Nos. 2014-1663, - 1664, - 1665

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REALTIME DATA, LLC,

Plaintiff-Appellee,

v.

CME GROUP, INC., BOARD OF TRADE OF THE CITY OF CHICAGO, INC., NEW YORK MERCANTILE EXCHANGE, INC.

Defendants-Appellants,

and

BATS TRADING, INC., AKA BATS Exchange, Inc., INTERNATIONAL SECURITIES EXCHANGE, NASDAQ OMX GROUP, INC., NASDAQ OMX PHLX, INC., NYSE EURONEXT, OPTIONS PRICE REPORTING AUTHORITY, NYSE ARCA, INC., NYSE AMEX, LLC, AND SECURITIES INDUSTRY AUTOMATION CORPORATION,

Defendants.

Appeals from the United States District Court for the Southern District of New York in Case Nos. 1:11-CV-6697, 1:11-CV-6699 and 1:11-CV-6702-KBF, Honorable Katherine B. Forrest

CORRECTED BRIEF FOR PLAINTIFF-APPELLEE REALTIME DATA, LLC

Dirk D. Thomas
McKOOL SMITH, P.C.
1999 K Street NW, Suite 600
Washington, DC 20006-1101
Telephone: (202) 370-8300
Facsimile: (202) 370-8344

Brett E. Cooper
McKOOL SMITH P.C.
One Bryant Park, 47th Floor
New York, New York 10036
Telephone: (212) 402-9400
Facsimile: (212) 402-9444

Laura A. Handley
McKOOL SMITH P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
Telephone: (214) 978-4000
Facsimile: (214) 978-4044

Attorneys for Plaintiff-Appellee, Realtime Data LLC

November 18, 2014

CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellee Realtime Data, LLC (doing business as IXO) certifies the following:

1. The full name of every party represented by me is:

   Realtime Data, LLC (doing business as IXO).

2. The name of the real party in interest represented by me is:

   None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by me is:

   None.

4. The names of all law firms and the partners or associates that appeared for the party represented by me in the trial court or are expected to appear in this Court are:

   McKool Smith P.C.; Dirk D. Thomas, Robert Cote, Brett Cooper, Daniel Melman, Laura Handley, Lauren Fornarotto, John Briody, Kevin Schubert, Jonathan Yim, Warren Lipschitz, Pierre Hubert, Holly Engelmann, Samuel Baxter, Thomas Guy Fasone, Joel L. Thollander.

TABLE OF CONTENTS

Page

I. STATEMENT OF THE ISSUES 1

II. STATEMENT OF THE CASE SETTING OUT THE FACTS 1

A. Preliminary Statement 1

B. Factual and Procedural Background 3

1. CME already argued every single issue presented to this court, but a very engaged trial court held that the case was not exceptional and had not been litigated in bad faith 3

2. After an exhaustive *Markman* process, the trial court adopted an open-ended definition for the disputed "data field/block type" term that did not preclude all infringement arguments 4

3. Realtime pursued good-faith litigation to advocate its interpretation of the open-ended "data field/block type" term 6

4. The trial court actively mediated the parties' dispute about Realtime's privilege log, and CME did not move for Rule 37 sanctions 9

III. SUMMARY OF THE ARGUMENT 11

IV. ARGUMENT 12

A. Recent Supreme Court precedent gives the trial court great latitude in its fee decisions under 35 USC § 285 12

B. CME has not met its burden of proving that the trial court abused its discretion by committing an error of law 13

1. The trial court was properly briefed on the controlling Supreme Court precedent, and applied it correctly 13

2. The trial court's citation of *Kaneka* was proper, particularly in light of the express factual finding that Realtime had not acted in bad faith 15

C. CME has not met its burden of proving that the trial court abused its discretion by relying on a clearly erroneous assessment of the relevant evidence.....18

1. CME has not shown clear error in the *Realtime* trial court's factual finding that there was no bad faith 19

2. All the arguments that CME makes here were presented to the *Realtime* trial court, but were found to be unpersuasive.....21

D. CME improperly requests that this Court depart from its long-standing precedent and second-guess the trial court's exercise of its discretion 28

V. CONCLUSION.....30

TABLE OF AUTHORITIES

Page(s)

CASES

Baldwin Hardware Corp. v. Franksu Enter. Corp.,
78 F.3d 550 (Fed. Cir. 1996) 28

Carroll Touch, Inc. v. Electro Mech. Sys., Inc.,
15 F.3d 1573 (Fed. Cir. 1993) 21, 28

Cartner v. Alamo Group, Inc.,
2012 U.S. Dist. LEXIS 187038 (N.D. Ohio Feb. 6, 2012).....17, 18, 20

Chevron USA, Inc. v. United States,
110 Fed. Cl. 747 (Fed. Cl. 2013) 26

Computer Docking Station Corp. v. Dell, Inc.,
519 F.3d 1366 (Fed. Cir. 2008) 22, 28

Cybor Corp. v. FAS Tech.,
138 F.3d 1448 (Fed. Cir. 1998) 21, 28

David A. Potts & Geomatrix, LLC,
2013 U.S. Dist. LEXIS 114649 23

Eon-Net LP v. Flagstar Bancorp,
653 F.3d 1314 (Fed. Cir. 2011) 20, 28, 29

Frank's Casing Crew & Rental Tools, Inc. v. Weatherford Int'l, Inc.,
389 F.3d 1370 (Fed. Cir. 2004) 28, 29

Glynn v. EDO Corp.,
2010 U.S. Dist. LEXIS 86013 (D. Md. Aug. 20, 2010) 26

Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.,
134 S. Ct. 1744 (2014).....13, 14, 29

Highway Equip. Co. v. FECO, Ltd.,
469 F.3d 1027 (Fed. Cir. 2006) 28, 29

ICON Health & Fitness, Inc. v. Octane Fitness, LLC,
2014 U.S. App. LEXIS 16411 (Fed. Cir. Aug 26, 2014) 14, 15, 17

Imagineering, Inc., v. van Klassens, Inc.,
53 F.3d 1260 (Fed. Cir. 1995) 28

Jang v. Boston Scientific Corp.,
532 F.3d 1330 (Fed. Cir. 2008) 16, 30

Kaneka Co. v. Zhejaing Medicine Co.,
2014 U.S. Dist. LEXIS 91659 (C.D. Cal. May 23, 2014).....11, 15, 16

Kilopass Tech., Inc. v. Sidense Corp.,
738 F.3d 1302 (Fed. Cir. 2013) 18

Lighting World, Inc. v. Birchwood Lighting, Inc.,
382 F.3d 1354 (Fed. Cir. 2004) 21, 28, 29

Luma Corp. v. Stryker Corp.,
2008 U.S. pp. LEXIS 7669 (Fed. Cir. April 10, 2008).....28, 29

MarcTec, LLC v. Johnson & Johnson,
664 F.3d 907 (Fed. Cir. 2012) 17, 18, 24, 25

Mid-Continent Cas. Co. v. Eland Energy, Inc.,
2007 U.S. Dist. LEXIS 21671 (D. Conn. Mar. 26, 2007) 26

Monsanto v. E.I. DuPont De Nemours & Co.,
748 F.3d 1189 (Fed. Cir. 2014) 19, 28

Motorola, Inc. v. Interdigital Tech. Corp.,
121 F.3d 1461 (Fed. Cir. 1997) 28, 29

Multiform Dessicants, Inc. v. Medzam, Ltd,
133 F.3d 1473 (Fed. Cir. 1998) 28

Nat'l Presto Indus. v. West Bend Co.,
76 F.3d 1185 (Fed. Cir. 1996) 19

Octane Fitness, LLC v. ICON Health & Fitness, Inc.,
134 S. Ct. 1749 (2014)..... 1, 11, 12, 13, 14, 15, 17, 18

Phonometrics, Inc. v. Westin Hotel Co.,
350 F.3d 1242 (Fed. Cir. 2003) 17, 18, 19, 23, 24

Power Mosfet Tech., L.L.C. v. Siemens AG,
378 F.3d 1396 (Fed. Cir. 2004) 28

Realtime Data, LLC v. CME Group, Inc.,
2014 U.S. Dist. LEXIS 91051 (S.D.N.Y. June 24, 2014) .....passim

Realtime Data, LLC v. Morgan Stanley,
2014 U.S. App. LEXIS 1512 (Fed. Cir. Jan. 27, 2014).....5

SAP AG v. DataTern, Inc.,
Case No. 1-11-CV-2648, slip. op. (S.D.N.Y. April 30, 2013) (Forrest, J.) .25, 26

Serio-US Indus., Inc., v. Plastic Recovery Techs., Corp.,
459 F.3d 1311 (Fed. Cir. 2006) 21, 28

Shinyei Corp. of America v. United States,
2010 U.S. App. LEXIS 21758 (Fed. Cir. Oct. 22, 2010) 30

Taurus IP, LLC v. DaimlerChrysler Corp.,
726 F.3d 1306 (Fed. Cir. 2013) 7, 18

Wedgetail, Ltd. v. Huddleston Deluxe, Inc.,
576 F.3d 1302 (Fed. Cir. 2009) 29

White Consol. Indus., Inc. v. Vega Servo-control, Inc.,
713 F.2d 788 (Fed. Cir. 1983) 28, 29

Wilson Sporting Goods Co. v. Hillerich & Bradsby Co.,
442 F.3d 1322 (Fed. Cir. 2006) 16, 30

Wireless Ink Corp. v. Facebook, Inc.,
2013 U.S. Dist. LEXIS 180182 (S.D.N.Y. Dec. 17, 2013).....23

Zodiac Pool Care, Inc. v. Hoffinger Ind., Inc.,
206 F.3d 1408 (Fed. Cir. 2000) 29

STATUTES

28 U.S.C. § 1927.....3, 19, 20

35 U.S.C. § 285.....passim

OTHER AUTHORITIES

FED. R. CIV. P. 37 .....10, 25

STATEMENT OF RELATED CASES

Plaintiff-Appellee Realtime Data LLC (referred to herein as "Realtime"), agrees with the Statement of Related Cases set forth by Defendants-Appellants CME Group, Inc., Board of Trade of the City of Chicago, Inc., New York Mercantile Exchange, Inc. (collectively referred to herein as "CME").

I. STATEMENT OF THE ISSUES

1. Whether CME has met its burden of showing that the trial court abused its discretion in denying CME's application for fees under 35 U.S.C. § 285 by applying an improper legal standard, when the proper legal standard under *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014), was briefed to, and followed by, the *Realtime* trial court.

2. Whether CME has met its heavy burden of showing that the trial court abused its discretion in denying CME's application for fees under 35 U.S.C. § 285 by relying on a clearly erroneous assessment of the relevant evidence.

II. STATEMENT OF THE CASE SETTING OUT THE FACTS

A. Preliminary Statement

Plaintiff-Appellee Realtime Data, LLC ("Realtime") was founded in 1998 by an entrepreneurial inventor, James Fallon, whose previous endeavors in the field of computerized satellite control led to the formation of a leading company in the military and commercial satellite field. (JA 2354-55). Mr. Fallon also had inventions in the field of data compression that were well-suited to the financial data industry. In 2002, Mr. Fallon published a white paper describing how his patented data compression techniques would allow the financial industry to transmit the ever-growing volumes of electronic financial data with minimized infrastructure and reduced delay in data transmission times. (JA 2356-57).

Realtime worked with two defendants (NASDAQ and Thomson Reuters) to prototype this technology. (JA 2358-60). Although NASDAQ termed the results "impressive" and Thomson Reuters, "promising," these defendants opted instead to join a group that began to work on a new protocol for data compression. (JA 2359-61). The financial industry universally adopted the resulting "FAST" standard. (JA 2360). Realtime believed that FAST infringed Realtime's data compression patents, and filed suit against 19 defendant groups. One major defendant, Bank of America, settled prior to the *Markman* proceedings. (JA 2942-43).

The *Realtime* trial court was aware that Realtime had filed these infringement suits in good faith. CME does not allege to the contrary, instead merely arguing that Realtime should have agreed to appeal immediately after the *Markman* order issued. This argument, however, overlooks the fact that the trial court gave one key claim term an expansive, open-ended construction. Realtime believed in good faith that its infringement position met this expansive claim term, and moved for summary judgment. Defendants disagreed and filed their own summary judgment motions. After evaluating the testimony of both expert witnesses, the trial court agreed with defendants. That Realtime ultimately lost, however, does not retroactively prove that it made its infringement arguments in bad faith. Indeed, all other defendants have waived attorney fees. (JA 2942-74).

CME's original fee request also included requests under 28 U.S.C. § 1927 and the trial court's inherent power, which required a finding of bad faith. The trial court rejected CME's fee request, expressly holding that Realtime had ***not*** acted in bad faith in continuing to litigate. Even though CME acquiesced to the trial court's rulings under 28 U.S.C. § 1927 and inherent power, it still alleges "bad faith" on appeal. Its arguments, however, were rejected by a very engaged trial court judge. Under the stringent abuse of discretion standard, CME has not shown any basis for reversing the trial court's considered decision denying fees.

B. Factual and Procedural Background

1. CME already argued every single issue presented to this court, but a very engaged trial court held that the case was not exceptional and had not been litigated in bad faith

CME's opening brief merely rehashes the same arguments about bad faith that the trial court already rejected. For example, CME repeats its argument that the *Markman* order was "case-dispositive" because it "expressly rejected" Realtime's infringement theory. (JA 0158, 0162; CME Br.[1] at 5, 8). CME also recycles its incorrect allegations that the court's summary judgment order turned solely on the *Markman* order (JA 0168; CME Br. at 13), and that the dispute over Realtime's privilege log demonstrated bad faith. (JA 0169; CME Br. at 14). The trial court rejected CME's arguments, holding that Realtime's "conduct was not so

[1] Citations herein to "CME Br." refer to the opening appellate brief filed in the present proceedings by Defendant-Appellant CME on September 29, 2014.

extreme or unreasonable that this case 'stands out from others'" and was "not so exceptional as to warrant an award of fees and costs pursuant to 35 U.S.C. § 285." *Realtime Data, LLC v. CME Group, Inc.*, 2014 U.S. Dist. LEXIS 91051, at *9 (S.D.N.Y. June 24, 2014).

2. After an exhaustive *Markman* process, the trial court adopted an open-ended definition for the disputed "data field/block type" term that did not preclude all infringement arguments

CME's briefing asks this Court to delve into the *minutae* of claim construction and to second-guess a trial court judge who was intimately familiar with the parties, the patents and the technology. Specifically, Judge Forrest conducted an all-day *Markman* hearing during which she heard several hours of direct and cross-examination of both technical experts. The trial court displayed familiarity with the parties' technical tutorials, over 2000 pages of briefing and exhibits, 34 pages of expert Declarations and over 200 pages of Realtime and Defendant powerpoint presentations, and asked many probing questions. (JA 02347; JA 2389; JA 2438; JA 2741; JA 2765; JA 2980; JA 2991; JA 3014; JA 3059-76). Judge Forrest then issued a 41 page *Markman* order. (JA 2248). Thus the trial court brought a uniquely educated perspective to CME's fee request.

CME's briefing reduces to one primary question: why did Realtime continue litigating after the *Markman* order? The simple reply is that one key claim term ("data field/block type") was open-ended, and Realtime believed in good faith that

its infringement contentions met that limitation. (JA 1996-97). Specifically, after detailed *Markman* briefing and a day-long hearing, the *Realtime* trial court adopted a definition of the "data field/block type" term that used the broadening phrase "***or other data type***." (JA 2286-87) (emphasis added). The trial court explained that the "inclusion of the phrase 'or other data type' in its construction ***allows for an expansive reading*** to this term to include data types that might not be listed but would be fairly encompassed by the invention." (JA 2271) (emphasis added). This Court affirmed.[2] Thus because the expansive "other data type" qualifier added claim breadth, summary judgment did not automatically follow.

Despite CME's insistence at the claim construction hearing that "it need[ed] to know" the "impact" of the construction on Realtime's infringement contentions for the "data field/block type" claim term (JA 0196), the trial court expressly refused CME's counsel's invitation to address infringement in its *Markman* order. (JA 2251-52). No doubt CME proposed the construction for "data field/block type" that the Court ultimately adopted because it believed that this would be a

[2] In affirming the Court's claim construction, the Federal Circuit also acknowledged that the inclusion of the "other data type" clause was "open-ended." *Realtime Data, LLC v. Morgan Stanley*, 2014 U.S. App. LEXIS 1512, at *17 (Fed. Cir. Jan. 27, 2014). On appeal, Realtime did not argue that the *Markman* order was case-dispositive, but instead noted that the trial court "relied on extrinsic noninfringement-driven testimony and argument from [CME's] expert and [CME's] counsel" to construe the disputed "data field/block type" claim terms. (JA 2207).

winning argument for defendants. Ultimately, CME's view on the merits prevailed. The question now before the Court is whether the trial court abused its discretion in finding that continued litigation of an expansive, open-ended claim term was not in bad faith, vexatious, unreasonable or baseless. The trial court had an informed, first-hand perspective that cannot be replicated by review of the cold record.

3. Realtime pursued good-faith litigation to advocate its interpretation of the open-ended "data field/block type" term

Realtime proceeded to advocate that its infringement position[3] met the expansive "data field/block type" limitation. (JA 0321). The trial court was well aware of the basis for Realtime's infringement allegations, and expressly rejected CME's arguments that Realtime continued litigation in bad faith.[4] (JA 1996-97; JA 0333-35; JA 0343-45; JA 0446; JA 0454). Although CME continues to allege bad faith on appeal, its contemporaneous actions were to the contrary. CME never

[3] Realtime contended that CME's accused products compared the content of the data field in the current message of a data packet with the content of the corresponding data field in a prior message of the same data packet ***for specific relationships*** between the content of the fields. (JA 1997; JA 0594; JA 0596; JA 0446; JA 0454; JA 0225). Contrary to CME's allegations, nowhere in its summary judgment papers did Realtime contend that "CME determined data field or data block types by [merely] 'checking a data value,'" as CME argued. (JA 0160; CME Br. at 12). Moreover, there was no "new" infringement theory. (JA 1997, n.21; JA 0225).

[4] CME recycles the same arguments about Realtime's Rule 56.1 statement that it unsuccessfully presented to the trial court. (CME Br. at 11; JA 0166-67; JA 02231). Moreover, CME did not contemporaneously move the trial court for relief regarding these alleged defects.

requested that Realtime withdraw its motion for summary judgment. Nor did CME ever warn that it would seek attorney's fees if Realtime maintained its summary judgment positions. Thus it appears that CME's pique is of recent vintage, designed to support its request for fees.

CME further alleges bad faith because the opinions of Realtime's technical expert allegedly were "junk science." (CME Br. at 11). Specifically, CME asserted that Realtime's expert coined new data types that were not in the patent. (JA 0175-76; CME Br. at 11). Dr. Shamos' opinion, however, was entirely consistent with the *Markman* order, which stated that the term includes "data types that might not be listed but would be fairly encompassed by the invention." (JA 2271).

CME also argues that Realtime exhibited bad faith in opposing CME's motion for summary judgment of noninfringement. CME's motion was based on its conflicting interpretation of the expansive "data field/block type" term. CME's differing view carried over into its Rule 56.1 statement, which went beyond the literal language of the *Markman* order to add disputable, self-serving language. Realtime, in good faith, disagreed with those statements. For example:

Markman order language	CME's 56.1 statement
"checking a value is not determining a data block type or data field type"	"checking whether data has a ***particular*** value does not ***categorize the data***"

(CME Br. at 12-13). Certainly Realtime cannot be faulted for refusing to admit CME's interpretation was a "fact." CME also incorrectly alleges that Realtime was "relying on the same rejected claim construction and repeating the same rejected infringement theory" in its briefing (CME Br. at 12). To the contrary, Realtime's briefing neither ignored the *Markman* construction of "data field/block type" nor reverted to its previously-rejected claim construction proposal. (JA 1996-98; JA 0333-35; JA 0343-45).

CME continues to press its unsuccessful argument that its ultimate victory retroactively proved that the *Markman* order was "unambiguously case dispositive." (CME Br. at 3). The trial court expressly disagreed with CME's 20/20 hindsight argument, holding that the fact that Realtime "ultimately lost on summary judgment does not itself amount to unreasonable or baseless conduct." *Realtime,* 2014 U.S. Dist. LEXIS 91051, at *9. Moreover, the record shows that the *Realtime* trial court considered "Realtime's description of how it performs this step" and also considered the opinions of both experts. (JA 1998; JA 2325). Thus, the Court did not merely refer back to its *Markman* to decide the disputed infringement question.

Finally, CME's briefing misconstrues the record regarding Realtime's agreement, at the trial court's request, to work with Defendants to sequence the 19 pending summary judgment motions for her consideration. There was no

"charade." (CME Br. at 12; JA 0167). Defendants gave the trial court a proposed sequence for considering certain noninfringement motions first, and Realtime concurred that Defendants had identified case-dipositive motions. (JA 2189; JA 2196). Realtime offered to hold over its mirror-image noninfringement motion in response to the Court's order requesting that the parties prioritize the motions. (JA 2001-02; JA 3077). However, Realtime also urged the Court to consider Realtime's own arguments concurrently, since the court could grant summary judgment for the non-movant. (JA 2196; JA 2001-02).

4. The trial court actively mediated the parties' dispute about Realtime's privilege log, and CME did not move for Rule 37 sanctions

Notwithstanding the trial court's express finding that "there is nothing to suggest that the issues regarding plaintiff's privilege log were the result of conduct taken in bad faith," *Realtime,* 2014 U.S. Dist. LEXIS 91051, at *12, CME rehashes its arguments that Realtime "engaged in a pattern of bad-faith conduct regarding inaccurate privilege assertions." (CME Br. at 14; JA 0169-71; JA 0178-79). CME presents no reason to second-guess Judge Forrest, who personally handled all the motions practice and reviewed the parties' extensive correspondence and briefing on this issue. (JA 0646; JA 1905; JA 2018-88; JA 2116; JA 0613; JA 1963; JA

2104). Moreover, CME never contemporaneously moved for sanctions under Rule 37[5] for conduct that it now argues is so egregious. (JA 1990).

Realtime produced its log just three days after CME produced its own log. (JA 1987; JA 0613). Realtime's initial privilege log (which its counsel received from another firm representing Realtime in a different litigation) required some revision. (JA 1987-88). Realtime's attorneys ***voluntarily*** began to re-review numerous entries identified by CME as suspect[6] and, by the end of July, had produced some 750 documents. (JA 1905; JA 2116; JA 1988; JA 2081). CME cut this cooperative process short and the Court conducted an *in camera* review of a random selection of documents. (JA -646; JA 1988-89; JA 2099; JA 2107). The trial court drew very strict lines on, *e.g.*, licensing-related and patent prosecution-

[5] Realtime had produced some 750 documents by the end of July 2012, and the trial court then ordered *in camera* review on August 2, 2012 (JA 2107). Final judgment was entered on November 9, 2012. (JA 2473). CME cannot credibly claim that it intended to delay seeking monetary relief for a discovery violation until after final judgment was entered, particularly given the fact that the trial court issued its summary judgment opinion ***after*** Realtime provided its final certification of the privilege log. (JA 0649; JA 2499)

[6] CME's correspondence provided little guidance to Realtime about the basis of its objections, despite Realtime's repeated requests for clarification. (JA 1987-88; JA 1988, n. 8; JA 1989, n. 13 JA 2059-74; JA 2081; JA 2104). CME did prioritize five broad document categories: (i) investment in Realtime; (ii) operational contract negotiations; (iii) entries allegedly lacking attorneys; (iv) documents allegedly authored by patent agents; and (v) licensing documents involving Realtime attorneys Padian or Tashjian.

related documents.[7] (JA 1989; JA 2471). Desiring to put any privilege disputes to rest and to focus without further distraction on pre-trial tasks, Realtime's attorneys rigorously applied Judge Forrest's strict privilege guidance and resolved numerous close questions in favor of production. (JA 0649; JA 1989-90). CME never used any of the previously-logged documents to support its pending summary judgment motions, and thus its intimations of prejudice are unsupported. (JA 1990).

III. SUMMARY OF THE ARGUMENT

CME fails to meet its heavy burden of proving that the *Realtime* trial court's denial of CME's request for fees under 35 U.S.C. § 285 was an abuse of discretion. First, CME fails to establish that the *Realtime* trial court abused its discretion by applying an improper legal standard. Rather, the parties briefed the proper legal standard, *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014), and the trial court duly followed *Octane Fitness*. The trial court's additional citation to *Kaneka* regarding a possible chilling effect on good faith litigation does not run afoul of any Federal Circuit precedent.

Second, CME fails to establish that the *Realtime* trial court abused its discretion in denying CME's application for fees under 35 U.S.C. § 285 by relying

[7] After the trial court drew a stricter line for licensing documents than Realtime had used in its initial review, Realtime produced additional licensing documents. (JA 0649). Realtime also produced many patent prosecution documents from the over 4000 prosecution-related log entries, most of which related to unasserted patents. Based on CME's prioritization, Realtime had not broadly reviewed prosecution documents before the trial court's *in camera* review. (JA 1989, n. 13).

on a clearly erroneous assessment of the relevant evidence. CME merely rehashes factual arguments that were presented to, and rejected by, the *Realtime* trial court. Given that one key claim term was expansive and open-ended, the *Realtime* trial court correctly held that Realtime's continued litigation was neither extraordinary nor in bad faith. Moreover, the actions of Realtime's counsel in voluntarily re-reviewing its privilege log evidenced good faith, as did its compliance with the trial court's stringent guidelines regarding licensing and patent prosecution documents.

IV. ARGUMENT

A. Recent Supreme Court precedent gives the trial court great latitude in its fee decisions under 35 USC § 285

Recently in *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, the Supreme Court held that 35 U.S.C. § 285 "imposes one and only one constraint on district court's discretion to award attorney's fees in patent litigation: The power is reserved for 'exceptional' cases." *Octane Fitness*, 134 S. Ct. at 1755-56. The Supreme Court noted that the definition of "exceptional" was "uncommon," "rare," or "not ordinary." *Id*. at 1756. The Supreme Court then announced the controlling standard for award of fees under 35 U.S.C. § 285:

> We hold then, that an "exceptional" case is simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated. District courts may determine whether a case is

> "exceptional" in the case-by-case exercise of their discretion, considering the totality of the circumstances."

Id. In short, 35 U.S.C. § 285 "is inherently flexible." *Id.*

In the companion case of *Highmark Inc. v. Allcare Health Management System, Inc.*, 134 S. Ct. 1744 (2014), the Supreme Court further clarified that a highly deferential abuse of discretion standard applied to trial courts' discretionary fee decisions under 35 U.S.C. § 285. *Highmark*, 134 S. Ct. at 1749. The Supreme Court noted that "as a matter of the sound administration of justice, the district court is better positioned to decide whether a case is exceptional, ***because it lives with the case over a prolonged period of time***." *Id*. at 1748 (quoting *Pierce v. Underwood*, 487 U.S. 552, 559 (1988) (emphasis added, internal quotations omitted)). Moreover, the Supreme Court noted that "[a]lthough questions of law may in some instances be relevant to the § 285 inquiry, ***that inquiry is, at heart, rooted in factual determinations."*** *Id*. at 1749 (quoting *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 401 (1990) (emphasis added, internal quotations omitted)).

B. CME has not met its burden of proving that the trial court abused its discretion by committing an error of law

1. The trial court was properly briefed on the controlling Supreme Court precedent, and applied it correctly

Octane Fitness and *Highmark* issued during the pendency of the briefing on CME's fee request, and CME immediately submitted them to the trial court. CME noted that "*Octane Fitness* is the more relevant of the two decisions because it both

lowers the evidentiary standard and clarified the discretionary considerations for finding a patent case "exceptional" under Section 285." (JA 3080). CME directed the trial court to the Supreme Court's holding that "a case is 'exceptional' if it simply stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." (JA 3080) (quoting and citing *Octane Fitness*). CME highlighted the discretionary nature of the inquiry "considering the totality of the circumstances," and the lower "preponderance of the evidence standard." (JA 3080). Finally, CME argued that *Highmark*, too, "does highlight the discretionary nature of the exceptional case determination now before this Court." (JA 3081). The resulting Order denying fees quoted *Octane Fitness* and then held: "[T]his case is not so exceptional as to warrant an award of fees and costs pursuant to 35 U.S.C. § 285. While plaintiff ultimately did not prevail in the underlying litigation, ***its conduct was not so extreme or unreasonable that this case stands out from others."*** *Realtime,* 2014 U.S. Dist. LEXIS 91051, at *9 (emphasis added). The *Realtime* trial court thus employed the same approach this Court recently directed the *Octane Fitness* trial court to apply on remand. *ICON Health & Fitness, Inc. v. Octane Fitness, LLC*, 2014 U.S. App. LEXIS 16411, at *8 (Fed. Cir. Aug 26, 2014). Moreover, "[t]he Supreme Court's decision in *Octane* did not, however, remove the discretion of a district court to

deny fee awards even in exceptional cases." *ICON Health & Fitness*, 2014 U.S. App. LEXIS 16411, at *7.

2. The trial court's citation of *Kaneka* was proper, particularly in light of the express factual finding that Realtime had not acted in bad faith

In an effort to create a legal error that might justify this Court's reversal of the denial of fees under the deferential abuse of discretion standard, CME mischaracterizes the *Realtime* trial court's citation of a nonbinding opinion of a sister court, *Kaneka Co. v. Zhejaing Medicine Co.*, 2014 U.S. Dist. LEXIS 91659 (C.D. Cal. May 23, 2014). (JA 2337). CME argues that the *Realtime* trial court cited *Kaneka* for an incorrect legal proposition that a plaintiff "must" be allowed to proceed to summary judgment and that this is "always" required. (CME Br. at 4, 22). CME is incorrect.

As an initial factual matter, the *Realtime* court did not "rely" on *Kaneka* for its ruling. The *Realtime* court made its ruling based on *Octane Fitness*, set forth in the preceding sentence: ***"[Realtime's] conduct was not so extreme or unreasonable that this case "stands out from others."*** *Realtime,* 2014 U.S. Dist. LEXIS 91051, at *9 (emphasis added). The *Realtime* court then cited *Kaneka* only with regard to CME's argument that Realtime was unreasonable in continuing to litigate after the *Markman* order: that Realtime "ultimately lost on summary judgment does not ***itself*** amount to unreasonable or baseless conduct." *Id*.

(emphasis added). Rebutting CME's argument with citation of the policy suggestion of a sister district court does not affect the *Realtime* trial court's dispositive finding that the case did not "stand out from others." Thus, CME is simply wrong when it argues that "the district court should have considered the objective merits of Realtime's infringement allegations at the time of the *Markman* order." (CME Br. at 23). The *Realtime* trial court ***did*** consider the merits, and as a result, it expressly held, *inter alia*, that there was no unreasonable, baseless, bad faith or vexatious conduct. *Realtime*, 2014 U.S. Dist. LEXIS 91051, at *12.

The *Realtime* trial court's acknowledgement of a "suggestion" in *Kaneka*, (*Realtime*, 2014 U.S. Dist. LEXIS 91051, at *9-10), does not run contrary to any controlling Federal Circuit precedent.[8] Certainly CME cannot cite to Federal Circuit case law that has issued a *per se* prohibition against taking into consideration policy concerns about chilling good faith litigation. Moreover, *Kaneka* is consistent with, *e.g.*, *Jang v. Boston Scientific Corp.*, 532 F.3d 1330, 1334 (Fed. Cir. 2008) and *Wilson Sporting Goods Co. v. Hillerich & Bradsby Co.*, 442 F.3d 1322, 1330 (Fed. Cir. 2006).

[8] In *Kaneka*, as here, the trial court expressly held that the plaintiffs had ***not*** acted in bad faith. *Kaneka*, 2014 U.S. Dist. LEXIS 91659 at *9; *Realtime*, 2014 U.S. Dist. LEXIS 91051, at *12. Without the "plus factor" of some evidence of bad faith, *Kaneka* is entirely within the bounds of denials of fees found to be proper by this Court. *See infra* n. 14.

CME cites to four pre-*Octane Fitness* Federal Circuit cases as support for its proposition that litigating after an unfavorable *Markman* order can support an award of fees. (CME Br. at 23 (citing *Phonometrics, Inc. v. Westin Hotel Co.*, 350 F.3d 1242 (Fed. Cir. 2003), *MarcTec, LLC v. Johnson & Johnson*, 664 F.3d 907 (Fed. Cir. 2012), *Taurus IP, LLC v. DaimlerChrysler Corp.*, 726 F.3d 1306, 1313 (Fed. Cir. 2013), and *Cartner v. Alamo Group, Inc.*, 2012 U.S. Dist. LEXIS 187038 (N.D. Ohio Feb. 6, 2012) (*aff'd*, 561 Fed. App'x 958 (Fed. Cir. 2014)). These cases are readily distinguishable, as in each instance the trial courts expressly found bad faith and vexatious conduct, and consequently opted to award fees. *Phonometrics*, 350 F.3d at 1244-46; *MarcTec*, 664 F.3d at 914-15; *Taurus IP*, 726 F.3d at 1671; *Cartner*, 2012 U.S. Dist. Lexis 187038, at *12-13. Here, to the contrary, the *Realtime* trial court exercised its sound discretion to expressly ***reject*** CME's arguments that Realtime acted in bad faith. Moreover, under an abuse of discretion standard, affirmance of a trial court's discretionary award of fees (as in *Phonometrics*, *MarcTec*, *Taurus IP* and *Cartner*) does not dictate that in subsequent cases a trial court ***must*** award fees. *See ICON Health & Fitness*, 2014 U.S. App. LEXIS 16411, at *8. Such an approach would abrogate the latitude given to the trial court under *Octane Fitness* and violate the deferential abuse of discretion standard.

Finally, CME incorrectly cites *Kilopass Tech., Inc. v. Sidense Corp.*, 738 F.3d 1302 (Fed. Cir. 2013), for the proposition that the *Realtime* court committed an error of law. (CME Br. at 23-24). The differences between *Kilopass* and the facts at bar here are instructive. In *Kilopass*, the Federal Circuit vacated and remanded the trial court's decision not to award fees under 35 U.S.C. § 285. The Federal Circuit noted that two prior Federal Circuit opinions (*MarcTec* and *iLOR*) contained dicta incorrectly requiring "actual knowledge" that a litigant's claims were baseless. *Kilopass*, 738 F.3d at 1309-10. The Federal Circuit remanded because it was unclear from the trial court's opinion whether it had followed the errant dicta. *Id.* In contrast here, CME has not established that the *Realtime* trial court followed bad law. Indeed, CME expressly urged the *Realtime* trial court follow and apply the correct law, *Octane Fitness*, (JA 3080-81), and the trial court complied. This is clearly evidenced in the trial court's written opinion. *Realtime*, 2014 U.S. Dist. LEXIS 91051, at *9. Nor does the *Realtime* Order run contrary to *Phonometrics*, *MarcTec*, *Taurus IP* and *Cartner*, since each of those cases involved bad faith "plus factors" not present here.

C. CME has not met its burden of proving that the trial court abused its discretion by relying on a clearly erroneous assessment of the relevant evidence

An appeal is not an opportunity for the Federal Circuit to sit in judgment *de novo* over the facts presented by the record. Rather, "factual findings are not

clearly erroneous unless 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Monsanto v. E.I. DuPont De Nemours & Co*., 748 F.3d 1189, 1196 (Fed. Cir. 2014) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985)). As CME's own cited precedent states, "We [*i.e.*, the Federal Circuit], of course, ***review*** the district court's decision. Thus, the issue is not whether we would award sanctions, but whether, applying the appropriate, deferential review standard, we must sustain the district court's decision." *Phonometrics*, 350 F.3d at 1250 n. 10 (emphasis in original). Moreover, the trial judge's discretion in the award of attorney fees under 35 U.S.C. § 285 permits the judge to weigh intangible as well as tangible factors: the degree of culpability of the infringer, the closeness of the question, litigation behavior, and any other factors whereby fee shifting may serve as an instrument of justice. *Nat'l Presto Indus. v. West Bend Co*., 76 F.3d 1185, 1197 (Fed. Cir. 1996).

1. CME has not shown clear error in the *Realtime* trial court's factual finding that there was no bad faith

CME initially argued that fees should be awarded based on 28 U.S.C. § 1927 and the Court's inherent power. A finding of "bad faith" was required to support these theories. (CME Br. at 15; JA 1993-94); *Realtime*, 2014 U.S. Dist. LEXIS 91051, at *11. Despite CME's devotion of well over a dozen pages to its allegations of "bad faith" on the part of Realtime, the trial court rejected CME's views. Instead, the trial court held unambiguously that Realtime did ***not*** act in bad

faith. *Realtime*, 2014 U.S. Dist. LEXIS 91051, at *12. Since determinations of bad faith are uniquely dependent on a trial court's personal experience with the parties, *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1324 (Fed. Cir. 2011), it is unsurprising that CME did not appeal the § 1927 and inherent power rulings. It ***is*** surprising that, notwithstanding its acquiescence on § 1927 and inherent power, CME continues to argue that Realtime acted in bad faith.[9]

CME argues on appeal that this Court should substitute its own view of Realtime's state of mind to find bad faith, even though the trial court necessarily examined Realtime's state of mind in order to rule on CME's abandoned fee claims under 28 U.S.C. § 1927 and the Court's inherent power. CME's request that the panel second-guess the trial court's state of mind finding runs directly counter to CME's own cited precedent. *Cartner*, 561 Fed. Appx. at 967 (appellate court must defer to trial court's resolution of factual question of good faith); *see also, Eon-Net LP*, 653 F.3d at 1324.

Similarly here, Judge Forrest was in the best position to monitor Realtime's conduct, and her resolution of the question of intent in favor of Realtime must stand. Indeed, other than frequently repeating the shibboleth of "bad faith," CME

[9] CME acknowledged that only the court's inherent power could justify an award of expert witness fees. (JA 0173). Accordingly CME cannot be heard to argue that it is dropping its "bad faith" arguments under inherent power on appeal because the relief is redundant.

has briefed nothing on appeal that could possibly support a definite and firm conviction that the trial court was in error. *Cybor Corp. v. FAS Technologies,* 138 F.3d 1448, 1461 (Fed. Cir. 1998) ("FAS's mere argument that Cybor's defenses and claims were "baseless" and in "bad faith" does not undermine the district court's conclusions to the contrary."); *see also, Lighting World, Inc. v. Birchwood Lighting, Inc.*, 382 F.3d 1354, 1366 (Fed Cir. 2004).

2. All the arguments that CME makes here were presented to the *Realtime* trial court, but were found to be unpersuasive

a. CME cannot use the lack of detailed factual findings to infer lack of consideration by Judge Forrest

CME unsuccessfully presented all the arguments it makes here to the *Realtime* trial court. In denying CME's fee request, the trial court provided a five page opinion that cited and applied the controlling Supreme Court precedent and provided a cogent explanation of the basis for its opinion. *Realtime,* 2014 U.S. Dist. LEXIS 91051, at *10-11. CME disparagingly characterizes that opinion as a "short ruling denying CME's motion that contained no analysis of Realtime's behavior following the *Markman* order." (CME Br. at 17). This Court has long held, however, that detailed fact-findings are not necessary to support a denial of fees. *Carroll Touch, Inc. v. Electro Mechanical Systems, Inc.*, 15 F.3d 1573, 1583-84 (Fed. Cir. 1993); *Serio-US Indus., Inc., v. Plastic Recovery Techs., Corp.*, 459 F.3d 1311, 1322 (Fed. Cir. 2006).

b. The trial court expressly rejected CME's arguments regarding Realtime's decision to continue litigating after the *Markman* order

On appeal, CME cites *Computer Docking Station Corp. v. Dell, Inc.*, 519 F.3d 1366 (Fed. Cir. 2008), for the general proposition that "if the patentee prolongs litigation in bad faith, an exceptional finding may be warranted." (CME Br. at 20). *Computer Docking* actually supports Realtime's position, however. On appeal, the Federal Circuit ultimately ***affirmed*** the *Computer Docking* trial court's ***denial*** of fees (just as Realtime requests the Court to do here). As is the case here, the *Computer Docking* trial court made an express finding that the party's "decision to continue the litigation after the district court's claim construction did not make this an exceptional case." *Computer Docking*, 519 F.3d at 1380. In upholding the trial court's denial, the Federal Circuit noted the propriety of denying fees based on litigating after receipt of an initial *Markman* order that had not yet been tested on appeal:

> If this court had reversed the district court's construction of the portable computer limitation, CDSC might have been able to prevail on the all connections limitation. Thus, the district court did not clearly err in refusing to find the case exceptional based on CDSC's decision to continue the litigation.

Computer Docking, 519 F.3d at 1380. Thus, the holding and rationale of *Computer Docking* is directly contrary to CME's argument.

Here, CME did not allege that Realtime's patent suit was brought in bad faith; CME alleges only that it was *continued* in bad faith following the *Markman* order. In fact, continued pursuit of infringement claims following an unsuccessful *Markman* order has been viewed as "counsel's good faith efforts to navigate a prolonged and complex litigation on behalf of its client." *Wireless Ink Corp. v. Facebook, Inc.*, 2013 U.S. Dist. LEXIS 180182, at *17-18 (S.D.N.Y. Dec. 17, 2013). "Defeat of a litigation position, even on summary judgment, does not warrant an automatic finding that the suit was objectively baseless; all of the circumstances must be considered." *David A. Potts & Geomatrix, LLC*, 2013 U.S. Dist. LEXIS 114649, at *5 (quoting *Aspex Eyewear Inc. v. Clariti Eyewear, Inc.*, 605 F.3d 1305, 1315 (Fed. Cir. 2010)).

CME also cites to *Phonometrics* and disparages Realtime's summary judgment briefing as an effort "to 'slide around' the court's order in bad faith." (CME Br. at 28). The lack of clear error regarding Realtime's state of mind is addressed *supra* at section IV.C.1. As for "sliding around," *Phonometrics* makes clear that what was objectionable was not the attempt to interpret and apply a claim construction (which is a routine activity for the patent litigation bar). Rather, *Phonometrics* turned on the uniquely unassailable nature of the claim interpretation at issue. *Phonometrics*, 350 F.3d at 1244 (prior Federal Circuit claim construction was *stare decisis* and Federal Circuit warned patentee that re-litigating the

construction would be sanctionable). Moreover, the objectionable "sliding around" in *Phonometrics* was a complete failure to accuse the infringer of violating the patent as it had been previously construed by the Federal Circuit. *Id.* at 1244-45. Here, in contrast, there had been no prior binding Federal Circuit claim construction, and the disputed term was open-ended and expansive.

CME's reliance on *MarcTec* for its charge that Dr. Shamos engaged in "junk science" is equally suspect. In *MarcTec*, the expert proffered an opinion that the Court ruled inadmissible under a *Daubert* challenge. The court noted that "spraying droplets at an unreasonable speed [*i.e.*, "nearly the speed of sound"] . . . is an untested and untestable theory." *MarcTec*, 644 F.3d at 913. Dr. Shamos' opinions do not likewise stretch scientific principles beyond credulity. Moreover, the Federal Circuit warned that objectionable expert testimony "in most cases likely would not [trigger a finding of litigation misconduct]." *MarcTec*, 644 F.3d at 920. Rather, the expert testimony was part of a larger pattern of egregious circumstances. These included the patentee's bad faith filing of a baseless infringement action, ignoring a clearly relevant disclaimer of claim scope made to the PTO, ignoring the specification and prosecution history, and misstating controlling legal precedent during the *Markman* briefing process. 644 F.3d at 914-15. CME cannot argue that Realtime's brief litigation after an "expansive"

Markman order coupled with a single, unsanctioned discovery dispute equates to the parade of horribles in *MarcTec*.

c. The trial court considered and rejected CME's arguments regarding the privilege log

CME devoted numerous pages to briefing to its litany of complaints regarding the privilege log before the trial court. (JA 0154-81; JA 2228-41). Once again, the *Realtime* court did not agree with CME's view, stating:

> Similarly, the fact that plaintiff submitted a privilege log that subsequently required significant revisions is insufficient to justify a finding that this case is extreme. While the deficiencies in plaintiff's privilege log did necessitate a great deal of time and attention on the part of the CME Defendants, there is no indication that plaintiff acted so unreasonably under the circumstances as to justify an award of attorney's fees pursuant to 35 U.S.C. § 285.

Realtime, 2014 U.S. Dist. LEXIS 91051, at *9. Moreover, the *Realtime* court expressly held that "there is nothing to suggest that the issues regarding plaintiff's privilege log were the result of conduct taken in bad faith." *Id*. at *10. Indeed, CME's one-sided litany omits significant facts that weigh in favor of Realtime. (JA 1987-90; JA 2003-06). Moreover, CME never moved for monetary sanctions pursuant to Rule 37 at the time of the privilege log dispute. (JA 1990). In Judge Forrest's court, failure to make a Rule 37 fee request at the time of the discovery dispute precludes any subsequent attempt to collect fees pursuant to 35 U.S.C § 285. (JA 2978) (*SAP AG v. DataTern, Inc*., Case No. 1-11-CV-2648, slip. op. (S.D.N.Y. April 30, 2013) (Forrest, J.)). Judge Forrest's requirement that fee

requests for discovery disputes be timely submitted is certainly within the realm of her discretion. Moreover, CME's argument that it preserved its sanction request regarding the privilege log is not reflected in the written record, as the Final Judgment is silent as to this issue. (JA 2240, n. 52; JA 2482). Given Judge Forrest's ruling in the earlier *SAP AG* case, CME should have expressly addressed fees for the privilege dispute in the Final Judgment if it intended to revisit that issue at a later time.

CME's legal arguments regarding the privilege log also should be rejected because CME relies on inapposite[10] or nonbinding[11] precedent. The one cited appellate precedent, *Chevron*, is readily distinguished by counsel's good faith, voluntary efforts to re-review and correct the log. In contrast, the Government in *Chevron* evidenced bad faith in standing firm on its privilege objections, even pursuing mandamus and adding four years of delay to the ultimate resolution of the litigation. The Federal Circuit's final privilege determination in *Chevron*

[10] *Chevron USA, Inc. v. United States*, 110 Fed. Cl. 747, 807 (Fed. Cl. 2013).

[11] The *Realtime* trial court was not persuaded by CME's citation of the non-binding precedents of *Mid-Continent Cas. Co. v. Eland Energy, Inc*., 2007 U.S. Dist. LEXIS 21671 (D. Conn. Mar. 26, 2007) and *Glynn v. EDO Corp*., 2010 U.S. Dist. LEXIS 86013 (D. Md. Aug. 20, 2010). Both are factually distinguishable. *Mid-Continent* did not award sanctions for over-withholding of documents, but rather merely issued a pre-emptive warning to a party that had sought to quash a third party subpoena. 2007 U.S. Dist. LEXIS 21671, at *3. *Glynn* issued a small monetary sanction in response to plaintiff's inappropriate actions in obtaining the disputed documents in the first instance. 2010 U.S. Dist. LEXIS 8013, at *38-39.

conclusively held that 42% of the analyzed folders contained improper privilege assertions. Here, in contrast, there was no such intransigence and delay. Nor was there a definitive ruling by this Court on Realtime's privilege assertions. Indeed, the *Realtime* trial court took an exceedingly strict view of privilege, but Realtime acquiesced and conducted its re-review (a mere 9 weeks before trial) with an eye toward avoiding any additional, distracting privilege disputes with CME.

d. CME's remaining arguments regarding alleged "litigation misconduct" evidence no clear error

CME's remaining few factual complaints[12] do not support this Court's departure from its traditional deference to the trial court. First, CME recycles its complaints that Realtime refused to give CME a detailed preview of its summary judgment motion in meet and confer after the *Markman* order issued. (CME Br. at 8-9; JA 0163-64). Although CME contests the quality of Realtime's disclosure, it provides no supporting legal authority that Realtime was obligated to do more. Nor did CME bring this complaint to the *Realtime* trial court at the time of the alleged infraction. Second, CME recycles its charges that Realtime allegedly impugned the integrity of the Court. (CME Br. at 8-9; *compare* JA 0164). CME

[12] CME includes these allegations in its factual background (CME Br. at 8-9), but does not link these allegations to its arguments made for reversal (CME Br. at 26-33). Out of an abundance of caution, Realtime addresses these allegations here.

mischaracterizes that hearing.[13] Moreover, it stands to reason that Judge Forrest, who observed nuances of demeanor and other intangibles not reflected on the cold hearing transcript, was in the best position to determine whether Realtime was attacking the integrity of the Court. Notably, Judge Forrest did not sanction Realtime's counsel. Nor did this hearing tilt the totality of circumstances regarding fees to CME's favor. *Realtime*, 2014 U.S. Dist. LEXIS 91051, at *12.

D. CME improperly requests that this Court depart from its long-standing precedent and second-guess the trial court's exercise of its discretion

Since its inception, this Court has consistently upheld the discretion of the trial court and affirmed denials of fees under 35 U.S.C. § 285. *White Consol. Indus., Inc. v. Vega Servo-control, Inc.*, 713 F.2d 788, 792 (Fed. Cir. 1983).[14]

[13] Realtime never attacked the *Markman* ruling, but rather stated it would go to trial with that ruling. (JA 0217). Nor did Realtime impugn the court's integrity; instead, counsel expressed Realtime's frustration at seeing its ideas incorporated into an industry standard while Realtime was left "on the sideline." (JA 0218).

[14] *Accord, Baldwin Hardware Corp. v. Franksu Enterprise Corp.*, 78 F.3d 550, 563 (Fed. Cir. 1996); *Carroll Touch*, 15 F.3d at 1584; *Computer Docking*, 519 F.3d at 1380; *Cybor*, 138 F.3d at 1461; *EON-Net*, 653 F.3d at 1329; *Frank's Casing Crew & Rental Tools, Inc. v. Weatherford Int'l, Inc.*, 389 F.3d 1370, 1380 (Fed. Cir. 2004); *Highway Equip. Co. v. FECO, Ltd.*, 469 F.3d 1027, 1039 (Fed. Cir. 2006); *Imagineering, Inc., v. van Klassens, Inc.*, 53 F.3d 1260, 1267 (Fed. Cir. 1995); *Lighting World, Inc. v. Birchwood Lighting, Inc.*, 382 F.3d 1354, 1366-67 (Fed. Cir. 2004); *Luma Corp. v. Stryker Corp.*, 2008 U.S. pp. LEXIS 7669, at *15-16 (Fed. Cir. April 10, 2008); *Motorola, Inc. v. Interdigital Tech. Corp.*, 121 F.3d 1461, 1474 (Fed. Cir. 1997); *Monsanto*, 748 F.3d at 1196; *Multiform Dessicants, Inc. v. Medzam, Ltd*, 133 F.3d 1473, 1482 (Fed. Cir. 1998); *Power Mosfet Tech., L.L.C. v. Siemens AG*, 378 F.3d 1396, 1415 (Fed. Cir. 2004); *Serio-US*, 459 F.3d at

This Court has traditionally used a deferential "abuse of discretion" standard in reviewing such fee denials. *Id.* This deference is rooted in the Court's oft-repeated recognition that the trial court is better situated to assess the merits of the parties' positions and behavior, and corresponding disinclination to second-guess the trial court. *See e.g.*, *EON-Net*, 653 F.3d at 1324; *Frank's Casing*, 389 F.3d at 1379; *Highway Equipment*, 469 F.3d at 1037; *Lighting World*, 382 F.3d at 1366; *Luma Corp*., 2008 U.S. App. LEXIS 7669, at *15-16; *Motorola*, 121 F.3d at 1468. This Court even affirmed a denial of fees on facts that were far more compelling than the mere 3 month continuation of litigation after receipt of a *Markman* order and a single, unsanctioned discovery dispute. *White Consol. Indus., Inc.*, 713 F.2d at 792 (affirming denial of fees notwithstanding trial court determination that the case was frivolous as filed, and award of sanctions for discovery misconduct). The Supreme Court's recent opinion in *Highmark* makes clear that this deference is appropriate because "as a matter of sound administration of justice, the district court is better positioned to decide whether a case is exceptional because it lives with the case over a period of time." *Highmark*, 134 S. Ct. at 1749.

Set against both the great weight of Federal Circuit precedent and *Highmark*, which CME itself recognized to "highlight the discretionary nature of the

---

1322; *Wedgetail, Ltd. v. Huddleston Deluxe, Inc.*, 576 F.3d 1302, 1307 (Fed. Cir. 2009); *Zodiac Pool Care, Inc. v. Hoffinger Ind., Inc*., 206 F.3d 1408, 1417 (Fed. Cir. 2000).

exceptional case determination" (JA 3081), it is quite telling that CME has not cited to a single Federal Circuit case granting the bold relief that it requests: reversal of the trial court's denial of fees under 35 U.S.C. § 285 and remand for calculation for damages. (CME Br. at 33). Indeed the one case that it cites in support, *Shinyei Corp. of America v. United States*, does not arise under 35 U.S.C. § 285 and is factually inapposite. 2010 U.S. App. LEXIS 21758, at *1 (Fed. Cir. Oct. 22, 2010) (appeal of denial of fees under the Equal Access to Justice Act for egregious government behavior). Moreover, CME's starting premise that the record contained enough detailed evidence establishing noninfringement is both unsupported by the record, *see supra* section II.B., and inconsistent with this Court's precedent. *Jang*, 532 F.3d at 1838-38; *Wilson*, 442 F.3d at 1330.

V. CONCLUSION

CME falls far short of establishing that the *Realtime* trial court abused its discretion in denying its request for fees under 35 U.S.C. § 285. Accordingly, Realtime respectfully requests that the decision of the trial court be affirmed.

Respectfully submitted,

/s/ Dirk D. Thomas

Dirk D. Thomas
McKOOL SMITH, P.C.
1999 K Street NW, Suite 600
Washington, DC 20006-1101
Telephone: (202) 370-8300
Facsimile: (202) 370-8344

Brett E. Cooper
McKOOL SMITH, P.C.
One Bryant Park, 47th Floor
New York, New York 10036
Telephone: (212) 402-9400
Facsimile: (212) 402-9444

Laura A. Handley
McKOOL SMITH P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
Telephone: (214) 978-4000
Facsimile: (214) 978-4044

Attorneys for Plaintiff-Appellee
Realtime Data, LLC

CERTIFICATE OF SERVICE

I, Mekbib Solomon, hereby certify that on November 18, 2014, I caused one copy of the documents listed below:

CORRECTED BRIEF FOR PLAINTIFF-APPELLEE REALTIME DATA, LLC

to be filed by CM/ECF with:

Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

and to be served via CM/ECF and electronic mail on the following:

CME Group Inc., Board of Trade of The City of Chicago, Inc., and New York Mercantile Exchange, Inc.:

Scott F Partridge
Michael A. Howes
Baker Botts LLP
One Shell Plaza, 910 Louisiana
Houston, TX 77002-4995
Telephone: (713) 229-1569
Facsimile: (713) 229-7769
Email: scott.partridge@bakerbotts.com
Email: michael.hawes@bakerbotts.com

I declare that I am employed by McKool Smith P.C. at whose direction the service was made. Executed on November 18, 2014, at Washington, D.C.

/s/ Mekbib Solomon
Mekbib Solomon
Senior Paralegal
McKool Smith, P.C.
1999 K Street, NW
Washington, D.C. 20006
Telephone: (202) 370.8300
msolomon@mckoolsmith.com

CERTIFICATE OF COMPLIANCE

I certify that the foregoing **CORRECTED BRIEF FOR PLAINTIFF-APPELLEE REALTIME DATA, LLC**:

1. Complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 7,569 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b). Microsoft Word 2010 was used to calculate the word count; and
2. Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type style.

Dated: November 18, 2014.

Respectfully submitted,

/s/ Laura A. Handley

Laura A. Handley
McKOOL SMITH, P.C.
300 Crescent Court
Suite 1500
Dallas, Texas 75201
Telephone: (214) 978-4000
Facsimile: (214) 978-4044

Attorney for Plaintiff-Appellee Realtime Data LLC