No. 23-_____

In The

Supreme Court of the United States

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TRAXCELL TECHNOLOGIES, LLC
Petitioner,
v.

AT&T INC.,
Respondent,

SPRINT COMMUNICATIONS COMPANY LP, SPRINT SPECTRUM, LP, SPRINT SOLUTIONS, INC., VERIZON WIRELESS PERSONAL COMMUNICATIONS, LP,
Respondents.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## Questions Presented

1. Where petitioner's patent infringement claims were not finally rejected until the district court judge approved the Magistrate Judge's ruling disposing of same, can petitioner's conduct in pressing its claims in the meantime and *before* that final ruling by the district court be relied upon to conclude that petitioner "knew or should have known" its claims were baseless so that this was an "exceptional" case under 35 U.S.C. § 285 justifying an award of respondents' attorney's fees?

2. Is the Magistrate Judge's decision rejecting petitioner's infringement claims—a decision to which it timely objected—a final ruling so that petitioner should have known that its claims were baseless even when that ruling had not yet been adopted by the district judge as a final disposition?

## Parties to the Proceeding

All the parties in this proceeding are listed in the caption.

**Statement of Related Cases**

1) *Traxcell Technologies, LLC v. AT&T, Inc. et al.*, Case No. 2:17-cv-00718 formerly pending in the Eastern District of Texas, Marshall Division, consolidating *Traxcell Technologies, LLC v. Verizon Communications, Inc. et al.*, Case No. 2:17-cv-00721 and *Traxcell Technologies, LLC v. Sprint Communications Co. LP., et al.*, Case No. 2:17-cv-00719 (Cases under Cert);

2) *Traxcell Technologies, LLC v. Verizon Wireless Personal Communications LP, et al.*, Appeal No. 10-23-0100 pending in the Tenth Judicial District, Waco, Texas, appealed from Trial Court Case No. 2023-368-4 pending in the 170th Judicial District Court of McLennan County, Texas (Appeal of State Court Receivership to collect fee awards by selling Patents, receivership Ordered March 7, 2023);

3) *Traxcell Technologies, LLC v. Huawei Technologies USA, Inc., et al.*, Case No. 2023-1782, pending in the United States Court of Appeals for the Federal Circuit (Appeal of Fee Award stayed by Order of June 20, 2023);

4) *Traxcell Technologies, LLC v. Huawei Technologies USA, Inc., et al.*, Case No. 2:17-cv-00042 formerly pending in the Eastern District of Texas, Marshall Division, consolidating *Traxcell Technologies, LLC v. Nokia Solutions and Networks Oy, et al.*, Case No. 2:17-cv-

000441 (Fee Award Order,. Doc. No. 459, dated March 24, 2023);

5) *Traxcell Technologies, LLC v. Verizon Wireless Personal Communications LP, et al.*, Pending in the Western District of Texas, Waco Division, Case No. 6:20-cv-1175 (Stayed Pending Bankruptcy over Fee Award, September 20, 2023, Doc. No. 234);

6) *Traxcell Technologies, LLC v. Verizon Wireless Personal Communications LP, et al.*, Pending in the Western District of Texas, Waco Division, Case No. 6:22-cv-0976 (Stayed Pending Bankruptcy over Fee Award, September 20, 2023, Doc. No. 38);

7) *Traxcell Technologies, LLC v. T-Mobile USA, Inc., et al.*, Pending in the Western District of Texas, Waco Division, Case No. 6:22-cv-0991 (Stayed Pending Bankruptcy over Fee Award, September 21, 2023, Doc. No. 48); and,

8) *Traxcell Technologies, LLC v. T-Mobile USA, Inc., et al.*, Pending in the Western District of Texas, Waco Division, Case No. 6:22-cv-0992 (Stayed Pending Bankruptcy over Fee Award, September 21, 2023, Doc. No. 47).

## RULE 29.6 STATEMENT

Traxcell Technologies, LLC is a Texas corporation. It has no parent corporations or publicly held corporation that owns 10% or more of the stock of Traxcell Technologies, LLC.

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The unpublished Order of the United States District Court for the Eastern District of Texas, Marshall Division, in the lead case of *Traxcell Technologies, LLC v. AT&T Corp. and AT&T Mobility LLC*, Civil Action No.2:17-cv-00718-RWS-RSP, decided and filed November 10, 2022, adopting the Magistrate Judge's Memorandum Order granting in part respondent Sprint's motion for attorney's fees, is set forth in the Appendix hereto (App. 4).

The unpublished Order of the United States District Court for the Eastern District of Texas, Marshall Division, in the lead case of *Traxcell Technologies, LLC v. AT&T Corp. and AT&T Mobility LLC,* Civil Action No. 2:17-cv-00718-RWS-RSP, decided and filed December 22, 2022, adopting the Magistrate Judge's Memorandum Order granting in part respondent Verizon's motion for attorney's fees, is set forth in the Appendix hereto (App. 8).

The unpublished Memorandum Order of the Magistrate Judge in the lead case of *Traxcell Technologies, LLC v. AT&T Corp. and AT&T Mobility*

*LLC,* Civil Action No. 2:17-cv-00718-RWSRSP, decided and filed March 29, 2022, granting in part Sprint's motion for attorney's fees from August 1, 2019, to December 31, 2019, is set forth in the Appendix hereto (App. 12).

The unpublished Memorandum Order of the Magistrate Judge in the lead case of *Traxcell Technologies, LLC v. AT&T Corp. and AT&T Mobility LLC*, Civil Action No. 2:17-cv-00718-RWSRSP, decided and filed March 29, 2022, granting in part Verizon's motion for attorney's fees from August 1, 2019, to October 31, 2019, is set forth in the Appendix hereto (App. 27).

The Order of the United States Court of Appeals for the Federal Circuit in *Traxcell Technologies, LLC v. AT&T Inc.*, C.A. Docket Nos. 2023-1246 & 2023-1436, dated August 29, 2023, denying petitioner timely filed petition for Panel rehearing or for rehearing *en banc*, is set forth in the Appendix hereto (App. 43).

## BASIS FOR JURISDICTION IN THIS COURT

The decision of the United States Court of Appeals for the Federal Circuit affirming the district court's entry of judgment in favor of respondents, was entered on July 13, 2023; and its Order denying petitioner's timely filed petition for Panel rehearing or for rehearing *en banc* was decided and filed on August 29, 2023 (App. 43)

This petition for writ of certiorari is filed within ninety (90) days of the date the Court of Appeals

denied petitioner's timely filed petition for Panel rehearing or for rehearing *en banc*. 28 U.S.C. § 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

### 28 U.S.C. §636(b)(1)(B)(C)

> **(B)** a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.
>
> **(C)** the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.
>
> Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as

provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

**Article III, U.S. Constitution:**

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

**United States Constitution, Amendment V**

No person shall...be deprived of life, liberty, or property, without due process of law....

**Jurisdiction, powers, and temporary assignment of Magistrate Judges**

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial [1] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court

and a copy shall forthwith be mailed to all parties. Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.

The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions. (2) A judge may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts. (3) A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.

**35 U.S.C. § 285**

The court in exceptional cases may award reasonable attorney fees to the prevailing party.

**Fed. R. Civ. P. 72**
**Magistrate Judges: Pretrial Order**

(a) Nondispositive Matters. When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

(b) Dispositive Motions and Prisoner Petitions.
(1) Findings and Recommendations. A magistrate judge must promptly conduct the required proceedings when assigned,

without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement. A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly mail a copy to each party.

(2) Objections. Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.

(3) Resolving Objections. The district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition;

receive further evidence; or return the matter to the magistrate judge with instructions.

## STATEMENT OF THE CASE

On October 31, 2017, petitioner Traxcell Technologies, LLC ("petitioner" or "Traxcell") brought suit for patent infringement against respondents Sprint Communications Company, LP, Sprint Spectrum, LP and Sprint Solutions, Inc. ("respondents" or collectively "Sprint") as well as Verizon Wireless Personal Communications, LP ("respondent" or "Verizon"). It alleged infringement of claims from four patents: United States Patent No. 8,977,284 ("the '284 patent"); United States Patent No. 9,520,320 ("the '320 patent"); United States Patent No. 9,642,024 ("the '024 patent") (collectively "the SON Patents"); and, United States Patent No. 9,549,388 ("the '388 patent" or "Navigation Patent") (collectively "the Asserted Patents").

These Asserted Patents are related through a common specification and the SON Patents generally relate to systems and methods for improving communication between wireless communication devices by optimizing radio frequency communications; the '388 Patent generally relates to navigation of a wireless device. Traxcell's suit against Sprint and Verizon was consolidated for pretrial matters with the lead case being *Traxcell v. AT&T Corp. et al.*, Civil Action No. No. 2:17-cv-00718-RWS-RSP ("the *AT&T* Case"). The *AT&T* Case is the one presently before the Court.

The *AT&T* Case is the second in a series of two consolidated cases involving the SON Patents. Prior to bringing the *AT&T* Case, Traxcell sued Nokia and Huawei Technologies USA Inc. for infringing the

same patents. This litigation ("the *Huawei* Case") (Civil Action No. 2:17-cv-00042-RWS-RSP), was before the same district court judge and Magistrate Judge as the *AT&T* Case.

On January 7, 2019, the Magistrate Judge issued a claim construction order in the *Huawei* Case which, among other things, determined that Claim 1 of the '284 Patent was indefinite. Based upon the patentee's statements in the prosecution history of the '284 Patent, it construed "computer" to mean "single computer" and "first computer" to mean "first single computer". He concluded that the applicant for the '284 Patent— one part of the SON Patents— distinguished the claimed invention from the prior art references and represented that the claimed invention was not merely a position in a grid pattern. Traxcell did not timely object to this claim construction order and a request for leave to file its objections late were denied by the Magistrate Judge.

On May 15, 2019, the Magistrate Judge issued a Report and Recommendation in the *Huawei* Case ("the *Huawei* R&R") which recommended that the district court judge grant summary judgment in Nokia's favor because, as he found, there was no genuine dispute of material fact that Nokia's products did not infringe the location and computer limitations and that Traxcell's claims of infringement were unsupported. On May 29, 2019, Traxcell timely filed its objections to the Magistrate Judge's recommendation of summary judgment of non-infringement in the *Huawei* Case.

In the meantime, on April 15, 2019, the Magistrate

Judge issued a claim construction order in the *AT&T* Case, one which ultimately provided the same claim construction for "computer" as the January, 2019 claim construction order in the *Huawei* Case; and the Magistrate Judge again found Claim 1 of the '284 Patent was indefinite. Traxcell's subsequent attempt to assert a corrected Claim 1 of the '284 Patent by filing a motion for leave to file an amended complaint was denied by the Magistrate Judge; and on June 19, 2019, Traxcell moved to supplement its infringement contentions with a Doctrine of Equivalents theory. On July 22, 2019, the Magistrate Judge denied that motion as well.

Because the *Huawei* Case involved the same subset of patents involved in the *AT&T* Case, the Magistrate Judge's Report and Recommendation that summary judgment enter in Nokia's favor in the *Huawei* Case—although *not* yet adopted by the district judge and therefore *not* yet final—gave impetus to both Sprint and Verizon to move separately for summary judgment in their respective favors in the *AT&T* Case, motions which they filed in the summer of 2019.

On September 18, 2019, the Magistrate Judge in the *AT&T* Case issued a Report and Recommendation which recommended that the district judge grant summary judgment of non-infringement of the '024 Patent to Verizon because Traxcell failed to create a genuine dispute as to whether Verizon's products infringed the computer and location limitations in the asserted claims of the '024 Patent. Similarly, on October 7, 2019, the Magistrate Judge in the *AT&T* Case issued a Report and Recommendation which

recommended that the district judge grant summary judgment of non-infringement to Verizon regarding the '388 Patent.

On the same day, October 7, 2019, the Magistrate Judge in the *AT&T* Case issued a Report and Recommendation which recommended that the district judge grant summary judgment of non-infringement to Sprint because Traxcell failed to create a genuine dispute as to whether Sprint's products infringed the asserted claims. On October 8, 2019, all proceedings in the *AT&T* Case were stayed.

At this point, the district court judge had yet to adopt and therefore make final the Magistrate Judge's recommendation in the *Huawei* Case that summary judgment enter in Nokia's favor. It was not until December 11, 2019, that the district judge overruled Traxcell's objections to the Magistrate Judge's Report and Recommendation in the Huawei Case and adopted the recommendation of summary judgment for Nokia.

This ruling by the district judge adopting and making final the recommendation of summary judgment for Nokia in the *Huawei* Case, involving as it did the same subset of patents as involved in the *AT&T* Case, ultimately proved dispositive as to Traxcell's claims against Sprint and Verizon in the *AT&T* Case. On April 15, 2020, the district judge adopted and thereby finalized the recommendations of the Magistrate Judge in the *AT&T* Case that summary judgment enter as well in favor of Sprint and Verizon.

In the aftermath of these rulings, both Sprint and Verizon moved for an award of attorney's fees they sustained after the Magistrate Judge on May 15, 2019, recommended in the *Huawei* Case that the district court judge grant summary judgment in Nokia's favor. On March 29, 2022, the Magistrate Judge issued a Memorandum Order granting in part Sprint's motion, awarding it $784,529.16 in fees from August 1, 2019, to December 31, 2019 (App. 12). On the same day, the Magistrate Judge also granted in part Verizon's motion, awarding it $132,046.50 in fees from August 1, 2019, to October 31, 2019 (App. 27). Traxcell timely objected to these rulings.

On November 10, 2022, the district court, Schroeder, J., entered an Order in the *AT&T* Case overruling Traxcell's objections and affirming the fee award to Sprint in the amount of $784,529.16 for fees sustained from August 1, 2019, to December 31, 2019 (App. 4). As he ruled, this was an "exceptional case" under 35 U.S.C. § 285, because "Traxcell should have known its patent infringement theories were unsupported when the [Magistrate Judge] issued a report and recommendation on summary judgment in the *Huawei* Case...which involved claim construction for 'location' and 'first computer'".

On December 12, 2022, Judge Schroeder issued an Order in the *AT&T* Case overruling Traxcell's objections and entering a fee award to Verizon in the amount of $489,710.00 for fees sustained from August 1, 2019, to October 31, 2019. As he again ruled, this was an "exceptional case" under 35 U.S.C. § 285, because "Traxcell should have known its patent infringement theories were unsupported when the

report and recommendation on summary judgment issued in [the *Huawei* Case]...construing 'location' and 'first computer'".

Traxcell appealed and the court of appeals summarily affirmed the fee awards under Fed. R. App. P. 36. On August 29, 2023, the court of appeals denied petitioner's timely filed petition for Panel rehearing or for rehearing *en banc*.

## REASONS FOR GRANTING THE PETITION

Review is warranted because the Court of Appeals for the Federal Circuit has so far departed from the accepted and usual course of judicial proceedings by sanctioning, through a Rule 36 affirmance, a fee award, a sanction under Title 35, Section 285, based on a party's litigation conduct made subject to timely objections to a magistrate's recommendation. In doing so, the CAFC has decided an important question of federal law, that a Section 285 award is appropriate for conduct that occurred before a magistrate's ruling is made final in contravention of clear precedent of this Court.

## ARGUMENT

Petitioner's patent infringement claims in the AT&T Case were not finally or authoritatively rejected until, at the earliest, December 11, 2019, when the district judge overruled petitioner's objections and adopted the Magistrate Judge's recommendation in the Huawei Case that summary judgment enter for Nokia. Petitioner's conduct in pressing its infringement claims in the ATT&T Case before this ruling entered may not be relied onto conclude that petitioner "knew or should have known" that its infringement claims were baseless so as to qualify as an "exceptional" case under 35 U.S.C. § 285, justifying an award of respondents' attorney's fees.

The Magistrate Judge's decision on May 15, 2019, in the Huawei Case rejecting petitioner's infringement claims and recommending to the district judge that summary judgment issue in Nokia's favor

was not as a matter of law a final resolution of the patent issues subsumed within that decision until the district judge overruled petitioner's objections and adopted that ruling as a dispositive one on December 11, 2019. Because petitioner's objections remained alive until that final ruling, there was no basis in law or reason for the Panel to assign it with knowledge prior to that ruling that its claims were baseless.

Review is warranted because the Panel has so far departed from the accepted and usual course of judicial proceedings by sanctioning, through a Rule 36 affirmance, fee awards, a sanction under 35 U.S.C. § 285, based on a party's litigation conduct made subject to timely objections to a Magistrate Judge's recommendation. In doing so, the Panel has decided an important question of federal law, i.e., that a fee award under 35 U.S.C. § 285, is appropriate for conduct that occurred before a Magistrate Judge's ruling is made final in contravention of clear precedent of this Court.

This exceptionally important question addressing whether a party can be assigned knowledge that its claims are baseless before a final ruling of its claims is made by the district judge comes within this Court's Rule 10(c)'s guidance about the considerations which support its granting a petition for certiorari, i.e., when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by th[e] Court, or has decided an important federal question in a way that conflicts with relevant decisions of th[e] Court."

The Court should grant certiorari, identify the Panel's error, vacate or reverse the awards of attorney's fees to both Sprint and Verizon, and rule that this case is not "exceptional" within the meaning of 35 U.S.C. § 285, so as to justify these fee awards.

### A. Litigation Conduct Cannot Be "Exceptional" Based On Conduct Occurring Before A Ruling On Petitioner's Infringement Claims is Final.

As a matter of law, the Panel's decision finding this case "exceptional" and affirming the fee awards under 35 U.S.C. § 285, based solely on conduct occurring before the Magistrate Judge's recommendation became final is contrary to the law and fundamentally unfair. Both the Panel and the district judge found both cases "exceptional" on precisely the same basis, i.e., that Traxcell should have known its patent infringement theories were unsupported when the [Magistrate Judge] issued a report and recommendation for summary judgment in the Huawei Case, a ruling which involved claim constructions for "location" and "first computer".

On its face, this reasoning cannot withstand scrutiny. The cited "report and recommendation on summary judgment in the Huawei case" was issued on May 15, 2019, well before the August 1, 2019, start of the period for which the Panel and the district judge found that "Traxcell should have known [that] its patent infringement theories were unsupported". However, that Report and Recommendation by the Magistrate Judge was not made final until approved by the District Judge Schroeder on December 11, 2019. If that Report and Recommendation by the

Magistrate Judge had been final — if that document had represented the District Court's considered judgment on the relevant patent infringement issues as of May 15, 2019—then it could possibly be argued that Traxcell might reasonably be charged with advancing "baseless" theories and filing "meritless" motions when it litigated the Sprint Case and Verizon Case during the summer and fall of 2019 in a manner contrary to the Magistrate Judge's Report and Recommendation. But that is not what transpired below.

As a matter of fact and law, the Magistrate's Report and Recommendation of May 15, 2019, in the Huawei Case was not final, and it was not the considered judgment of the District Court until Judge Schroeder overruled petitioner's objections and adopted the Magistrate Judge's ruling as a dispositive one on December 11, 2019. It is well-established by this Court that the recommendation of a Magistrate Judge is not a final decision and does not in any way dispose of a party's claims. Rather, for dispositive motions like the motion for summary judgment in the Huawei Case, a "party dissatisfied with a Magistrate Judge's decision may instead obtain relief by objecting to the Magistrate Judge's Findings and Recommendations, thereby compelling the District Court to review [its] objections *de novo*." 28 U.S.C. § 636(b)(1)(C). Traxcell did just that in the Huawei Case, and the District Court did not resolve Traxcell's objections until December 11, 2019. Assigning Traxcell with knowledge that its objections were baseless before this ruling is fundamentally unfair and at odds with the wording and spirit of Fed. R. Civ. P. 72(b)(3) (The district judge must determine de novo

any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions).

All the Federal Rules of Civil Procedure, including Fed. R. Civ. P. 72(b)(3), "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1 (emphasis supplied). The right of every litigant to adequate notice and the opportunity to respond in a meaningful way to challenges to its pleadings or proof is deeply embedded in the Federal Rules' concept of fair play and substantial justice. See *Memphis Light, Gas &Water Div. v. Craft*, 436 U.S. 1,13 14 (1978); *Arnett v. Kennedy*, 416 U.S. 134, 142 146 (1974); *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314 (1950). This reflects the fundamental principle of judicial administration that every person is entitled to notice and the availability of some kind of response or even a hearing before adverse judicial action is taken against it. See generally *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694,707 (1988).

These embedded notions in the Federal Rules of notice and a fair opportunity to respond and be heard before adverse judicial action is taken are founded on the principle that a litigant's cause of action and its right to have its claims fairly heard and decided in federal court is a valuable property right entitled to due process protection. Board of *Regents v. Roth*, 408 U.S. 564, 571 572 (1972). The Panel's emasculation of

Rule 72(b)(3)'s protocol for making objections to a Magistrate Judge's rulings denies Traxcell its right to rely on the non-final nature of those rulings until the district court judge adopted them as dispositive and final on December 11, 2019. Depriving Traxcell of proceeding consistent with Rule 72(b)(3) by labeling its litigation conduct "baseless" before the district judge finally ruled on the Magistrate Judge's Report and Recommendation in the Huawei Case denied it the process due it as envisioned by the Rule.

No district court or court of appeals has suggested that Traxcell advanced baseless theories or filed meritless motions after December 11, 2019. Indeed, both the Sprint Case and Verizon Case were stayed on October 8, 2019, and so Sprint and Verizon should not have incurred any of their awarded fees after December 11, 2019.

During oral argument before the Panel, one member stated that "…[Magistrate] Judge Payne is not some brand new Magistrate; he's been around since well before I got on this court you know that." Petitioner agrees that Magistrate Judge Payne is highly experienced. However, the experience of a Magistrate Judge is not a factor under 28 U.S.C. § 636(b)(1)(C). It is black letter law that a Magistrate's ruling is not final until approved by a district court. It was error for the Panel to base its fee award entirely upon rulings that were not final and could not have been final until December 11, 2019. None of the conduct that was found to be "exceptional" under 35 U.S.C. § 285, occurred after the Magistrate Judge's recommendation was made final on December 11, 2019. The Rule 36 affirmance by the Panel

unfortunately is likely to discourage further review and thus further compound the procedural unfairness of the Panel's decision. The ruling effectively eviscerates the statutory authority of 28 U.S.C. § 636(b)(1)(C), allowing review of a Magistrate Judge's ruling by the district court, an Article III court. Under the Panel's reasoning, a Magistrate Judge's ruling that is properly objected to can serve as the basis of a fee award under 35 U.S.C. § 285, for conduct that occurred solely before the review afforded by 28 U.S.C. § 636(b)(1)(C).

The attorney fee awards should be vacated and reversed.

B. There Was No Final Order In The Huawei Case Until December 11, 2019.

The issues presented in this Petition are whether a Magistrate Judge's ruling is final before pending objections are ruled upon by the district judge and whether a party's reliance on its pending objections to maintain an infringement theory can make a case "exceptional" when alternate infringement theories are advanced that take into account the Magistrate Judge's ruling. While a district court is afforded discretion in awarding fees under 35 U.S.C. § 285, that discretion is not unlimited and should be based on whether the district court's decision commits legal error or is based on a clearly erroneous assessment of the evidence. Here, the district judge stated—and the Court of Appeal wholly approved—that it based its decision to award fees to Sprint and Verizon because "Traxcell continued to pursue theories that it knew or should have known were baseless. It filed meritless

motions [and argued, constantly reurging] positions that had already been rejected. Traxcell's conduct, when viewed considering the totality of the circumstances, renders this case exceptional under 35 U.S.C. § 285". However, the district court did not make the Huawei Case final until December 11, 2019, when it ruled on Traxcell's properly and timely filed objections. How could Traxcell possibly be charged with knowing that any of its positions were baseless until a ruling from the District Court disposing of same? It simply cannot and 28 U.S.C. § 636(b)(1)(C) plainly provides otherwise.

### C. The Panel Decision Awarded Attorneys' Fees For a Period of Time When There Was No Final Order.

This case is only remarkable because there were no final rulings on any motion until many months after summary judgment was recommended by the Magistrate Judge in the Sprint Case and Verizon Case, and, in fact, after both cases were stayed. An award of attorneys' fees under 35 U.S.C. § 285, is supposed to be for those rare cases that stand out from the rest due to a party's unreasonable conduct or exceptionally weak case. Traxcell relied on statutory law, the rules of civil procedure and caselaw in lodging its objections and expected those objections to be ruled upon before its conduct would be deemed sanctionable. Traxcell continued its litigation by advancing an alternate infringement theory that took into account the Magistrate Judge's orders and maintaining its original infringement theories subject to its objections, which is reasonable because a Magistrate's Recommendation "does not in any way

'dispose of' a party's claims." *U.S. v. Cooper*, 135 F.3d 960, 962-963 (5th Cir. 1998) (emphasis supplied). See *United States v. Raddatz*, 447 U.S. 667, 673-676 (1980); *Donaldson v. Ducote*, 373 F.3d 622, 624 (5th Cir. 2004); *Stripling v. Jordan Productions Co.*, 234 F.3d 863, 868 (5th Cir. 2000).

The Magistrate Judge ordered Traxcell to pay Sprint its attorneys' fees from August 1, 2019 to December 31, 2019, a period of time for which there were no final orders and a period that includes time when the Sprint Case was stayed. Judge Schroeder did not overrule Traxcell's objections and adopt the Magistrate Judge's Report & Recommendation in the Huawei case until December 11, 2019, which was after summary judgment was recommended and the case stayed (on October 8, 2019). As such, there was no order overruling Traxcell's objections during the pendency of either the Sprint Case or the Verizon Case.

In fact, it is a well-established that a Magistrate Judge's order is not "final"... "The recommendation of Magistrate Judge is not a final decision and does not in any way 'dispose of' a party's claims." U.S. v. Cooper, supra. A dissatisfied party may obtain relief by objecting to the Magistrate Judge's findings and recommendations, thereby compelling the District Court to review his objections de novo under both 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b)(3). Stated another way, a Magistrate Judge's order only becomes final once the district court makes it final.

This is exactly what Traxcell did, it filed objections. Therefore, as Traxcell objected to the

Magistrate Judge's order recommending summary judgment in the Huawei case, there was no disposition of any of Traxcell's claims and objections until Judge Schroeder ruled on same on December 11, 2019. As there were no final orders until after the Sprint and the Verizon case were stayed on October 8, 2019, it belies belief that Traxcell's litigation conduct was deemed unreasonable because it maintained its infringement theories subject to its objections.

As a matter of fact, there were no orders from the district court either affirming or overruling Traxcell's objections; and legally the Magistrate Judge's orders were not—and could not have been— final. While Section 285 gives discretion to a District Court to award fees, this Court should correct the Panel's obvious misapprehension of the facts and misapplication of the law. Failing do so renders 28 U.S.C. § 636(b)(1)(C) and the accompanying Fed. R. Civ. P. 72(b)(3) superfluous. This is an absurd result. Either 28 U.S.C. § 636(b)(1)(C) and its accompanying Federal Rule mean something or they do not.

Finally, as a different Panel of the Federal Circuit has noted, the "objectively baseless" calculus under 35 U.S.C. § 285, has improperly been expanded to include fee awards just for lack of success "which is not an appropriate use of section 285, and will likely chill legitimate advocacy." In re *PersonalWeb Technologies LLC*, 85 F.4th 1148; 2023 WL 7267010 at *11 (Fed Cir. 11/3/2023) (Dyk, J., dissenting). Such is the case here.

## CONCLUSION

For all the reasons identified herein, the Court should grant certiorari, identify the Panel's error, vacate or reverse the awards of attorney's fees to both Sprint and Verizon, and rule that this case is not "exceptional" within the meaning of 35 U.S.C. § 285, so as to justify these fee awards; or provide petitioner such other relief as is fair and just in the circumstances.

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