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., and 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, Judge Katherine B. Forrest

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REPLY BRIEF FOR DEFENDANTS – APPELLANTS CME GROUP, INC., BOARD OF TRADE OF THE CITY OF CHICAGO, INC., AND THE NEW YORK MERCANTILE EXCHANGE, INC.

December 4, 2014

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I. ARGUMENT IN REPLY

The district court adopted narrow constructions for the critical "data type" terms that expressly excluded the infringement theory Realtime had agreed it was willing to "live and die by." JA2270-73; JA2246-47. Indeed, in granting summary judgment of non-infringement, the district court's order was unambiguous: "It is clear from Realtime's description of how it performs this step, that it is performing a value check. The question is whether there is an issue of fact as to where this value check can constitute content categorization. There is not. ***The Court resolved this issue in connection with its Markman opinion***." JA2325 (emphasis added). The district court committed an error of law in concluding that a case can never be exceptional due to a patentee pushing forward with infringement claims after a dispositive *Markman* order, even when the ground for an exceptional case is that the infringement claim is baseless in view of that claim construction. CME therefore seeks its fees for the time period when Realtime needlessly prolonged litigation, from the *Markman* opinion through grant of summary judgment.

Realtime attempts to rewrite the history of this litigation. First, despite the district court stating that it adopted a construction that directly contradicted Realtime's infringement theory, Realtime now contends that the district court's construction was "expansive" and "open-ended" and supported infringement. *See, e.g.*, RT Resp. at 2 ("[T]he trial court gave one key claim term an expansive, open-

ended construction."). That revisionist history ignores (1) the *Markman* order's explanation of how the construction precluded Realtime's infringement theory; (2) the numerous instances where Realtime argued against the construction as too narrow, both before and after adoption; and (3) the fact that, in pursuing and opposing summary judgment, Realtime applied its own rejected claim construction rather than the construction adopted by the district court. Indeed, rather than apply the district court's construction, Realtime prolonged litigation by continuing to advocate its preferred interpretation instead of stipulating to non-infringement and seeking appeal.

Realtime also argues that because the order denying fees recited the proper *Octane Fitness* standard, the district court could not have applied an incorrect legal rule. *See* RT Resp. at 13-15. But Realtime successfully convinced the district court to adopt the erroneous understanding that, with only a "claim construction issued apart from a case-dispositive motion," "an appellate court cannot properly exercise its appellate jurisdiction." JA134. Despite extensive discussion in CME's opening brief explaining why that is ***the*** most significant error requiring reversal (CME Br. at 21-26), Realtime does not even attempt to defend that basis for the district court's ruling.

Realtime similarly asks this Court to disregard the extensive record of Realtime's misconduct on the basis that the district court already considered that

evidence. *See* RT Resp. at 21. Because of a mistaken belief that Realtime needed to continue litigating to create a record for appeal, however, the district court addressed only the evidence relating to false privilege assertions and found that, standing alone, it did not justify attorneys' fees. JA134. Contrary to Realtime's argument, the district court did not discuss any of the other evidence of Realtime's misconduct in pursuing litigation following claim construction. *Id.* Moreover, despite its best attempts, Realtime cannot hide from the record of its vexatious behavior.

Realtime's response faults CME for not following the lead of defendants who "waived attorneys fees" (RT Resp. at 2), which fails to recognize CME's unique role in this litigation. CME identified the key "data type" terms as case dispositive and argued those terms at the *Markman* hearing, including presenting the district court with Realtime's infringement theory ***against CME*** to illustrate the significance of the claim construction dispute. *See* CME Br. at 3-5; JA192-99. After the district court adopted CME's construction, CME filed the case-dispositive non-infringement motion on "data type" two weeks before any other party's motion for summary judgment (including Realtime's). JA3115-33; JA2322-26. Additionally, it was CME who litigated Realtime's inaccurate privilege assertions, from initial review of the log through motion practice. *See* CME Br. at 14-15, 34-38. In other words, CME spent time and money litigating

precisely the issues where Realtime most unreasonably prolonged litigation and therefore appropriately seeks reimbursement for those fees.

A. Realtime prolonged litigation despite a claim construction order that directly rejected its "best" infringement theory that it was "willing to live and die by."[1]

Realtime now denies that the *Markman* order impacted its infringement theory, claiming that "the trial court expressly refused CME's counsel's invitation to address infringement in its *Markman* order." RT Resp. at 5. Realtime evidently forgets that it previously has told ***this Court*** the exact opposite: "[Defendants] invited the court to construe this term with the objective of precluding [Realtime's infringement] arguments, and ***the court accepted that invitation.***" JA282 (emphasis added).

As Realtime previously informed this Court, the *Markman* order construed the meaning of the asserted claims as a matter of law—and did so in a way that directly contradicted the interpretation of those claims required for Realtime's infringement theory. Specifically, the order acknowledged the difference between CME and Realtime's proposed constructions ("[t]he essential difference between the two constructions is that plaintiff's is broad enough to capture any

[1] In a hearing held after Realtime had reviewed CME's source code, the court asked, "[D]o you feel, plaintiffs, that you have given your best and narrowest shot that you're willing to live and die by[?]" Realtime answered, "Your Honor, the answer is yes." JA2246-47.

characteristic or any attribute of data"), adopted CME's proposal ("[t]he Court construes the term consistent with defendants' construction"), rejected Realtime's proposal ("[t]he intrinsic evidence does not support" Realtime's construction), and expressly explained that the court's construction excluded Realtime's sole infringement theory ("checking a value is not determining a data block type or data field type"). JA2271; JA2273.

Realtime now suggests that it pursued infringement following the *Markman* order because the construction—which it vigorously disputed in claim construction briefs to the district court and on appeal to this Court—actually supported its infringement theory. *See* RT Resp. at 4-6. That argument is pure fantasy.

Realtime focuses myopically on the word "expansive" in the *Markman* order. The district court used that word to explain that the "or other data types" language in the "data type" term construction, which followed a list of more specific data types (e.g., "ASCII" and "image data"), "allows for an expansive reading of this term to include data types that might not be listed but ***would be fairly encompassed by the invention***." JA2271. Realtime seizes on the word "expansive" as a cure-all for its infringement theory, ignoring that the remainder of the claim construction order clarified that Realtime's value-check infringement accusations did not include a data type that "would be fairly encompassed by the invention." JA2273. Similarly, Realtime self-servingly adopts this Court's

characterization of the construction as "open-ended" (RT Resp. at 5 n.2 (citing *Realtime Data, LLC v. Morgan Stanley*, 554 Fed. App'x 923, 933 (Fed. Cir. Jan. 27, 2014)), but omits this Court's explanation that Realtime's infringement theory contradicted that "open-ended" construction. *See Realtime*, 554 Fed. App'x at 935 ("[The accused encoding techniques do] not analyze the content of the data block for categorization as one of several different data types, as required by the 'data field/block type' claim construction[.]").

Realtime's new-found embrace of the "expansive" and "open-ended" language is contradicted by its arguments against the construction before CME moved for attorneys' fees. For example, in its opening claim construction brief, Realtime argued that CME's "proposed construction tries to ***improperly narrow*** the term 'data block type' by requiring the invention to identify only one of many possible characteristics of the data block, ***namely the particular format of the data***." JA2371 (emphasis added). And on appeal, Realtime urged reversal by ***repeatedly*** characterizing the district court's construction as too narrow and as improperly excluding Realtime's value-check infringement theory:

- "[T]he court ***further narrowed [the 'data type'] construction*** by holding that 'checking a value is not determining [or recognizing] a data block type or a data field type.'" JA279 (emphasis added).
- "[T]he court again adopted a construction that ***improperly narrowed the broad claim language*** based on extrinsic expert testimony, and imported extraneous limitations from the specifications into the claims." *Id* (emphasis added).

- "[T]he construction suggests that ***the only data types 'fairly encompassed by the invention' are data format characteristics***. The patents are clear, however, that ***the invention is not limited*** to the determination of data formats." JA280 (emphasis added).

- "The court's construction, therefore—***focusing as it does on data formats such as ASCII—effectively narrows the claims*** to an embodiment that the specification describes as disadvantageous" *Id.* (emphasis added).

- "[I]n reaching its construction of this term—***and its further narrowing of that construction***—the district court improperly relied on extrinsic noninfringement-driven testimony[.]" *Id.* (emphasis added).

- "***Nothing in the intrinsic record disclaims 'checking a value'*** as a way to determine a data field type, ***and the district court erred in concluding otherwise***." JA282 (emphasis added).

Thus, contrary to Realtime's current position that the district court's construction supported infringement, it was clear at the time that the *Markman* order negated the theory Realtime had committed to "live and die by." That is also demonstrated by Realtime's refusing to apply the order. As explained in CME's opening brief, Realtime instead moved for and opposed summary judgment using the "any characteristic" interpretation that the *Markman* order had expressly rejected. *See* CME Br. at 10, 12. In response, Realtime claims (without explanation) that its "briefing neither ignored the *Markman* construction of 'data field/block type' nor reverted to its previously-rejected claim construction proposal." RT Resp. at 8. But Realtime cannot hide from the record that, in direct contradiction of the claim construction order, its Motion for Summary Judgment stated that "a 'data type' may be a ***characteristic*** of the data block" and asserted

infringement on the basis that various newly-invented "data types" (*i.e.*, "redundant," "sequentially different," "most common value") qualified as a "***characteristic*** of the data block." JA343-45 (emphasis added).

B. Following claim construction, Realtime continued to advocate for its own claim interpretations rather than apply the district court's constructions.

Realtime correctly notes that "CME's briefing reduces to one primary question: why did Realtime continue litigating after the *Markman* order?" RT Resp. at 4. Amidst over thirty pages of revisionist history, Realtime's response does admit the true answer: it wanted "to ***advocate its interpretation*** of the open-ended 'data field/block type' term." *Id.* at 6 (emphasis added). Indeed, at a time when Realtime should have been assessing whether infringement existed under ***the district court's*** claim construction, Realtime admits that it prolonged litigation by re-advocating its ***own*** rejected interpretation.

Realtime incorrectly believes that it was entitled to persist in advocating its rejected claim interpretations because the district court's constructions had not yet been affirmed on appeal. For example, the response cites *Computer Docking Station Corp. v. Dell*, 519 F.3d 1366 (Fed. Cir. 2008), for the proposition that "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***[.]" RT Resp. at 22 (emphasis added). That is a complete misreading of *Computer Docking Station*,

where this Court approved a denial of fees precisely because the patentee in that case did exactly what Realtime failed to do here—"attempted to obtain a final judgment of non-infringement to ***expedite appeal of the district court's claim constructions***." *Computer Docking*, 519 F.3d at 1380 (emphasis added). The patentee in *Computer Docking* only proceeded in the district court because "[t]he parties could not agree on the form of judgment[.]" *Id.*

Realtime commits the same fallacy in its attempt to distinguish *Phonometrics, Inc. v. Westin Hotel Co.*, 350 F.3d 1242, 1244-45 (Fed. Cir. 2003), arguing that "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***. Here, in contrast, ***there had been no prior binding Federal Circuit claim construction***, and the disputed term was open-ended and expansive." RT Resp. at 23-24 (emphasis added). But the fact that the claim constructions in *Phonometrics* issued from the Federal Circuit was only relevant to explain why those constructions were binding in another case concerning the same patent. *Phonometrics*, 350 F.3d at 1244-45. Here, the district court issued its own constructions that were binding on Realtime in this litigation. Realtime made this case exceptional when it flouted those constructions to continue pursuing its own interpretations.

C. The district court erred as a matter of law in concluding that Realtime had an unlimited right to prolong the litigation.

Despite the record that Realtime proceeded in this case without a viable infringement theory, the district court declined to address the issue because it mistakenly believed that awarding fees would "put future plaintiffs at the mercy of defendants—plaintiffs would be unable to pursue a case dispositive order and therefore a suitable record for appeal without risking an award of attorney fees." JA134 (quoting *Kaneka Corp. v. Zhejiang Medicine Co.*, No. 11-CV-2389, Dkt. No. 351 (C.D. Ca. May 23, 2014) ("*Kaneka*") at 8 (JA2344)). As discussed in CME's opening brief, that legal principle does not apply to this litigation because the record at the time of the *Markman* order contained extensive infringement-related evidence to provide "a suitable record for appeal." CME Br. at 24-25.[2]

In response, Realtime does not rebut CME's arguments about the state of the record or defend the mistaken principle of law adopted by the district court. Realtime instead attempts to downplay the district court's erroneous legal ruling as

[2] Further litigation following claim construction may have been appropriate in *Kaneka*, where expedited claim construction occurred early in the litigation and the plaintiff responded to summary judgment with "a reasonable, but unconvincing argument for additional discovery." *Kaneka* at 7 (JA2343). In this case, however, discovery closed and Realtime committed to a final infringement theory that it promised to "live and die by" ***before*** the district court's *Markman* order. JA2246-47 (32:21-33:1). Additionally, Realtime did not oppose summary judgment on the basis that it needed further discovery but instead filed its own Motion for Summary Judgment of Infringement.

merely "taking into consideration policy concerns about chilling good faith litigation." RT Resp. at 16. That is the height of hypocrisy given that Realtime urged the district court to follow the incorrect legal rule in its brief opposing fees:

> Accepting CME's argument would mean that a litigant must waive its substantial rights and proceed to appeal following an adverse claim construction to avoid risking a finding that it has engaged in prolonged and vexatious litigation. ***This is not—and cannot be—the law***. Indeed, the Federal Circuit has declined to resolve claim construction issues on appeal where the record is underdeveloped and lacking key information concerning the question of infringement.

JA1998 (emphasis added).[3] Then, when the *Kaneka* decision issued shortly thereafter, Realtime filed a supplemental brief quoting ***the exact paragraph that the district court adopted*** in its Order and stating that CME's request for fees should be denied "for the same reasons[.]" JA3103-04. After twice advocating that the district court adopt an erroneous view of the law, Realtime may not now avoid reversal to correct that legal error on the ground that it was irrelevant to the outcome.

[3] As CME explained in reply: "CME does not request sanctions because [Realtime] did not give up after an 'adverse claim construction.' A party may of course pursue infringement even if a court disagrees with its constructions, but it must apply the ***court's constructions***. CME seeks sanctions because [Realtime] proceeded in bad faith with an infringement theory contradicted by this Court's *Markman* order." JA2233.

D. An award of attorneys' fees is further supported by the total record of Realtime's misconduct.

To distinguish the numerous cases where courts have awarded fees after a plaintiff pursued infringement with no viable theory, Realtime argues that the present litigation lacked a "plus factor" to justify fees. *See* RT Resp. at 16 n.8, 18 ("[E]ach of those cases involved bad faith 'plus factors' not present here."). Realtime cites no authority for the proposition that fees should only be awarded where there is a "plus factor" in addition to frivolous infringement allegations, but in any event, CME's opening brief provided numerous examples of Realtime's other vexatious conduct.

Realtime tries to escape the record of its conduct by arguing disingenuously that the district court already considered that evidence. But because the district court adopted an erroneous legal rule that it had to ignore Realtime's unnecessarily prolonged litigation, its order addressed only the misconduct unrelated to Realtime's failure to abide by the *Markman* order. Specifically, the district court focused only on Realtime's false assertions of privilege and explained that, standing alone, they did not justify CME's request for fees; the order does not reflect any consideration of Realtime's other misconduct or bad faith following claim construction. JA134. If the district court had applied the correct legal standard and properly understood that Realtime could be held accountable for

prolonging litigation in defiance of the dispositive construction, it certainly could have taken a different view of the vexatious way in which Realtime proceeded.

As to the actual record of misconduct, Realtime's response alternately ignores the record or rewrites it. As an example of the former, Realtime does not attempt to explain why it accompanied its Motion for Summary Judgment with a burdensome, unsupported statement of facts (CME Br. at 11; RT Resp. at 6 n.4) or an expert declaration that transparently attempted to circumvent the district court's claim constructions with newly-invented sham "data types" based on the rejected "characteristic" claim construction (CME Br. at 11; RT Resp. at 7, 24 (responding only that Realtime's expert's declaration did not "stretch scientific principles beyond credulity")). As an example of the latter, Realtime infers that CME's "pique is of recent vintage" because CME failed to warn Realtime not to frivolously prolong litigation after claim construction. RT Resp. at 7. As discussed in the opening brief (CME Br. at 8-9), however, CME ***did*** confront Realtime immediately after the *Markman* order during a meet and confer specifically to discuss that issue—a conversation Realtime now creatively recharacterizes as one in which "Realtime refused to give CME a detailed ***preview*** of its summary judgment motion[.]" RT Resp. at 27 (emphasis added).

Additionally, Realtime now suggests that it withdrew its Motion for Summary Judgment in "response to the Court's order requesting that the parties

prioritize the [summary judgment] motions." RT Resp. at 9. But the district court's order requested an identification of "which of the pending motions for summary judgment are ***critical to the trial***." JA3077 (emphasis added). A judgment of infringement against all defendants on all claims would have been "critical to the trial," and the only explanation for Realtime's withdrawing its motion is the fact that the motion had no merit.

With respect to the privilege log, Realtime invents from whole cloth a narrative where it voluntarily corrected its fraudulent privilege allegations through a "cooperative process" (RT Resp. at 10), without "intransigence and delay" (*Id.* at 27). As CME wrote to the district court, however:

> In responding to CME's letters [regarding inaccurate privilege logging], Realtime has dragged its feet, ignored our challenges, mischaracterized our challenges, complained that our challenges did not include enough detail, complained that our challenges were too long, declared false resolution of issues, and insisted on playing whack-a-mole with a few documents at a time. Thus, although Realtime finally produced [an inaccurately logged work product document] today—after seven weeks of correspondence, e-mails, meet & confers, and letters to this Court—it still has not produced the very next entry on its log, which is *identical* . . . .

JA1925. Immediately thereafter, the district court requested documents for *in camera* review and ordered a complete, partner-certified re-review of every document on the log. JA2494; JA2470-72.

Similarly, Realtime complains that "CME never moved for monetary sanctions pursuant to Rule 37 at the time of the privilege log dispute" (RT Resp. at

25) and that "CME never used any of the previously-logged documents to support its pending summary judgment motions" (*Id.* at 11). In so arguing, Realtime fails to acknowledge that it only fully produced the improperly withheld documents on a Friday three days before the Court issued its case-dispositive summary judgment order. JA2495. The parties immediately began negotiating a final judgment, and within a week, Defendants proposed (and Realtime soon agreed) that any fees motions would proceed on a schedule set by the Court.[4] CME cannot be faulted for failing to supplement its summary judgment motions over the weekend in response to Realtime's belated production of more than 10,000 improperly-withheld documents or for seeking fees on the schedule to which the parties agreed.

In short, although CME disagrees that any "plus factor" is needed, the record is replete with evidence of Realtime's vexatious conduct during the three months for which CME seeks fees.

II. CONCLUSION

For the foregoing reasons, this Court should reverse the district court's denial of CME's request for an exceptional case finding and attorneys' fees award. This Court should remand for a calculation CME's fees from the time of the *Markman* order adopting CME's claim construction to the date of the order for summary judgment.

[4] That agreement is memorialized in the Final Judgment. JA2482 (extending time for attorneys' fees motions "to such date as the Court may set in the future").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deborah Saucier, Senior Paralegal, employed by Baker Botts LLP, hereby certify that on the 4th day of December, 2014 I caused one copy of the

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

In reliance upon the word-count feature of the word-processing system used to prepare this brief, I hereby certify that this brief contains 3,557 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).