

Litigators of the Week: The Married Couple at Kramer Levin Who Zapped Cisco With a \$1.9 Billion Patent Damages Award

Paul Andre and Lisa Kobialka discuss the excitement of handling an eight-week virtual bench trial of many firsts and the joy of showing up for trial each morning wearing tennis shoes.

By Ross Todd
October 9, 2020

The first virtual bench trial in a patent case ended in a \$1.9 billion bang on Monday as U.S. District Judge Henry Morgan of the Eastern District of Virginia issued a 167-page findings of fact and conclusions of law siding with Centripetal Networks Inc. in its showdown with networking giant Cisco Systems Inc over cybersecurity technology.

After eight weeks of trial conducted via Zoom, Morgan found that Cisco willfully infringed five Centripetal patents and awarded 2.5 times the actual past damages of about \$750 million. It was a **Kramer Levin Naftalis & Frankel** team led by married couple **Paul Andre** and **Lisa Kobialka** that brought home that big verdict. Andre and Kobialka, this week's Litigators of the Week, shared with the Litigation Daily the excitement of handling a trial of many firsts and the joy of showing up for trial wearing tennis shoes.

Lit Daily: Who was your client and what was at stake?

Paul Andre: Our client is Centripetal Networks, and literally the future of the company was at stake in this case. When Centripetal provided Cisco with its secret sauce under an NDA, it had no idea that its proprietary technology would end up in Cisco's networking products a year later. Having a Goliath like Cisco marketing and selling Centripetal's patented technology not only hit Centripetal in the



L-R Paul Andre and Lisa Kobialka, Kramer Levin Naftalis & Frankel.

Courtesy photos

pocketbook, but more importantly it hit their reputation as the innovator for a new type of cybersecurity. I think Centripetal's CEO Steven Rogers stated it best when he said, "We've worked toward a paradigm shift in security through our development of the fundamental technologies behind CleanINTERNET. We believe these technologies are important for the country. Without the protection of a patent an emerging company could never take on big important challenges like these."

I gather that you see this \$1.9 billion verdict as potentially even larger than the record \$2.5 billion dollar jury verdict Merck won against Gilead back in 2016, which was later overturned post-trial. Explain why that is.

Lisa Kobialka: The decision is 167 pages (with another seven pages of two appendices), so there is a fair bit to review to get a full picture of the

determination. The Court ruled that the past damages is \$1.9 billion for sales through June 20, 2020. Any sales thereafter apply the different royalty rates over the next six years with a minimum of \$750 million and a maximum of \$1.35 billion. Consequently, the total damages award in the Court's judgment is \$2.65 billion to \$3.25 billion. In the Merck case, the \$2.5 billion finding was a jury verdict that the district court judge vacated due to invalidity. Consequently, there was never any final judgment at the district court level for any damages in that case. We have the highest judgment in a district court case.

Who all was on your trial team and how did you divvy up the work?

Kobialka: Our trial team is made up of some spectacular lawyers, paralegals and staff. Many of us have worked together or with Paul Andre for most, if not, our entire legal careers. The partners are Paul Andre, **James Hannah, Hannah Lee, Kris Kastens, Eileen Patt** and Virginia counsel, **Stephen Noona**. The associates are **Michael Lee, Yuridia Caire, Aakash Jariwala, Stephanie Nguyen, Greg Proctor, Hien Lien** and **Missy Brenner**. And we can never recognize our amazing paralegal team and staff sufficiently, led by **Steve Dennison**.

What were the challenges of putting on your infringement case against Cisco via an eight-week virtual bench trial?

Kobialka: We always enjoy the challenges of trying something new and different, but having to stare at a screen during trial all day and then working with witnesses and colleagues via video conferencing hours thereafter is incredibly exhausting. My eyesight is never going to recover from it. I am watching our kids do school remotely and can see how difficult it is for them. Also, there are challenges in persuasively presenting evidence via Zoom, which took a fair bit of time to master.

Andre: Figuring out how best to present evidence and witnesses over Zoom was the biggest challenge. The witnesses at trial were located throughout the country, so we had to make sure they had sufficient bandwidth from their internet carrier and that exhibits could be easily viewed on the screen. The biggest concern was the possible loss of the human connection you get with witnesses at trial, but we were able to overcome that challenge by putting a bunch of time in on Zoom conferences. Overall, the technology worked perfectly, and the court had the opportunity to judge the credibility of the witnesses and facts in amazing detail.

What advice would you have for any other lawyers trying a case virtually?

Kobialka: Make sure you are fluent with the technology and have the right team there for you who know what you need and when you need it. You will seem unprepared if you walk away from the camera (like you might be able to do in a courtroom before a jury or judge), and it is hard to ask for things discreetly when the camera is focused on you.

Andre: Get a great trial technician. We used **Geoff Thomas** as our trial technician guru, and he handled the technical issues and trial logistics like he had done 100 Zoom trials.

Judge Morgan relied heavily on the Federal Circuit's decision in *Finjan, Inc. v. Blue Coat Sys., Inc.*, a case you handled, in apportioning damages. Does *Finjan* now count, in a sense, as a double-win for you?

Andre: Apportionment in patent cases used to be a nightmare, because there was not a set way to do it for complex technology. In *Finjan*, the Federal Circuit gave us a solid methodology to do apportionment in these types of cases, and we followed the court's methodology to the letter. So *Finjan* was not only a double-win for us, but we expect it to be the gift that keeps on giving.

Kobialka: We regularly vet ideas about how we can frame new factual and legal damages issues in our cases with a focus on how the Federal Circuit could view those issues. Decisions like *Finjan* as well as *Prism v. Sprint*, another case Paul and I handled, go a long way to providing some meaningful law in this area.

The Federal Circuit tends to take a skeptical view of large damages awards. What makes this award different?

Kobialka: The Federal Circuit tends to be skeptical of large, medium and small damages awards if they are not well supported or if unduly prejudicial evidence is in the record. Neither of those circumstances exist here. Judge Morgan's opinion has pages and pages discussing the evidence presented and how it was weighed and considered.

Andre: Judge Morgan's opinion is built on bedrock. The analysis follows Federal Circuit precedent, and the astronomical sales of the infringing Cisco products more than justify the damages award.

Lisa and Paul, since you're married, I'm wondering what the benefits are to trying a case with your spouse?

Andre: After working with someone for 23 years, you get to know them pretty well. Put that together with being married to them, and you could say Lisa probably knows how I think about cases and trials better than I do. We have done so many trials together at this point that they seem like second nature to us, and it's hard for me to imagine doing a trial without her.

Kobialka: We are a true partnership. Trials often take twists and turns and we can deal with them as they happen in real time. We trust each other and know our respective roles and strengths. It also

creates an environment for the whole team. We are a well-oiled machine that does not get phased during trial.

I don't want to get either of you in trouble here, but are there any drawbacks?

Kobialka: You are a troublemaker with that question! We have brutal honesty with each other, which can be tough, and we definitely do not agree all the time. That being said, we know that it is just a disagreement and respect each other's opinions and decisions. At the end of the day, it is always done constructively with the goal of challenging ourselves to be better advocates, trial lawyers and people.

Andre: More than I will ever admit, but overall the pros far outweigh the cons.

What will you remember most about this trial?

Andre: Doing the first ever Federal Court virtual trial will be a lasting memory for me. It's not often that you have to reinvent the wheel in Federal Court trials, but that's what we did. Everything we did in this trial was for the first time—first time to do an opening statement on video, first time to cross every witness from a different state, and first time to wear tennis shoes every day at trial. The entire experience was amazing.

Kobialka: My genuine excitement on the first day of this trial, because it was a new trial forum and uncharted territory, all being done during a global pandemic. Wearing tennis shoes was definitely an added benefit.

Ross Todd is the Editor/columnist for the *Am Law Litigation Daily*. He writes about litigation of all sorts. Previously, Ross was the Bureau Chief of *The Recorder*, ALM's California affiliate. Contact Ross at rtodd@alm.com. On Twitter: @Ross_Todd.