Nos. 13-1527, 14-1121, 14-1526, and 14-1528 (consolidated)

United States Court of Appeals for the Federal Circuit

WESTERNGECO LLC,
Plaintiff-Cross-Appellant,

v.

ION GEOPHYSICAL CORPORATION,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Texas in Case No. 09-CV-01827, Judge Keith P. Ellison

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INTRODUCTION

ION offers no sound defense of the rulings excluding WesternGeco's original royalty calculation and finding ION's infringement not objectively willful. If the Court reaches WesternGeco's conditional cross-appeal, those rulings should be reversed.

As to the royalty, the district court ruled that WesternGeco's original calculation was unreasonable "[a]s a matter of law" because it was "profit-eliminating" for ION. JA62.[1] That ruling is directly contrary to this Court's precedent holding that an infringer's profits are not a *per se* cap on royalties, and reversal is thus straightforward. This Court has repeatedly held in no uncertain terms that "*[t]here is no rule* that a royalty be no higher than the infringer's net profit margins."[2] *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 883 F.2d 1573, 1580 (Fed. Cir. 1989). ION does not distinguish that precedent. Instead, ION spends most of its

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[1] ION's inclusion of JA12199, JA12480-12545, JA13546-645; JA13826, JA13827, JA13828, JA13829, JA13830-32, JA13833-35, and JA13836-14084 in the joint appendix is inappropriate. These materials were not part of the record before the district court and thus do not "constitute the record on appeal." Fed. R. App. P. 10(a). WesternGeco respectfully requests that the Court not consider the portions of ION's briefs relying on these materials.

[2] All quoted emphasis is added unless otherwise indicated.

response repeating the same erroneous reasoning the district court applied, and reiterating its own view that the royalty is simply "too high" because it exceeds ION's profits. Other than its own profits, ION does not identify a single fact to undermine WesternGeco's original royalty calculation. ION was aware of WesternGeco's patents, WesternGeco's licensing policy, and WesternGeco's market exclusivity, yet ION chose to infringe. WesternGeco is statutorily entitled to "damages adequate to compensate for the infringement," and it is no answer for ION to say that the damage its infringement inflicted on WesternGeco may have exceeded ION's profits. In essence, ION asks this Court to penalize WesternGeco for ION's business model. The ruling excluding WesternGeco's original royalty calculation cannot stand, and ION fails to defend it on appeal.

As to willfulness, ION again misstates the law, arguing only that there was no objective willfulness because WesternGeco did not win summary judgment on all of its defenses. That is not the test. ION does not even argue that it can prevail on this issue under a *de novo* standard of review; it depends entirely on the contorted logic that an abuse of discretion standard should apply. Under either standard,

however, ION's infringement was objectively willful. Each and every one of ION's defenses failed convincingly—some on summary judgment and some at trial, and third parties were so concerned about ION's infringement that they identified specific claims that DigiFIN infringed and requested indemnity from ION. On this record, if the Court reaches the issue, the judgment of no objective willfulness should be reversed.

After five years of litigation, WesternGeco desires finality. Thus, if the Court denies ION's appeal, WesternGeco's cross-appeal is conditional and need not be addressed. If the Court grants ION any relief on its appeal, however, ION offers no sound defense of the rulings challenged in WesternGeco's cross-appeal, and WesternGeco respectfully requests that those rulings be reversed.

ARGUMENT

I. WesternGeco's Original Royalty Calculation Should Not Have Been Excluded

Rather than defending the district court's reasoning, JA60-63, ION invents "alternative grounds" to support the exclusion of WesternGeco's damages model. ION argues that (1) WesternGeco's proposed royalty was too high; and (2) ION would not have agreed to pay a royalty on revenues from surveys conducted outside the United States. ION

Reply-Br. 43-48. The first argument is framed as an "alternative" ground, but ultimately lapses into repeating the district court's error of treating ION's business model and profits as a *per se* limit on WesternGeco's entitlement to royalties. The second largely repeats the erroneous "extraterritoriality" arguments ION makes in its own appeal. Neither suffices to defend the exclusion of WesternGeco's original royalty calculation.

A. The Amount Of WesternGeco's Reasonable Royalty Does Not Make It *Per Se* Unreasonable

WesternGeco's patents confer "the right to exclude others" from practicing its patented inventions. 35 U.S.C. §154(a)(1); *cf.* U.S. Const. art. I. §8 ("securing for limited Times to … Inventors *the exclusive Right* to their respective … Discoveries"). It is undisputed that WesternGeco's patents disclose and claim a significant breakthrough in the industry, and that WesternGeco owned 100% of the lateral steering market from 2001, when it launched its "Q-Marine" system, to 2007, when ION began infringing. *See* Red-Br. 10-12.

ION was also undisputedly aware of WesternGeco's patents. *Id.* at 14. ION's pre-infringement business plan confirms that ION was aware of both the damage its infringement would inflict on Western-

Geco and the value its infringement would provide to WesternGeco's competitors. JA8084-86. WesternGeco's lost market share and profits post-DigiFIN launch confirm ION's success in commoditizing the proprietary market that WesternGeco had created with its patented technology. JA2700:8-18; JA2701:10-2703:8. The evidence at trial, and in Sims' report, established that ION's infringement generated over *$3 billion* in revenue for ION and its customers. JA3271:11-17; JA10185-86; JA10244-45. That revenue came from ION and its customers applying WesternGeco's patented technology in competition with WesternGeco in a market in which WesternGeco previously stood alone. *See* Red. Br. 12-14. Having prevailed at trial, WesternGeco is entitled under 35 U.S.C. §284 to "damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer."

All agree that an appropriate royalty rate is one that approximates the results of a hypothetical negotiation between a willing licensee and licensor. WesternGeco's initial royalty calculation followed settled law, and appropriately took into account, *inter alia*, the $3 billion in revenue that ION and its customers gained by ION's infringe-

ment, and the fact that WesternGeco had market exclusivity before ION's infringement began. JA10242-46; JA10251-53. The only reason the district court gave for excluding WesternGeco's original royalty analysis was that the number exceeded ION's profits. *See generally* JA60-63; JA62 ("As a matter of law, no such risk" of "a huge, profit eliminating (and even revenue eliminating) royalty" "can be taken"). As explained in WesternGeco's opening brief, this Court's precedent is directly to the contrary. This Court consistently rejects the idea that damages under §284 must be capped at the amount of an infringer's profits or at the amount the infringer would have preferred to pay. Red-Br. 79-80.

ION does not dispute the foregoing legal principles, nor does it attempt to defend the reasoning in the district court's order. Instead, ION attempts to avoid reversal by suggesting that the district court may have had *other* reasons for excluding WesternGeco's royalty analysis. ION Reply-Br. 42, 44-45, 48. ION tries to cobble together these purported "alternative grounds" by quoting snippets of the district court's comments and questions from an oral argument, *id.* at 44-45 (discussed *infra* at §I.B.), or by alluding in a footnote to "what occurred post-trial,"

as "[a]n additional, independent ground," without even suggesting that "what occurred post-trial" had any bearing on the district court's *pre*-trial order excluding WesternGeco's analysis. *Id.* at 48 n.27.[3] The district court's reason for excluding WesternGeco's royalty analysis is stated in its order, JA60-63, and this Court's precedent is directly to the contrary, *see* Red-Br. 79-80. ION cannot and does not defend that ruling on its actual reasoning.

ION's primary "alternative" argument against WesternGeco's original royalty calculation is to compare the $300 million royalty with ION's $60 million in revenue and assert that the royalty is too high. ION myopically focuses only on the profits it secured for itself, and contends that WesternGeco is seeking an unreasonable "400% royalty." ION Reply-Br. 42-43. Not so. As WesternGeco's expert Sims documented in his report, ION and its customers illegally gained over $3 bil-

[3] In the interest of completeness and to aid the Court, WesternGeco responds to certain of the substantive arguments made in the 29 footnotes in ION's reply brief. It bears noting, however, that undeveloped arguments and "arguments raised in footnotes are not preserved." *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (collecting cases). WesternGeco does not concede, by not specifically addressing, every passing misstatement made in ION's footnotes.

lion in revenue by using WesternGeco's patented technology without permission. JA10242-46; JA10251-53. And ION does not dispute that its customers are liable for infringement under 35 U.S.C. §§271(f)(1) and (f)(2) because they, too, supplied or caused to be supplied DigiFIN from the United States for use in systems that infringe WesternGeco's patents. Red-Br. 82-83. Nor does ION dispute that ION and its customers should be jointly and severally liable for infringing WesternGeco's patents. *Id.*; *see also Shockley v. Arcan, Inc.*, 248 F.3d 1349, 1364 (Fed. Cir. 2001) ("Each joint tort-feasor is liable for the full amount of damages (up to a full single recovery) suffered by the patentee."). Thus, when measured against the value ION's infringement provided to ION and its customers, WesternGeco's original royalty calculation is effectively 10%. Red-Br. 20; JA10185-86.

Regardless, ION's focus on its own profits ignores that the hypothetical negotiation construct assumes that *both* parties are willing negotiators, and ignores the actual harm to WesternGeco caused by ION's infringement. Before ION's infringement, WesternGeco had 100% market share. Red. Br. 12. WesternGeco would have never agreed to a license that failed to account for the full competitive harm WesternGeco

would suffer from ION's infringement. *Id.* at 81-83. This Court and the Supreme Court have repeatedly held that the relevant inquiry in the damages analysis is the harm to the patentee, *not* the infringer's gains, and is certainly not capped by those gains. *See, e.g.*, *Yale Lock Mfg. Co. v. Sargent*, 117 U.S. 536, 552 (1886); *Panduit v. Stahlin Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1156 (6th Cir. 1978); *King Instruments Corp. v. Perego*, 65 F.3d 941, 948 (Fed. Cir. 1995). ION's "400%" argument is erroneous rhetoric, and inconsistent with basic damages law.

Beyond the foregoing, ION's defenses of the district court's ruling amount to little more than repeating the contention that it should not have to pay more in royalties than it made in profit from its infringement. For example, ION argues that "[n]o rational negotiator would agree to pay a royalty of more than $4 for every $1 of gross revenue." ION Reply-Br. 45-46. This Court has repeatedly rejected such a *per se* rule. *See, e.g.*, *State Indus.*, 883 F.2d at 1580 ("There is no rule that a royalty be no higher than the infringer's net profit margin."); *Mars, Inc. v. Coin Acceptors, Inc.*, 527 F.3d 1359, 1374 (Fed. Cir. 2008) ("[W]e reject [the] argument that a reasonable royalty can never result in an infringer operating at a loss."), *amended on other grounds*, 557 F.3d 1377

(Fed. Cir. 2009); Red-Br. 79-80. ION also slings numerous epithets at WesternGeco's calculations, calling the number "irrational," "outrageous," "excessive," or "sticker[-]shock" inducing. ION Reply-Br. 45-46 & n.23, 48. Tellingly, however, ION offers *no* factual evidence or expert testimony to undermine WesternGeco's calculations. Nor does ION offer any reason—other than its own profits—why a successful *ex ante* negotiation between ION and WesternGeco would not have yielded that royalty. It is well-established that "[a]ttorneys' argument is no substitute for evidence," *Johnston v. IVAC Corp.*, 885 F.2d 1574, 1581 (Fed. Cir. 1989), yet that is all ION offers in support of the ruling below.

By contrast, WesternGeco presented a reasoned expert analysis, explaining that ION and WesternGeco would have negotiated a 10-11.5% royalty for the non-lost-profits infringing surveys, based on the value WesternGeco's patented technology contributed to DigiFIN. Red-Br. 20. WesternGeco's analysis applied that royalty to the billions in revenue ION's infringing customers earned from performing surveys with DigiFIN, resulting in a $300.8 million total royalty.[4] *Id.* Using

[4] In the event of a remand, the royalty base can be reduced from $3.3 billion because of WesternGeco's settlements with ION customers Fugro and Polarcus. *See, e.g.*, JA407¶13 (crediting $3,000,000 against ION's

WesternGeco's patented technology, DigiFIN gave ION's customers the ability to compete with WesternGeco and contributed to over 20% of the surveys' value. *Id.*

ION's brief quibbles with details of Sims' report, but fails to defend the ruling excluding it "*as a matter of law*" as "profit-eliminating" for ION. JA62. At best, ION's quibbles concern the weight, not admissibility, of WesternGeco's expert evidence, which is properly addressed by cross-examination or competing evidence in the event of a remand. But ION's criticisms are also erroneous in their own right. This Court recently explained that an argument like ION's "incorrectly replaces the inquiry into the parties' anticipation of what profits would be earned *if a royalty (of amounts being negotiated) were to be paid* with an inquiry into what profits were earned *when [ION] was charging prices without accounting for any royalty*." *Aqua Shield v. Inter Pool Cover Team*, __ F.3d __, 2014 WL 7239738, at *5 (Fed. Cir. 2014) (emphases in original). Thus, although ION "assumed that any royalty [it] paid … would have directly reduced its profits, dollar for dollar … that would

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damages judgment in light settlement with Polarcus that occurred after trial).

not be true … if [ION] could have raised its prices (over what it actually charged for infringing sales) to account (fully or partly) for a royalty payment." *Id.* ION points to nothing, other than attorney argument, that shows it could not have raised its prices to account for a royalty. WesternGeco's expert Sims did, however, explain how ION could have accounted for the royalty, and thus the value of WesternGeco's patented technology, by requiring its customers themselves to pay a royalty on each survey they performed with DigiFIN. JA10412:17-JA10414:22. In response, ION contends that "Sims admit[ted] he had never seen such a royalty agreement." ION Reply-Br. 45-46 n.23. But Sims stated the opposite at his deposition:

> Q. [O]ne of the options that … would have been available during this hypothetical negotiation is ION could say to its customer, we'll sell you this product for X dollars and then every time you use it, you will owe us a royalty of X percent on your revenue?
>
> A. Right. …
>
> Q. Have you seen license agreements like that?
>
> A. I mean, I don't — can't think of any examples, but I've seen a lot of license agreements, and I believe I have probably seen license agreements that have provisions for obtaining — well, yeah, *there's lots of license agreements where parties are able to* charge customers and, you know, *basically sublicense the technology to others*.

JA10412:17-JA10412:25; JA10414:23-10415:11. Likewise, Fugro's damages expert Wagner testified that he was aware of such agreements, and identified a particular supplier/customer license agreement as a "very good example" of a license/sublicense that WesternGeco and ION could negotiate. JA20397-98. And here, such an agreement would have been rational, where ION knew that DigiFIN would be the only alternative to WesternGeco's Q-Marine in the lateral steering ket. *See* JA8084-85.

ION also criticizes Sims for not performing a price elasticity analysis "to determine the extent to which demand would be impaired by such sticker shock." ION Reply Br. 45-46 n.23. No such analysis was necessary. "Price elasticity" concerns the extent to which changes in price affect overall demand. *See, e.g.*, *Crystal Semiconductor Corp. v. TriTech Microelecs. Int'l, Inc.*, 246 F.3d 1336, 1359 (Fed. Cir. 2001) (explaining relation of price to demand). Essentially, ION contends that if it had paid WesternGeco royalties instead of infringing without paying, ION might have raised its prices, and thus made fewer sales. In other words, ION is again arguing that its own profits and business model should act as a ceiling on WesternGeco's entitlement to royalty damag-

es. But as the Court explained in *Douglas Dynamics, LLC v. Buyers Product Co.*, 717 F.3d 1336 (Fed. Cir. 2013), "[t]he infringer's selling price can be raised if necessary to accommodate a higher royalty rate, and indeed, requiring the infringer to do so may be the only way to adequately compensate the patentee for the use of its technology." *Id.* at 1346. Moreover, this Court rejected an argument similar to ION's in *Go-Light, Inc. v. Wal-Mart Stores, Inc.*, 355 F.3d 1327 (Fed. Cir. 2004). There, the infringer asserted that the awarded royalty was "unreasonable as a matter of law because it would have left [the infringer] selling the accused product well below cost." *Id.* at 1338. Thus, the infringer contended, "it could not have raised the price of its products to cover the cost of the royalty …." *Id.* at 1338. This Court rejected that argument, noting, *inter alia*, that the infringer had only "sparse" evidentiary support for its argument, offering only "a few pages of sales data" and the testimony of two witnesses. *Id.*

Here, ION's evidence that it could not have charged its customers royalties (that they would have been required to pay as joint-tortfeasors) is not merely sparse; it is non-existent. ION knew that when it launched DigiFIN "the only competitor in the cable steerage

market [wa]s WesternGeco, with their proprietary 'Q' system." JA8085. ION further knew that WesternGeco "ha[d] no intention of selling [its] system to other contractors" and that "oil companies ha[d] no alternative to [WesternGeco's] "Q" vessels. [As a result t]he DigiFIN opens the door to all 3D vessels … to compete in the market space that the WesternGeco has created." JA8084-85. And ION's Business Plan acknowledges that ION chose its price point to "accelerate market penetration," not because another price would have been unacceptable to its customers. JA8085.

More fundamentally, a central purpose of the patent system is to protect innovations that are costly to invent but cheap to copy. WesternGeco risked a decade of research and tens of millions of dollars' investment to invent and commercialize Q-Marine, Red-Br. 10, and it disclosed its inventions to the world through the patents-in-suit. Rather than wait for WesternGeco's exclusive rights to expire, ION chose to infringe, and now disputes the extent of WesternGeco's entitlement to royalties because of choices ION made in setting up its infringing business model. In the context of injunctions, this Court has said that "[o]ne who elects to build a business on a product found to infringe can-

not be heard to complain if an injunction against continuing infringement destroys the business so elected." *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1156 (Fed. Cir. 2011) (quoting *Windsurfing Int'l Inc. v. AMF, Inc.*, 782 F.2d 995, 1003 n.12 (Fed. Cir. 1986)). And in the context of royalties, as discussed above and in WesternGeco's opening brief, Red-Br. 79-80, this Court has rejected similar complaints from infringers who argue that a royalty award should not exceed an infringer's profits. ION's attempted defense of the district court's order essentially asks the Court to use ION's choice of business model as a ground to deny WesternGeco "damages adequate to compensate for the infringement." 35 U.S.C. §284. There is no basis in law or logic for ION's arguments.

B. Revenues From Infringing Surveys Should Not Be *Per Se* Excluded From The Royalty Base

ION defends the exclusion of WesternGeco's original royalty calculation by arguing that surveys performed outside the United States (using the components ION supplied from the United States and induced its customers to combine) should not be part of the analysis.

As an initial matter, ION overreaches when it asserts that the district court adopted that argument. ION states that "[t]he district court

… was clear that Sims'[] reasonable royalty analysis was inadmissible because it did not take into account which (if any) uses by ION's customers were performed domestically versus extraterritorially," ION Reply-Br. 44, and goes on to argue that this Court should find that "[t]he district court was within its discretion in excluding Sims'[] opinion on this ground." To arrive at this conclusion, ION strings together snippets from the court's comments and questions at the oral argument. But the court's reason for excluding WesternGeco's royalty calculation is in its order, and the order confirms that the district court chose *not* to exclude Sims' opinion "on this ground." JA60-63. Any suggestion that the district court actually excluded WesternGeco's original royalty calculation on the basis of ION's "extraterritoriality" argument is belied by the record. The district court allowed WesternGeco to pursue a royalty from Fugro (ION's customer and co-defendant), based on Fugro's revenues from conducting surveys, *i.e.*, the very revenues that ION claims cannot be part of any reasonable royalty determination. JA3377:16-19; JA3425:15-3427:7.

In any event, ION's "extraterritoriality" argument is wrong—both in ION's appeal as an argument against lost profits, and repackaged in

ION's response to WesternGeco's cross-appeal as an argument against WesternGeco's original royalty calculation. As explained in WesternGeco's Opening Brief, this Court's *Power Integrations* decision addresses 35 U.S.C. §§271(a)-(b), and affirmed a remittitur for damages "not related to parts that were manufactured, used, or sold in the United States… [or] imported into the United States." *Power Integrations, Inc. v. Fairchild Semiconductors Int'l, Inc.*, 589 F. Supp. 2d 505, 511 (D. Del. 2008), *aff'd in relevant part* 711 F.3d 1351, 1371-72 (Fed. Cir. 2013); *see also* Red-Br. 73-76. No one disputes that damages must be "rooted in … infringing activity." *Power Integrations*, 589 F. Supp. 2d at 511. The remitted portion of the damages in *Power Integrations* was not rooted in infringing activity. The damages here, however, are plainly rooted in infringing activity under 35 U.S.C. §271(f). It is undisputed that ION supplied every one of its DigiFINs from the United States, and caused its customers to combine them to perform surveys in competition with WesternGeco. Likewise, ION's customers are joint tortfeasors with ION, as they caused ION to supply the components they combined to perform surveys in competition with WesternGeco. *See* Red-Br. 82-83. It is thus a misleading non-sequitur for ION to argue that because the

surveys "occur[] outside the territory of the United States[, n]o recovery is available to [WesternGeco] for that use." ION Reply-Br. 43-44.

Even if the Court accepts ION's argument as to lost profits, however, it was still error to exclude WesternGeco's original royalty analysis. That royalty analysis was based on the value ION's infringement provided to its customers, who used DigiFIN to take WesternGeco's market share. Red-Br. 20. It is well-established that "[t]he use that has been made of the patented device is a legitimate aid to the appraisal of the value of the patent at the time of the breach." *Sinclair Ref. Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689, 697 (1933); *see also Georgia-Pac. Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970) ("The extent to which the infringer has made use of the invention; and any evidence probative of the value of that use" may be considered in determining a reasonable royalty.). A reasonable royalty "depends on what royalty reasonably would have resulted from negotiations where a willing licensor was aware that [ION] would make and [ION's customers] would use" WesternGeco's patented technology. *See Stickle v. Heublein, Inc.*, 716 F.2d 1550, 1562 (Fed. Cir. 1983). In this case, ION's customers earned billions of dollars from per-

forming seismic surveys with WesternGeco's patented technology. JA3271:8-17. As the district court and jury found, ION intended that use when it supplied components from the United States. JA53-54; JA71-72. All parties to the hypothetical negotiation would have known of that use and its attendant value, and it was thus not unreasonable for WesternGeco's damages expert to account for that use and value in analyzing the royalty that the hypothetical negotiation would have produced.

The district court's order excluding WesternGeco's initial royalty analysis cannot be supported—either on its own reasoning or on the "alternative" reasoning ION attempts to supply on appeal. That order must be reversed in the event the Court reaches WesternGeco's cross-appeal.

II. ION's Infringement Was Objectively Willful

The district court erroneously applied a "no reasonable litigant" standard, and erroneously found under that standard that ION's infringement was not objectively willful. In response, ION offers nearly nothing in defense of the substance of its position. Rather, ION relies heavily on the procedural arguments that WesternGeco did not win its

case on summary judgment, and that the Court should review objective willfulness deferentially on appeal. ION's arguments are without merit. A patentee is not required to win its entire case on summary judgment to show willfulness. And while this Court's review of the objective prong of willfulness is *de novo*, ION's infringement was willful under any standard, and reversal—or, at a minimum, remand—is required if the Court reaches WesternGeco's cross-appeal.

A. ION's Position Was Unreasonable Under Any Standard

ION relies heavily on the argument that its defenses are reasonable because WesternGeco "did not move for summary judgment on many of [ION's] defenses" and because the district court denied summary judgment on certain defenses. ION Reply-Br. 52. In other words, ION contends that its infringement cannot have been objectively willful because WesternGeco did not win its entire case on summary judgment. That is not the law, and this Court has never held that the fact of a case going to trial precludes a finding of willfulness. *See, e.g.*, *SSL Servs., LLC v. Citrix Sys., Inc.*, 769 F.3d 1073, 1091 (Fed. Cir. 2014) (affirming objective willfulness where, as here, "the district court did not grant summary judgment" on all defenses, and "the jury soundly rejected [de-

fendant's] invalidity argument[s] and non-infringement arguments" at trial); *K-TEC, Inc. v. Vita-Mix Corp.*, 696 F.3d 1364, 1378 (Fed. Cir. 2012) (infringement willful where "noninfringement theory[and] … most of [defendant's] invalidity theories were properly disposed of on summary judgment …[; and i]ts remaining theories were soundly rejected by the jury.").

In this case, as in *SSL* and *K-TEC*, while WesternGeco did not win the *entire* case on summary judgment, the district court did resolve several substantive issues in WesternGeco's favor *as a matter of law*. The court rejected two of ION's defenses on summary judgment, and rejected additional defenses as a matter of law before the case was submitted to the jury. JA174-76; JA191-97; JA385; JA537-39. Further, the court found, in a pretrial *summary judgment order*, that ION *and* ION customer Fugro infringed claim 18 of the '520 patent under 35 U.S.C. §271(f)(1). JA49-58; JA352-56; JA358-372. Thus, when the trial began, the court had ruled on summary judgment that ION and Fugro infringed and that at least two of their defenses were unsound as a matter of law. ION does not appeal *any* of the defenses it raised in its complaint or took to trial. WesternGeco's brief explained the substantive

shortcomings of those defenses, Red-Br. 87, and ION says not a word in substantive rebuttal.

In addition to ION's ineffective defenses, ION does not dispute that its customers were aware of ION's infringement liability, to the point of identifying specific claims of WesternGeco's patents that DigiFIN infringed and requesting indemnity from ION. Red-Br. 15-16. ION does not dispute that evidence as a factual matter, but argues that it is relevant only for subjective, not objective, willfulness. That evidence is relevant to both prongs. *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 860 (Fed. Cir. 2010) ("[T]he same evidence [supporting the objective prong] supports the jury's findings as to the subjective prong …."), *aff'd*, 131 S. Ct. 2238 (2011). In addition to being relevant to ION's subjective state of mind, that evidence—specific concerns about infringement liability from attorneys and managers of ION's customers—corroborates the objective lack of merit of ION's position in this case. *See Acumed LLC v. Stryker Corp.*, 483 F.3d 800, 811 (Fed. Cir. 2007) (affirming willful infringement where "[m]ost notable [wa]s the fact that two patent attorneys … had at first strongly discouraged [defendant] from marketing the infringing [product] in the United States");

see also Red-Br. 87-88. Put differently, a reasonable party would not have proceeded to infringe in the face of such information. That ION did so was objectively reckless.

B. The Standard Of Review Does Not Save ION From Objective Willfulness

To the extent the standard of review matters, ION simply has it wrong. ION repeatedly asserts that the district court's ruling on objective willfulness is reviewed for an abuse of discretion. *See, e.g.*, ION Reply-Br. 48 ("V. The district court's decision regarding non-willfulness was not an abuse of discretion."); *id.* at 50 ("WG has not identified any abuse of discretion …."); *id.* at 53 (asserting Court cannot "overturn the repeated findings of the district court that ION's defenses as a whole were reasonable."); *id.* ("[T]he district court found that ION's defenses were reasonable, and thus, WG cannot show … by clear and convincing evidence that ION's positions were unreasonable."). Not so. This Court has repeatedly, consistently, and recently held that it reviews the objective prong of the willfulness inquiry *de novo*. *See Stryker Corp. v. Zimmer, Inc.*, ___ F.3d ___, 2014 WL 7210311, at *8 (Fed. Cir. 2014) (reversing willfulness ruling: "[w]e have held that objective recklessness … is best decided by the judge as

a question of law subject to *de novo* review."); *SSL Servs.*, 769 F.3d at 1090-91 (affirming willfulness ruling: "[w]e review the first objective prong *de novo*.").

ION further suggests, that if abuse of discretion is not the correct standard of review, the court may wish to change its law. ION Reply-Br. 49-50 ("[I]f this Court were to adopt for §284 willfulness the Supreme Court's recent holding rejecting the *PRE* test with respect to §285 exceptional case, it follows that it should likewise adopt for §284 the new abuse of discretion standard of review of §285."). But even if the Court were to change to an abuse-of-discretion standard, that would make no difference here because the district court itself analyzed ION's objective willfulness under the wrong legal standard. Red-Br. 84-86. Application of an erroneous legal standard is, by definition, an abuse of discretion and must therefore be reversed under any standard of review. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law ….").

ION's attempt to re-cast and defend the standard the district court applied is unavailing. ION argues that the district court applied

a "no reasonable litigant standard" to one defense and a more general "reasonableness" standard to others. ION Reply-Br. 52-53. That argument is nonsensical and misstates the district court's reasoning. The district court's opinion unequivocally states the standard it applied: "WesternGeco has the burden to show that *no reasonable litigant* could realistically expect success on the merits." A24-25.

As WesternGeco's opening brief explained, that was error for two reasons: (1) the district court misread *Bard Peripheral Vascular, Inc. v. W.L. Gore & Associates, Inc.*, 682 F.3d 1005 (Fed. Cir. 2012), and (2) the district court's misreading of *Bard* is inconsistent with the logic of the Supreme Court's opinion in *Octane Fitness LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014). Red-Br. 85-86. ION accuses WesternGeco of "overstating the Supreme Court's holding in *Octane Fitness*," ION Reply-Br. 49, but offers no response at all to WesternGeco's showing that the district court misread *Bard* and that the "no reasonable litigant" standard is simply not the law.

The "no reasonable litigant" standard, articulated in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* ("*PRE*"), 508 U.S. 49, 51 (1993), applies to a narrow issue of antitrust

immunity. *Bard* discussed the *PRE* standard in its exposition of the law:

> *PRE … dealt with immunity from antitrust liability for bringing lawsuits*, which is granted unless the litigation is considered a sham. 508 U.S. at 51. It held that a suit will not be considered sham litigation unless the lawsuit is "objectively baseless in the sense that *no reasonable litigant could realistically expect success on the merits*. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome," it is not objectively baseless.

Bard, 682 F.3d at 1003. While *Bard* drew some guidance from *PRE*, it did not hold that the *PRE* "no reasonable litigant" standard for antitrust immunity is also the standard for objectively willful patent infringement. Red-Br. 85. The *PRE* standard is thus not the applicable law, and ION's reference to "no basis to overrule *PRE* in this context" assumes an erroneous premise. ION Reply-Br. 49.

Nor is there any merit to ION's conclusory statement that *Octane* differentiated *PRE* based on "a distinction between simple fee shifting in §285 and the treble damages at stake in an antitrust case…. [that] applies equally to treble damages for willful infringement." *Id.* It is unclear what ION is attempting to argue about the standard the district court applied to analyze ION's objective willfulness. To the extent, however, that ION suggests that the law of antitrust damages should be

perfectly congruent with the law of objectively willful patent infringement for purposes of patent damages, ION is mistaken. The two remedies are vastly different for at least the reason that treble damages and attorney fees are discretionary in patent cases and mandatory in antitrust cases. *Compare* 35 U.S.C. §284 ("[T]he court *may* increase the damages up to three times…."), *and id.* §285 ("The court in exceptional cases *may* award attorney fees…."), *with* 15 U.S.C. §15 ("[A]ny person who shall be injured … by reason of anything forbidden in the antitrust laws … *shall recover threefold* the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."). The Supreme Court in *Octane* relied on precisely that distinction to hold that the *PRE* standard is inapplicable to §285. *Octane*, 134 S. Ct. at 1749 ("The threat of antitrust liability (and the attendant treble damages, 15 U.S.C. § 15) far more significantly chills the exercise of the right to petition than does the mere shifting of attorney's fees."); Red-Br. 86. Like §285, whether and to what extent to enhance damages is at the discretion of the district court. The reasoning *Octane* gave for distinguishing the *PRE* standard in the §285 context thus applies equally to §284, and

further underscores that the district court applied the wrong standard in analyzing ION's objective willfulness.

In sum, the district court erroneously applied a "no reasonable litigant" standard to assess ION's objective willfulness, and this Court ultimately reviews that determination *de novo*. If the Court reaches WesternGeco's cross-appeal, the district court's ruling should be reversed.

CONCLUSION

The judgment of the district court should be affirmed in full. However, if the Court reverses or remands any part of the judgment, it should also reverse the district court's rulings (a) excluding WesternGeco's original reasonable royalty damages calculation and (b) concluding that ION's infringement was not objectively willful, and remand for further proceedings as to ION's willfulness and WesternGeco's entitlement to damages.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

On December 29, 2014, the foregoing brief was submitted to the Court through the CM/ECF system. All parties are represented by CM/ECF users and will be served by the CM/ECF system.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 28.1(e)(2). According to the word processing system used to prepare it, the brief contains 5,946 words.

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