No. 2015-1103

In the
United States Court of Appeals
for the Federal Circuit

SUMMIT DATA SYSTEMS LLC,

Plaintiff-Appellant,

v.

NETAPP INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Delaware, Case No. 1:10-cv-00749-GMS.
The Honorable **Gregory M. Sleet**, Judge Presiding.

NON-CONFIDENTIAL REPLY BRIEF OF PLAINTIFF-APPELLANT SUMMIT DATA SYSTEMS LLC

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AMENDED STATEMENT OF RELATED CASES

The following other appeals in this Court might or might not qualify as "related:"

Chalumeau Power Systems v. Alcatel-Lucent Enterprise USA, 2015-1191

Brilliant Optical Solutions v. Comcast Cable Comm's., 2015-1595.

They and this appeal each involve a subsidiary of Acacia Research Group appealing a Section 285 fee award imposed after a voluntary dismissal with prejudice. The parties are each different, the factual and procedural histories are each different, the trial counsel representing the parties during the conduct in question are each different, and it is not likely that *res judicata* or collateral estoppel would apply across the cases. However, if this Court holds in any of them that Section 285 fee awards should not be imposed after a voluntary dismissal with prejudice in the absence of litigation misconduct or a prior adverse liability ruling, then principles of *stare decisis* would likely affect the outcome of those others.

I. ARGUMENT IN REPLY

NetApp's defense of the district court's fee decision rests on sidestepping what the record actually says. NetApp instead offers recharacterizations of the record and out-of-context snippets, and relies on

those. This Court may easily inoculate itself against such arguments. Summit respectfully commends the Court's attention to the text of Mr. Zimmerman's expert reports to ascertain the scope of the infringement theories (not recharacterizations of his testimony), and the text of the RPX agreement itself to ascertain whether it automatically bestowed rights upon Microsoft (not recharacterizations of what Summit learned after NetApp stopped concealing its license defense).[1]

A. NetApp Does Not Actually Contest That the District Court Erred in Believing That Summit Presented No Alternative Infringement Theories

Summit had advanced still-viable infringement theories as of the date of dismissal. Those theories rested on NetApp storage servers interoperating with nonlicensed "host computers." The district court mistakenly believed that those theories had never been presented, basing its "exceptionality" finding primarily on their absence (*see* Blue Br. 20-25). After Summit's principal brief in this Court proved otherwise, NetApp's brief shifted the premise. NetApp now questions the evidentiary support for those theories

[1] Summit's principal brief also noted that under case law that emerged from the District of Delaware after briefing on the order under appeal had closed, NetApp was likely not the prevailing party in the district court, and thus had no right to seek fees. (*See* Blue Br. 35 n.10). NetApp focuses heavily on the issue (Red Br. 31-35). Summit recognizes that it has no unfettered right to ask that this Court address the issue. The decision whether to set aside the appellate waiver doctrine is within this Court's discretion. Because it is of great moment to public policy, it was important to make the Court aware.

(*see* Red Br. 15-21). But NetApp does not deny that the district court made a mistake to think that Summit had not presented them at all.

The district court's misperception that justified (in its mind) an "exceptionality" finding appears on pages 5 and 6 of the decision on appeal. There, the district court stated:

> From the outset, Summit rested its entire theory of infringement on the premise that NetApp products, when used in conjunction with Microsoft initiator software, infringed the asserted patents. . . . Throughout litigation, Summit has never been able to identify an alternative theory of infringement that did not require NetApp's products interacting with Microsoft software.

(A5-A6). Thus, the district court did not reach the "plausibility" of, or "evidentiary support" for, infringement theories that rest on a Linux or UNIX multi-connection host computer. The district court thought that they did not exist at all. On appeal, Summit flagged this misperception as a fundamental legal error that, when corrected, removed all justification for finding the case "exceptional" (*see* Blue Br. 20-25).

In its opposition, NetApp does not try to defend the accuracy of this stated justification for the district court's exercise of discretion.[2] NetApp

[2] NetApp knows that it would have been impeached if it were to adopt the district court's rationale. NetApp's experts in their rebuttal reports show their awareness that Summit's opening expert report from Mr. Zimmerman included a theory of induced infringement based on Linux and UNIX multiple-connection host computers (*see* A2369, excerpt from NetApp's Hess damages report referring back to NetApp's Gardner noninfringement

instead carefully shifts the focus elsewhere. For example, NetApp states, "Summit has never set forth a viable infringement theory *with even a minimum of evidentiary support*" (Red Br. 15, emphasis added). NetApp also states, "Summit failed to present any *viable* infringement theory based on Linux or UNIX software" (Red Br. 16, emphasis added). NetApp concludes that "there was [n]ever a *plausible* infringement claim presented based on Linux or UNIX software," and that Summit's "expert presented no *plausible* infringement claim during the case" (Red Br. 18, emphasis added). But the district court did not rule based on viability, plausibility or evidentiary support. It ruled based on its mistake in thinking that Summit did not present such a theory at all.

For example, the district court omitted any mention (much less analysis) of Mr. Zimmerman's expert report where he identified "*either* a Windows, Linux *or* UNIX based operating system which includes iSCSI initiator drivers that support multiple TCP connections" (A1573, emphasis added). Nor did the district court cite or analyze Mr. Zimmerman's deposition testimony in which he affirmed his opinion that Linux and UNIX programs satisfy the "host computer" claim limitation:

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report, reflecting on "three identified host-side software programs" operating as host computers, only one of which was Microsoft's).

> A. And so that leaves open, then, the Linux running on a hardware platform that's not licensed.
>
> Q. Where multiple connections are actually being used?
>
> A. Correct.
>
> Q. Because you acknowledge that they may not be in that setup?
>
> A. Correct.
>
> Q. And would you agree that it's speculative as to whether there is any such configuration that meets all those different requirements? How do we know whether there's such a system?
>
> A. That requires the analysis of the vendor mix out there.
>
> Q. Okay. And then it would just be – even if you knew the vendor mix, ***wouldn't it then still be speculation to say that someone that had Linux used it on a nonlicensed hardware and then implemented multiple connections***?
>
> A. ***No***, I think the analysis of use of multiple connections we've already talked about, about the – ***that being a majority***. And, you know, you can disagree with me on that, but that might – my – my opinion is that ***there's a majority of – of iSCSI systems out there that are connected to host computers would be using multiple connections of one flavor or another***.

(A2217-18, emphasis added). NetApp never moved to strike these opinions under *Daubert* (which it had procedural rights to do). These opinions existed in the case, unchallenged as admissible evidence, as of the time of dismissal.

This expert testimony from Mr. Zimmerman also goes a long way to restore the context to deposition snippets that NetApp takes out of context in

its arguments to this Court. Irrelevant as it is, NetApp's brief seeks to support its attack on the "viablility," "plausibility" and "evidentiary support" of the nonlicensed Linux/UNIX-based infringement theories (issues the district court did not reach) by quoting selectively from Mr. Zimmerman. At page 19 of its brief, NetApp quotes the following from pages 103-04 of his deposition:

> Q. How come you did not include any actual evidence that UNIX or Linux have multiple connections capability in your reports in this case?
>
> A. My initial report was focused on the Microsoft example and Microsoft host operating system and that's why – that's why my report references that.

(Red Br. 19, quoting A865-66 [103:21-104:1]). Previous answers show that here, Mr. Zimmerman simply explained why he supplied no ***documentation*** of a fact about Linux and UNIX that, as an expert, he already knew (A865: "Q. And is the information about whether UNIX or Linux have multiple connections, did you produce that documentation in connection with your case, with your opinions in this case? A: It was not referenced in my report."). As explained on pages 22-23 of Summit's principal brief, Mr. Zimmerman's testimony about Linux or UNIX was admissible opinion evidence regardless.

Likewise, NetApp quotes the following from page 110 of his deposition:

> Q. And then the reason why you couldn't put in an opinion on UNIX or Linux that had the evidentiary support in your reply was it came up at the last minute and you just didn't have time? I think that's what you said.
>
> A. Yeah, I did – I did not perform that analysis.
>
> Q. And that's because you didn't have time?
>
> A. It was – yeah. I didn't have time.

(Red Br. 19, quoting A1688 [110:7-15]). As before, the missing context is not hard to find. First, these answers followed directly, on the following page, after Mr. Zimmerman's affirmation (quoted above) that he did ***not*** speculate to opine on Linux/UNIX-based multi-connection infringement. Second, the so-called "evidentiary support" that Mr. Reines loaded into the just-quoted question referred back to previous questions in the line that directed Mr. Zimmerman's attention to an "actual configuration" – *i.e.*, Mr. Zimmerman's identification of a specific deployment that actually runs in the real world.

> Q. But you're definitely not aware of any actual system that – for which NetApp induced infringement, any actual configuration?
>
> A. I have not run tests myself.

> Q. But forget the run tests [sic]. All your analysis, with all the discovery that you get in a federal case, anything on the Internet, you've never been able to find one system in NetApp [sic] that is an infringing system?
>
> A. I have not done that analysis.

(A1687 [109:16-24]). As already explained in Summit's principal brief at page 21, questions eliciting that the expert has not seen a real-world deployment have limited probative value in the face of this Court's precedents permitting circumstantial evidence to serve as proof of inducement.

In short, all of NetApp's attempts to justify the central pillar of the district court's exercise of discretion to find the case exceptional address an issue separate from what the district court actually addressed. NetApp attacks the plausibility or evidentiary support for Summit's theories of Linux/UNIX-based infringement, not their existence. That NetApp stood ready to attack the weight of Mr. Zimmerman's opinion before the jury cannot, of itself, make a case "exceptional." If that were so, then every contested case would meet that description. And notwithstanding their irrelevance to this appeal, NetApp's misapprehensions about the evidentiary record do not support its "plausibility" attacks anyway. As explained above and at pages 20-25 of Summit's principal brief, Mr. Zimmerman had ample

basis for opining that 53% of the damages claim remained, even subtracting Microsoft-based host computers from the mix.

This Court recently reversed an exceptional case finding that was similarly based on misperceptions of a lack of support for the patentee's positions. *See Biax Corp. v. NVIDIA Corp*., Nos. 2013-1649, 2013-1653, 2013-1654 (Fed. Cir. Feb. 24, 2015) (nonprecedential slip op.). NetApp has left the path wide open to do the same. This Court should correct the district court's abuse of discretion in finding this case "exceptional."

B. NetApp Does Not Seriously Contest That the District Court Erred in Assuming that Microsoft Became Licensed Automatically Under the RPX Agreement

Independent of whether the decision below should be reversed because 53% of the damages claim remained at the time of dismissal, a second reason remains for this Court to find that the district court's "exceptionality" conclusion was wrong in its entirety. Even if it nullified the whole case, NetApp's late-breaking news that one of Summit's infringement theories was not viable (based on a previously-concealed license defense) was not obvious from the text alone of the RPX agreement. The district court mistakenly believed otherwise, basing its "exceptionality" finding on Summit's presumed awareness of this waivable defense (*see* Blue Br. 26-30). NetApp's brief avoids quoting the RPX agreement on this point, effectively

conceding that there indeed had to be a condition subsequent, extrinsic to the document text itself, before Microsoft (and by extension, NetApp) received any license rights (*see* Blue Br. 27-28).

NetApp derides Summit's textual analysis of the RPX agreement as "make-weight" and "after-the-fact" (Red Br. 24). But NetApp cannot, and does not, negate the importance of that analysis to the issues on appeal. The district court mistakenly believed that simply reading the RPX agreement would have clued Summit into the fact that NetApp later revealed – that [redacted] (A6-A7). But that is preposterous. The [redacted] was neither self-executing, nor automatic. Summit showed this in its Principal Brief, pages 26-30. NetApp does nothing to rebut this, and never quotes or cites the operative language for the argument.

Though NetApp has not allowed the record to show exactly when [redacted], NetApp does not dispute that Summit accepted NetApp's counsel's October 5, 2012 email as a representation that this condition subsequent had occurred. As far as the record reveals, this could have occurred just days before NetApp's revelation. As such, though no one now disputes NetApp's license rights passed through Microsoft, the event allowing those rights to exist could easily have taken place well after Summit filed its complaint. That scenario

is more than plausible, given that NetApp would presumably have given interrogatory answers about a supposed license defense in April 2012 if the [redacted] existed as of that date (*see* Blue Br. 9, 11). It never did.

NetApp's defense of the district court's actions in this Court depends on avoiding the text of the operative legal document, in favor of selectively quoting Summit's principal brief to divorce it from its context. NetApp argues that "Summit acknowledged that 'the RPX agreement on its face appeared to license any storage server utilized with a Microsoft operating system'" (Red Br. 22, quoting Summit's Principal Brief at 12). This Court will easily perceive what NetApp leaves out – the preamble to this statement qualifying it as "in light of the October 5 email" (*see* Blue Br. 12). In other words, after the condition subsequent had occurred (indicated by NetApp's counsel's October 5, 2012 email), Summit responsibly concluded that the Microsoft-based infringement contentions gave rise to a legitimate license defense, just five days after receiving information that it did.

NetApp also misperceives what it calls the "argument on ambiguity" (Red Br. 23). The analysis above rests on completely unambiguous portions of the RPX agreement. Ambiguity only comes into play if one assumes the counterfactual scenario (now seemingly abandoned by NetApp) that the RPX agreement ***did*** automatically spring Microsoft rights. Were that so, then

the NetApp option rights mentioned elsewhere in the body of the RPX agreement would make little sense (*see* Blue Br. 27). Though NetApp tries to find a theoretical hole in Summit's argument, and hold up the "argument on ambiguity" to ridicule, it is NetApp who fails to offer an interpretation of the RPX agreement that would prove that Summit should have known of NetApp's license passthrough just by reading it.[3]

To sum up, the second necessary ground for the district court's finding of "exceptionality" is based on legal error, just like the first. No fair reading of the RPX agreement would have convinced a reasonable party that NetApp possessed license rights of any kind automatically. NetApp avoids discussion of the operative text of the RPX agreement. Thus on this basis as well, the path remains wide open to correct the errors and reverse the finding of "exceptionality."

[3] Though it carries the burden on a section 285 fee motion, NetApp remarkably casts stones at Summit for not presenting the testimony of Acacia personnel to prove a negative – that they did not think the RPX agreement sprung license rights to NetApp (Red Br. 22). Ironically, related testimony exists, and NetApp has opposed Summit's motion (now referred to the merits panel) to supplement the record with the page that contains it – A2610. As explained in the co-pending motion papers, NetApp placed into the district court record a deposition page containing the relevant question, but intentionally left out of the record the next page containing the answer. It comes with poor grace for NetApp to point to the absence of the very thing it is fighting to keep out.

C. NetApp Cites No Factual Support for the District Court's *Eon-Net* Findings

The Court need not dwell long on NetApp's attempt to justify the district court gratuitously applying *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314 (Fed. Cir. 2011). The district court merely found "support" for its exceptionality finding by applying that decision. Standing alone, even the district court did not contend that so-called "extortionate" settlements with other parties justified fee shifting (A7-8). Moreover, NetApp's damages expert effectively accepted the royalty rates in the other agreements as being consistent with industry standards, stating that they "should be considered appropriately when determining a reasonable royalty in this matter" (A2283-84).

NetApp in fact now concedes that the settlement amounts in question translated to amounts that would have been uneconomical for Summit to pursue through trial (*see* Red Br. 27). But critically, NetApp fails to cite any record evidence tending to support a finding that the amounts were actually "extortionate" – *i.e.*, either that the underlying respective infringement claims would not have succeeded, or that Summit sought amounts in excess of its damages entitlements. *See Site Update Solutions, LLC v. Accor North America, Inc.*, No. 5:11-cv-3306-PSG, 2015 U.S. Dist. LEXIS 17603, at *49-51 (N.D. Cal. Feb. 11, 2015) (distinguishing its facts from *Eon-Net* and

reaffirming its previous (pre-*Octane Fitness*) denial of a section 285 motion for attorneys' fees in part because the plaintiff's settlement behavior did not have the same "indicia of extortion."). The recent *Site Update* decision underscores the need to assess all relevant details about any different-party settlement that purportedly qualifies as "exceptional:" "unlike cases which were deemed exceptional in part because plaintiffs filed frivolous suits in order to extort settlement fees, here [Plaintiff]'s litigating position was not so contrary to the governing law and facts of the case as to be objectively unreasonable."). *Id.* at *50. Nor does NetApp attempt to distinguish the sound authority cited in Summit's Principal Brief at 32 that separates the present case from *Eon-Net*, based on the fact that the number of party-settlements here number less than ten, in contrast to more than 100 in *Eon-Net*.

NetApp also concedes by its silence that Summit won the claim construction in this case, and several settlements followed on the heels of that victory (*see* Blue Br. 9-11, 32-33). *Eon-Net*, by contrast, involved a party who presented a frivolous claim construction, which specifically served as the foundation for all of the "extortionate" infringement assertions. *Eon-Net*, 653 F.3d at 1327. This Court easily concluded that every Eon-Net settlement rested on a meritless infringement contention because every

infringement assertion was frivolous. *Id.* That is not possible here. For example, NetApp does not even try to demonstrate that any settling party's technology fell outside the claim scope, or was completely licensed under the RPX agreement (or otherwise). Innuendo does not count. Therefore, nothing in NetApp's brief in this Court, or the record at large, lends substance or support to the inflammatory and untrue "extortionate settlement" findings of the district court.

Apparently recognizing the weakness of its appellate position, NetApp seeks to reverse the presumptions and burdens that apply for a fee motion. In this Court, it contends that Summit (not NetApp) had the burden. NetApp contends that Summit had to show that it had a meritorious claim of infringement against each of the settling parties, on pain of each and every out-of-court resolution that it had ever achieved becoming tarred, in hindsight, with the "extortion" label (*see, e.g.*, Red. Br. 25, "Summit has not shown that it ever had legitimate claims against any storage server company that was not covered by the RPX license;" 28, "Summit failed to show that it had a meritorious claim against any of the defendants;" *Id.*, "Summit . . . has failed to show it had any meritorious claim.").

This is not only not the law; it also would be unfair to patentee-licensors, unworkable in practice, and would disincentivize legitimate settlements on the fear that a future holdout would succeed in a campaign to mislabel them as "extortionate." Though the Supreme Court recently clarified that the standard of proof is lower than previously thought, the burden of proof on a fee motion still rests with the party seeking fees. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, ___ U.S. ___, 134 S. Ct. 1749, 1758 (2014) (discussing preponderance of the evidence standard under the burden); *Hensley v. Eckerhart*, 461 U.S. 424 (1983) ("[T]he fee applicant bears the burden of establishing entitlement to the award."). NetApp stretches beyond zealous advocacy in arguing that the burdens are the opposite of what they actually are. It cannot justify the district court's shoehorning this case into the narrow and fact-specific holdings of *Eon-Net*.

D. NetApp Does Not Address or Refute the Reasons Not to Expand § 285 to Include Fee Awards After Voluntary Dismissal, in the Absence of Litigation Misconduct or Negative Liability Rulings

Summit's principal brief observed that neither this Court, nor any pre-1981 regional circuit court, had ever affirmed or imposed exceptional case sanctions on a patentee who voluntarily dismissed, unless there was litigation misconduct or a prior adverse liability ruling (*see* Blue Br. 35-37). NetApp's brief cites no law to the contrary. Thus, NetApp undisputedly

seeks to use this case to expand 35 U.S.C. § 285 into areas that reviewing courts have never previously allowed.

Summit explained sound reasons – and pointed to the great weight of case law – that should always foreclose a fee award, "exceptionality" findings notwithstanding, under the precise scenario here: a voluntary dismissal with prejudice absent a finding of litigation misconduct or prior negative liability rulings (*see* Blue Br. 34-41). NetApp remarkably contends only one thing in response: that the dismissal here was not voluntary (Red Br. 28-30). Ignoring the citation to Federal Rule of Civil Procedure 41(a)(2) (which contains the word "voluntary") within the district court's own dismissal order (A1066), NetApp points out that it had pending on the docket a "summary judgment request" (*see* Red Br. 29, referring to A824: letter-request for *permission* to file for summary judgment). This incredible characterization of a request for leave to file a motion as the motion itself deflects from the real issue. Summit dismissed voluntarily. There is no denying it. How loudly NetApp banged the war drums at the moment Summit lay down its sword is of no moment. The fact remains that Summit voluntarily left the field of battle.

NetApp thus does not address Summit's well-documented and amply-supported arguments for how this Court should follow nearly every prior

circuit or district court to reach the issue, and reject this unnecessary and unwise expansion of the use of 35 U.S.C. § 285. Even after Summit submitted its Principal Brief in this matter, a different judge in the District of Delaware became the latest to emphatically reject awarding sanctions after such a voluntary dismissal (indeed, creating an intra-district conflict in view of this case). *See Computer Software Prot., LLC v. Adobe Sys. Inc.*, Nos. 12-451-SLR, 12-455-SLR, 2015 U.S. Dist. LEXIS 41346, at *7-8 (D. Del. Mar. 31, 2015) ("[I]n a case where settlements were reached with other parties, and the court did not construe the claims, or resolve multiple discovery disputes, or resolve motions to dismiss or for summary judgment, to characterize these circumstances as exceptional is exceptionally presumptuous, as well as inconsistent with the court's understanding of what justifies the fee-shifting provisions of § 285.").

Regardless of whether the Court accepts any of the previous grounds for reversal, the Court should accept this one. NetApp offers no reason to do otherwise.

Amici weigh in to bolster NetApp's position, and to remind the Court of the policy of deterrence behind 35 U.S.C. § 285. Those briefs are simply not helpful. The gravamen of this appeal (as reflected in Summit's Principal Brief) is that (1) the underlying infringement litigation had merit from

inception until its economically-motivated voluntary dismissal (*e.g.*, Summit ***won*** the claim construction, and its infringement theories encompassed nonlicensed instrumentalities), (2) a ***partial*** license defense did not emerge until NetApp revealed it after six months of silence in violation of its discovery obligations, and (3) the district court erred in misperceiving these factors to such a degree that it awarded fees under 35 U.S.C. § 285 under the misimpression that this was an exceptional case, even though Summit conceded the partial license defense five days after NetApp provided it with notice of NetApp's pass-through rights (gained through a condition subsequent to the RPX license that neither NetApp nor RPX had previously disclosed).

Amici instead attempt to brief policy issues that do not assist the Court here. Everyone agrees, for example, that suits known to be meritless should be deterred, if doing so will not create a chilling effect against meritorious filings. But this high-minded notion offers no assistance to the Court in resolving numerous case-specific issues here. Both briefs also present disputed issues-on-appeal as undisputed. For example, both assume 1) that there was no viable infringement theory from case inception until Summit's voluntary dismissal with prejudice, 2) that the RPX license was clear that NetApp received pass-through rights, and 3) that Summit's

agreements with the other defendants in this case were "nuisance-value" settlements. Amici also misstate one of Summit's central premises: that a patent holder who voluntarily dismisses should not face fee shifting, exceptionality or not, ***absent litigation misconduct or a negative liability ruling*.** These are all live issues on this appeal. Amici's briefs effectively assume NetApp already won the appeal, and then pile on to ratify Summit's punishment.

Finally, Amici urge this Court to expand Section 285 to allow district courts to consider a party's conduct before another tribunal when deciding whether a case is exceptional and whether fees should be awarded. They go further still, urging consideration of non-party conduct in cases where the non-party is within the same corporate family. This Court has cautioned against using conduct before different tribunals to justify a sanctions award. *See Highmark, Inc. v. Allcare Health Mgmt. Sys.*, 687 F.3d 1300, 1319 (Fed. Cir. 2012) ("The district court offered no justification for sanctioning conduct before a different tribunal. On appeal, Highmark likewise offered no authority for the issuance of sanctions for conduct that occurs solely before another tribunal. Thus, these supposed misrepresentations do not support an exceptional case finding."), *rev'd in non-pertinent part*, 134 S. Ct. 1744

(2014). NetApp wisely distances itself from this extreme position by not advancing it.

E. NetApp Does Not Refute Its Own Culpability in Waiting Six Months Before Unveiling the Defense that Led to Voluntary Dismissal

Summit also explained how the district court failed to consider NetApp's culpability for concealment of its defense, or alternatively that NetApp's own 6-month delay proved the defense to be unobvious (*see* Blue Br. 41-45). NetApp in response does not dispute that it failed to answer or supplement Summit's license defense interrogatory, ever (*see* Red Br. 30-31). The record remains devoid of any reasonable NetApp explanation for its concealment or delay. NetApp also does not dispute that, if it had culpability under this timeline, this should have factored into the district court's exercise of discretion of whether to award fees.

NetApp instead tries to lay blame at Summit's feet. NetApp contends that Summit's reservation of rights to add more evidence to Summit's own infringement contention interrogatory answer somehow justified NetApp's concealment (*see* Red Br. 31). This deflection will not work. As pointed out in Summit's Principal Brief at page 44, Summit's early contention interrogatory responses contained claim charts that clearly and unambiguously pointed to a Microsoft operating system powering the "host

computer" of one infringing NetApp configuration (A1019-20). This undisputedly became the last piece of information NetApp needed to be on notice of every fact motivating its license defense, since it disclosed as infringing the Microsoft host system configuration.

NetApp nonetheless seeks to characterize the district court's failure to consider NetApp's culpability as a "valid exercise of discretion" (Red Br. 30). NetApp contends that the district court "presided over the to-and-fro in the discovery process, and . . . knows the practices in the Delaware courts on discovery contentions and motion practice . . ." (*Id.*). NetApp's argument might have some force if the district court had analyzed the culpability question and considered the rationales both for and against holding NetApp responsible. But that did not happen here. The decision on appeal simply ignores NetApp's culpability in its entirety.

NetApp's argument fails for a second reason. Summit does not appeal the district court's failure to grant a discovery motion, as NetApp's praise of district courts exercising discretion seems to imply. Summit simply points out that, under the unambiguous application of the Federal Rules of Civil Procedure, confirmed under this Court's precedents, NetApp had no right to present a license defense at trial without a fully informative interrogatory answer, or its equivalent (*see* Blue Br. 43). That did not come until NetApp

counsel sent its October 5, 2012 email, which resulted in a prompt withdrawal of the affected contention by Summit.

For these reasons, even if all of the other errors mentioned above could be brushed aside, the fee award should at least be vacated and remanded to the district court to take into account the role that NetApp played in engaging in its own "exceptional" conduct.

F. NetApp Does Not Refute that Calculation Errors Embody Pure Errors of Law, and Thus Fall Within a Clear Exception to Appellate Waiver

Finally, if the Court must reach them, Summit explained two undisputable legal errors within the actual fee calculation: improperly including expert costs, and improperly using non-forum billing rates (*see* Blue Br. 45-47). NetApp argues that Summit waived these legal errors. But NetApp does not plausibly refute their existence (*see* Red Br. 38-39).

Concerning expert fees, NetApp does not contest that they do not belong in a fee award under 35 U.S.C. § 285. Instead, NetApp contends that the present fee award also invoked the district court's inherent authority. NetApp is not correct. Putting aside the complete absence of any explicit invocation of such sanction power in the decision on appeal, even the district court's legal citations never refer to inherent authority as a basis for

sanctions. The district court simply did not rely on its inherent authority. It awarded fees solely under 35 U.S.C. § 285.

While NetApp contends that the findings as a whole amount to the district court's decision that Summit "abused the judicial process," that is clearly not so. The gravamen of the district court's complaint about Summit's conduct, at worst, was that Summit should have known not to bring the case based on the district court's perception of a high likelihood that NetApp would prove an affirmative defense. This is the thrust of the district court's critique that the litigation was "reckless and wasteful," and overly motivated by a desire to monetize the underlying rights. Such beliefs, even if credited, do not equate with a belief that Summit "defiled the temple of justice" by perpetrating a fraud on the court – a necessary factor before a court may properly award inherent authority sanctions that usually refers to perjury, evidence fabrication, or other shocking misconduct. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) (*citing Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575 (1946) (discussing reopening of judgment secured by bribing federal judge)).

Concerning hourly rates, NetApp does not contest that the district court failed to apply the law that forum rates should be used, absent special findings that forum counsel would not or could not take the case (Red. Br.

39). Nor does NetApp reconcile its $1,025 per hour attorney fees for California counsel with its own $395 per hour attorney fees for its own Delaware (forum) counsel (*see* Blue Br. 47).[4] It simply ignores the gaping $630 rate difference.

Thus, the mistakes of law enveloping the calculation errors fit comfortably within the well-grounded framework for setting aside allegations of appellate waiver. The "issue involves a pure question of law and refusal to consider it would result in a miscarriage of justice; [or alternatively,] the proper resolution is beyond any doubt. . . ." *L.E.A. Dynatech, Inc. v. Allina*, 49 F.3d 1527, 1531 (Fed. Cir. 1995). To underscore, Summit does not appeal the calculation because of factual insufficiencies supporting any given time entry. Summit appeals because the entire calculation rested on an incorrect application of law. Remand will permit correction.

NetApp mainly defends by characterizing Summit's request to the district court for a period of fee negotiation, with possible subsequent briefing, as a waiver of objections in the first instance. But Summit clearly preserved the issue that it did not accept or admit the veracity of NetApp's

[4] To the extent NetApp argues that citation to the AIPLA survey for these local-market rates was improper, NetApp is incorrect. Nothing prevents the Court from consulting an authoritative publication.

overreaching calculations (A2249). This is especially so in light of conventional Delaware local practice.

In Delaware, litigants and their counsel reasonably expect that district courts decide liability for fees first, and then direct the parties to brief any disputes over the calculations later. *See Parallel Iron LLC v. NetApp Inc.*, No. CV 12-769 (RGA), 2014 U.S. Dist. LEXIS 127850, at *25 (D. Del. Sept. 12, 2014) (granting defendant's motion for attorneys' fees and ordering the parties to provide supplemental briefing regarding the amount of damages); *Chalumeau Power Sys. LLC v. Alcatel-Lucent USA Inc.*, No. CV 11-1175 (RGA), 2014 U.S. Dist. LEXIS 157129, at *1 (D. Del. Nov. 6, 2014) (noting the Court had previously granted the defendants' motion for attorneys' fees and, based on later additional submissions, the Court determined the appropriate amount of fees); *Tech. Innovations, LLC v. Amazon.com, Inc.*, No. CV 11-690 (SLR), 2014 U.S. Dist. LEXIS 100061, at *6 (D. Del. July 23, 2014) (finding it was impossible to discern whether the requested fees were reasonable and requiring supplemental briefing on the same); *In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litig.*, No. CV 09-MD-2118 (SLR), 2012 U.S. Dist. LEXIS 3678, at *12 (D. Del. Jan. 12, 2012) (granting motion for attorney fees pursuant to 35 U.S.C. § 285 and ordering the submission of briefing on the reasonableness of fees);

TruePosition Inc. v. Andrew Corp., 611 F. Supp. 2d 400, 414 (D. Del. 2009) *aff'd*, 389 F. App'x 1000 (Fed. Cir. 2010) ("The court finds the foregoing to be clear and convincing evidence of the type of vexatious litigation precluded by § 285, and awards plaintiff its attorney fees and costs in connection with its motions at bar. Plaintiff shall submit for the court's review an accounting of its reasonable attorney fees and costs in accordance with this opinion."); *Microstrategy Inc. v. Crystal Decisions, Inc.*, 555 F. Supp. 2d 475, 483 (D. Del. 2008) (finding the matter was an exceptional case and requesting counsel to submit a detailed summary of the hours spent, rate charged and expenses so a determination on amount of fees could be made); *Philips Electronics N. Am. Corp. v. Contec Corp.*, No. CV 02-123 (KAJ), 2005 U.S. Dist. LEXIS 3718, at *21-22 (D. Del. Mar. 8, 2005) *aff'd sub nom. Philips Electronics N. Am. Corp. v. Contec Corp.*, 177 F. App'x 981 (Fed. Cir. 2006) (granting plaintiff's motion for attorney fees but requiring it to submit documentation in support of its request within 14 days and granting defendant 14 days to respond); *Lucent Techs., Inc. v. Newbridge Networks Corp.*, 168 F. Supp. 2d 269, 277 (D. Del. 2001) (holding that attorneys' fees were appropriate because the matter was exceptional and requiring the parties to make additional submissions regarding the amount of damages owed).

At the very minimum, Summit should not be punished to the tune of six or seven figures of irrefutable calculation error, just because its trial counsel expected a Delaware jurist to follow the conventional Delaware practice. Parties should at least be able to rely on a district court applying the correct law if it decides to short circuit due process that it has signaled it will usually give litigants. NetApp has not shown that, if fees are affirmed at all, the Court should let stand manifest and unjust calculation errors.

II. CONCLUSION

Efforts to direct this Court's attention away from the underlying record cannot serve to justify the district court's errors. The district court mistakenly thought that Summit's claims for additional, unlicensed infringement covering more than 53% of the market for NetApp products did not exist. The district court also mistakenly thought that simply reading the RPX agreement allowed a conclusion that NetApp had license rights through Microsoft. As a result of these and the other errors identified above, none of which stand refuted by NetApp, this Court should reverse the district court's abuse of discretion in awarding fees under 35 U.S.C. § 285. In the alternative, at a minimum, this Court should vacate and remand for the district court to consider for the first time the contribution NetApp itself made to lengthening proceedings in this case by concealing its defense, and

if any calculation remains necessary, to calculate any resulting award in compliance with this Court's precedents.

Dated: May 18, 2015

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CERTIFICATE OF SERVICE

I, Rose E. Olejniczak, being duly sworn according to law and being over the age of 18, upon my oath deposes and states that:

Counsel Press was retained by Flachsbart & Greenspoon, LLC, Attorneys for Plaintiff-Appellant, Summit Data Systems LLC, to print this document. I am an employee of Counsel Press.

On May 18, 2015, Flachsbart & Greenspoon authorized me to electronically file the foregoing Reply Brief of Plaintiff-Appellant Summit Data Systems LLC (Confidential and Non-Confidential Versions) with the Clerk of the Federal Circuit using the CM/ECF System, which will serve e-mail notification of such filing to all counsel who are registered as CM/ECF users.

On May 18, 2015, two copies of the Reply Brief of Plaintiff-Appellant Summit Data Systems LLC (Confidential Version) will be sent via prepaid Federal Express overnight delivery addressed to:

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Upon acceptance by the Court of the e-filed document, six paper copies of the Reply Brief of Plaintiff-Appellant Summit Data Systems LLC, confidential version will be filed with the Court, via Federal Express, within the time provided in the Court's rules.

/s/ Rose E. Olejniczak
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 6,212 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b).

The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in 14-point Times New Roman type.

/s/ Robert P. Greenspoon