No. 2015-1103

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SUMMIT DATA SYSTEMS LLC,

Plaintiff-Appellant,

v.

NETAPP INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Delaware, No. 1:10-cv-00749 (Judge Gregory M. Sleet)

CORRECTED BRIEF FOR *AMICUS CURIAE* COMCAST CABLE COMMUNICATIONS, LLC IN SUPPORT OF APPELLEE NETAPP INC.

NATALIE HANLON-LEH
MARY V. SOOTER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1225 Seventeenth Street
Suite 1660
Denver, CO 80202
(720) 274-3130

Counsel for Amicus Curiae Comcast Cable Communications, LLC

May 5, 2015

CERTIFICATE OF INTEREST

Counsel for *Amicus Curiae* Comcast Cable Communications, LLC certifies the following:

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

Comcast Cable Communications, LLC

2. The names of the real party in interest represented by us is:

NA.

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

Comcast Cable Communications LLC is a wholly-owned subsidiary of Comcast Holdings Corporation, which in turn is a wholly-owned subsidiary of Comcast Corporation. No publicly held corporation owns 10 percent or more of Comcast Corporation's stock.

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 are:

WILMER CUTLER PICKERING HALE AND DORR LLP: Natalie Hanlon-Leh, Mary V. Sooter

Dated: May 5, 2015

/s/ Natalie Hanlon-Leh

NATALIE HANLON-LEH
WILMER CUTLER PICKERING
HALE AND DORR LLP
1225 Seventeenth Street
Suite 1660
Denver, CO 80202
(720) 274-3130

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae Comcast Cable Communications, LLC ("Comcast Cable") is the nation's largest provider of video, high-speed Internet, voice, and other related services. The products and services Comcast Cable offers are implemented using a combination of technologies developed not only by Comcast Cable but also by a large number of third-party suppliers.

Comcast Cable is frequently involved in patent disputes, both to enforce its own patents and to defend against accusations of patent infringement. In cases where Comcast Cable is an accused infringer, Comcast Cable has observed that certain classes of patent owners sometimes level meritless infringement accusations without performing thorough pre-suit investigations. Comcast Cable notes a disturbing trend of these patent owners accusing products and methods that are already covered by one of the patent owner's own licenses—information that would have been apparent upon even the most rudimentary pre-suit investigation by the patent owner. Such behavior reflects either a deliberate effort to obtain double recovery for the same activity (once through a license fee to one party such as a supplier or membership organization, and once through litigation damages

[1] Pursuant to Fed. R. App. P. 29(c), amicus states: 1) no party's counsel authored this brief in whole or in part; 2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and 3) no person other than the amicus curiae contributed money that was intended to fund preparing or submitting this brief.

from another party such as a supplier's customer or an organization's member) or willful blindness to the patentee's existing license obligations—neither of which should be encouraged or tolerated by the courts.

In one specific example, Comcast Cable was recently sued by the largest non-practicing entity ("NPE"), Acacia Research Corporation, through its subsidiary Brilliant Optical Solutions, LLC (collectively referred to as "Acacia"). Acacia accused Comcast Cable products and services already covered by licenses that Acacia had granted to Comcast Cable's third-party suppliers. Acacia delayed production of the relevant licenses during nearly a year of litigation, including requiring Comcast Cable to subpoena third parties to obtain licenses Acacia should have considered before bringing suit and should have produced at the outset of litigation or when executed during the litigation. After Comcast Cable finally obtained copies of the relevant licenses and notified Acacia of the complete defense they afforded, Acacia ultimately dismissed its case with prejudice. The United States District Court for the District of Colorado recently granted Comcast Cable's ensuing request to declare the case exceptional under 35 U.S.C. § 285 and awarded over $425,000 in fees and costs. *See Brilliant Optical Solutions, LLC v.*

Comcast Corp.,[2] No. 1:13-cv-00886-REB, 2015 WL 1476691 (D. Colo. Mar. 27, 2015).

Like other companies frequently sued by NPEs, Comcast Cable has an interest in ensuring that patent owners diligently review their licenses prior to filing suit to ensure that they have not already licensed the accused products and methods. Comcast Cable has a further interest in ensuring that patent plaintiffs promptly disclose relevant licenses during litigation and promptly dismiss any accused products or services that enjoy the benefit of any license that is granted during suit.

Comcast Cable respectfully submits this brief to urge affirmance of the fee award in this case, which involves near-identical circumstances to those Comcast Cable and other operating companies have faced at the hands of unscrupulous NPE plaintiffs. Affirming the fee award in this case would not only compensate NetApp for having to defend against an exceptional case, but more importantly, also deter NPEs like Acacia from continuing this type of abusive litigation tactics.

[2] The proper defendant in that case is Comcast Cable Communications, LLC. The Court granted a motion to substitute Comcast Cable Communications, LLC for Comcast Corporation on January 15, 2014, so Comcast Corporation is not a party to the suit. *Brilliant Optical Solutions*, Dkt. No. 31 (D. Colo. Jan. 15, 2014).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Section 285, 35 U.S.C., reflects Congress's judgment that courts should use fee awards to discourage abusive litigation behavior in "exceptional" patent cases. Exceptional cases include those in which a plaintiff knows, or reasonably should know, that it cannot prevail, because the accused products or methods are already covered by a license. Other similar exceptional litigation behavior includes failing to consider and produce potentially exculpatory licenses promptly during litigation and failing to dismiss suits promptly when a new license becomes effective that covers the accused products or methods—tactics that appear transparently designed to extract maximum settlement value for products or methods that could never be the subject of an actual infringement judgment.

One increasingly prevalent category of exceptional litigation includes cases filed by NPEs, sometimes known as patent monetization entities ("PMEs"), that allege infringement by products or methods that the NPE knows (or reasonably should know) are already covered by a license to the asserted patent. This fact pattern arises, for example, when an NPE enters into a license agreement with a supplier that extends to the supplier's customers' use of the supplier's products, yet the NPE later sues the customer for use of the supplier's products. NPEs sometimes compound the exceptional nature of the suit by delaying disclosure of the license and its terms for as long as possible, in the hope of prolonging litigation

and extracting a settlement. In another variation of this behavior, NPEs sometimes enter into licensing agreements during litigation that may lead to a partial or complete defense, but fail to disclose the license and dismiss the claims against the licensed products or methods or entire suit promptly. These abusive litigation tactics, which are regrettably increasingly common in NPE litigation, are exceptional and warrant fee shifting under 35 U.S.C. § 285.

Comcast Cable respectfully submits that the Court should affirm the fee award in this case, and do so in a precedential opinion that will make plain to NPEs, defendants, and district courts that the indiscriminate accusation of licensed activity is an appropriate basis for a fee award. Such a ruling will not simply compensate NetApp for defending against this particular exceptional case, it also will deter NPEs from engaging in such tactics—tactics that have become so frequent that they cannot be accidental.

ARGUMENT

I. WHEN A PATENTEE FILES OR MAINTAINS SUIT DESPITE KNOWLEDGE OR REASONABLE NOTICE THAT THE ACCUSED PRODUCTS AND/OR METHODS ARE LICENSED, A FINDING OF EXCEPTIONALITY UNDER 35 U.S.C. § 285 IS APPROPRIATE

This Court has long recognized that 35 U.S.C. § 285 is "[t]he only deterrent to the equally improper bringing of clearly unwarranted suits on obviously invalid or unenforceable patents." *Mathis v. Spears*, 857 F.2d 749, 754 (Fed. Cir. 1985). Indeed, the substantial risk of paying an opponent's attorneys' fees is one of the

few deterrents to those patent plaintiffs (often NPEs), who are not above engaging in repetitive, abusive behavior in an effort to extract whatever settlement value they can. The average cost for a defendant to litigate a case brought by an NPE can range from $420,000 for small/medium companies to at least $1.52 million for large companies. Bessen, James & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 Cornell L. Rev. 387, 400 (Jan. 2014). Consequently, even when a defendant is confident that it should or ultimately will prevail on the merits, the defendant may begrudgingly negotiate a settlement that is less than the cost of litigation, sometimes referred to as a "nuisance settlement." NPEs often take advantage of this economic phenomenon by filing and maintaining suits having little or no merit in order to extract settlements or license fees. Scholars have taken notice. *See, e.g.*, Rader, Randall R., et al., *Make Patent Trolls Pay in Court*, N.Y. Times (June 4, 2013). At the moment, the Patent Act's only sanction for such behavior is the availability of fee awards for "exceptional" cases under 35 U.S.C. § 285.

The Supreme Court in *Octane Fitness* noted that Section 285 provides a flexible framework for fee shifting:

> [A]n "exceptional" case is simply one that *stands out* from others with respect to *the substantive strength of a party's litigating position* (considering both the governing law and the facts of the case) or *the unreasonable manner in which the case was litigated*. District courts may determine whether a case is "exceptional" in the case-by-case exercise of their discretion, considering the totality of the

circumstances.

Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749, 1756 (2014) (emphases added). Further, sanctionable conduct is not necessary to award fees; instead, several factors may be weighed, including "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*." *Id.* at 1756, n.6 (citation and internal quotation marks omitted) (emphasis added).

One disconcerting pattern of abusive litigation that has emerged is the willingness of certain plaintiffs to sue for patent infringement despite knowing or being on reasonable notice that the accused products or methods are already protected by a license. As a simple example, a defendant may be licensed because the plaintiff already granted the defendant a license covering the accused behavior, or the prior owner of the patent did so and the plaintiff is aware or on reasonable notice of that fact. In a variation on this scenario, a defendant may be licensed because the defendant's *supplier* holds such a license that covers the supplier's downstream customers, including the defendant.

In the latter scenario, the defendant may not immediately *know* of its license defense. Licensing relationships can be complex and difficult for the defendant to discover. For example, an NPE may grant a license to a membership organization

that in turn grants sub-licenses to its members, who in turn provide sub-sub-licenses to the members' customers. This is a common scenario when a patentee licenses patents to a patent aggregator, such as RPX Corporation ("RPX"), which helps its members avoid NPE patent litigation.[3] And because an aggregator's members usually want to ensure that their *customers* will not be sued for infringing the same licensed patents, the aggregator's licenses and sublicenses often extend to the members' customers and their use of the members' products, even when used in combination with other third-party products. *Cf. Chalumeau Power Sys. LLC v. Alcatel-Lucent*, No. 1:11-cv-1175-RGA, Dkt. 130, at 4 (D. Del. Oct. 14, 2013), *docketed as* 15-1191 (Fed. Cir.) (arguing that the defendant was entitled to a license defense because the accused products included components obtained from third-party suppliers that were RPX members and that benefitted from an Acacia-RPX license agreement).

Importantly, however, the customers will often not ***know*** that they are licensed.[4] The NPE, the aggregator, and the aggregator's members typically know

[3] In exchange for membership dues, RPX pays for and obtains patents and patent licenses from patent owners, including NPEs, and then extends royalty-free sublicenses to those patents to its members. Anderson, Patrick, *RPX Pursues More 'License Option' Agreements*, SEEKING ALPHA (October 5, 2012), available at http://seekingalpha.com/article/906021-rpx-pursues-more-license-option-agreements?page=2.

[4] This lack of transparency is compounded by the fact that confidentiality restrictions often prevent in-house counsel—who frequently have important insight

of the existence and terms of relevant patent licenses, but the members' customers often do not, since the list of members, licenses, licensees, and covered patents is not public. Without knowledge of the possibly dispositive license and its terms, a customer—if sued by the patentee—will have to rely on discovery in litigation in order to obtain a copy of such a license. And if the patentee delays or obstructs production of the license during discovery, the defendant customer may incur substantial unnecessary litigation costs, and indeed may *never* learn of such a license before agreeing to pay a license fee in order to settle the case or having the case decided against it on the merits.

In some cases, NPEs, who are typically savvy parties whose principal business model involves negotiating licenses, take advantage of this asymmetrical knowledge and sue unknowing customers based on the use of products that the NPE knows to be licensed, but the defendants do not. For example, an NPE may enter into a license benefiting a vendor's customers, and still knowingly bring suit against a customer alleging infringement based on the customer's use of those very products. The NPE does not expect to win an infringement judgment—indeed, it knows or reasonably should know that it cannot—but it knows that an unknowing customer who does not discover the license early is likely to settle first rather than endure the costs of litigation. The NPE thus withholds disclosure of the license to

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into the relevant vendor relationships—from learning the specific terms of the relevant licenses.

the defendant—either dragging its heels or affirmatively objecting to production—and instead seeks to obtain a settlement before the defendant learns of the existence and terms of the license.

That is precisely what Summit did to NetApp in this case, and what Acacia did to Comcast Cable in other cases. For example, in the *Brilliant Optical* case, Acacia's subsidiary Brilliant Optical Solutions did not produce applicable license agreements, and Comcast Cable was forced to engage in formal and informal third-party discovery to obtain them. *Brilliant Optical Solutions*, Dkt. 71, at 7-8 (May 16, 2014). Comcast Cable finally obtained the licenses approximately a year after the case began. *Id.* Similarly, in *DN Lookup Technologies LLC v. Comcast Corp*., 11-cv-1181-LPS (D. Del. 2011), an Acacia subsidiary unilaterally dismissed its case against Comcast—after nineteen months of litigation—just when Comcast notified Acacia that it was preparing to file a motion to compel access to the licenses it had learned about and believed were applicable to the accused activity there. *See Brilliant Optical Solutions*, Dkt. 71, at 14.

In yet another scenario, an NPE may enter into a license with a supplier or other third party that benefits a defendant in a *current litigation* and yet fail to disclose the new, dispositive license promptly to that defendant, in the hope that the affected defendant will decide to settle, rather than continue to expend

resources litigating a case that they have not yet learned is completely meritless. *See, e.g.*, *Brilliant Optical Solutions*, 2015 WL1476691, at *3.

District courts, like the one in this case and in Comcast Cable's litigation against Acacia, have correctly recognized such tactics as abusive and "exceptional," warranting an award of attorneys' fees. Section 285, 35 U.S.C., is the proper tool not only to compensate the defendants in such cases, but also to deter similar behavior in the future.

II. ACACIA'S DEMONSTRATED PATTERN OF SUING AND MAINTAINING SUIT AGAINST LICENSED DEFENDANTS IS EXCEPTIONAL AND WARRANTS FEE SHIFTING.

In three recent cases, including this one, Acacia and its subsidiaries have sued defendants despite knowing that Acacia had already granted licenses covering the accused products and methods. In all three cases, the district courts have properly exercised their discretion to award fees to the defendants. These fee awards are important to discourage future abusive behavior and should be upheld. *See Highmark Inc. v. Allcare Health Mgmt. Sys. Inc.*, 134 S. Ct. 1744, 1747 (2014) (saying that a district court's determination of exceptionality under Section 285 is reviewed for abuse of discretion).

As Appellee here explains, Acacia is a sophisticated publicly-traded company that is in the business of monetizing, licensing, and enforcing patents. Acacia's *modus operandi* is to assign a related set of patents to a subsidiary that

typically does not have its own operations, but rather is run by Acacia employees out of its Newport Beach, California, headquarters. Acacia and its subsidiaries regularly enter into licensing agreements with aggregators, such as RPX. RPX's members, its licenses, and the scope of these licenses are not public knowledge.

Acacia regularly sues defendants based on the defendants' use of suppliers' products. In and of itself, that is not exceptional. What is exceptional, however, is that Acacia regularly sues for infringement based on defendants' use of suppliers' products that Acacia *knows*, or reasonably should know, it or the prior owner of the patent has already licensed. Further, Acacia obstinately drags its feet in producing the exculpatory licenses or claims lack of access to prior licenses during discovery, and is not diligent in dismissing cases even when it knows defendants have become licensed.

For example, Acacia, through its wholly-owned subsidiary Brilliant Optical Solutions, LLC, sued Comcast Cable, accusing Comcast Cable's use of third-party equipment, despite knowing that Comcast Cable's use of that third-party equipment was already licensed. *See generally Brilliant Optical Solutions*, 2015 WL 1476691, at *1. Acacia had licensed the patent-in-suit to one of Comcast Cable's suppliers nine months prior to filing suit. *Id.* at *2-3. Then, after filing suit, Acacia licensed the same patent to more of Comcast Cable's suppliers. The

licenses extended to use by the suppliers' customers (including Comcast Cable) of the suppliers' products. *Id.* at *3.

Comcast Cable's discovery of Acacia's license came only after significant discovery efforts that Acacia resisted at every turn, forcing Comcast Cable to continue litigating. *See Brilliant Optical Solutions*, Dkt. 71, at 7-8 (May 16, 2014). When Comcast Cable finally received the relevant licensing agreements—through formal and informal third-party discovery—and confronted Acacia, Acacia dismissed the case with prejudice. *Id.* at 8.

On March 27, 2015, the district court awarded fees under Section 285, finding that Acacia's patent infringement allegations against licensed devices were objectively unreasonable. The court found that "there is little, if any, reasonable room for debate about the applicability of these agreements, as licenses, to the devices at issue in this case." *Brilliant Optical Solutions*, 2015 WL 1476691, at *3. The court continued: "A careful reading of that agreement demonstrates that Comcast Cable had a license to use the covered device or devices in the manner at issue here.… Prosecution of an infringement claim in the face of such a license is objectively unreasonable." *Id.* The District Court awarded Comcast Cable over $425,000 in fees and costs. *Id.* at *5.

Similarly, in *Chalumeau Power Systems LLC v. Alcatel-Lucent*, Acacia sued through another subsidiary, once again filing suit just two months after licensing

the patent-in-suit to RPX. *Chalumeau Power Sys.*, Dkt. 161, at 6 (Feb 14, 2014). Acacia withheld the license agreement for the first fifteen months of litigation. *Id.* at 19. Following production of the RPX agreement and related third-party discovery of RPX, defendants moved to amend their answer and counterclaims to assert a license defense based on the RPX license. *See generally Chalumeau Power Sys.*, Dkt. 130. Once defendants' motion was granted to assert the license defense, Acacia unilaterally dismissed the case. *Chalumeau Power Sys. LLC v. Alcatel-Lucent*, No. 11-cv-1175-RGA, 2014 WL 4675002, at *3 (D. Del. Sept. 12, 2014). Defendants sought attorneys' fees, and the district court awarded defendants approximately $800,000 in fees. *Chalumeau Power Sys. LLC v. Alcatel-Lucent*, No. 11-cv-1175-RGA, 2014 WL 5814062, at *2 (D. Del. Nov. 6, 2014). The district court found that Acacia "filed a frivolous lawsuit with the sole purpose of extorting a settlement fee" from defendant, and "[w]hen it realized that was not going to happen, it dropped the case." *Chalumeau Power Sys.*, 2014 WL 4675002, at *3. The court further found that Acacia's "entire litigation strategy was devoted to stringing out the case in the hopes that Alcatel would incur fees while [Acacia] would not." *Id.* The facts in *Chalumeau* are consistent with Acacia's double dipping tactics in other cases: Alcatel-Lucent was forced to engage in "(expensive) discovery" to obtain the RPX license and surrounding facts. *Id.* Once discovered, the RPX license provided Alcatel-Lucent with a

potential license defense to Acacia's patent infringement claim. *Id.*; *see also Chalumeau Power Sys.*, Dkt. 161, at 18-19.

Those cases are similar to the present case. Here, Acacia asserted infringement through its subsidiary Summit Data Systems, accusing NetApp's use of a Microsoft product in combination with NetApp's own product. *Summit Data Sys. LLC v. EMC Corp.*, No. 10-749-GMS, 2014 WL 4955689, at *1, 3 (D. Del. Sept. 25, 2014). Just two months prior to suit, Acacia had entered into an agreement with RPX that licensed the patent-in-suit to Microsoft and its customers. *Id.* at *1. Acacia knew that Microsoft was an RPX member and that NetApp's use of Microsoft's product was also covered by the RPX license. *Id.* at *4. Nonetheless, Acacia knowingly filed a meritless suit, or "[a]t best" was "careless in reading their own multi-million dollar Licensing Agreement before embarking on a lawsuit spanning several years and costing the parties and the Court countless resources." *Id.* As in *Chalumeau*, Acacia withheld the RPX license during litigation for eighteen months in hopes that it could persuade NetApp to pay to settle the meritless case. *Id.* at *3.

Acacia dismissed its case against NetApp, and the district court granted NetApp's motion for fees, finding that Acacia was "objectively unreasonable in bringing a lawsuit against NetApp mere months after executing [a license to third-party RPX Corporation] that effectively eliminated [Acacia's] theory of

infringement." *Id.* at *5. Acacia's double-dipping tactics succeeded, however, with five of the other defendants that paid nuisance settlements. *Id.* at *2.

These three examples are ample evidence of Acacia's pattern of bringing litigation that Acacia either knows or reasonably should know is meritless, because it accuses products or conduct that Acacia itself has licensed. There are others, and examples involving other NPEs. These meritless suits are exceptional and warrant fee shifting. This type of conduct either reflects manifest disregard of known license agreements, or a deliberate campaign to extract settlement dollars from infringement suits NPEs know they cannot win on the merits. Either way, such litigation is exceptional under *Octane Fitness* and the fees awarded to defendants in such cases should be affirmed under *Highmark*.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Natalie Hanlon-Leh

NATALIE HANLON LEH
MARY V. SOOTER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1225 Seventeenth Street
Suite 1660
Denver, CO 80202
(720) 274-3130

May 5, 2015

CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of May, 2015 I filed the foregoing Corrected Brief for *Amicus Curiae* Comcast Cable Communications, LLC in Support of Appellee NetApp Inc. 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.

/s/ Natalie Hanlon-Leh

NATALIE HANLON-LEH
WILMER CUTLER PICKERING
HALE AND DORR LLP
1225 Seventeenth Street
Suite 1660
Denver, CO 80202
(720) 274-3130

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(b).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 3,619 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Natalie Hanlon-Leh

NATALIE HANLON-LEH
WILMER CUTLER PICKERING
HALE AND DORR LLP
1225 Seventeenth Street
Suite 1660
Denver, CO 80202
(720) 274-3130

May 5, 2015