Nos. 2014-1431, -1462

IN THE

United States Court of Appeals

FOR THE FEDERAL CIRCUIT

THE DOW CHEMICAL COMPANY,

Plaintiff-Cross Appellant,

v.

NOVA CHEMICALS CORPORATION (CANADA),
NOVA CHEMICALS INC. (DELAWARE),

Defendants-Appellants.

On Appeal from the United States District Court of Delaware,
Court No. 1:05-cv-00737-LPS,
Honorable Leonard P. Stark, United States District Judge

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PRELIMINARY STATEMENT

Just as it did in its own appeal, Nova seeks in its response to Dow's cross-appeal to avoid the consequences of its knowing, voluntary, and unapologetic infringement of Dow's polyethylene-related patents. But in doing so, Nova makes little effort to defend the ruling on appeal—the district court's decision to deny enhanced *supplemental* damages for *post*-judgment infringement based solely on its conclusion that Nova's *pre*-judgment infringement was not willful. Nova does not dispute that the district court gave no weight whatsoever to the judgment rejecting all of Nova's defenses in determining whether Nova's post-judgment infringement was willful.

Instead of defending the district court's rationale, Nova relies on isolated snippets from the district court's prior decisions and irrelevant evidence in a strained effort to justify its continued infringement following the jury's verdict and the entry of final judgment. Substantial authority, however, shows that an *adjudged infringer's* decision to continue its infringing conduct is willful, in all but the most unusual circumstances, because it is generally undertaken in the face of an objectively high likelihood of infringing a valid patent. Nova identifies no circumstances here that could possibly render its post-judgment infringement objectively reasonable, let alone justify its decision to *ramp up* production despite the judgment rejecting all of its defenses.

The district court's judgment thus should be vacated to the extent it denied enhanced supplemental damages, and the case remanded for further consideration of enhancement.

ARGUMENT

I. NOVA IS UNABLE TO DEFEND THE DISTRICT COURT'S DENIAL OF ENHANCED SUPPLEMENTAL DAMAGES FOR POST-JUDGMENT INFRINGEMENT

A. Nova Wrongly Relies On The *Seagate* Framework

Nova does not seriously dispute that there is a "fundamental difference" between damages for "pre-verdict infringement and damages for post-verdict infringement," *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1361 (Fed. Cir. 2008), or that post-judgment infringement is willful "absent unusual circumstances," *Mondis Tech. Ltd. v. Chimei InnoLux Corp.*, 822 F. Supp. 2d 639, 652 (E.D. Tex. 2011). Indeed, Nova ignores most of the decisions upon which Dow relied (Dow Br. 69-70) to show—contrary to the district court's ruling—that enhanced damages for post-judgment infringement may be awarded even absent pre-judgment willfulness and that a judgment of validity and infringement should be given substantial weight in assessing willfulness.[1]

[1] Nova attempts to distinguish only *Synqor, Inc. v. Artesyn Technologies, Inc.*, 709 F.3d 1365 (Fed. Cir. 2013), and *Affinity Labs of Texas, LLC v. BMW North America, LLC*, 783 F. Supp. 2d 891 (E.D. Tex. 2011), and in each case is unsuccessful. Nova suggests (Reply Br. 51) that enhancement was awarded in *Synqor* due to violations of an injunction, but this Court's decision says no such

Nova nevertheless invokes (Reply Br. 47-48) the two-part willfulness standard from *In re Seagate Technology, LLC*, 497 F.3d 1360 (Fed. Cir. 2007) (en banc), to contend (Reply Br. 48) that Dow has not shown "by clear and convincing evidence that NOVA's post-judgment conduct was 'objectively reckless' as a matter of law." Nova, however, identifies no case in which the *Seagate* standard has been applied to enhancement of damages for *post-judgment* infringement, which are awarded only after a defendant's product has been *adjudged* to infringe and thus where the continued sale of the product deliberately flouts a judgment of validity and infringement. *See* Dow Br. 68-70. But if Nova were correct, at a minimum, a remand would be warranted if this Court were to reevaluate the

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thing—instead, it affirmed enhancement where (as here) the defendants had "continu[ed], and even increas[ed], sales *in the face of an infringement verdict*." 709 F.3d at 1385 (emphasis added). And this Court specifically rejected the defendant's contention that the plaintiff's failure to establish "*pre-verdict* willful infringement at trial should preclude the district court from finding willful infringement for *post-verdict* sales." *Id.*

While Nova is correct (Reply Br. 51) that *Affinity Labs* involved an ongoing royalty under 35 U.S.C. § 283, the court there expressly analogized to past damages under 35 U.S.C. § 284, and thus relied on the *Read* factors to determine the degree to which an ongoing royalty rate should be enhanced above the pre-judgment rate. *See* 783 F. Supp. 2d at 905 (citing *Read Corp. v. Portec, Inc.*, 970 F.2d 816, 826-27 (Fed. Cir. 1992), *abrogated in part on other grounds by Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 975 (Fed. Cir. 1995) (en banc)). In any event, nothing about the technical distinction between enhanced past damages for willful infringement and enhanced ongoing royalties for willful infringement bears on the court's ruling that continued infringement in the face of a judgment is presumptively willful. *See id.* at 899.

Seagate standard in light of the Supreme Court's recent decision in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014).[2]

Additionally, even if the patentee bears the burden of demonstrating willfulness in the *post*-judgment context (*but see* cases cited in Dow Br. 69-70), Nova is incorrect to contend (Reply Br. 46-48) that willfulness must be proven by clear and convincing evidence instead of simply a preponderance. *See Octane Fitness*, 134 S. Ct. at 1758 (holding that "nothing in § 285 justifies" departure from traditional rule that "patent-infringement litigation has always been governed by a preponderance of the evidence standard"); *Halo Elecs.*, 769 F.3d at 1385 (O'Malley, J., concurring) ("As with § 285, moreover, § 284 has no language that would justify a higher standard of proof; it just demands a simple discretionary inquiry and imposes no specific evidentiary burden."). Thus, neither this Court

[2] In *Octane Fitness*, the Supreme Court rejected this Court's two-prong subjective/objective test for an award of attorneys' fees under 35 U.S.C. § 285, explaining that the objective baselessness standard from *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), is relevant only as a narrow exception to the *Noerr-Pennington* doctrine in antitrust cases, and held that Section 285 requires a flexible totality-of-the-circumstances analysis. 134 S. Ct. at 1756-57. Two judges of this Court have recently suggested that *Octane Fitness* "call[s] into question [this Court's] two-part test for determining willfulness" under Section 284, *Bard Peripheral Vascular, Inc. v. W.L. Gore & Assoc., Inc.*, __ F.3d __, 2015 WL 151557, *8 (Fed. Cir. Jan. 13, 2015) (Hughes, J., concurring), and suggests that a "flexible totality of the circumstances test" should apply under Section 284 as well, *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 769 F.3d 1371, 1385 (Fed. Cir. 2014) (O'Malley, J., concurring).

now nor the district court in any remand should require clear and convincing evidence of willfulness.

B. Even If *Seagate* Applies, Nova's Post-Judgment Decision To Continue Infringing Dow's Patents Was Unreasonable

Even assuming that the *Seagate* framework applies here, the district court's denial of enhanced supplemental damages should be vacated. Abandoning the express basis for the district court's decision—that Nova's *pre*-judgment infringement had been held to be non-willful (A26-27)—Nova argues (Reply Br. 48-51) that its *post*-judgment decision to continue sales of its infringing SURPASS products was not willful because it had a reasonable basis to believe that it would prevail in its appeal of the Rule 54(b) final judgment, that the district court sanctioned its continued infringement by denying a permanent injunction, and that its post-judgment infringing sales were reasonably limited. Nova's arguments are unavailing.[3]

[3] Nova also suggests (Reply Br. 44, 45)—but never directly argues—that Dow's request for enhanced supplemental damages was untimely. Nova raised this argument below, but the district court did not find waiver and instead addressed the merits. Indeed, Nova does not identify a single case holding that willfulness for post-judgment sales must be separately pled. And because Dow pled its request for enhanced damages in its original Complaint (A16004), Nova cannot (and indeed does not) contend that it was caught off-guard or in any way prejudiced by Dow's requested enhancement of the supplemental damages award.

1. Nova Had No Reasonable Expectation That This Court Was Likely To Reverse The Judgment Of Validity Or Infringement

Nova contends (Reply Br. 48) that its continued infringement was not "objectively reckless" because it "had a reasonable basis to believe that one or more of its defenses would succeed on appeal throughout the supplemental damages period." As Nova appears to concede, anything less than an objective *likelihood of success* in *reversing* a judgment of infringement or validity is necessarily insufficient to show that an *adjudged infringer* was not acting "despite an objectively high likelihood that its actions constituted *infringement* of a *valid* patent." *Seagate*, 497 F.3d at 1371 (emphasis added).[4] But none of Nova's present arguments provides any objective indicia that it was likely to obtain reversal as to either validity or infringement.

Nova first relies (Reply Br. 48) on Judge Farnan's statement in denying a permanent injunction that Nova had "substantial issues for appeal" (A5035). But

[4] *See also Mondis*, 822 F. Supp. 2d at 651 (rejecting "standard that a party is not a willful infringer until after it has resolved all its rights on appeal and has lost" because "[i]mplicit in this argument is [an] obvious lack of respect for the jury's verdict or this Court's judgment"); *Stryker Corp. v. Davol, Inc.*, 75 F. Supp. 2d 746, 748 (W.D. Mich. 1999) ("[T]he hypothetical possibility that [a post-trial motion] might be granted was clearly insufficient to support a good faith belief that continuing sales of the [product] were not infringing."), *aff'd*, 234 F.3d 1252, 1259-60 (Fed. Cir. 2000); *cf. Cummins-Allison Corp. v. SBM Co., Ltd.*, 669 F. Supp. 2d 774, 780 (E.D. Tex. 2009) ("Once the jury found that all of the asserted claims were infringed and not invalid, unless Defendants obtained JMOL or reversal on appeal as to every one of the representative claims of the four patents-in-suit, future sales would be infringing.").

the presence of "substantial issues for appeal" does not constitute a *likelihood of success* on appeal. *See, e.g.*, *United States v. Smith*, 793 F.2d 85, 89 (3d Cir. 1986) (defining "substantial question for appeal" as "one of more substance than would be necessary to a finding that it was not frivolous"; it must be "fairly debatable") (quoting *United States v. Handy*, 761 F.2d 1279, 1282 n.2 (9th Cir. 1985)). Judge Farnan's statement thus offered Nova no basis for reasonably believing that it was likely to succeed on appeal, particularly in light of his rejection of Nova's post-trial JMOL motions.

Similarly, Judge Farnan's statement in dicta that he likely would have stayed any permanent injunction (A5035 n.1) does not suggest that Nova was likely to prevail on appeal of the judgment of validity or infringement, since an injunction may be stayed even if the enjoined party is unable to demonstrate a likelihood of success on the merits. *See, e.g.*, *Arlington Indus., Inc. v. Bridgeport Fittings, Inc.*, 425 Fed. App'x 896, 896 (Fed. Cir. 2011) (stay may be granted if movant "demonstrate[s] a substantial case on the merits [and] that the harm factors militate in its favor") (citing *Hilton v. Braunskill*, 481 U.S. 770, 778 (1987); *E.I. DuPont de Nemours & Co. v. Phillips Petroleum Co.*, 835 F.2d 277, 278 (Fed. Cir. 1987)). Here, Judge Farnan's decision to deny a permanent injunction emphasized his conclusions that the balance of hardships and the public interest favored Nova (A5035-36)—meaning that he properly could have granted a stay even if he

believed that Nova was *unlikely* to succeed on appeal. *See, e.g.*, *Mohammed v. Reno*, 309 F.3d 95, 102 (2d Cir. 2002) ("substantial possibility" of success on appeal means "something less than 50 percent"); *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011) ("none of [the formulations of the standard for granting a stay] demand[s] a showing that success is more likely than not").

In any event, regardless of Judge Farnan's remarks, neither of the appellate issues upon which Nova relies could have provided an objectively reasonable justification for continued infringement. The standing issue concerned only whether Nova had been sued by the correct plaintiff, not whether it was infringing a valid patent, *see Dow Chem. Co. v. Nova Chems. Corp. (Canada)*, 458 Fed. App'x 910, 912 (Fed. Cir. 2012) ("*Dow I*"), and thus is irrelevant to whether Nova continued to infringe in the face of an "objectively high likelihood that its actions constituted infringement of a valid patent," *Seagate*, 497 F.3d at 1371. Even if Dow *itself* had not owned the patents, Nova knew that it was infringing *some Dow entity's* valid patents, and therefore its continued infringement was objectively willful. *Cf. Aqua Shield v. Inter Pool Cover Team*, __ F.3d __, 2014 WL 7239738, *6 (Fed. Cir. Dec. 22, 2014) (denial of preliminary injunction irrelevant to

willfulness when it "cannot reasonably be read to support a conclusion that any substantial basis existed for doubting infringement or validity").[5]

Nor has Nova shown (*contra* Reply Br. 48-49) that it reasonably could have believed that its indefiniteness challenge to Dow's patents was *likely* to succeed on appeal. Nova relies on Judge Farnan's initial hesitation about indefiniteness following a *Markman* hearing that was held more than a year *before* the 2010 trial in which Nova's indefiniteness arguments were rejected. But while Judge Farnan could not, "*at [that] stage*, eliminate the possibility that the claims will ultimately be found indefinite" (A497 (emphasis added)), he *did* eliminate that possibility *after trial*, when, following development of the record, he ruled that the testimony of Dow's expert, Dr. Benjamin Hsiao, provided "more than ample evidentiary support for the jury's verdict" of validity (A418). Judge Farnan's *pre-trial* comments on indefiniteness thus cannot provide an objectively reasonable basis for Nova's decision to continue its infringement *after* the judgment.

Judge Stark's statement that he did "not find a basis for concluding that [Nova's] indefiniteness contention is unreasonable" (A14182) likewise does not

[5] Even if the standing issue were relevant to willfulness, Nova is incorrect to the extent it asserts (Reply Br. 48) that Judge Reyna's dissent in *Dow I* shows that its decision to continue infringing was reasonable. *See Bard*, 2015 WL 151557, at *5 ("[W]e reject [defendant's] argument that the mere fact a member of the previous panel dissented on this issue indicates that its position was reasonable.").

demonstrate that Nova was likely to succeed on appeal. The purported *pre*-judgment reasonableness of Nova's indefiniteness argument does not account for the reevaluation of Nova's argument that was necessary in light of the adverse judgment. *See, e.g.*, *Paice LLC v. Toyota Motor Corp.*, 609 F. Supp. 2d 620, 626, 630 (E.D. Tex. 2009) ("Once judgment is entered, ongoing infringement by the adjudged infringer is willful. … [T]he fact that [a defendant] is an adjudged infringer who chooses to continue infringing simply cannot be ignored"). Even if Nova's indefiniteness argument might have stood a reasonable chance of success *before trial*, no reasonable litigant would *expect* to succeed on a defense that has been rejected by an amply supported jury verdict and a district court on post-trial motions. This is particularly so here, given that, as this Court noted in *Dow I*, Nova's own expert made several significant concessions that undermined its indefiniteness argument. *See* 458 Fed. App'x at 918 ("Nova's own expert witness, Dr. Fuller, agreed with Dow's attorney that a typical stress/strain curve was 'very, very well known [to a] person of ordinary skill in the art ….'"); *id.* at 920 ("Experts for Dow and Nova agreed that the user manual for the Instron Tensile Tester, available when the patents in suit were filed, specified that when the crosshead speed is inches per minute, the units for load and elongation are pounds and inches (English units), unless expressly specified otherwise.").

Likewise, contrary to Nova's intimations (Reply Br. 49), the Supreme Court's *2014* decision in *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014), cannot possibly support Nova's argument that it reasonably expected to succeed years earlier in its *2010* appeal of the Rule 54(b) final judgment. In any event, as Dow explained (Dow Br. 33-52), *Nautilus* does not strengthen Nova's failed indefiniteness argument.

The pendency of Nova's appeal during the supplemental-damages period thus does not render its post-judgment infringement non-willful as a matter of law.

2. The Denial Of A Permanent Injunction Did Not Authorize Nova's Continued Infringement

Nova's argument (Reply Br. 49-50) that the district court's denial of a permanent injunction renders Nova's post-judgment infringement non-willful is also incorrect. Judge Farnan's discretionary and equitable decision not to enter an order prohibiting sales of Nova's SURPASS products did *not* authorize continued sales; to the contrary, the court *upheld* the jury's findings of validity and infringement (A417-18, A420-23) and denied an injunction primarily because it concluded that the balance of hardships and the public interest did not favor such relief (A5035-36). Without affirmative "authority" to continue selling its SURPASS products, Nova's continued sales constituted infringement, 35 U.S.C. § 271(a), for which Dow is entitled to recover damages, including enhanced

damages, *see id.* § 284 (court may award enhanced damages "[u]pon finding for the claimant" on infringement, irrespective of whether it awards injunctive relief).

Nor did the district court's denial of an injunction reflect any determination that Nova's adjudged infringement was not willful, or otherwise justify denying enhanced supplemental damages. *See* A5035-36; *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (injunction factors do not include whether conduct is willful); *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 735 F.3d 1352, 1371 (Fed. Cir. 2013) (affirming district court's conclusion that purported willfulness of infringement did not favor granting injunction); *I/P Engine, Inc. v. AOL Inc.*, 2014 WL 309245, *4 (E.D. Va. Jan. 28, 2014) ("Defendants point to no support for the proposition that continued infringement following a jury verdict of infringement should not be considered willful because of a court-ordered ongoing royalty. Instead, the case law this Court is aware of directly contradicts their argument.") (citing *Affinity Labs*, 783 F. Supp. 2d at 899; *Paice*, 609 F. Supp. 2d at 631), *rev'd on other grounds*, 576 Fed. App'x 982 (Fed. Cir. 2014). The district court's denial of injunctive relief thus has no bearing on whether Nova continued to sell its SURPASS products "despite an objectively high likelihood that its actions constituted *infringement* of a *valid* patent." *Seagate*, 497 F.3d at 1371 (emphasis added).

Nova also errs (Reply Br. 50) to the extent it relies on *Amado* to argue that a "willfulness inquiry is improper" here. In *Amado*, this Court explained that calculation of an ongoing royalty under Section 283 for infringement occurring while a permanent injunction has been stayed does not turn on the infringing party's willfulness, but rather "should take into account the change in the parties' bargaining positions, and the resulting change in economic circumstances, resulting from the determination of liability … as well as the evidence and arguments found material to the granting of the injunction and the stay." 517 F.3d at 1362. Here, there was no stay of a permanent injunction and, unlike in *Amado*, the willfulness inquiry is directly implicated since Dow seeks enhanced supplemental damages under Section 284. *See, e.g.*, *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 858 (Fed. Cir. 2010) ("A finding of willful infringement is a prerequisite to the award of enhanced damages."). Regardless, nothing in *Amado* suggests that either denial or stay of a permanent injunction precludes enhanced damages under Section 284, which, as Dow has shown (Dow Br. 69-70), are commonly awarded for infringing sales that occur after an injunction is denied.

3. Nova's Calculated Decision To Ramp Up Sales Of Its Infringing Products Was Not Reasonable

Finally, Nova does not dispute that its sales of infringing SURPASS products rose to record levels in the post-judgment period, but instead boasts (Reply Br. 50) of a purported post-judgment "remedial policy" of not selling

infringing SURPASS products to *new* customers. Even if Nova had such a policy—the district court made no such finding—whether Nova sought out *new* customers is irrelevant to the willfulness of its continued infringing sales to its *existing* customers; the willfulness inquiry turns on the sales that the adjudicated infringer actually made, not any sales it forewent. *See Seagate*, 497 F.3d at 1371 (inquiring whether "the infringer *acted* despite an objectively high likelihood that its actions constituted infringement of a valid patent") (emphasis added).[6]

Likewise, the fact that Nova's market share declined an insignificant *1%* (a number Nova conspicuously fails to mention) from 2008 to 2010 is not only irrelevant to the willfulness inquiry, but it greatly understates both the harm to Dow and the benefit to Nova during that period: Regardless of Nova's *relative* share of a growing market, the *absolute* volume of its infringing sales climbed by *more than 36%* (*see* A14195; A14018). Nova's calculated decision to ramp up its sales of its infringing SURPASS products—even if only to its sizeable existing customer base—is hardly a mitigating factor, let alone one that could create the unusual circumstances necessary to render its post-judgment infringement non-willful.

[6] At most, a "remedial policy" may be relevant to the *degree* of enhancement that is warranted following a determination of willful infringement, *see Read*, 970 F.2d at 827, not the threshold question whether Nova continued to sell products found to infringe despite an "objectively high likelihood" of infringement, *Seagate*, 497 F.3d at 1371.

CONCLUSION

The judgment should be affirmed except to the extent it denied enhanced supplemental damages, that portion of the judgment should be vacated, and the case should be remanded for further proceedings on enhancement.

Dated: January 16, 2015

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that on January 16, 2015, I caused the foregoing REPLY BRIEF FOR PLAINTIFF-CROSS APPELLANT to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Harry J. Roper
Harry J. Roper
Attorney for Plaintiff-Cross Appellant

CERTIFICATE OF COMPLIANCE

Counsel for Plaintiffs-Cross Appellant hereby certifies that:

1. The brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(C) because exclusive of the exempted portions it contains 3,550 words as counted by the word processing program used to prepare the brief; and

2. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Office Word 2007 in a proportionately spaced typeface: Times New Roman, font size 14.

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