No. 16-489

IN THE

Supreme Court of the United States

JOHNSON & JOHNSON VISION CARE, INC.,

Petitioner,

v.

REMBRANDT VISION TECHNOLOGIES, L.P.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, respondent states that Rembrandt Vision Technologies, L.P. has no parent company and no publicly traded company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

STATEMENT OF THE CASE

Respondent sued petitioner for patent infringement. Petitioner prevailed. After trial, evidence from a third party demonstrated that the testimony of petitioner's expert was fraudulent and, moreover, that important documents central to petitioner's claim of noninfringement had not been provided to respondent as required in discovery. The district court denied respondent discovery regarding this misconduct and denied respondent relief from the judgment under Rule 60(b). Applying the law of the Eleventh Circuit, the Federal Circuit reversed.

1. Respondent Rembrandt Vision Technologies, L.P. sued petitioner Johnson & Johnson Vision Technologies for infringement of respondent's U.S. Patent No. 5,712,327. The case proceeded to trial, in which petitioner contested two limitations of the patent: whether the accused lenses were "soft" and whether they had a "surface layer."

Respondent principally relied on the expert testimony of Dr. Thomas Beebe, Jr., with respect to both limitations. Regarding the "soft" limitation, Dr. Beebe's testimony included a description of his testing methodology. Under cross-examination, however, Dr. Beebe testified to using a different methodology than he had previously described.

For its part, petitioner relied heavily on the testimony of its own expert, Dr. Christopher Bielawski, with respect to the "surface layer"

limitation. But petitioner also used Dr. Bielawski to attack Dr. Beebe's testimony and his credibility generally. Petitioner's counsel then relied on and amplified that criticism, attacking Dr. Beebe's credibility in closing argument.

The jury found that petitioner had not infringed the patent. After the entry of the verdict, the district court struck Dr. Beebe's testimony with respect to the "soft" limitation. Because respondent's claim with respect to that limitation depended on that testimony, the district court granted petitioner judgment as a matter of law (JMOL) as well with respect to that limitation.

2. After trial, respondent received substantial evidence from a third party that Dr. Bielawski's testimony was false and that important documents had not been provided to respondent in discovery. In particular, Dr. Bielawski falsely testified that he had conducted critical tests personally and about his qualifications and experience to conduct those tests. Petitioner's counsel in turn presented Dr. Bielawski "as an expert in TOF-SIMS testing, [when] he actually 'had no TOF-SIMS experience whatsoever.'" Pet. App. 4a (quoting C.A. J.A. 5437).

Petitioner also "withheld data from tests conducted on third-party contact lenses previously found to infringe the asserted claim." *Id.* 5a. Significantly, petitioner "provided the samples of these lenses to Dr. Bielawski and requested that he perform 'any initial setup experiments.'" *Id*. (quoting C.A. J.A. 5576). The resulting test results were not provided to respondent in discovery. *Id.* Nevertheless, petitioner's counsel "emphasized Dr.

Bielawski's testimony on this point as proof of noninfringement during closing argument." *Id.*

Respondent sought relief from judgment under both Rule 60(b)(2) and Rule 60(b)(3). Respondent also repeatedly sought to take discovery from petitioner and its counsel, including with respect to their knowledge of and involvement in providing the false testimony and withholding the documents. The district court stated that if it had known of Dr. Bielawski's misconduct, it might well not have excluded Dr. Beebe's testimony. *Id.* 10a-12a; *see also id.* 39a-46a. But with little explanation, the court both denied respondent discovery and denied relief under Rule 60(b). *Id.* 6a; *see also id.* 36a n.1.

3. On respondent's appeal, a divided panel of the Federal Circuit – applying the regional law of the Eleventh Circuit – reversed, holding that under this "unusual set of circumstances" respondent was entitled to relief under Rule 60(b)(3) on two independent grounds. *Id.* 1a-2a.

The Federal Circuit explained that under governing precedent respondent was required by Rule 60(b)(3) to "establish that: (1) the adverse party engaged in fraud or misconduct; and (2) this conduct prevented the moving party from fully and fairly presenting its case." *Id.* 7a (citation omitted). The court began with the latter, which it viewed as "the easier question." *Id.* 8a.

The court found that Dr. Bielawski both "testified on a central infringement issue at trial" and "withheld contradictory test results . . . generated at the request of [petitioner's] counsel." *Id.* 8a-9a. Both Dr. Bielawski and petitioner's counsel "seized several

opportunities to impugn the credibility of Dr. Beebe." *Id.* 9a. On these facts, the panel majority found that "[t]he verdict was irretrievably tainted." *Id.*

The court held that relief was independently appropriate under Rule 60(b)(3) because respondent was not provided important documents in discovery. Respondent "could have deposed the individuals who actually conducted the testing for [petitioner, who] based its noninfringement argument at trial nearly exclusively on the surface layer limitation" to which Dr. Bielawski testified. *Id.* 13a.

The Federal Circuit also rejected an argument advanced by petitioner, on which the district court itself had not relied: that Dr. Bielawski's testimony was not relevant to the "soft" limitation. *Id.* 13a-14a. The majority recognized that the district court had excluded Dr. Beebe's testimony, and granted JMOL on that basis, with respect to that limitation. But it explained that "[t]he district court judge acknowledged that he may well have responded differently had he been aware at the time of Dr. Bielawski's false testimony." *Id*. 10a.

The court then turned to whether petitioner is properly held accountable for the "fraud or misconduct." The majority found that petitioner's claim that it was unaware of Dr. Bielawski's misconduct in withholding documents "strains credulity," given that it provided the third-party lenses to him, requested that he perform the testing, and stressed the results to the jury. *Id.* 15a.

As a legal matter, the court held that relief is available under Rule 60(b)(3) even if a party and its attorneys are not "complicit" in fraud. *Id.* 16a-18a. It

was sufficient, the court ruled, that: "Although [petitioner] may have been unaware of Dr. Bielawski's false testimony, [petitioner] *should have known* that additional tests were conducted and additional documents were generated." *Id.* 17a (emphasis added).

The Federal Circuit did not decide whether petitioner was entitled to discovery and was otherwise entitled to relief under the separate provisions of Rule 60(b)(2). *Id.* 18a. The court remanded to the district court for further proceedings. *Id*.

The Federal Circuit denied rehearing en banc with no noted dissent. *Id.* 126a-27a.

REASONS FOR DENYING THE WRIT

The Federal Circuit correctly described this as a "most unusual case involving false testimony by both parties' experts and misconduct." *Id.* 18a. It involves "an unusual set of circumstances" that are unlikely to recur. *Id.* 2a. No other court of appeals has addressed similar facts, much less done so in a manner that suggests it would reach the opposite result.

The fact that cases involving Rule 60(b) are inherently fact-bound is reflected in the many instances in which this Court has denied similar petitions for certiorari. Nothing differentiates the petition in this case from those. *See, e.g.*, Petition for Writ of Certiorari, *Hallco Mfg. Co. v. Foster*, 1994 WL 16043097 (Nov. 2, 1994) (No. 94-792), *cert. denied*, 513 U.S. 1080 (1995) (seeking certiorari because "[i]n the forty-six year history of the current version of Rule 60(b), the Supreme Court has *never* ruled on

what standard the lower courts should use in determining whether to grant a motion under Rule 60(b)(3)"); Brief in Opposition, *Hallco Mfg. Co. v. Foster*, 1994 WL 16100931 (Nov. 29, 1994) (No. 94-792), *cert. denied*, 513 U.S. 1080 (1995) (seeking certiorari, as characterized by respondent, over clear and convincing evidence standard); *see also* Petition for Writ of Certiorari, *Pflum v. United States*, 2001 WL 34116987 (Aug. 15, 2001) (No. 01-295), *cert. denied*, 534 U.S. 896 (2001) (seeking certiorari to determine if the movant has to show that party acted with an intent to deceive); Petition for Writ of Certiorari, *Anderson v. Beatrice Foods Co.*, 1990 WL 10058742 (July 30, 1990) (No. 90-198), *cert. denied*, 498 U.S. 891 (1990) (seeking certiorari to "annunciate for the first time the standards by which discovery misconduct should be measured under Rule 60(b)(3)").

I. There Is No Conflict Over The Application Of The Clear And Convincing Standard.

Petitioner claims the circuits are divided three ways over whether Rule 60(b) requires a movant to prove its entitlement to relief from a judgment by clear and convincing evidence. Pet. 19-28.

1. Any claim of a conflict is a non-starter, because this case was governed by the rule petitioner endorses. As petitioner admits, the court of appeals here applied Eleventh Circuit law. Pet. 8; Pet. App. 7a. That is the actual import of petitioner's backhanded criticism that "the Federal Circuit purported to apply Eleventh Circuit." Pet. 19. The Eleventh Circuit applies the clear and convincing

evidence standard. *E.g.*, *Cox Nuclear Pharmacy, Inc. v. CTI, Inc.*, 478 F.3d 1303, 1314 (11th Cir. 2007).

Petitioner's argument is therefore entirely fact-bound. Petitioner claims that this one panel misapplied the accepted legal standard governing one part of one subdivision of Rule 60(b) – *viz*., whether under Rule 60(b)(3), the movant must prove by clear and convincing evidence that it was deprived of a full and fair opportunity to prove its case. But that is wrong too. The panel never indicated that it required anything less than clear and convincing evidence, by for example applying a preponderance of the evidence standard. To the contrary, it cited the district court's acknowledgement that there was clear and convincing evidence of Dr. Bielawski's misconduct. Pet. App. 10a-11a. It was unnecessary to do anything more because the panel regarded the effect on respondent's ability to present its case as the "easier question" in the case. *Id*. 8a. When a panel does not specify a legal standard, the only reasonable assumption is that it followed existing precedent, not that it abandoned that precedent to *sub silentio* adopt some new legal rule – and certainly not that later panels would deem themselves bound to apply that secret rule rather than their explicit precedent.

There is accordingly no serious argument that the ruling below gives rise to a circuit conflict. Any inconsistency in the application of the Eleventh Circuit's precedent by definition can be resolved by that court. It is not a basis for review in this Court.

2. In any event, there is no conflict because every circuit applies the clear and convincing evidence standard. To create the false impression of a conflict, the petition simply mixes apples and

oranges. It begins by citing some cases from a few circuits addressing the *amount* of proof the movant must produce – *i.e.*, clear and convincing evidence. Pet. 19-22. It then seeks to contrast those rulings with some cases from a few circuits addressing the *subject* of that proof – *e.g.*, that the fraud substantially interfered with the movant's fair opportunity to present its case. *Id.* 22-24. Those different sets of rulings address entirely different questions, so they cannot be the subject of a circuit split.

That is why petitioner errs in relying upon the supposed "major area of controversy" relating to Rule 60(b)(3) described by one panel in an unpublished ruling. Pet. 26. As that court explained, that controversy relates to whether the fraud must "substantially interfere[]" or instead "foreclose[]" the movant's presentation of its case in order to justify relief under Rule 60(b). *Jordan v. Paccar, Inc.*, No. 95-3478, 1996 WL 528950 (6th Cir. Sept. 17, 1996). It has nothing to do with the "clear and convincing" burden of proof. Petitioner does not identify, for example, any circuit that applies a "preponderance" standard instead of "clear and convincing evidence." None does.

Petitioner asserts that the D.C., Ninth, and Tenth Circuits do not apply the clear and convincing evidence standard. Pet. 22-24. That is not correct. *See, e.g. Zurich N. Am. v. Matrix Serv.*, 426 F.3d 1281, 1290 (10th Cir. 2005) ("[T]he party relying on Rule 60(b)(3) must . . . clearly substantiate the claim of fraud, misconduct, or misrepresentation. In other words, they must show clear and convincing proof of fraud, misrepresentation, or misconduct."); *De*

Saracho v. Custom Food Mach., Inc., 206 F.3d 874, 880 (9th Cir. 2000) ("To prevail [under Rule 60(b)(3)], the moving party must prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct . . . ."); *Shepherd v. ABC*, 62 F.3d 1469, 1477 (D.C. Cir. 1995) ("It is also well-settled that a litigant seeking relief from a judgment under Federal Rule of Civil Procedure 60(b)(3) based on allegations of fraud upon the court must prove the fraud by clear and convincing evidence."). As noted, the decisions cited by petitioner actually address the distinct question of the *subject* of the movant's proof. *See, e.g.*, *Summers v. Howard Univ.*, 374 F.3d 1188, 1193 (D.C. Cir. 2004) (explaining that, to "demonstrate actual prejudice," the movant can show that the misconduct "affected [her] substantial rights" (internal quotation marks omitted)).

Petitioner next argues that a ruling of the First Circuit and an unpublished, nonprecedential opinion of the Sixth Circuit applied a burden-shifting framework. Pet. 24-26. In fact, the settled precedent of both courts applies the clear and convincing evidence standard. *See, e.g.*, *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 454 (6th Cir. 2008) ("[T]he party seeking relief under Rule 60(b) bears the burden of establishing the grounds for such relief by clear and convincing evidence."); *Tiller v. Baghdady*, 294 F.3d 277, 280 (1st Cir. 2002) ("In order to obtain relief under Rule 60(b)(3), Tiller had to present the district court with clear and convincing evidence that the claimed fraud or misconduct occurred." (internal quotation marks omitted)).

The cases cited by petitioner instead apply a special rule favorable to the movant in one specific subset of cases: those involving intentional misconduct. *See Anderson v. Cryovac, Inc.*, 862 F.2d 910, 925 (1st Cir. 1988) ("In the case of intentional misconduct, as where concealment was knowing and purposeful, it seems fair to presume that the suppressed evidence would have damaged the nondisclosing party."); *Paccar*, No. 95-3478, 1996 WL 528950, at *6-7 (limiting relief under Rule 60(b) to intentional misconduct, providing that Rule 60(b)(3) "requir[es] the moving party to demonstrate misbehavior of one of the three relevant kinds by clear and convincing evidence," and applying a burden-shifting regime in such cases); *see also West v. Bell Helicopter Textron, Inc.*, 803 F.3d 56, 70 (1st Cir. 2015) (quoting *Anderson* for existence of a "presumption" in favor of the movant "[i]n the case of intentional misconduct"). This case does not implicate that question and therefore is not a vehicle to address that issue. The Federal Circuit found it unnecessary to determine whether petitioner or its agents engaged in intentional fraud. Pet. App. 15a-17a.

Petitioner finally argues that the Federal Circuit rejects the clear and convincing evidence standard. Pet. 27. That is not correct. *See, e.g.*, *Hildebrand v. Steck Mfg. Co.*, 292 F. App'x 921, at *3 (Fed. Cir. 2008) (noting that, under Rule 60(b), movant must "produce the clear and convincing evidence necessary to substantiate his allegations"); *Hutchins v. Zoll Med. Corp.*, 253 F. App'x 926, 930 (Fed. Cir. 2007) ("To obtain relief from judgment under Rule 60(b)(3), the movant must demonstrate misconduct by clear

and convincing evidence." (internal quotation marks omitted)); *Venture Indus. Corp. v. Autoliv ASP, Inc.*, 457 F.3d 1322, 1334 (Fed. Cir. 2006) ("On remand, the district court [in reviewing Rule 60(b)(3) motion] must decide whether Autoliv has established, by clear and convincing evidence, that reliance . . . constituted fraud or misrepresentation."). It also is irrelevant to this case, which, as petitioner acknowledges, was instead governed by the regional law of the Eleventh Circuit. *See supra* at 3.

3. Whether relief under Rule 60(b) is subject to a "clear and convincing evidence" rule or instead some other standard also makes no difference in this case. The difference between a "preponderance" and a "clear and convincing evidence" standard matters in cases in which there is conflicting evidence. *See, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-55 (1986) (discussing summary judgment analysis under preponderance of evidence versus clear and convincing evidence standards). But petitioner does not identify any factual conflicts in the evidence.

The relevant question under Rule 60(b) is whether the fraud or misconduct undermined respondent's ability to develop and present its case. The panel correctly explained why it did. Those findings would satisfy any standard. Petitioner does not come close to establishing that the standard of proof would allow it (referred to below as JJVC) to maintain the benefit of a judgment it received through fraud.

In the underlying ruling denying relief, the district court *itself* explained that "even JJVC now *agrees* that there is clear and convincing evidence that Dr. Bielawski gave false testimony." Pet. App.

38a (emphasis added). In addition, Dr. Bielawski "took advantage of several opportunities to impugn Dr. Beebe's credibility." *Id.* 3a. Among other things, "Dr. Bielawski described Dr. Beebe's failure to correct allegedly incorrect data as 'misleading and tantamount to dishonesty.'" *Id.* (quoting C.A. J.A. 4683). Petitioner's counsel amplified that attack in closing argument. *Id*.

Those harsh attacks on Dr. Beebe's testimony inevitably affected respondent's ability to fairly present its case. They almost certainly directly affected both the jury's judgment of infringement and the district court's determination whether to strike his testimony and enter JMOL in petitioner's favor. If Dr. Bielawski's fraud had been disclosed to the jury, his testimony (including his attacks on Dr. Beebe) would have been gutted, and petitioner's own credibility as a party with it. *Id.* 9a-14a.

Petitioner thus errs in stressing that Dr. Bielawski's false testimony and the withholding of documents did not relate to the "soft" limitation of respondent's patent. Pet. 9 n.1. Of note, not even the district court adopted this rationale. The jury's determination of noninfringement as to *both* limitations would have been heavily influenced by its view of Dr. Beebe's credibility, as Dr. Beebe was petitioner's witness regarding the "soft" limitation. "While we do not know the exact impact the false testimony the would have had on the jury, the false testimony may well have been critical to the noninfringement verdict and the jury may well have been impacted upon learning that Dr. Bielawski committed an act at least as egregious as Dr. Beebe's." Pet. App. 9a.

The Federal Circuit explained that the district court subsequently granted JMOL on the "soft" limitation only after finding that "its exclusion of Dr. Beebe's unreliable testimony required that result. The *district judge acknowledged* that he may well have responded differently had he been aware of Dr. Bielawski's false testimony." *Id.* 10a (emphasis added). In particular, if JJVC's fraud had been disclosed, there is a substantial prospect that the district court would have reached the opposite conclusion for either of two reasons: (i) Dr. Beebe was more credible than was contended by Dr. Bielawski and petitioner's counsel; or (ii) excluding Dr. Beebe's testimony (and in turn entering JMOL) was an inappropriate sanction, given that petitioner engaged in such serious misconduct. *Id.* 10a-11a.

But there is more. If JJVC had instead complied with its duty to produce the improperly withheld documents, the course of the proceedings and petitioner's ability to develop and present its case would have been substantially different:

> Here, Rembrandt could have deposed the individuals who actually conducted the testing for JJVC. JJVC based its noninfringement argument at trial nearly exclusively on the surface layer limitation. Knowing the weaknesses in JJVC's evidence may well have changed the nature of the entire proceedings. . . . Suffice it to say that this raises a substantial question undermining the judgment of infringement.

Id. 13a.

Petitioner's contrary arguments merely reargue the facts of the case and how they were understood by this particular panel of the Federal Circuit in applying the law of another court of appeals. Petitioner's arguments do not involve any *legal* holding by the Federal Circuit that would control any later case and that would accordingly merit review in this Court. Petitioner says that in its view, the opinion below found a substantial prospect that the course of proceedings would have been different "without cogent explanation" and "avoided explaining" its analysis. Pet. 27. Petitioner's view of the opinion is less than entirely objective. For the reasons just given, it is also wrong. But no matter. The relevant point is that the panel did not articulate any legal standard meriting certiorari.

4. Not only is the standard of proof not outcome dependent, but this case is not a vehicle in which to decide the first Question Presented. That is true for several independent reasons.

First, as discussed, petitioner conflates the required amount of proof ("clear and convincing evidence") with what that evidence must prove (for example, a substantial interference with the movant's presentation of its case). *See supra* at 7-11. Petitioner has drafted the first Question Presented in an effort to encompass both of those distinct issues in an attempt, as discussed, to identify a conflict by mixing apples and oranges. Pet. i.

There is no material circuit conflict on either issue. But categorically, the Court *cannot* decide the first Question Presented in this case. Petitioner waived the latter argument. It did not argue to the Federal Circuit that respondent must prove that

petitioner's fraud foreclosed its ability to fairly present its case. The court of appeals was not given an opportunity to decide that issue. Nor did it pass on the issue *sua sponte*, as opposed to simply accepting the parties' own assumptions. As a result, the issue remains open for decision in a later case and is not properly presented here.

Second, the outcome of this case is overdetermined; the outcome is overwhelmingly likely to be the same even if the Court agrees with much of petitioner's argument. There is every reason to believe that if the Court grants certiorari it will affirm on factual grounds or simply dismiss the petition as improvidently granted.

That is so because the Federal Circuit held that petitioner engaged in *two* distinct acts of misconduct, both separately warranting 60(b) relief. "Rembrandt alleges fraud based on Dr. Bielawski's false testimony and misconduct based on Dr. Bielawski and JJVC's failure to produce the contradictory test results on third-party lenses. Each allegation forms an independent basis for a new trial under Rule 60(b)(3)." Pet. App. 14a.

Petitioner argues that the court of appeals applied an inadequately rigorous burden of proof. As discussed, that is not correct; the court applied the rule petitioner advocates. But in any event, the Questions Presented by the petition make no difference unless this Court determines that the burden of proof is outcome determinative with regard to both bases for the panel's ruling, alone and in combination. A determination by this Court that the court of appeals was correct as to either would end

any inquiry into the question of petitioner's misconduct.

Third, the inquiry into a movant's entitlement to relief under Rule 60(b) is intensely fact-bound. Petitioner actually highlights that point by resting its argument on the burden of proof. But this case is a bad vehicle in which to consider such questions given that petitioner's own obstructionism has left the record almost uniquely underdeveloped. After JJVC's fraud was disclosed through evidence from a third party, respondent sought to take discovery from petitioner. *Id.* 37a-38a. Respondent made that request to the district court numerous times. But without explanation, "the district court denied Rembrandt's request for post-trial discovery." *Id.* 3a. The supposed gaps in the record about which petitioner complains thus result only from petitioner's own refusal to produce the relevant documents, which are uniquely within its possession.

Fourth and relatedly, the district court's ruling is reviewed for abuse of discretion. *See id.* 7a (citing *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984)). But here the district court gave essentially no explanation for its decision, and it specifically did not rely upon the theory on which petitioner principally relies. In this context it would be particularly difficult to craft an opinion articulating the circumstances in which a district court abuses its discretion under Rule 60(b).

Fifth, by petitioner's own description, this case is not a vehicle in which to resolve the only actual conflict over application of the "clear and convincing evidence" standard. As noted, there is some authority for applying a burden-shifting framework

in cases involving *intentional* misconduct. But this case does not implicate that conflict because the Federal Circuit found it unnecessary to determine whether JJVC's acts were a purposeful effort to deceive the court. Granting certiorari in this case would necessarily leave that actual disagreement unresolved. The Court should accordingly await a later case in which that issue is presented.

Because there is no circuit conflict with respect to the first Question Presented, and this case is not a vehicle to decide that question in any event, certiorari should be denied.

II. There Is No Conflict Regarding The Degree Of Knowledge Or Responsibility Of A Party For Fraud Against The Court.

With respect to the second Question Presented, petitioner contends that the ruling below gives rise to a circuit conflict over whether Rule 60(b)(3) relief is available when fraud on the court is committed by a witness, rather than directly by a party or its counsel. Pet. 28-31. That conflict is illusory.

Petitioner simply mischaracterizes the ruling below. It asserts that "the court of appeals held that false testimony by an expert witness may, without more, be imputed to the party that called the witness." Pet. 29. That is inaccurate. The Federal Circuit merely held that a party need not in every case be "*complicit*" in fraud in order to be subject to Rule 60(b)(3). Pet. App. 16a-18a (emphasis added). No court of appeals rejects that holding, immunizing a party from relief under Rule 60(b)(3) so long as there is not clear and convincing evidence that the party actively participated in a fraud.

Petitioner provides no citation for its characterization of the opinion below. Surprisingly, it omits the rule the Federal Circuit expressly applied. The court concluded,

> Although JJVC may have been unaware of Dr. Bielawski's false testimony, JJVC *should have known* that additional tests were conducted and additional documents were generated. Indeed, it provided samples of the third-party lenses to Dr. Bielawski, requested that he conduct initial testing on those lenses, and questioned Dr. Bielawski on the same subject matter during trial.

Id. 17a (emphasis added).

Petitioner also omits that the Federal Circuit suggested that petitioner's counsel played a direct role in perpetrating the fraud on the court. "Whereas Dr. Bielawski was presented to the jury as an expert in TOF-SIMS testing, he actually 'had no TOF-SIMS experience whatsoever.'" *Id.* 4a (quoting C.A. J.A. 5437). Petitioner's counsel cannot absolve themselves of having failed to truthfully identify and represent the qualifications of the very expert they identified, vetted, hired, prepared, and presented at trial.

The ruling below thus requires negligence by the party, at a minimum. Every circuit agrees. As petitioner expressly acknowledges, other circuits hold that the Rule applies if there is "evidence that the party knew *or had reason to know* of the expert's misconduct." Pet. 29-30 (emphasis added). No court of appeals holds that negligence by a party in failing

to identify and prevent fraud by its central witness is inadequate to provide relief under Rule 60(b)(3).

This case is not a vehicle to decide the second Question Presented. The petition does not challenge the Federal Circuit's determination that JJVC at the least should have known of Dr. Bielawski's fraud. Even if the petition did dispute that finding, it would not warrant certiorari. It would reduce to a dispute over this one panel's reading of this particular record.

In any event, if a circuit conflict actually did exist, it would make no difference to this case. There was more than enough evidence to satisfy any reasonable standard. The Federal Circuit properly recognized that "JJVC's argument strains credulity, given that it provided the lenses to Dr. Bielawski and talked about them during closing argument." Pet. App. 15a.

To the extent that petitioner claims there is insufficient proof of its own knowledge of the fraud, that is only because petitioner successfully opposed providing respondent discovery on this question. Petitioner cannot simultaneously resist the production of the only documents that would prove a point, then turn around and fault respondent's supposed resulting lack of proof. *See supra* at 16.

Further, Dr. Bielawski was no average "expert witness." Petitioner paid him to play a central role in its case and his testimony was stressed by petitioner's counsel. Pet. App. 8a-9a. As discussed, it was essential to the Federal Circuit's decision that Dr. Bielawski was heavily critical of Dr. Beebe's testimony and vigorously attacked his honesty and credibility. *Id.* 3a, 9a-14a. To anyone experienced in

the presentation of expert testimony in litigation, the claim that petitioner was not deeply and directly involved in the preparation and presentation of his testimony blinks reality.

III. This Case Does Not Implicate Any Conflict Over Whether An Accidental Omission Is Misconduct For The Purposes Of Rule 60(b)(3).

Petitioner contends that an unpublished, nonprecedential decision of the Sixth Circuit holds – in conflict with every other court of appeals – that only a party's purposeful misconduct justifies relief under Rule 60(b)(3). Pet. 31-33 (citing *Paccar*, No. 95-3478, 1996 WL 528950, at *7). But here too, petitioner conflates two separate questions: (i) whether misconduct for purposes of the Rule includes accidental acts; and (ii) whether a "party" whose misconduct is subject to the Rule includes witnesses, rather than being limited to the party or its counsel. *Id*.

Regarding the former, it is true that the unpublished Sixth Circuit ruling does require purposeful misconduct. But as discussed, petitioner concedes that requirement is satisfied here. Dr. Bielawski's misconduct was so pervasive that there is no serious argument that it was anything other than intentional. There is no dispute that petitioner's expert, Dr. Bielawski, *intentionally* both made an array of misstatements and withheld documents. There is no "accident" in this case.

Petitioner's argument instead depends on the assumption that a "party" for purposes of the Sixth Circuit's unpublished decision does not include a

party's central expert witness. But that assumption is simply wrong. As discussed, petitioner concedes with respect to the second Question Presented that every circuit attributes to a party misconduct of which it reasonably should have known. The panel in this case found that requirement satisfied in a finding that petitioner does not challenge.

If there were a conflict over whether Rule 60(b)(3) is limited to cases of a party's own misconduct, this case would not be a vehicle to resolve it. Petitioner waived the benefit of it. Petitioner included a single passing citation to the unpublished Sixth Circuit ruling in its brief on appeal. That is insufficient to preserve a substantive argument. *See. e.g.*, *United States v. Great Am. Ins. Co.*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) ("It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived." (citations omitted)); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) ("Our law is well established that arguments not raised in the opening brief are waived."). But in any event, petitioner never urged the Federal Circuit to adopt the rule that it now urges for the first time in the petition: that a party is immune from relief under Rule 60(b)(3) unless the party itself engaged in purposeful misconduct.

IV. This Case Is A Particularly Poor Vehicle In Which To Decide The Questions Presented.

In addition to the reasons stated above, there are additional grounds on which to deny certiorari. The ruling below is interlocutory. There is no reason for this Court to stretch to intervene to save petitioner

from the gross misconduct of its leading expert, with the apparent involvement of its own counsel. The district court is now actively reconsidering respondent's claims. If petitioner prevails on the merits, Rule 60(b)'s role in the case will be moot. If it does not, petitioner can present any questions that it has properly preserved in a subsequent petition from an appeal of the substantive patent issues in the case.

Further, respondent challenges the denial of relief under not only Rule 60(b)(3) but also Rule 60(b)(2) and would continue to press that argument as a substantial alternative ground for affirmance. See Pet. App. 18a ("Because we reverse the district court's denial of Rembrandt's motion for a new trial under Rule 60(b)(3), we do not consider whether the district court abused its discretion in denying Rembrandt's Rule 60(b)(2) and discovery motions."). If this Court agreed, it would not reach any of the Questions Presented.

To the extent any of the Questions Presented merit certiorari, this Court should accordingly await a more appropriate case in which to decide those issues.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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