claims 18-19 generally cover a method of using such a fixture. Appx21.

Appellee Forum filed suit against Flow Valve on April 28, 2017, Appx30, seeking a declaration of invalidity and non-infringement of the Reissue Patent. Forum’s First Amended Complaint was filed on July 19, 2017. Appx28-34. Flow Valve answered and counterclaimed for infringement of claims 14-20 of the Reissue Patent, Appx70-71.<sup>2</sup> Forum contended, *inter alia*, that claims 14-20 are invalid because they do not comply with the “original patent” rule of 35 U.S.C. § 251. Appx38.

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<sup>2</sup> Claims 1-13 were not asserted by Appellee or challenged by Appellant, and are not at issue in this appeal.

Because the question of whether claims 14-20 are invalid under the “original patent” rule required no additional discovery, Appellee Forum elected to pursue summary judgment early in the litigation. Although the Western District of Oklahoma typically limits parties to a single motion for summary judgment pursuant to LCvR 56.1(a), Forum sought leave to file an early motion for summary judgment without prejudice to filing later motions for summary judgment. Appx79-84. Appellant Flow Valve opposed Forum’s motion for leave, arguing that Forum should not be allowed to file later motions for summary judgment if it filed its early motion on the original patent defense. Appx85-87. The trial court found that the interests of justice would be served by permitting Forum to file its early motion without prejudice to filing later motions, in light of the fact that the motion would present a single question of law (with some factual underpinnings). Appx94-95.

Appellee Forum filed its motion for summary judgment on November 9, 2017, highlighting six material facts about which no genuine dispute existed that made summary judgment on its original patent defense appropriate. Appx101-102. In its response, Flow Valve admitted Appellee’s statements of material facts 1-5 and purported to deny only statement 6, which provided: “The specification of the Original Patent does not indicate in an explicit and unequivocal manner that the invention described therein can be practiced without a plurality of arbors.”

Appx102, Appx164. Appellant did not actually dispute this material fact, but rather argued that the law does not require an “explicit” and “unequivocal” disclosure of a claimed invention for reissue claims to be valid. Appx172. Appellant was wrong on the law, as discussed in Section IIA below.

In its counter-statement of material facts, Appellant offered only two points in support of its position that summary judgment was inappropriate: (1) the level of experience of one of ordinary skill in the art, and (2) its claim that such a person “would understand, from the disclosure of the original patent, that it supports claims to multiple inventions” consisting of “claims with arbors, and without arbors.” Appx164. Although Appellee disputed both of these alleged facts in its reply brief, Appx185-186, Appellee emphasized that whether one of ordinary skill in the art “would understand” that the common specification of the original patent and the reissue patent “supports claims to multiple inventions,” including a fixture without arbors, is insufficient to satisfy the original patent requirement, Appx191-193, as discussed in Section IIB below.

The trial court agreed and granted summary judgment on February 21, 2018. Appx3-14. Reviewing the affidavit of Flow Valve’s expert, Terry Iafrate, the trial court concluded that Flow Valve failed to “contend that the original patent teaches a fixture without arbors in an explicit and unequivocal matter. Rather, Iafrate’s affidavit discusses what a worker of ordinary skill *would* understand, or *would*

know, or *would* appreciate.” Appx8 (emphasis in original). Relying upon this Court’s holding in *Antares Pharma, Inc. v. Medac Pharma Inc.*, 771 F.3d 1354 (Fed. Cir. 2014), the trial court held that “no matter what a person of ordinary skill in the art would recognize, the specification of the original patent must clearly and unequivocally disclose the newly claimed invention in order to satisfy the original patent rule.” Appx12. This was a statement of the *Antares* (and *U.S. Industrial Chemicals, Inc. v. Carbide & Carbon Chemicals Corp.*, 315 U.S. 668 (1942)) rule, *not* as Flow Valve claims throughout its opening brief, a declaration by the trial court that the views of those of ordinary skill in the art could be disregarded by the court in interpreting the specification or the claims. Specifically referencing Mr. Iafrate’s declaration, the Court found that it did “not create a genuine issue of *material* fact . . . that the specification of the original patent does not explicitly and unequivocally indicate that the invention described therein can be practiced without a plurality of arbors.” Appx12 (emphasis in original).

### **SUMMARY OF THE ARGUMENT**

Only by taking a small portion of the trial court’s Order granting summary judgment out of context is Appellant Flow Valve able to accuse the trial judge of “deeming his own assessment of the original patent’s disclosure controlling, ‘no matter what a person of ordinary skill in the art would recognize.’” Appellant’s Br. at 9. The trial court *did not* ignore the view of those of ordinary skill in the art

in concluding that the new claims of the reissue patent are invalid because “the specification of the original patent does not indicate in an explicit and unequivocal manner that the invention described therein can be practiced without a plurality of arbors.” Appx13; *see also* Appx8. Rather, the trial court, taking Flow Valve’s expert’s affidavit as true, recognized that the affidavit “does not contend that the original patent teaches a fixture without arbors in an explicit and unequivocal manner,” but rather “discusses what a worker of ordinary skill *would* understand, or *would* know, or *would* appreciate.” Appx8.

This Court’s decision in *Antares* makes clear that mere *suggestions* about a broader invention are insufficient to satisfy the “original patent” requirement. No matter what a person of ordinary skill in the art would *recognize*, the specification of the original patent must clearly and unequivocally disclose the newly claimed invention in order to satisfy the original patent rule. Flow Valve and its expert missed the mark. In their narrow effort to raise a genuine fact issue, they focused on what an ordinary worker might have understood from the specification of the Original Patent, rather than attempting to demonstrate that the Original Patent clearly and unequivocally disclosed an embodiment claimed for the first time in the Reissue Patent.

Reissue Claims 14-20 are invalid because the specification of the Original Patent and the Reissue Patent describe only a fixture with a plurality of arbors.

Because a fixture *without* a plurality of arbors was not clearly and unequivocally disclosed in the specification, the Reissue Claims are invalid for failure to comply with the “original patent” requirement of 35 U.S.C. §251.

## **ARGUMENT AND AUTHORITIES**

### **I. Standard of Review**

Appellee agrees with Appellant’s statement regarding the standard of review, with the following additions specific to 35 U.S.C. § 251 and the original patent defense:

“Whether the statutory requirements of 35 U.S.C. § 251 have been met is a question of law.” *Hester Industries, Inc. v. Stein Inc.*, 142 F.3d 1472, 1479 (Fed. Cir. 1998); *see also AIA Engineering Ltd. v. Magotteaux Int’l S/A*, 657 F.3d 1264, 1271 (Fed. Cir. 2011) (“Determining whether the claims of a reissue patent violate 35 U.S.C. § 251 is a question of law which we review *de novo*.”). The legal conclusion regarding section 251 compliance can involve underlying questions of fact. *Hester Industries*, 142 F.3d at 1479. However, it is solely the court’s function, and not a proponent’s expert witness, to determine whether a reissue patent impermissibly broadens the original patent’s specifications:

Although it is the duty of a court to determine for itself, by examination of the original and the reissue, whether they are for the same invention, it is permissible, and often necessary, to receive expert evidence *to ascertain the meaning of a technical or scientific term or term of art* so that the court may be aided in understanding not what the instruments mean but what they actually say. It is

inadmissible to enlarge the scope of the original patent by recourse to expert testimony to the effect that a process described and claimed in the reissue, different from that described and claimed in the original patent, is, because equally efficacious, in substance that claimed originally.

*U.S. Industrial Chemicals, Inc. v. Carbide & Carbon Chemicals Corp.*, 315 U.S. 668, 678 (1942) (emphasis added).

“Likewise, comparing the scope of the claims of an original patent and a reissue patent is a legal question subject to *de novo* review.” *AIA Eng'g*, 657 F.3d at 1271.

## **II. The Trial Court Properly Granted Summary Judgment on Appellant’s Original Patent Defense As There is No Genuine Dispute that Fixtures Without Arbors Were Not Explicitly and Unequivocally Disclosed in the Original Patent**

### **A. The “Original Patent” Doctrine**

35 U.S.C. § 251 provides in relevant part that “whenever any patent is, through error, deemed wholly or partly inoperative or invalid . . . by reason of the patentee claiming more or less than he had a right to claim in the patent, the Director shall . . . *reissue the patent for the invention disclosed in the original patent . . . for the unexpired term of the original patent.* No new matter shall be introduced into the application for reissue.” (emphasis added).

The original patent defense is a long-existing doctrine that was recently reaffirmed by this Court in *Antares Pharma, Inc. v. Medac Pharma Inc.*, 771 F.3d 1354 (Fed. Cir. 2014).



As recognized by *Antares*, 771 F.3d at 1358-60, the requirement that reissue claims be for the same invention disclosed in the original patent has been recognized by the Supreme Court for over 160 years. *See, e.g., Battin v. Taggart*, 58 U.S. 74, 85 (1854) (noting that reissued patents must be “for the same invention as the original patent”); *Klein v. Russell*, 86 U.S. 433, 466 (1873) (same). In *Russell v. Dodge*, 93 U.S. 460 (1876), for instance, the Supreme Court found that the reissue claims were invalid where the original specification described *heated* fat liquor as a desirable part of the described leather treatment process, and the original claims required the use of heated fat liquor, while the reissue claims covered the use of fat liquor in the treatment of leather without regard to whether it was heated. *Id.* at 463-64. “The evident object of the patentee in seeking a reissue was not to correct any defects in specification or claim, but to change both, and thus obtain, in fact, a patent for a different invention. This result the law, as we have seen, does not permit.” *Id.* at 464.

In *Gill v. Wells*, 89 U.S. 1 (1874) the Supreme Court invalidated reissue claims for a machine for making hat bodies when those claims omitted a requirement of a chamber or tunnel for using a current of air to convey fur to a rotating cone that would become part of a hat. “Nothing was said in the original specification to lead one to suppose that any result whatever could be accomplished without the . . . integral structures called the ‘chamber’ or ‘tunnel.’”

*Id.* at 5. The *Gill* court noted that a party *may* obtain a *reissue* patent containing claims for a combination of elements disclosed in an original patent specification but not claimed in the original patent. *Id.* at 24.

Very different rules, however, apply in a case where the only invention described in the original patent is the one which includes all the ingredients of the machine, provided there is no suggestion, indication, or intimation that any other invention of any kind has been made. Such a patentee as the one last mentioned may subsequently discover that he can accomplish a new and useful result by a combination embracing less than the whole number of the ingredients included in the prior patented combination, but he cannot secure the right and privilege of a patentee in the combination of the smaller number of the ingredients by a surrender of his first patent and a reissue of the same which shall include the second combination as well as the first, because the reissued patent in that event would not be for the same invention as the surrendered original.

*Id.* at 24-25. In *Corbin Cabinet Lock Co. v. Eagle Lock Co.*, 150 U.S. 38 (1893), the Supreme Court made it clear that even a specification's suggestion or indication of a broader invention claimed by reissue claims was not sufficient to satisfy the original patent rule. "It is settled by the authorities that, to warrant new and broader claims in a reissue, such claims must not be merely suggested or indicated in the original specification, drawings, or models, but it must further appear from the original patent that they constitute parts or portions of the invention, which were intended or sought to be covered by such original patent."

*Id.* at 42-43.

In *Antares*, this Court cited *U.S. Industrial Chemicals, Inc. v. Carbide & Carbon Chemicals Corp.*, 315 U.S. 668 (1942) as containing “[t]he Supreme Court’s definitive explanation of the original patent requirement.” *See Antares*, 771 F.3d at 1359. In *Industrial Chemicals*, the patent related to a process for the production of a chemical compound. The original claims included numerous process steps and required the presence of water as a catalyst. The patentee subsequently obtained a reissue patent covering similar process steps but omitting the water catalyst requirement, claiming that it was included in error. The Supreme Court found that the reissue patent was “not for the same invention described and claimed and intended to be secured by the original patent and is, therefore, void.” 315 U.S. at 681.

In reaching its decision, the Supreme Court explained that reissue claims would satisfy the original patent requirement “if the broader claims in the reissue are not merely suggested or indicated in the original specification but constitute parts or portions of the invention which were intended or sought to be covered or secured by the original patent.” *Id.* at 676.

If there be a failure of disclosure in the original patent of matter claimed in the original, it will not aid the patentee that the new matter covered by the reissue was within his knowledge when he applied for his original patent. And it is not enough that an invention might have been claimed in the original patent because it was suggested or indicated in the specification. *It must appear from the face of the instrument that what is covered by the reissue was intended to have been covered and secured by the original.*

*Id.* (emphasis added). The step omitted from the reissue claims in *Industrial Chemicals* “was not designated as optional or desirable but described and claimed [in the original patent] as an integral part of the whole operation.” *Id.* at 677. The specification hinted at the fact that water might be optional, *see, e.g., id.* at 672 (“Water can be admitted to the reaction vessel . . .”), and the lower courts had been persuaded by expert testimony that the introduction of water was immaterial. *Id.* at 677. But this was not enough to persuade the Supreme Court, where a clear teaching that water was not necessary was lacking.

The inquiry at once arises, if this were so, why did he not say so. If he had discovered a process, which the claims of the reissue are certainly broad enough to cover – that of mixing dry oxygen and ethylene in the presence of a catalyst at the prescribed temperature to produce ethylene oxide—it is not understood why, throughout his specifications and claims, he spoke of exposing ethylene to the simultaneous action of oxygen and water or steam.

We think the court below fell into error in adopting the scientific conclusion of expert witnesses that the result would be the same whether water were introduced into the reaction chamber or not as proof that [plaintiff’s] invention was not what he stated it to be in his original patent but rather the invention of a process of bringing ethylene and oxygen into contact in the presence of a catalyst.

*Id.* at 677-78. The Supreme Court continued: “This court has uniformly held that the omissions from a reissue patent of one of the steps or elements prescribed in the original, thus broadening the claims to cover a new and different combination, renders the reissue void, even though the result attained is the same as that brought

about by following the process claimed in the original patent.” *Id.* at 678.<sup>3</sup> The Court rejected the patentee’s argument that water was not described or claimed as an “essential feature” as excusing its inclusion in the reissue claims. *Id.* at 680.

It was with this lengthy background of Supreme Court cases, that *Antares* was decided. In *Antares*, Antares asserted several claims from a reissue patent against the defendant, Medac. The original claims of the patent at issue covered a “Needle Assisted Jet Injector” system for injecting medicine in which a needle punctures the skin before forcefully expelling the medicine (unlike other jet injectors in which the medicine itself ruptures the skin). During the prosecution of the original claims, the applicants repeatedly focused on the “jet injector” in their claims 1-22 (the original claims). Subsequently, the plaintiff obtained a reissue patent in which claims 23-37 were not limited to jet-injection devices and instead focused on various safety features for any injection devices. 771 F.3d at 1356.

Antares brought suit against Medac for infringement of several of the reissue claims covering the safety features. Antares sought a preliminary injunction, which the district court denied, finding instead that Antares likely violated the “recapture rule,” by adding claim scope in the reissue claims that it had surrendered during patent prosecution. Antares appealed. The Federal Circuit did

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<sup>3</sup> *Citing Russell v. Dodge*, 93 U.S. 460, 464 (1876) and *Gill v. Wells*, 89 U.S. 1, 24-25 (1874) (discussed *supra*).

not reach the recapture rule issue because it found that the asserted reissue claims violated the original patent requirement of 35 U.S.C. § 251. 771 F.3d at 1357-58.

In beginning its discussion of the original patent requirement, the Federal Circuit noted that 35 U.S.C. § 120 allows patent applicants to file continuing applications covering the same invention covered by an original application, and divisional applications covering distinct inventions that are disclosed in an original application but not specifically claimed, provided that either type of application is filed before the original parent application issues as a patent. *Id.* at 1358. Once the parent patent has issued, if there are no pending continuation or divisional applications, the applicant can only seek to add claims by filing a reissue application. “The delay in seeking to broaden the claims is not without cost. By waiting until after the patent is issued, the applicant becomes subject to two additional requirements . . . the recapture rule . . . and the statutory original patent requirement of 35 U.S.C. § 251.” *Id.* at 1358.

Applying the *Industrial Chemicals* requirement that “the specification must clearly and unequivocally disclose the newly claimed invention as a separate invention,” the *Antares* court found that the reissue claims related to the safety features for injection devices were invalid. 771 F.3d at 1362 (citing *Industrial Chemicals*, 315 U.S. at 676). The original claims required the “jet injection” limitation and the asserted reissue claims focused on safety features and did not

contain the “jet injection” limitation. The Federal Circuit found that the original specification did not adequately disclose the claimed safety features to meet the *Industrial Chemicals* standard. “Although safety features were mentioned in the specification, they were never described separately from the jet injector . . . .” *Id.* at 1363. For example, a push button safety feature was mentioned in only one passage in the specification. *Id.* The passing references to safety features were mere suggestions or indications “of alternative inventions . . . not sufficient to satisfy the original patent requirement of § 251. . . . Nowhere does the specification disclose, in an explicit and unequivocal manner, the particular combinations of safety features claimed on reissue, separate from the jet injection invention.” *Id.* Accordingly, the reissue claims were invalid for failure to satisfy the original patent requirement of 35 U.S.C. § 251. *Id.*<sup>4</sup>

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<sup>4</sup> See also *Riley v. Broadway-Hale Stores*, 217 F.2d 530 (9<sup>th</sup> Cir. 1954), cited with approval in *Antares*, 771 F.3d at 1354. In *Riley*, the original claims related to foam rubber shoulder pads with various recesses described as “voids.” The reissue claims omitted the “voids” limitation. The patentee claimed that the omission was supported by a single reference in the specification. *Id.* at 532 (“The shape thereof can, of course, vary, depending upon the current style, without departing from the idea of the light-weight, porous material having relatively large voids as well as small ones, or may be made entirely of porous rubber.”) However, the rest of the specification related solely to shoulder pads with voids, “and they did not provide as an alternative for shoulder pads without voids.” *Id.* Following the *Industrial Chemicals* holding, the 9<sup>th</sup> Circuit found that the reissue claims without the void limitation were invalid because “it is not enough that an invention might have been claimed in the original patent because it was suggested or indicated in the specification.” *Id.* at 532 (quoting *Industrial Chemicals*, 315 U.S. at 675-76).

In *Ex Parte Briscoe*, Appeal 2011-013538, 2015 WL 3430398 (Patent Tr. & App. Bd. May 27, 2015) (Appx160), the Patent Trial and Appeal Board relied upon *Antares* in its rejection of a reissue claim for violating the “original patent” requirement of 35 U.S.C. § 251. The original claims had covered only a micro-gas chromatograph device for analyzing an analyte *gas*, while the proposed reissue claims covered a micro-*liquid* chromatograph device for analyzing analyte *liquid*. The Title of Invention, the Abstract, and the Summary of the Invention of the original patent “clearly allow persons of ordinary skill in the art to recognize that the [reissue applicant’s] invention as disclosed in the original patent, was limited to a micro-gas chromatograph device for analyzing an analyte gas.” *Id.* at \*4. The PTAB rejected the applicant’s argument that the specifically described embodiment was merely a preferred embodiment. *Id.* The PTAB also found that the applicant’s declaration arguing that “persons skilled in the art would recognize that the embodiments described in the original patent ‘could work equally well with liquids as well as gases’ and ‘would be able to make and use it’ misapprehended the standard for compliance with the written description requirement (and analogously the original patent requirement).” *Id.* (citing *Antares*, 771 F.3d at 1361; *Lockwood v. Am. Airlines, Inc.*, 107 F.3d 1565, 1572 (Fed. Cir. 1997) (“[D]escription which renders obvious the invention . . . is not



sufficient.”). Thus, the PTAB affirmed the rejection of the reissue claim under the “original patent” clause of § 251.

**B. Appellant Flow Valve’s Reissue Claims Violate the Original Patent Doctrine**

Because it is undisputed that the invention covered by the new claims of the Reissue Patent was not explicitly and unequivocally disclosed in the specification of the original patent, those claims are invalid based on the clear and convincing evidence.

**1. The Flow Valve Patent Only Describes a Fixture With a Plurality of Arbors**

A plain reading of the specification of Flow Valve’s Original Patent (reproduced in the Reissue Patent, to which references below will be made) makes it clear that the “original patent” was directed to a fixture with a plurality of arbors and to no other embodiments. Under the “Summary of Invention” section for Flow Valve’s patent, the third sentence states “A *plurality of arbors* extend from the body member, each arbor having an axis coincident with a datum axis of one of the extending workpiece portions.” Appx19 (Col. 1, ll. 53-56 (emphasis added)). The summary further states: “The nature, principle, and utility of the invention will be made apparent from the following detailed description when read in conjunction with the accompanying drawings and appended claims.” *Id.* (Col. 1, ll. 59-62). With regard to the drawings, the only drawings that show fixtures, Figures 4 and 5,

both show fixtures with two arbors. Appx17-18. The description of Figure 4 specifically says that “Fig. 4 is a perspective view of a workpiece machining implement supporting a workpiece supporting assembly *constructed in accordance with the present invention.*” Appx19 (Col. 2, ll. 10-12 (emphasis added)). The sole embodiment described by the patent has two arbors. *See, e.g.*, Appx20 (Col. 3, ll. 11-28, ll. 42-47) (“Thus, the multiple arbors of the workpiece supporting assembly provides means for machining the ends of the unfinished elbow member 12 by a single setup and only a change from one arbor to one of the other arbors allows rapid and accurate machining of the workpiece in a machine turning machine.”). A fixture with two arbors (or at least a fixture with a plurality of arbors) is the only embodiment disclosed in Flow Valve’s patent. There are no drawings or written description in the Original Patent that disclose a fixture that does not include two arbors.

Appellant cannot point to language in the Original Patent that describes a fixture without arbors. The provisions in the Original Patent cited by Appellant are either unrelated to the omission of arbors from the fixture, or non-specific boilerplate patent language indicating that the patent is not intended to be limited to the preferred embodiment described in the specification. Like the reissue claims at issue in *Industrial Chemicals* and the other Supreme Court cases discussed above, Flow Valve’s Reissue Claims omitted a limitation that was taught to be a

required element of the invention described in the specification of the Original Patent.<sup>5</sup> There is no explicit or unequivocal statement that the invention could be used without arbors. Claims 14-20 are invalid pursuant to the original patent clause of § 251.

**2. Appellant’s Attempts to Claim a Subcombination Do Not Excuse It From Complying With the Original Patent Rule**

Flow Valve attempts to defend the differences between the new reissue claims and the explicit disclosure of the specification as merely part of the “long-established” practice of subcombination claiming. Appellant’s Opening Br. at 11-13. But while what was apparent to one of ordinary skill in the art but not

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<sup>5</sup> Appellant argues that its reissue claims could omit the “plurality of arbors” limitation because “no passage in the original patent identifies arbors as critical to the inventions it discloses,” comparing its proposed rule to *Johnson Worldwide Associates, Inc. v. Zebco Corp.*, 175 F.3d 985 (Fed. Cir. 1999). See Appellant’s Br. at 17. However, *Johnson Worldwide* did not concern either a reissue patent or the original patent rule, but only the sufficiency of an original patent specification to support claims in an original patent. *Johnson* upheld a broad meaning for disputed claim terms, distinguishing case law that denied such a broad construction on the ground that a patent disclosure had made clear that a particular understanding of a claim term was an essential element of the invention. *Id.* at 993. Neither *Johnson* nor the rule it distinguishes applies here, in determining the validity of a reissue patent, which is governed by the rule of *Antares* and *Industrial Chemicals*, both of which require that a patentee explicitly and unequivocally describe in the original specification the invention covered by reissue claims. *Industrial Chemicals* rejected the notion that the validity of reissue claims turns on the question of whether an omitted element was identified as “essential” in the original patent. 315 U.S. at 680. No invention without arbors is explicitly or unequivocally described in the specification at issue in this case, and the sufficiency of the Original Patent specification to support the Original Patent claims 1-13, is not in controversy.

explicitly stated in a specification *might* be sufficient to support claims in a continuation application, such is not the case with reissue claims.

Typically, if an applicant files a patent application disclosing and claiming one invention and later realizes that the specification discloses a second or broader invention, he may seek coverage of those additional claims pursuant to 35 U.S.C. § 120, which allows for continuing applications to claim the priority date of earlier applications. . . . When an applicant seeks to add new claims pursuant to a continuation or divisional application, the statute explicitly states that the original specification provides adequate support for the new claims if the original specification satisfies the § 112(a) written description requirement for the new claims. 35 U.S.C. § 120.

The filing of continuations and divisionals is limited by the co-pendency requirement of § 120: a continuing application cannot be filed after the original parent application issues. In such circumstances, an applicant can only seek to add claims by filing a reissue application. 35 U.S.C. § 251. The delay in seeking to broaden the claims is not without cost. By waiting until after the patent is issued, the applicant becomes subject to two additional requirements relevant here: first, the claims must not violate the recapture rule; second, the claims must satisfy the statutory original patent requirement of 35 U.S.C. § 251.

*Antares*, 771 F.3d at 1358.

Appellant conceded that a fixture without arbors is a distinct invention from a fixture with arbors. *See, e.g.*, Appx171 (“Mr. Iafrate’s evidence shows that an artisan would recognize at least two inventions within the original patent’s disclosure: one with arbors, and one without them.”) The Reissue Patent application of 35 U.S.C. § 251 was filed after the original patent issued, so the statutory original patent requirement applies.

**3. Appellant’s Expert’s Declaration Does Not Contend That Fixtures Without Arbors Are Disclosed in An Explicit and Unequivocal Manner**

In opposing summary judgment, Appellant argued that 35 U.S.C. § 251 did not require that the distinct invention claimed in the Reissue Patent be disclosed in the original patent in “explicit and unequivocal” terms to meet the original patent requirement. Appx172. But that is the exact language used by the Federal Circuit in *Antares*, 771 F.3d at 1363 (“Nowhere does the specification disclose, in an explicit and unequivocal manner, the particular combinations of safety features claimed on reissue, separate from the [previously claimed invention]. This does not meet the original patent requirement under § 251.”). The *Antares* Court also relied upon the Supreme Court’s opinion in *Industrial Chemicals* for its holding that “‘it is not enough that an invention might have been claimed in the original patent because it was suggested or indicated in the specification.’ Rather, the *specification must clearly and unequivocally disclose the newly claimed invention as a separate invention.*” *Antares*, 771 F.3d at 1362 (quoting *Industrial Chemicals*, 315 U.S. at 676) (emphasis added).

Having abandoned arguing against this Court’s and Supreme Court precedent, Flow Valve now argues that its expert did effectively assert that fixtures without a plurality of arbors were explicitly and unequivocally disclosed, although he did not use those specific terms. Appellant’s Opening Br. at 18-19. Flow Valve

further accuses the trial court of “deeming his own assessment of the original patent’s disclosure controlling,” *id.* at 9, and of “giving preclusive effect to his own beliefs about the patent, ‘no matter what a person of ordinary skill in the art would recognize.’” *Id.* at 19. Flow Valve’s characterization of the trial court’s opinion is wrong, and a simple review of Mr. Iafrate’s Declaration, which was carefully considered and discussed by the trial court, shows the lack of merit to Appellant’s claims about the trial court.

Despite the length of Mr. Iafrate’s Declaration, Appx178-84, the purportedly material parts of the Declaration are limited to Paragraphs 16-26. Appx181-182. Nowhere in those paragraphs does Mr. Iafrate contend or imply, substantively or otherwise, that the patent teaches a fixture without arbors in “an explicit and unequivocal manner.” *Antares*, 771 F.3d at 1363. Rather, he argues as follows:

- “I am satisfied that a worker of ordinary skill *would understand* that not every fixture disclosed in the patent requires ‘a plurality of arbors.’” Appx181 ¶ 16 (emphasis added).
- “A worker of ordinary skill *would appreciate* from the patent, including the passage cited above, that arbors are an optional feature of the fixtures. Such a worker *would recognize that other configurations of known components could serve the same purpose that the patent identifies for arbors. . . .*” Appx182 ¶ 19 (emphasis added); see also Appx183 ¶25.
- “The patent tells a worker of ordinary skill that such a substitution is within the scope of the invention: ‘while the presently preferred embodiments of the invention have been described in varying detail for purposes of the disclosure, *it will be understood that numerous changes may be made which will readily suggest themselves to those skilled in the art and which are encompassed within the spirit of the invention disclosed* and as defined in

the above text and in the accompanying drawings.’ See [Appx20] col. 3 53-60.” *Id.* ¶ 20 (emphasis added).

- “The patent contains sufficient information to permit a worker of ordinary skill to make and use a fixture without arbors. To make such a fixture, arbors would be omitted from the structures shown and described in the patent.” Appx183 ¶26.

Even now Appellant does not and cannot claim that the patent specification itself disclosed fixtures without arbors or teaches other configurations. For example, Appellant argues that “[g]iven the purpose for arbors revealed by the patent’s text, Mr. Iafrate believed that a worker of ordinary skill would have recognized that arbors were not an essential component. Such an artisan would have known that other configurations of known components could have achieved the same purpose as arbors.” Appellant’s Br. at 7.<sup>6</sup> Appellant argues that “[n]o passage in the patent identifies arbors as essential or critical to the disclosed invention.” Appellant’s Br. at 4. But *Industrial Chemicals* explicitly rejected the patentee’s argument that reissue claims could omit components identified in the original patent and claims on the ground that they were not identified therein as “essential.” 315 U.S. at 680.

Although Appellant argued that Mr. Iafrate “cited one such arborless configuration as an example,” *id.* (citing Appx182 ¶ 19), the example he gives, one

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<sup>6</sup> See also Appellant’s Br. at 16 (“Mr. Iafrate believed that a worker of ordinary skill would have recognized that arbors were not an essential component of this invention,” and that “[s]uch an artisan would have known that other configurations of known components could achieve the same purpose that the patent identified for arbors.”)

with “pins formed on the lathe and buttons (holes) formed on the fixture,” is not taught in the patent, but is rather a possible alternative configuration that Mr. Iafrate claims a worker of ordinary skill “would recognize . . . could serve the same purpose.” Appx182 ¶ 19. These alternatives - the use of pins and holes in place of arbors - are exactly the kind of technical details that *could have been* included in the specification of the original patent, but cannot be added through litigation-driven hindsight in the claims of a reissue patent. To permit the introduction of new claim limitations in a reissue patent that are not explicitly and unequivocally disclosed in the specification of the original patent would entirely defeat the public notice function of the patent system, which is why *Antares* and *Industrial Chemicals* forbid such broadening when it is not supported by an explicit disclosure.

Nowhere does Mr. Iafrate claim that there is any explicit or unequivocal teaching regarding a fixture without arbors. He merely claims that those of ordinary skill would “understand” or “recognize” that a fixture without arbors could perform the same functions. This type of attempt to expand the meaning of the patent disclosure through expert disclosure was rejected by the *Industrial Chemicals* Court.

Although it is the duty of a court to determine for itself, by examination of the original and the reissue, whether they are for the same invention, it is permissible, and often necessary, to receive expert evidence *to ascertain the meaning of a technical or scientific term or*



*term of art so that the court may be aided in understanding **not what the instruments mean but what they actually say**. It is inadmissible to enlarge the scope of the original patent by recourse to expert testimony to the effect that a process described and claimed in the reissue, different from that described and claimed in the original patent, is, because equally efficacious, in substance that claimed originally. If such testimony could tip the scales on the issue of the validity of a reissue, it would always be possible to substitute any new combination of steps or elements or devices for the one originally described and claimed by proving that the omission of any one or more steps would not alter the result.*

*Industrial Chemicals*, 315 U.S. at 678 (emphasis added). A declaration like Mr. Iafrate's was found to be insufficient to prove compliance with the "original patent" requirement by the PTAB in *Ex Parte Briscoe*, 2015 WL 3430398 (Patent Tr. & App. Bd. May 27, 2015):

The statements by [Applicant's declarant] that persons skilled in the art would recognize that the embodiments described in the original patent "could work equally well with liquids as well as gases" and "would be able to make and use it" (¶¶ 2, 11) demonstrate that he misapprehended the standard for compliance with the written description requirement (and analogously the original patent requirement). *Antares*, 771 F.3d at 1362 ("[F]or § 251, 'it is not enough that an invention might have been claimed in the original patent because it was suggested or indicated in the specification.' . . . Rather, the specification must clearly and unequivocally disclose the newly claimed invention as a separate invention.") (internal citation omitted); *Lockwood v. Am. Airlines, Inc.*, 107 F.3d 1565, 1572 (Fed. Cir. 1997) ("[D]escription which renders obvious the invention ... is not sufficient.").

2015 WL 3430398 at \*4. Likewise, in this case, Appellant's and Mr. Iafrate's arguments that those of ordinary skill in the art would recognize that fixtures could be made without arbors or would be able to design such a fixture do not satisfy the

original patent requirement. Without an explicit teaching that fixtures disclosed in the specification could be used without arbors, the “original patent” requirement is not satisfied.

The trial court correctly found that Mr. Iafrate’s affidavit “does not contend that the original patent teaches a fixture without arbors in an explicit and unequivocal matter. Rather, Iafrate’s affidavit discusses what a worker of ordinary skill *would* understand, or *would* know, or *would* appreciate.” Appx8 (emphasis in original). The Court found that Mr. Iafrate’s declaration failed to raise any material issues of fact. *See* Appx12. The trial court *did not*, as Appellant claims, simply rely upon its own beliefs “no matter what a person of ordinary skill in the art would recognize.” Appellant’s Opening Br. at 19. The trial court stated in full: “Thus, according to the Federal Circuit’s understanding of *Industrial Chemicals* as set out in *Antares*, no matter what a person of ordinary skill in the art would recognize, the specification of the original patent must clearly and unequivocally disclose the newly claimed invention in order to satisfy the original patent rule.” Appx12. This was an accurate statement of the rule articulated in *Antares*; it was not a conclusion by the trial court that the opinions of experts regarding what is explicitly and unequivocally disclosed in a patent should be disregarded, but rather an explanation that an expert being able to envision alternative inventions from a patent’s disclosure was not sufficient to support reissue patent claims.

**4. *Antares* Is Consistent With, and Explicitly Considered, *Amos* and *Revolution Eyewear***

Appellant claims this Court's pre-*Antares* decisions in *Amos* and *Revolution Eyewear* diminish the strength of the *Antares* holding. They do not. *In re Amos*, 953 F.2d 613 (Fed. Cir. 1991), was specifically distinguished in *Antares*. In *Amos*, in his application for a reissue patent, the applicant sought to broaden his claims on an invention relating to the use of rollers to hold down work-pieces on a moving table. The specification expressly disclosed that rollers could be "raised either mechanically by the roller cams or electronically by the computer controlling the router." *Amos*, 953 F.2d at 614. The original claims only covered the manual raising. On reissue, the applicant sought to add computer-controlled raising of the rollers. *Id.* The Board denied the reissue because there was no objective "intent to claim" the computer-controlled embodiment as his invention in the original application. *Id.* at 615. This court reversed the Board because the exact embodiment claimed on reissue was expressly disclosed in the specification. *Id.* at 617–19. The *Antares* Court, considering *Amos*, found that "such an express disclosure is exactly what was missing" in the specification at issue in *Antares*. 771 F.3d at 1363. Similarly, an express disclosure of a fixture without a plurality of arbors is lacking in this case.

*Revolution Eyewear, Inc. v. Aspex Eyewear, Inc.*, 563 F.3d 1358 (Fed. Cir. 2009), rejected an original patent defense in a single paragraph, finding that the

original patent requirement was satisfied “[b]ecause we have held that the written description is satisfied.” *Id.* at 1367. Appellant relies on that statement to argue that there is a “legal rule” that the original patent requirement is satisfied as long as the written description requirement is satisfied. Appellants’ Br. at 21. But as observed by the *Antares* Court, “[t]hat statement cannot be taken to establish as precedent that the standards are the same, but merely reflects the way the parties presented the issue, neither of whom made any reference to *Industrial Chemicals* or argued for a standard different than § 112.” *Antares*, 771 F.3d at 1362 n.8.<sup>7</sup> The trial court did not, as Appellant claims, Appellant’s Opening Br. at 21, perceive *Antares* as altering any holdings of *Amos* or *Revolution*. To the contrary, the district court recognized that the *Antares* court distinguished both *Amos* and *Revolution* – *Amos* on the ground that the original patent contained the explicit and unambiguous specification disclosure that a reissue patent requires, and *Revolution* on the ground that the question of the applicable standard was not even in controversy. *See* Appx12 (citing *Antares*, 771 F.3d at 1362 n.8).

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<sup>7</sup> *See also Amos*, 953 F.2d at 618 (“[T]he issue of whether the tests, for written description and enablement under § 112 ¶ 1 and for “same invention” under § 251, are in every case exactly co-extensive, neither briefed nor argued in this case, is not properly before us on the instant facts . . . .”)

**5. Summary Judgment on an Original Patent Defense Is Appropriate Where There Are No Disputed Issues of *Material* Fact**

Appellant also argues that a ruling on an original patent defense on summary judgment is generally inappropriate. Appellant's Opening Brief at 19-22. However, because the application of the original patent rule is a question of law and there are no disputed issues of *material* fact, as the trial court found, Appx12, summary judgment was entirely appropriate.

The *Antares* case came from an appeal by a patent plaintiff of a denial of a preliminary injunction. 771 F.3d at 1357. The district court had denied the preliminary injunction on other grounds and did not reach the issue of whether the "original patent" requirement was satisfied. However, the Federal Circuit invalidated the patent on appeal based on the original patent rule because "whether the claims at issue satisf[ied] the original patent requirement of § 251 [did] not depend on any not-yet-resolved factual issues." *Antares*, 771 F.3d at 1363 n. 9. Similarly, in this case, there are not any genuinely disputed issues of material fact that make summary judgment improper.

As held by the Supreme Court in *Industrial Chemicals*, although expert testimony may be appropriate to aid the court's understanding of the meaning of technical or scientific terms or terms of art in an instrument, 35 U.S. at 678, the expert may not usurp the court's function, and "[i]t is the duty of a court to

determine for itself, by examination of the original and the reissue, whether they are for the same invention.” *Id.* Appellant has conceded that they are not. *See, e.g.,* Appx171 (“Mr. Iafrate’s evidence shows that an artisan would recognize *at least two inventions* within the original patent’s disclosure: *one with arbors, and one without them.*”)(emphasis added). At best, Mr. Iafrate’s declaration can be taken as an argument about what the specification of the Original Patent meant to disclose, rather than what it actually said about what the invention or inventions were (let alone said explicitly and unambiguously). This is insufficient according to *Industrial Chemicals*. The Original Patent described only a fixture with a plurality of arbors, and thus reissue claims 14-20 are invalid.

**6. Appellant’s Patent Prosecution Counsel Also Confirmed That There Is No Explicit Disclosure of a Fixture with a Plurality of Arbors**

“On judicial review, the correctness of the decision appealed from can be defended by the appellee on any ground that is supported by the record, whether or not the appellant raised the argument.” *Rexnord Indus., LLC v. Kappos*, 705 F.3d 1347, 1356 (Fed. Cir. 2013) (citing and quoting additional authorities). Although not considered by the trial court in finding that the reissue claims did not comply with the original patent rule, Appx7 n.3, the testimony of Appellant’s counsel who prosecuted the claims of the Reissue Patent (and was litigation counsel in the First Patent Suit) also supports summary judgment. As Flow Valve’s counsel admitted,

using the invention without arbors was, at most, “merely suggested or indicated in the original specification,” which is insufficient to support broadened reissue claims. *Industrial Chemicals*, 315 U.S. at 676.

Appellant’s counsel, Mick McCarthy was not involved with the prosecution of the Original Patent claims, Appx134, ll. 22-24, but was intimately involved with the prosecution of the Reissue Patent claims, signing the office action response filed by Flow Valve during the Reissue Patent prosecution and drafting the reissue claims along with his father, Bill McCarthy. *See, e.g.*, Appx142-144. Mick McCarthy admitted that there was no explicit disclosure of a fixture without two arbors in the patent specification of the Original Patent:

Q. Is there any express indication in here [Exhibit 1, the Original Patent] that this invention can be performed without using a fixture with two arbors?

A. There’s nothing expressed, no.

Q. . . . [A]ny indication in the patent that you don’t need two arbors for this invention, you would say is implied?

A. Implicitly, yes.

Appx148.

Q. Is there anything that explicitly says in here it can be used without a plurality of arbors?

A. It does not expressly say this invention can be used without arbors, no.

Appx152.

The original patent requirement is only satisfied “if the broader claims in the reissue are not merely suggested or indicated in the original specification.” *Industrial Chemicals*, 315 U.S. at 676. Flow Valve does not meet that standard by its patent attorney’s own admission.

Mr. McCarthy took the position that it would have been obvious that Flow Valve’s invention could be used without a plurality of arbors.

A. I believe . . . that this disclosure in its entirety, as soon as the skilled artisan sees it, would say, wow, that’s a cool solution, that’s a cool way to do things in a lathe. If I want to do it in a vertical mill anyway, I certainly wouldn’t need the arbors. But if I could clamp the elbow in this fixture . . . and keep it clamped so that I can machine both ends with the same setup, he would do so. *He would . . . use it in a way that’s not expressly disclosed in the illustrative embodiments of this . . . patent.*

*Q. It would imply to him that he could use this invention without the two arbors?*

*A. Yes.*

*Id.* at Appx156-157 (emphasis added). This acknowledged dependence on alleged obviousness that the fixture could be modified to make a fixture without arbors not claimed in the Original Patent again shows that appellant does not satisfy the original patent standard. *Antares*, 771 F.3d at 1363 (rejecting reissue claims covering claimed invention not disclosed in the specification in “an explicit and unequivocal manner”); *see also Lockwood v. Am. Airlines, Inc.*, 107 F.3d 1565, 1572 (Fed. Cir. 1997) (“[D]escription which renders obvious the invention . . . is



not sufficient.”). Mr. McCarthy’s testimony is thus further confirmation that the Reissue Patent does not satisfy the original patent rule.

Appellant attempted to distance itself from the admission of its counsel who prosecuted the Reissue Patent, claiming that his testimony was inadmissible expert testimony. Appx175. However this is not a case like *Sundance, Inc. v. De Monte Fabricating, Ltd.*, 550 F.3d 1356 (Fed. Cir. 2008), in which an accused infringer hired a patent attorney who had no connection to the prosecution of the patent to testify as an expert regarding non-infringement and invalidity, *id.* at 1361, and this Court found such testimony to have been improperly admitted. *Id.* at 1364. Appellee did not offer the testimony of Mr. McCarthy, who was deposed as an adverse witness in the First Patent Suit, as expert testimony, let alone paid expert testimony.

Mr. McCarthy as the prosecuting attorney for the Reissue Patent, was a relevant witness to show additional (albeit unnecessary) undisputed facts supporting summary judgment because of his personal direct involvement with the claims at issue in this case, his prior representation of Appellant, and his first-hand knowledge of the specification. *See, e.g., Keystone Retaining Wall Systems, Inc. v. Rockwood Retaining Wall, Inc.*, Civ. No. 00-496 (RHK/SRN), 2001 WL 36102284, at \* 10 (D. Minn. Oct. 9, 2001) (finding that the attorney who prosecuted patent-in-suit could testify as a fact witness about the prosecution of the

patent) (Appx204); *see also Takeda Chem. Indus., Ltd. v. Mylan Labs, Inc.*, 417 F.Supp.2d 341, 345 (S.D.N.Y. 2006) (discussing prosecuting patent attorney's role as a fact witness); *Solaia Technology LLC v. Arvinmeritor, Inc.*, No. 02 C 4704, 2004 WL 549449 at \*2 (N.D. Ill. Jan. 28, 2004) (discussing patent prosecuting attorney's likely role as fact witness)(Appx215). As this Court has found in the context of claims of inequitable conduct, "the knowledge and actions of applicant's attorney are chargeable to applicant." *FMC Corporation v. Manitowoc*, 835 F.2d 1411, 1415 n.8 (Fed. Cir. 1987); *see also Taltech Limited v. Esquel Enterprises Ltd.*, 604 F.3d 1324, 1334 (Fed. Cir. 2010) (same).<sup>8</sup> While a prosecuting attorneys' testimony regarding the meaning of claims and the specification may not be absolutely binding on a patentee, the understanding of the claims and specification by the person who drafted those claims, acting on behalf of the patentee, is certainly relevant, especially when not countered in a material way by the patentee.

### **CONCLUSION**

Claims 14-20 of the Reissue Patent are invalid for failure to comply with the original patent rule, 35 U.S.C. § 251, because of Appellant's failure to explicitly

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<sup>8</sup> *Cf. Bell & Howell Document Mgmt. Prod. Co. v. Altek Sys.*, 132 F.3d 701, 706 (Fed. Cir. 1997) ("Patents should be interpreted on the basis of their intrinsic record, not on the testimony of such after-the-fact "experts" that played no part in the creation and prosecution of the patent."). Mr. McCarthy is not such an "after the fact 'expert'" but rather the patent attorney responsible for the creation and prosecution of the very reissue claims being challenged here.

and unequivocally teach a fixture without a plurality of arbors in the Original Patent specification. The judgment should be affirmed.

Respectfully Submitted,

s/Keith Jaasma

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s/Keith Jaasma

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of July, 2018, I electronically transmitted the foregoing document to the Clerk of Court using the ECF system. Based on the electronic records currently on file, the Clerk of Court will transmit a Notice of Docket Activity to the following ECF registrants:

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s/Keith Jaasma

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