2016-1683

United States Court of Appeals for the Federal Circuit

NET TALK.COM, INC., a Florida corporation,

Plaintiff—Appellee,

v.

MAGICJACK VOCALTEC LTD., an Israel limited partnership, MAGICJACK HOLDINGS CORPORATION, a Delaware corporation, fka YMax Holdings Corporation, MAGICJACK LP, a Delaware limited partnership,

Defendants—Appellants,

MICHELE BORISLOW, Personal Representative of the Estate of Daniel Borislow,

Defendant.

Appeal from the United States District Court for the Southern District of Florida in Case No. 9:12-CV-81022, Hon. Darrin P. Gayles.

REPLY BRIEF OF DEFENDANTS-APPELLANTS MAGICJACK VOCALTEC LTD., MAGICJACK LP, AND MAGICJACK HOLDINGS CORPORATION F/K/A YMAX HOLDINGS CORPORATION

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NOVEMBER 3, 2016

CERTIFICATE OF INTEREST

Counsel for the Defendants-Appellants magicJack VocalTec Ltd., magicJack LP, and magicJack Holding Corporation f/k/a YMAX Holdings Corporation certifies the following:

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

   magicJack VocalTec Ltd., magicJack LP, magicJack Holding Corporation f/k/a YMAX Holdings Corporation, Daniel Borislow, and Michele Borislow

2. The name of the real party in interest (please only include any real party in interest NOT identified in Question 3) represented by me is:

   The parties listed in Question 1 above are the real parties in interest. magicJack VocalTec Ltd. is a publicly held corporation and has no parent company. There is no publicly held corporation that owns ten percent (10%) or more of magicJack VocalTec's stock. magicJack LP is a limited partnership whose general partner is magicJack Holdings Corporation, which is a wholly owned subsidiary of magicJack VocalTec Ltd. Mr. Daniel Borislow was sued in his individual capacity. Ms. Michele Borislow is the personal representative of the Estate of Daniel Borislow and was substituted in this action as defendant after Mr. Borislow's death in July 2014.

3. Parent corporations and publicly held companies that own 10 percent or more of the stock in the party:

   Not applicable

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

   FENWICK & WEST LLP: Virginia K. DeMarchi, Elizabeth J. White, Saina S. Shamilov, Earl Mah, Justin Hulse

   RASCO KLOCK REININGER PEREZ ESQUENAZI VIGIL & NIETO: Janet T. Munn

   ACKERMAN LLP: David S. Brafman, Mark D. Passler, Brian Miller

   VINSON & ELKINS LLP: Ajeet Pai, Chris Granaghan, Puneet Kohli

Dated: November 3, 2016

/s/ Darryl M. Woo
DARRYL M. WOO
VINSON & ELKINS L.L.P.

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REPLY ARGUMENT

A. INTRODUCTION

netTalk's lawsuit against magicJack was hardly the "mine-run" case of netTalk's attempted portrayal. (*See* NTBr. 22). netTalk's brief focuses on what it tries to cast as a good faith claim construction dispute, but what is more revealing is what netTalk chooses to *not* talk about: as it did below, netTalk wholly fails to explain its spurious $200 million damages claim or its conduct following the *ex parte* reexamination. Indeed, nearly every aspect of netTalk's lawsuit—its extensive reexamination amendments to the lone asserted patent claim; its resulting baseless infringement claim; its baseless claims for pre-issuance and pre-reexamination damages; and its failure to prosecute its own case while, at the same time, holding up the distribution of the estate of magicJack's deceased founder—cause this case to stand out. When considered altogether, under the appropriate totality of the circumstances standard, which the District Court acknowledged but failed to apply below, this case is exceptional.

To begin with, netTalk had more problems with its infringement case than the mere reasonable claim construction dispute that netTalk seeks to portray. (*See, e.g.*, NTBr. 22-24). As the District Court recognized, the accused magicJack Plus ATA product could not infringe because it does not have an "Internet connection provided by the ATA" as required by the lone asserted claim. (MJBr. 32-34,

Appx12). That issue did not rise or fall with claim construction at all, because neither party sought construction of this limitation, and, on the plain language of the amended claim, the District Court labeled netTalk's infringement argument "weak and, possibly, meritless." (MJBr. 32-34, Appx17). To be sure, netTalk *also* relied on a claim construction argument to attempt proof of a second missing limitation, but the District Court determined that argument "was unlikely to prevail." (MJBr. 34-36, Appx16). Consequently, rather than reflect the reasonableness of its positions, netTalk's "unlikely to prevail" claim construction argument *compounded* the lack thereof regarding netTalk's already "weak and, possibly, meritless" infringement claim against magicJack. (Appx16-17).

Beyond its baseless infringement claim, netTalk fails to explain its baseless damages claims, which also cause this case to stand out. (*See* NTBr. 38-39). After reexamination, just as it had from the very beginning of the lawsuit, netTalk continued to claim that magicJack owed more than $200 million in damages, dating back to the publication of netTalk's patent application in 2009. (Appx13). Of course, there was no reasonable basis for those claims then, and netTalk's brief still fails to explain them now. (*See* NTBr. 38-39). Indeed, netTalk has *never* offered any explanation for its repeated allegations that it was entitled to damages dating back to the publication of the asserted patent's application notwithstanding

the extensive amendments to the asserted claim during both the original prosecution *and* the *ex parte* reexamination. (*See* Appx13-14, NTBr. 38-39).

netTalk likewise fails to dispute or explain its litigation misconduct, which reveals that it did not genuinely pursue its purported $200 million infringement claim. (*See* NTBr. 17-18, 35-36). Rather, already knowing that its pre-suit testing revealed magicJack's lack of infringement of the "Internet connection provided by the ATA" limitation, netTalk matched that with its baseless, outsized damages claim for a year after reexamination to force magicJack to spend millions on claim construction and attempted discovery to defend against the potential liability. (*See* MJBr. 54-55). Meanwhile, netTalk took virtually no discovery of its own and even failed to serve expert reports, flouting the discovery deadlines ordered by the District Court. (MJBr. 48-53). netTalk also repeatedly induced magicJack to incur significant expenses preparing for depositions and other significant deadlines only to unilaterally cancel at the last minute and avoid related expenses of its own. (*Id.*). netTalk does not dispute any of these facts in its brief and provides no explanation whatsoever to justify its conduct. (NTBr. 38-39).

This case is also marked by netTalk's rancor towards Daniel Borislow, the deceased founder of magicJack. (*See* MJBr. 8-9). netTalk pursued an induced infringement claim against Mr. Borislow in his individual capacity and maintained that claim when it knew full well that Mr. Borislow had left magicJack in 2013

before the time any alleged infringement of the Reexamined Patent could have occurred in 2014 when it emerged from reexamination with its substantially amended claims. (*Id.*). netTalk maintained its inducement claim against Mr. Borislow's widow even after his death and then went so far as to file a *verified* $200 million claim against Mr. Borislow's estate to keep the estate from making any distributions to her or her children. (*See* MJBr. 44-45, 52-53; Appx1208-1209 (attesting under "penalt[y] of perjury" that netTalk was entitled to "approximately $200,000,000.00, plus attorneys' fees, cost of suit, interest, penalties and any other remedies" for claims arising out of its patent infringement lawsuit)).

At the same time that netTalk's claim prevented Borislow's widow from distributing and settling the estate, netTalk forced magicJack to engage in expensive claim construction and played a game of "Lucy, Charlie Brown, and the football" with discovery, repeatedly feigning cooperation to induce magicJack to engage in expensive preparation for depositions that netTalk knew it would never provide. (MJBr. 13-17, 48-57). Again, netTalk does not dispute any of these facts and provides no explanation whatsoever to justify its conduct. (NTBr. 17-18, 35-36).

netTalk's dismissal of its own claims also confirms that this was not a mere "mine-run" case that solely hinged on a good faith claim construction dispute. After netTalk eventually conceded that it could not prove infringement, netTalk

could have stipulated to noninfringement and challenged the District Court's claim construction on appeal. But instead of preserving its case, netTalk unilaterally granted magicJack a covenant not to sue and moved to dismiss its own claims, foregoing any possibility of appealing the District Court's adverse claim construction and completely walking away from its purported $200 million infringement claim. (MJBr. 16-17, 53; Appx1618-1625).

Considered altogether, this case stands out as exceptional. netTalk pressed a claim it knew from its testing and claim amendments was not infringed and claimed an objectively baseless $200 million in damages to force magicJack to litigate the case commensurately against a plaintiff who had no intention of genuinely resolving the case on the merits, and who, instead, continuously flouted discovery deadlines and advanced frivolous infringement, induced infringement, and damages theories with the mere hope of gaining settlement leverage and causing its competitor to incur needless fees. As this Court has noted, "the aim of § 285 is to compensate a defendant for attorneys' fees it should not have been forced to incur." *Kilopass Tech., Inc. v. Sidense Corp.*, 738 F.3d 1302, 1313 (Fed. Cir. 2013). An award under Section 285 is necessary here to compensate magicJack for the fees imposed by netTalk's cost-multiplying litigation tactics, and to deter similar tactics from netTalk and others in the future.

B. THE DISTRICT COURT FAILED TO EVALUATE THE TOTALITY OF THE CIRCUMSTANCES AS REQUIRED BY *OCTANE FITNESS*

As explained in magicJack's opening brief, the District Court abused its discretion by failing to consider the totality of the circumstances in its exceptional case analysis. (MagicJack Principal Brief ("MJBr.") 39-48, 57-60). netTalk, in response, points to three sections of the Magistrate's Report and Recommendation ("Report") that recite the words "totality of the circumstances." (NTBr. 20, 33-35). But the District Court must do more than merely recite the right words, it must actually apply them. Here, the District Court failed to actually consider the totality of the circumstances because it (1) failed to assess the lack of merit to netTalk's damages claim; (2) assessed, improperly, the flaws in netTalk's frivolous infringement allegations on a "stand[ ] alone" basis; and (3) assessed, improperly, netTalk's litigation misconduct in isolation.

1. The District Court Did Not Consider netTalk's Baseless Damages Allegations in Its Exceptional Case Analysis and netTalk Still Fails to Provide Any Justification for Those Allegations

The District Court could not have evaluated the totality of the circumstances in its exceptional case analysis because it failed to assess the merits of netTalk's baseless damages allegations. (MJBr. 42-48, Appx1-2, Appx13-14). In response, netTalk emptily asserts that the Report provided a "detailed discussion of the parties' respective damages arguments." (NTBr. 38). What netTalk does not and

cannot point to, however, is any actual assessment of those arguments or, more fundamentally, the merits of its damages allegations, because there is no such assessment in the Report. (*See* Appx1-2, Appx13-14). And, tellingly, netTalk still fails to provide any justification for its damages claims in its Principal Brief on appeal. (NTBr. 38-39).

The portion of the Report that netTalk identifies, Section I(B)(2), provides nothing more than a recitation of the applicable law and the parties' arguments related to whether netTalk was entitled to damages, as it alleged, for the period of time before it amended patent claim emerged from *ex parte* reexamination. (NTBr. 38-39; Appx13-14). Nowhere in the Report, however, is there any assessment of the propriety or reasonableness of netTalk's damages claims. (*See* Appx13-14). For example, the Report does not contain any analysis as to whether "the original claims and the re-examined claims were substantially identical" as the Report recognized is required for a patentee to be entitled to damages from the time period before reexamination. (*See* Appx13) (*citing Laitram Corp. v. NEC Corp*., 163 F.3d 1342, 1346 (Fed. Cir. 1998)).

Given the District Court's failure to examine the lack of merit to netTalk's damages claim—one of the most salient issues in this case—the Court objectively could not have considered the totality of the circumstances, as required under *Octane Fitness.* (MJBR. 42-48). The propriety of netTalk's damages claim goes

to "the substantive strength of [netTalk's] litigation position" and should have been considered as part of the totality of the circumstances. *Octane Fitness*, 134 S. Ct. at 1756; *see also DietGoal Innovations LLC v. Chipotle Mexican Grill, Inc.*, No. 2:12-cv-00764-WCB, 2015 WL 1284826, *3-4 (E.D. Tex. Mar. 20, 2015) (Bryson, J., sitting by designation) (considering "arguments regarding . . . damages . . . as part of the totality of the circumstances bearing on the 'exceptional case' determination, as dictated by the Supreme Court in *Octane Fitness*.").

Tellingly, rather than try to fill in the analysis missing from the District Court below, netTalk's Principal Brief avoids any explanation of the propriety of its damages allegations. (NTBr. 38-39). For good reason: as magicJack established in its Principal Brief, netTalk had no good faith basis for its damages allegations. (*See* MJBr. 42-48).

By netTalk's own admission, its damages claim could only total $200 million if it could obtain damages reaching back to the date its patent application published in 2009, before the revoked B2 Patent issued in 2012 and the Reexamined Patent issued in 2014. (MJBr. 42-48, Appx13, Appx78, Appx167-168). But a patentee is only entitled to infringement damages accruing before a reexamination certificate issues if the reexamined claims are "substantially identical" to the originally issued claims. 35 U.S.C. §§ 252, 307(b); *see also R+L*

Carriers, Inc. v. Qualcomm, Inc., 801 F.3d 1346, 1349 (Fed. Cir. 2015); *Laitram*, 163 F.3d at 1346. netTalk recognized this requirement because it alleged the bare conclusion in its Amended Complaint that it was entitled to damages dating back to 2009 because "the claims in the Reexamination Certificate were not substantively changed from the claims in the [B2] Patent, which are, themselves substantively identical to the claims in the published '851 Application." (Appx13, Appx167).

That allegation is plainly baseless, and netTalk says nothing in its brief to even try to substantiate it. As shown on the face of the Reexamined Patent in italicized font, netTalk itself extensively amended Asserted Claim 3 of the Reexamined Patent during *ex parte* reexamination by adding 126 new words and new claim limitations. (Appx1750-1751, Appx1778-1779, MJBr. 4-7, NTBr. 5-7). In fact, netTalk did not have a good faith basis even before reexamination to its claimed damages based on provisional rights dating back to 2009, as even the originally issued claims of the B2 Patent differed substantially from the published claims of the application.[1] *Compare* (Appx1760-1761) (B2 Patent) *with*

[1] As with its claims for damages from the time period before the Reexamined Patent issued, netTalk could only be entitled to provisional rights royalties if the issued patent claims were substantially identical to those in the published application. *See* 35 U.S.C. § 154(d); *Rosebud LMS Inc. v. Adobe Sys., Inc.*, 812 F.3d 1070, 1075 (Fed. Cir. 2016). As explained in magicJack's Principal Brief, netTalk amended its claims after publication such that the issued claims were no longer substantially identical to the published claims. (MJBr. 4-7, 42-43). netTalk

(Appx1770-1771) (published application); (*see also* Appx1773-1776; MJBr. 42-44).

On appeal, netTalk fails to address the merits of its damages claims. In its Counterstatement of the Case, (NTBr. 3-22), and on the just-over-a-page of its brief devoted to discussing its damages claims, (NTBr. 38-39), netTalk makes no attempt to explain how the asserted claim of the Reexamined Patent could be "substantially identical" to the claim in the revoked B2 Patent when there are 126 materially different words encompassing several additional narrowing claim limitations. Indeed, netTalk has *never* explained how its claims were "substantially identical" even though it was repeatedly called upon to do so.[2]

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does not dispute those arguments here and even notes the significant amendments to the claim-at-issue. (NTBr. 5-7). In any event, netTalk also cannot be entitled to provisional rights royalties because, as explained above, it is not entitled to damages from the period before its reexamination certificate issued. *Bloom Eng'g v. N. Am. Mfg.*, 129 F.3d 1247, 1249 (Fed. Cir. 1997).

[2] For example, netTalk has never explained how its claims were "substantially identical" in (1) briefing on magicJack's motion to dismiss, (*see* Appx114-117; Appx135-136); (2) briefing and hearing for magicJack's motion for attorneys' fees, (*see* Appx1730-1732; Appx2233-2234; Appx2553-2563; Appx2568-2592); (3) briefing for magicJack's Objections to the Magistrate's Report, (*see* Appx2596-2600, Appx2608); and (4) the appellate briefing before this Court, (MJBr. 42-48; NTBr. 38-39). Given its continued silence on the issue, this Court should find that netTalk has waived any argument that it ever had a viable damages theory to substantiate its allegations. *See, e.g.*, *Fresenius USA, Inc. v. Baxter Intl., Inc.*, 92 U.S.P.Q.2d 1163, 1169 (Fed. Cir. 2009) ("If a party fails to raise an argument before the trial court, or presents only a skeletal or undeveloped argument to the trial court, we may deem that argument waived on appeal, and we do so here.").

Instead, at every opportunity, netTalk has ignored or changed the subject when confronted with the topic of damages. Even the Report noted its avoidance tactics: "Rather than addressing the merits of the damages claim, Plaintiff's argument focused on its conduct in attempting to resolve this case following the issuance of the claim construction order." (Appx14; *see also* Appx2233-2234). But netTalk's conduct has no bearing on the propriety of its damages claims, and the District Court's failure to assess the objective reasonableness of those claims, and their significant impact on the litigation as part of the totality of the circumstances, was an abuse of discretion. *Octane Fitness*, 134 S. Ct. at 1756.

2. The District Court Considered the Flaws in netTalk's Infringement Claim and Its Litigation Misconduct in Piecemeal Fashion, Not as Part of the Totality of the Circumstances

The District Court considered netTalk's baseless infringement allegations and litigation misconduct each in isolation, finding that neither, standing alone, warranted attorneys' fees. For example, in its analysis of netTalk's infringement allegations, the District Court concluded with a bare statement that it had considered the "totality of the circumstances." (Appx17). This is then followed by a separate analysis of netTalk's manner of litigation, which also contains the same incantation: that the Court had evaluated the "totality of the circumstances." (Appx18).

The structure of the Report itself, however, reflects that the Court did not consider all the facts together and only considered piecemeal the issues of infringement and litigation misconduct. Under a proper analysis of the totality of the circumstances, netTalk's actions violated every single factor outlined in *Octane Fitness* that would warrant attorneys' fees: "frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Octane Fitness*, 134 S. Ct. at 1756 n. 6 (2014) (citation omitted).

a. The District Court Addressed the Flaws in netTalk's Infringement Argument in Piecemeal Fashion and Failed to Consider the Compounded Consequences of Those Flaws

While netTalk attempts to portray this case as a close question of claim construction, the infringement issues here did not require claim construction for resolution and, as a result, this was never a close case.

First, netTalk cannot hide behind the need for claim construction. netTalk's Principal Brief points to the District Court's issuance of its December 2014 claim construction order as the critical moment when it realized there could be no infringement because the accused magicJack Plus product did not include "multiple separate and independent [I]nternet access points." (NTBr. 13-16). While there was certainly no good faith basis for netTalk to continue its infringement claims after the Court's claim construction ruling, nothing in that

order changed the already-existing lack of infringement of the only asserted claim based on a different claim limitation. (MJBr. 32-34).

netTalk already knew the accused magicJack Plus ATA product could not infringe because it lacked, as netTalk learned from its 2012 testing, the required "Internet connection provided by the ATA." (*Id.*). As netTalk concedes, it never sought construction of that limitation,[3] which it added to the claim during the *ex parte* reexamination even as it knew the results of Mr. Paxinos's "sound card" testing. (*Id.*). Here, the knowing absence of even a single claim limitation in the only asserted claim precluded a finding of infringement of the Reexamined Patent, regardless of whether netTalk prevailed on its separate claim construction argument. (MJBr. 18-19).

For the same reasons, the cases that netTalk cites where attorneys' fees were denied to the losing party receiving an unfavorable claim construction are inapposite.[4] (NTBr. 29-30). netTalk did not just lose on claim construction. As

[3] netTalk presents—for the first time in this lawsuit—a new claim construction argument with regard to this term. (*See* NTBr. 7-12). As discussed in Section D below, netTalk waived this new claim construction argument as it was never raised below. (*Id*.).

[4] Of course, losing on claim construction does not necessarily *insulate* a plaintiff from an attorneys' fee award, which netTalk seems to imply. (NTBr. 29-31). Unfavorable claim construction rulings may, as here, also confirm the unreasonable nature of a plaintiff's claim construction arguments and support an award of fees. *See, e.g., TNS Media Research, LLC v. TiVo Research & Analytics, Inc.*, No. 11 CIV. 4039 SAS, 2014 WL 5639930, at *8 (S.D.N.Y. Nov. 4, 2014),

explained above, and as the District Court recognized, magicJack could not infringe because the accused device did not have an "Internet connection provided by the ATA." (Appx12). Neither party sought construction of that limitation, and consequently, a claim construction ruling was not necessary for netTalk to know that magicJack did not infringe the only asserted claim. (Appx17). netTalk's infringement claim lacked basis regardless of the improbability of its success on the other limitation as to which it did seek claim construction.

Second, netTalk here does not dispute or respond to magicJack's argument that, rather than reflect the reasonableness of its positions in this litigation, netTalk's "unlikely to prevail" claim construction argument compounded its already "weak and, possibly, meritless" infringement claim against magicJack. (MJBr. 39-40). The District Court erred here by viewing these arguments in piecemeal fashion, allowing the purported reasonableness of netTalk's claim construction argument to somehow mitigate the absence of another claim limitation that did not require claim construction, notwithstanding the fact that only a single claim limitation need be absent for there to be noninfringement. (MJBr. 38-39, Appx15-17).

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vacated on other grounds, 616 Fed. Appx. 421 (Fed. Cir. 2015) (awarding attorneys' fees for frivolous claim construction where "[n]o correct application of the rules of grammar could have supported TRA's proposed construction.").

With regard to the "multiple separate and independent [I]nternet access connections" limitation, the District Court found that "***standing alone***, [this limitation was] insufficient to support a finding of exceptionality." (Appx16) (emphasis added). Then, the District Court held that "[w]ith respect to the claim element not requiring claim construction, the Court agrees that Plaintiff's argument…was weak and, possibly, meritless. ***Standing alone***, however, it is insufficient to render this case extraordinary." (Appx17) (emphasis added).

Instead of viewing each of these flaws "standing alone," the District Court should have held that the two arguments—viewed together under the totality of the circumstances—actually compounded the unreasonableness of netTalk's overall infringement position—and make this case stand out as exceptional. (MJBr. 39-40). Though non-infringement could be found based on the "Internet connection provided by the ATA" limitation alone, netTalk's case hinged on not one, but two unreasonable infringement arguments for the same, and only, asserted claim. (MJBr. 40-42).

Third, to confirm that netTalk's infringement claims in this case did not depend on claim construction, the Court need look no further than netTalk's own decision to completely walk away from its purported $200 million infringement claim mere months before trial, rather than preserve its ability to appeal the Court's claim construction decision. netTalk could have agreed to a judgment of non-

infringement to preserve its ability to appeal the merits of this case—and even acknowledged that option, (Appx2579)—but it decided not to pursue that route, and instead unilaterally granted magicJack a covenant not to sue, waiving any chance for an appeal on the merits. (Appx1605, Appx1956). *See, e.g.*, *Openwave Sys., Inc. v. Apple Inc.*, 808 F.3d 509, 511 (Fed. Cir. 2015) (explaining that a plaintiff may stipulate to non-infringement and challenge a district court's construction on appeal).

For good reason: netTalk's infringement claims were already foreclosed by a limitation not at issue during claim construction at all; specifically, the asserted claim's requirement for an "Internet connection provided by the ATA." (MJBr. 32-34). As explained in magicJack's Principal Brief, because netTalk had already analyzed the accused magicJack Plus ATA product by the time it added that limitation to the asserted claim during reexamination, netTalk knew or should have known that there could be no infringement once the patent emerged from reexamination. (*Id.*).

Though absent in its papers below, two explanations are now offered by netTalk's Principal Brief for why it believed it was reasonable to maintain its case following reexamination in view of the added requirement for an "Internet connection provided by the ATA," a term that was never the subject of claim construction. First, netTalk maintains that despite containing the words "provided

by," that limitation could be construed as not requiring the transfer of Internet data and not requiring a *direct* Internet connection provided by the ATA. (NTBr. 7-12). But netTalk never sought construction of that term, and as discussed in Section D below, netTalk's belated new theories are contrary to the plain language of the claim limitation, were not raised below, and should be waived. Second, netTalk asserts that Mr. Paxinos never admitted that the magicJack Plus ATA did not infringe Claim 3. (NTBr. 37). This denial is belied by Mr. Paxinos' actual testimony, in which he stated that the magicJack Plus ATA did not provide an "Internet connection" and acted instead as a "sound card." (MJBr. 7-8, Appx1829, Appx 1832-1833).

Here, magicJack conservatively sought attorneys' fees only from the date the case resumed after issuance of the Reexamined Patent, which contained extensively amended Claim 3 and the "Internet connection provided by the ATA" limitation. (Appx1728-1732, Appx1735-1736). netTalk should have conceded non-infringement when the Reexamined Patent issued, rather than draw the lawsuit out for another year and a half. Even before the *Octane Fitness* decision, litigants had a continuing duty to evaluate the soundness of their patent infringement claims as a case progresses. *See Taurus IP, LLC v. DaimlerChrysler Corp.*, 726 F.3d 1306, 1326-30 (Fed. Cir. 2013) (upholding exceptional case and finding implicit subjective bad faith where patent owner prolonged litigation despite adverse claim

construction); *Medtronic Navigation, Inc. v. BrainLAB Medizinische Computersysteme GmbH*, 603 F.3d 943, 954 (Fed. Cir. 2010) ("While an adverse claim construction generally cannot, alone, form the basis for an exceptional case finding, this court's decisions . . . do not undermine the rule that a party cannot assert baseless infringement claims and must continually assess the soundness of pending infringement claims, especially after an adverse claim construction."). Courts have thus awarded fees to prevailing defendants where plaintiffs have failed to drop their infringement claims after significant litigation milestones. *Taurus IP*, 726 F.3d at 1326-30.

As the Supreme Court recently noted, "[s]ome companies may use patents as a sword to go after defendants for money, even when their claims are frivolous." "District courts have the authority and responsibility to ensure frivolous cases are dissuaded" through Rule 11 and Section 285. *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1930-31 (2015). Under the totality of the circumstances, the District Court's failure to consider the combined consequence of netTalk's two infringement defects—one limitation upon which it was unlikely to prevail, and the other meritless—along with its litigation misconduct and baseless $200 million damages claim, was improper.

b. netTalk Fails to Explain Its Litigation Misconduct

netTalk's pervasive litigation misconduct alone is sufficient basis to award fees here, and notably, netTalk's Principal Brief never disputes or excuses its litigation misconduct:

- netTalk prevented magicJack from completing discovery and forced magicJack to incur needless deposition preparation expenses by agreeing to depositions and then canceling those depositions at the very last minute. (*See* MJBr. 13-14, 49-50).

- netTalk took no fact discovery of its own, even withdrawing the depositions of magicJack's CEO and CFO, the only two witnesses it had noticed[5] – at the last moment. (*Id.* at 15, 50).

- netTalk failed to respond to written discovery requests and other court-ordered discovery. (*Id.* at 15-17, 50).

- netTalk announced only three days before the expert report deadline that it would not be serving expert reports of its own, in defiance of the District Court's scheduling order. Not only was it too late by then for magicJack to avoid the expense of preparing reports, but magicJack was forced to move for an extension of time to serve its own reports so as not to be at a strategic disadvantage. (*Id.* at 14-15).

netTalk's Principal Brief points to no evidence to try to counter or justify these facts. Under a preponderance of the evidence standard, netTalk's silence with regard to its conduct should have weighed heavily against netTalk. *Jacobs v. Dep't of Justice*, 35 F.3d 1543, 1548 (Fed. Cir. 1994) ("This is not preponderance

[5] Although this is a patent case, netTalk neither noticed, nor took, the deposition of any magicJack engineer or technical witness, a further indication it was not proceeding in good faith but to cause magicJack needless expense. (MJBr. 15-17, 50).

of the evidence. This is not even substantial evidence. There is literally no evidence here.").

As magicJack showed, netTalk's tactics, deemed by the District Court to be "less than desirable," were designed to impose costs on magicJack while minimizing expenses for netTalk. (MJBr. 48-49). As one netTalk witness confirmed during deposition, netTalk's motivation to delay the case was because the longer the litigation dragged on, the more damages netTalk could claim. (MJBr. 54; Appx1113-1114).

netTalk tries to shift the focus by pointing to its purported reasonable behavior in the three months after the District Court issued its claim construction order, and after the lawyers that prosecuted the patent application and filed the lawsuit withdrew from the case. (NTBr. 17-18, 36). But netTalk's litigation misconduct started before the District Court issued its claim construction order, and continued even after netTalk hired its new lawyers. For example, after the District Court ordered netTalk to provide all outstanding discovery, (Appx1456), netTalk's new lawyers repeatedly promised to produce documents and produce witnesses for depositions. (*See* MJBr. 15, 52; Appx19; Appx1469-1476; Appx1480-1483; Appx1551-1573; Appx1575; Appx1605; Appx1952-1953; Appx1956-1957). Yet, netTalk never followed through with the promised discovery and, just as it had before the District Court issued its claim construction

order, cancelled depositions of its key witnesses at the last minute. (*See* MJBr. 52, Appx1469-1476; Appx1952-1953; Appx1956-1957).

All of these roadblocks and feigned compliance forced magicJack to spend resources to file a motion to compel and engage in needless preparation for depositions that netTalk knew they would not provide. (Appx1469-1476). In the face of that motion and after forcing magicJack to incur as much expense as it could before having to make expenditures of its own to comply with the District Court's discovery order and expert report deadline, netTalk finally issued a covenant not to sue and moved to dismiss its own frivolous claims. (MJBr. 16-17; Appx1618-1625).

On appeal, netTalk again misdirects by arguing that it resolved the case expeditiously after new lawyers were hired—"less than two months after netTalk retained its new counsel." (NTBr. 17). However, given the March 2, 2014, discovery deadline, those two months were the entire period netTalk had to resolve the case before it would begin incurring costs to comply with the District Court's discovery schedule. (*See* Appx1470-1472). In actuality, netTalk dragged this case on for well over a year even after the reexamination certificate issued, advancing a frivolous infringement allegation as to the "Internet connection provided by the ATA" limitation even as that term did not require claim construction for there to be noninfringement. (Appx12-13).

The three months after netTalk hired new counsel cannot excuse netTalk's misconduct throughout this litigation—misconduct that existed from even before the issuance of the claim construction order, and misconduct that continued even after it hired new counsel.

C. THE DISTRICT COURT ABUSED ITS DISCRETION BY APPLYING A PRE-*OCTANE FITNESS* STANDARD AND EXPECTING MAGICJACK TO HAVE SOUGHT SANCTIONS BEFORE SEEKING FEES

In addition to failing to actually consider the totality of the circumstances, the District Court also applied the wrong legal framework on two key points. First, the District Court erroneously held magicJack to a higher standard for proving exceptionality than required under *Octane Fitness* by relying on a pre-*Octane Fitness* case to evaluate infringement. (*See* Appx15-16; *see also* MJBr. 36-38). In response, netTalk does not dispute that the District Court relied on a pre-*Octane Fitness* case, but argues that the Court also cited "numerous post-*Octane*" cases and "can turn to pre-*Octane Fitness* case law for guidance." (NTBr. 39-40). Second, the District Court erroneously considered that magicJack had not sought sanctions before seeking to recover its attorney fees. (*See* MJBr. 56-57). In response, netTalk argues that the District Court did not "require" magicJack to seek sanctions but only "note[d]" that it should have. (NTBr. 40-41). Neither point vitiates the errors.

1. The District Court Abused Its Discretion by Relying on a Pre-*Octane Fitness* Standard for Finding Exceptionality.

In assessing the exceptionality of netTalk's infringement claims, the District Court relied on *Old Reliable*, a pre-*Octane Fitness* case, for the proposition that "[u]nless an argument or claim asserted in the course of litigation is *so unreasonable that no reasonable litigant could believe it would succeed*, it cannot be deemed objectively baseless for purposes of awarding attorney fees." (Appx15-16) (citing *Old Reliable Wholesale, Inc. v. Cornell Corp.*, 635 F.3d 539, 544 (2011)).

That is no longer the standard for finding exceptionality. *Octane Fitness* explains that, instead, "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)." *Octane Fitness*, 134 S. Ct. at 1756.

Here, netTalk's baseless infringement claims merely had to contribute to this case standing out; they need not have been "so unreasonable that no reasonable litigant could believe it would succeed."[6] (*Id.*). Moreover, *Old Reliable* was

[6] netTalk quotes *Biax Corp. v. Nvidia Corp.*, 626 Fed. Appx. 968, 971 (Fed. Cir. 2015), for the unremarkable statement that "objective reasonableness remains a relevant factor." (NTBr. 27-28). Nothing in *Biax*, however, supports netTalk's assertion that its position or conduct was objectively reasonable, or marks a return to the overruled standard of proof that the claims must be "so unreasonable that no reasonable litigant could believe [they] would succeed." To the contrary, *Biax*

decided under a clear and convincing evidence standard for finding entitlement to fees, a standard that *Octane Fitness* explicitly rejected. (*Id.* at 1758) (citations omitted). Consequently, it was error for the District Court to have employed the legal standards of *Old Reliable*.

In its Principal Brief, netTalk fails to directly address the District Court's erroneous reliance on the legal standards for exceptionality in *Old Reliable*. (NTBr. 39-40). netTalk instead argues how district courts may consider pre-*Octane Fitness* cases "for guidance." (NTBr. 40). But such cases may only be used as a guide to whether a party's litigation conduct was unreasonable, and cannot supplant the legal standards of *Octane Fitness*. The full passage from the case that netTalk selectively quotes explains:

> [A]lthough the Supreme Court rejected our *Brooks Furniture* test in *Octane Fitness*, it gave no indication that we should rethink our *litigation misconduct line of § 285 cases*. [W]e conclude that, under *Octane Fitness*, the district court must consider *whether the case was litigated in an unreasonable manner* as part of its exceptional case determination, and that district courts can turn to our pre-*Octane Fitness* case law for guidance.

SFA Systems, LLC v. Newegg Inc., 793 F.3d 1344, 1349 (Fed. Cir. 2015).

netTalk cites no cases holding that, post-*Octane Fitness*, it is appropriate to rely on the "so unreasonable that no reasonable litigant could believe it would

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confirmed that, in determining objective reasonableness, *Octane Fitness* merely requires courts to assess whether the case "stands out from others." *Biax*, 626 Fed. Appx. at 971.

succeed" standard articulated in *Old Reliable* as the District Court did here, or that a pre-*Octane Fitness* case can be relied upon in analyzing the merits of netTalk's infringement allegations. (*See* Appx15-16). And because that standard conflicts with *Octane Fitness*, it was error for the District Court to employ it in evaluating exceptionality.

2. The District Court Abused Its Discretion in Viewing Sanctionable Conduct as the Benchmark for an Award of Attorneys' Fees

netTalk argues that the District Court appropriately discounted netTalk's baseless infringement claims and litigation misconduct because magicJack did not seek Rule 11 or discovery sanctions.[7] Under *Octane Fitness*, however, "sanctionable conduct is not the appropriate benchmark" for awarding fees in an exceptional case. 134 S. Ct. at 1756. It was thus improper for the District Court to have held magicJack's decision not to seek Rule 11, (Appx14), or discovery, (Appx16), sanctions against it in considering whether it was entitled to fees. *See*,

[7] magicJack likewise should not suffer for not having moved for summary judgment on netTalk's damages or infringement claims, because of the District Court's "one summary judgment motion" rule and the District Court's expressed desire only to consider summary judgment motions after discovery. *See* Southern District of Florida Local Rule 7.1(c)(2) ("Filing multiple motions for partial summary judgment is prohibited, absent prior permission of the [District] Court."). When magicJack sought leave to challenge netTalk's baseless damages claim on summary judgment, (Appx691-696), Judge Gayles stated that he would prefer to address summary judgment in a single motion to be filed only after the completion of discovery. (Appx2467) ("[I]n this case, I'd prefer that there be one motion and I'll consider it together . . . . I don't feel comfortable handling it piecemeal. I prefer to deal with the motion, handling all the issues together.").

e.g., *MarcTec, LLC v. Johnson & Johnson*, 664 F.3d 907, 919 (Fed. Cir. 2012) (upholding, even under the more difficult pre-*Octane Fitness* standard, an award of attorneys' fees even where conduct was not necessarily independently sanctionable, finding that "litigation misconduct and unprofessional behavior may suffice, by themselves, to make a case exceptional under § 285.") (internal quotation and citation omitted).

D. THE COURT SHOULD REFUSE NETTALK'S NEW CLAIM CONSTRUCTION ARGUMENT

In its Counterstatement of *Facts*, netTalk raises new claim construction arguments with regard to the "Internet connection provided by the ATA" limitation—even though netTalk admits that neither party asked below for construction of that term.[8] (NTBr. 7-12, 16). Without citing any prior argument or support in the record—netTalk argues (1) that Claim 3 does not require any "Internet format packets" to be exchanged between the ATA and the PC; and (2) that Claim 3 does not require a "direct" Internet connection provided by the ATA. (NTBr. 8-12). As such, the Court should refuse to consider these new

[8] netTalk's shifting and belated claim construction theories are emblematic of the gamesmanship and improper litigation tactics that magicJack had to contend with throughout this litigation. netTalk furthermore cannot possibly believe its new claim construction arguments have any good faith basis, when it granted magicJack a covenant not to sue that precluded any appeal of the District Court's claim construction. (MJBr. 16-17; Appx1618-1625).

arguments as having been waived. *See, e.g.*, *Broadcomm Corp. v. Qualcomm Inc.*, 543 F.3d 683, 694 (Fed. Cir. 2008) ("[A] party may not introduce new claim construction arguments on appeal or alter the scope of the claim construction positions it took below. Moreover, litigants waive their right to present new claim construction disputes if they are raised for the first time after trial.") (citing *Conoco, Inc. v. Energy & Envtl. Int'l, L.C.*, 460 F.3d 1349, 1358-59 (Fed. Cir. 2006)) (internal citations and quotations omitted); *Eli Lilly & Company v. Aradigm Corp.*, 376 F.3d 1352, 1360 (Fed. Cir. 2004) (where a party below "never requested that the district court construe any terms in [the relevant claim] and never offered a construction of [that claim]," a party waives its right to request a construction on appeal.).

Even if considered on the merits, netTalk's new arguments are frivolous. The plain language of the limitation is "Internet connection provided by the ATA." As admitted, however, by netTalk's CTO, Mr. Paxinos, rather than "providing" any Internet connection, the accused magicJack Plus ATA was "different," acting as a "sound card." (Appx1832-1833). That he further explained that the device "provides audio service, audio in and audio out," and that the device passed no Internet format packets only confirmed his "sound card" admission that the accused device was "different." (*Id.*). As such, magicJack did not argue, and there is no need to read in, any "Internet packet" limitation into the claim language—

there is simply no Internet connection provided by the ATA, and netTalk erects but a strawman.

netTalk's further belated argument, that the accused magicJack Plus ATA somehow provides an "indirect" Internet connection despite being only a "sound card" that passes no Internet format packets "back and forth between the MagicJack Plus and the PC," but instead provides "audio service, audio in and audio out," is equally frivolous and backed by no citation to the record whatsoever. (Appx1832-1833).

Accordingly, not only did netTalk never request construction of this claim limitation, none was necessary for netTalk to know the accused devices did not infringe. Indeed, Mr. Paxinos' testimony was so devastating to netTalk's infringement case that its new counsel admitted that magicJack could not have infringed based on that testimony. (Appx1462). netTalk's weak attempt to contradict their own admitted position is too little, too late.

E. THE MAGISTRATE JUDGE AND DISTRICT JUDGE DID NOT HAVE "TWO AND A HALF YEARS OF EXPERIENCE WITH THE CASE"

Finally, netTalk overstates its repeated insistence that the decision below soundly reflects the District Court's "great familiarity and two-and-a-half years of experience with the case." (*See, e.g.*, NTBr. 1). To the contrary, neither of the judges involved in deciding magicJack's motion for attorneys' fees was involved

in the proceedings for anywhere near two-and-a-half years. The fee motion and Report, (Appx4-28), were Magistrate Judge Turnoff's first involvement with the case. As a result, he had no more familiarity with this case then, than this court has now. District Judge Gayles presided over the case for less than nine months before he dismissed netTalk's claims with prejudice[9]—not two and a half years—and his order adopted the Report with hardly any comment and did not address any of the deficiencies noted above.

CONCLUSION

For the foregoing reasons, this is an exceptional case under 35 U.S.C. § 285, and the Court should reverse the District Court's denial and award magicJack $2,026,386 in fees, an amount not disputed by netTalk. (Appx1735-1740; *see generally* Appx2219-2234). In the alternative, the Court should vacate and remand the District Court's Order denying magicJack's fee motion with appropriate instructions.

[9] This matter was originally assigned to District Judge Donald M. Middlebrooks, who stayed the case pending the outcome of the *ex parte* reexam. (Appx152-155 (Order on Defendants' Motion to Stay)). When the case resumed, the matter was soon assigned to Judge Gayles, for whom this was his first patent case. (Appx53 (docket entry showing reassignment order at Docket No. 69); Appx762 ("I have been a judge in state court for ten years, this is my first month in federal court; this is my first patent case.")).

Dated: November 3, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Darryl M. Woo, certify that on this, the 3rd day of November, 2016, I caused the foregoing Reply Brief of Defendants-Appellants magicJack VocalTec Ltd., magicJack LP, and magicJack Holding Corporation f/k/a YMAX Holdings Corporation to be filed with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system, which will send notice of such filing to all registered CM/ECF users, including opposing counsel of record in this appeal:

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