

In the
Supreme Court of the United States



ROADIE, INC.,

Petitioner,

v.

BAGGAGE AIRLINE GUEST SERVICES, INC.,

Respondent.

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

**BRIEF IN OPPOSITION OF RESPONDENT
BAGGAGE AIRLINE GUEST SERVICES INC.**

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether it is abuse of discretion to deny a motion for attorney fees under Section 285 when the parties fully brief issues concerning exceptionality, including noninfringement when discussing the manner in which the case was litigated, and a District Court judge acknowledges the noninfringement argument in its decision on fees under Section 285.

2. Whether it is abuse of discretion when a District Court judge includes in its order on fees under Section 285 an analysis only those factors delineated in *Octane Fitness* that explain his decision to deny fees and not include those factors that did not affect the decision.

CORPORATE DISCLOSURE STATEMENT

Respondent Baggage Airline Guest Services, Inc. is a wholly owned subsidiary of SP Plus Corporation (NASDAQ: SP). No publicly held company owns 10% or more of SP Plus Corporation's stock.

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STATEMENT OF THE CASE

The instant case was preceded by *Baggage Airline Guest Servs., Inc. v. Roadie, Inc.*, No. 6:17-cv-01253-RBD-GJK filed in the Middle District of Florida on July 6, 2017 (the “First Florida Case.”). Although Petitioner Roadie, Inc. (“Roadie”) contends in its briefing that the issue of abstractness as it relates to U.S. Patent No. 9,659,336 entitled “Mobile Baggage Dispatch System and Method” (the “’336 Patent”) is open and shut, Roadie moved to dismiss the First Florida Case brought against it based upon a lack of standing on August 3, 2017, but not based upon patent ineligibility under 35 U.S.C. § 101. This First Florida Case was dismissed without prejudice due to a lack of standing on September 1, 2017. Roadie then sought fees under 35 U.S.C. § 285 based upon lack of standing, but not based upon patent ineligibility under 35 U.S.C. § 101. The Middle District of Florida reasoned that Respondent Baggage Airline Guest Services, Inc. (“Bags”) “filed the Complaint in this Court but did not serve it on Defendant because Plaintiff intended to correct the [’336] Patent’s assignment” and thus, considering the totality of the circumstances, found “no frivolousness, bad faith motivation, or objective unreasonableness to make [the] case exceptional” and denied Roadie’s Section 285 fees motion.

Concurrently with its motion to dismiss in the First Florida Case on August 3, 2017, Roadie filed a Complaint for Declaratory Judgment in Delaware. *Roadie, Inc. v. Baggage Airline Guest Services, Inc. and Bags, Inc.*, Case No. 1:17-cv-1079, (D. Del. 2017). Although Count I of Roadie’s complaint in the Declaratory

Judgment Action asserted several purported bases for noninfringement, none of these related to the “selection to hold delivery” limitation. Bags moved to transfer the Declaratory Judgment Action to Florida, which motion was granted on November 2, 2017. Once the Declaratory Judgment Action was transferred to Florida, Roadie voluntarily dismissed the declaratory judgment case on November 2, 2017.

Bags filed the instant case in the Middle District of Florida on August 24, 2017. Roadie responded to the Complaint in the instant case on November 10, 2017 with a Rule 12(b)(6) motion to dismiss for improper venue, but, again, did not move to dismiss based upon patent ineligibility. On January 17, 2018, three months after its first motion to dismiss was filed, Roadie improperly filed a second Rule 12(b)(6) motion to dismiss based upon patent ineligibility claiming that the asserted patent was invalid. After Bags pointed out that this was procedurally improper, Roadie then withdrew the Rule 12(b)(6) motion, answered the Complaint, and filed a Motion for Judgment on the Pleadings under Fed. R. Civ. P. 12(c) based upon patent ineligibility on February 6, 2018. Roadie’s Rule 12(c) motion was ultimately granted on January 17, 2020. (Petition (“Pet.”) at 10).



SUMMARY OF THE ARGUMENT

“As a matter of the sound administration of justice, the district court is better positioned to decide whether a case is exceptional because it lives with the case over a prolonged period of time.” *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 564 (2014) (internal quotations omitted). This is the case here: Judge Andrews of the District of Delaware heard both parties’ arguments during the hearing on Roadie’s Section 101 motion, witnessed the parties’ conduct for eight months, and carefully reviewed the parties’ arguments in its ruling on both Roadie’s Section 101 motion and Section 285 motion. Relying on this closeness to the case, Judge Andrews pronounced that “[w]ithout nefarious intent, I will not impute it where I do not see it.” (Petitioner’s Appendix (“App.”) at 11a).



REASONS FOR DENYING CERTIORARI

Pursuant to Supreme Court Rule 10, “[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion” and will only be granted for “compelling reasons.” One of the situations suggested by Rule 10 as “compelling” is that a United States court of appeals has “decided an important question of federal law that has not been, but should be, settled by [the U.S. Supreme Court], or has decided an important federal question in a way that conflict with relevant decisions of this Court.” Here, Roadie does not argue either situation because it cannot.¹ The Federal Circuit’s decision to defer to Judge Andrews’ reasoned analysis, which took into account and did not overlook all of the arguments presented in Roadie’s Petition, does not satisfy Rule 10’s requirement of a compelling reason to grant certiorari.

I. EXCEPTIONALITY WAS FULLY BRIEFED AND CONSIDERED BY THE LOWER COURT AND THE FEDERAL CIRCUIT IN ACCORDANCE WITH SUPREME COURT PRECEDENT

As an initial matter, both Roadie’s background section of its Petition for Writ of Certiorari and several large portions of its argument section are copied and pasted word for word from its opening appellate brief. *Compare* (Pet.5-15, 18-38) *with* Brief of Appellant at *4-*14, *15-*37, *Baggage Airline Guest Services, Inc. v. Roadie, Inc.*, (No. 2020-1540) (Fed. Cir. May 5,

¹ It is also notable that Roadie did not seek panel rehearing before the Federal Circuit before submitting its Petition.

2020), 2020 WL 2216654. The only new argument provided in its Petition is in the statement of the case, summary of factors, reasons for granting the petition, and summary of argument sections. This alone should warrant a denial of the Petition as it does not include anything persuasive not already considered by the district court and the Federal Circuit.²

Indeed, Supreme Court Rule 14(4) states in no uncertain terms that “[t]he failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the point requiring consideration is sufficient reason for the Court to deny a petition.” Roadie’s Petition lacks the clarity to decide the questions it presents to this Court, namely how the considerations it states in its Petition which were previously fully considered and determined not to be exceptional, is an abuse of discretion. Roadie’s Petition should be denied for that reason alone.

Absent that, one of the reasons Roadie suggests for granting the Petition is the imposition of several bright line rules in the context of Section 285 fee motions, which is in direct contravention of the guidance suggested by this Court. As explained in *Octane Fitness*, “[t]here is no precise rule or formula for making these determinations,’ but instead equitable discretion should be exercised ‘in light of the considerations we have identified.’” 572 U.S. at 554 (quoting

² For ease of reference and because the analysis was accepted by the district court and the Federal Circuit, Respondent likewise copies a portion of its responsive briefing from the Federal Circuit for a part of its argument.

Fogerty v. Fantasy Inc., 510 U.S. 517, 534, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994).

Petitioner would impose two separate, yet equally rigid, bright line rules. First, Petitioner proposes that a party's noninfringement position *must* be taken into consideration even though a patent was declared invalid prior to any determination on infringement. Second, Roadie proposes that a case should be *per se* exceptional where corporate disclosure rules are not followed if a party includes evidence tying those missteps to a motive for carrying on "bogus litigation." Roadie's proposals "superimposes an inflexible framework onto statutory text that is inherently flexible." *Octane Fitness*, 572 U.S. at 555. These proposed rules directly contradict this Court's guidance, and Roadie fails to offer a compelling justification for this Court to revisit and overturn its past precedent. As a result the Petition should be denied.

A. The Abuse of Discretion Standard

The denial of a motion seeking an award of fees under Section 285 is reviewed for abuse of discretion. *Highmark*, 572 U.S. at 561. "[D]eference [to the trial court] . . . is the hallmark of abuse-of-discretion review." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997). "To meet the abuse-of-discretion standard, the appellant must show that the district court made 'a clear error of judgment in weighing relevant factors or in basing its decision on an error of law or on clearly erroneous factual findings.'" *SRI Int'l, Inc. v. Cisco Sys., Inc.*, 918 F.3d 1368, 1382 (Fed. Cir. 2019) (quoting *Bayer CropScience AG v. Dow Agrosciences LLC*, 851 F.3d 1302, 1306 (Fed. Cir. 2017)); *see also Highmark*, 572 U.S. at 563 n.2. "In matters of judicial discretion,

especially with respect to litigation procedures, the appellate court should exercise restraint in substituting its view for that of the judge who was on the spot.” *Romag Fasteners, Inc. v. Fossil, Inc.*, 866 F.3d 1330, 1346 (Fed. Cir. 2017) (citing *Motorola, Inc. v. Interdigital Tech. Corp.*, 121 F.3d 1461, 1468 (Fed. Cir. 1997)).

The Patent Act provides that a court “in exceptional cases may award reasonable attorney fees to the prevailing party.” 35 U.S.C. § 285. “Exceptional” has been defined by the Supreme Court as “simply one that stands out from others with respect to the substantive strength of a party’s litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.” *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014). “District courts may determine whether a case is ‘exceptional’ [by] . . . considering the totality of the circumstances.” (*Id.*) Factors for consideration include “frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance consideration of compensation and deterrence.” (*Id.* at 554 n.6) (internal quotation marks omitted). As an entitlement to attorneys’ fees under Section 285 must be shown by a preponderance of the evidence, “Section 285 demands a simple discretionary inquiry; it imposes no specific evidentiary burden, much less a high one.” (*Id.* at 557.)

Moreover, “patent law provides the statutory right to exclude those that infringe a patented invention.” *Checkpoint Sys., Inc. v. All-Tag Sec. S.A.*, 858 F.3d 1371, 1375 (Fed. Cir. 2017). “Enforcement of this right is not an ‘exceptional case’ under the patent law.”

(*Id.*) “A patentee’s assertion of reasonable claims of infringement is the mechanism whereby patent systems provide an innovation incentive.” As such, there is a “presumption that an assertion of infringement of a duly granted patent is made in good faith.” (*Id.* at 1375-76.)

A case cannot be found exceptional absent a determination that a party’s “conduct, isolated or otherwise, is such that when considered as part of and along with the totality of circumstances, the case is exceptional.” *Intellectual Ventures I LLC v. Trend Micro Inc.*, 944 F.3d 1380, 1384 (Fed. Cir. 2019). It is not appropriate to look only at a discrete portion of the case rather than looking at the case as a whole. *Id.* at 1383.

This Court in *Octane Fitness* “made clear that it is the substantive strength of the party’s litigating position that is relevant to an exceptional case determination, not the correctness or eventual success of that position.” *SFA Sys., LLC v. Newegg Inc.*, 793 F.3d 1344, 1348 (Fed. Cir. 2015) (citing *Octane*, 572 U.S. at 554). “A party’s position on issues of law ultimately need not be correct for them to not ‘stand out,’ or be found reasonable.” (*Id.*) (brackets omitted). It is not relevant that the non-movant’s claim or defense “may have been weak, if it did not rise to the level of being objectively unreasonable.” *Romag*, 866 F.3d at 1341.

Here, taking into account the totality of the circumstances as presented in the Parties’ briefing, Judge Andrews performed a reasoned analysis in line with *Octane Fitness* such that his decision was not an abuse of discretion, and the Federal Circuit properly upheld Judge Andrews’ decision.

B. The District Court Did Not Abuse Its Discretion in Denying Roadie's Section 285 Motion

The district court properly exercised its discretion when it found that Roadie failed to prove that this case was exceptional because Bags did not litigate this case in an unreasonable manner (either with respect to the strength of Bags' litigation positions or Bags' conduct), much less a manner that was so unreasonable as to stand out from routine patent litigation. Moreover, the Federal Circuit already reviewed this decision for an abuse of discretion and correctly found none. Roadie repeats, word for word, the argument made to the Federal Circuit in the forlorn hope that it will resonate anew. Under this Court's guidelines, it cannot.

Roadie cannot demonstrate that this case is exceptional merely because Bags' patent was invalidated; such arguments are directly contrary to the reasoning in *Octane Fitness* and *SFA Systems*. "The legislative purpose behind [35 U.S.C.] § 285 is to prevent a party from suffering a 'gross injustice,' not to punish a party for losing. *Checkpoint Sys., Inc. v. All-Tag Sec. S.A.*, 858 F.3d 1371, 1376 (Fed. Cir. 2017); *see also Octane Fitness*, 572 U.S. at 548 (explaining that courts also do not award attorney's fees as "a penalty for failure to win a patent infringement suit"). As the Federal Circuit has stressed, "[a] party's position . . . ultimately need not be correct for them not to 'stand[] out.'" *SFA Sys., LLC v. Newegg Inc.*, 793 F.3d 1344, 1348 (Fed. Cir. 2015). Rather, to prove this case was exceptional, Roadie needed to show by a preponderance of the evidence that, considering the totality of the circumstances, the case stands out from other because Bags either (1) had an unreason-

able litigation position or (2) litigated the case in bad faith such that, considering the totality, the litigation was “objectively baseless.” *Octane Fitness*, 572 at 554. Roadie has not shown either even under the relaxed preponderance of the evidence standard mandated by *Octane Fitness*.³

Even if Roadie could dispute a factual finding underlying the district court’s decision (it cannot), Roadie fails to identify any clearly erroneous finding of fact or incorrectly applied legal standards that would allow this Court to find the district court abused its discretion. Roadie similarly does not (and cannot) point to any incorrectly applied legal standards underlying the district court’s decision. Instead, Roadie merely repeats the same arguments that the district court found insufficient to meet Roadie’s burden.

At the end of the day, Roadie is disappointed that it has to pay its attorneys. However, under the American Rule and absent exceptional circumstances as laid out in *Octane Fitness*, Judge Andrews’ decision was the correct one under this Court’s precedent. “There is no precise rule or formula for making these determinations, but instead equitable discretion should

³ Roadie spends a portion of its Petition arguing (while at the same time not providing any actual supporting case law) that since Bags was acquired by SP Plus Corporation (“SP+”), it could then engage in needless litigation to, in effect, squash Roadie as the smaller entity. *See* Roadie Petition at 3-4, 39-40. Yet, Roadie hired a large law firm which had spent “approximately \$800,000 in attorneys’ fees” before a *Markman* hearing was held. (App.5a). Roadie’s appeal to emotion unequivocally demonstrates the relative weakness of its other arguments. Furthermore, Roadie never mentions how large of an entity they really are.

be exercised in light of the considerations we have identified.” *Octane Fitness*, 572 U.S. at 554 (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994)).

1. The Failure to Update Its Corporate Disclosure Statement Does Not Render Bags’ Litigation Conduct *Per Se* Unreasonable

First, it should be noted that no argument, case law, or persuasive statements are made in the entirety of Roadie’s brief concerning Bags’ corporate disclosure statement.⁴ Roadie proposes a bright line rule about corporate disclosure but includes no argument to its point. *See* (Pet.5, 39-40).

Second, corporate disclosure rules are in place to allow courts to analyze whether there is a conflict of interest between the parties and the judge assigned to the matter. The 2002 Advisory Committee Notes to Fed. R. Civ. P. 7.1 state the following:

Rule 7.1 is drawn from Rule 26.1 of the Federal Rules of Appellate Procedure, with changes to adapt to the circumstances of district courts that dictate different provisions for the time of filing, number of copies, and the like. The information required by Rule 7.1(a) reflects the “financial interest” standard of Canon 3C(1)(c) of the Code of Conduct for United States Judges. This information will support properly informed disqualification

⁴ It should be noted that Bags followed the corporate disclosure requirements here as well as at the Federal Circuit level. The failure to update the corporate disclosure statement was an oversight at the district court level and not part of a nefarious scheme as Roadie seems to suggest in its Petition.

decisions in situations that call for automatic disqualification under Canon 3C(1)(c). It does not cover all of the circumstances that may call for disqualification under the financial interest standard, and does not deal at all with other circumstances that may call for disqualification.

Thus, the purpose of the rule looks at the *judge's* interest, not that of the party submitting the corporate disclosure statement. Roadie's proposed bright-line rule, contrary to the holding in *Octane Fitness*, would focus the attorney fees inquiry concerning exceptionality on an issue that is entirely unrelated to the "substantive strength of [Bags'] litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." 572 U.S. at 554. Neither party was litigating the sale of Bags to SP+. The sale of Bags to SP+ simply had no bearing on the validity of the patent or Roadie's alleged infringement meaning this case was not exceptional so as to award fees. Likewise, Roadie has put forth no evidence or argument that the litigation was "bogus" beyond mere puffery. (Pet.3, 5, 39). Simply put, this case was not one that "stands out" from others with respect to those considerations; an understanding held by the district court and the Federal Circuit examining those two considerations.

2. The District Court Was Correct in Not Considering Roadie's Noninfringement Position

Roadie argues that "[w]hen considering whether case was exceptional, the district court failed to

consider or even acknowledge the strong showing of noninfringement.” (Pet.13). In support, Roadie advances two arguments: that the district court erred when it stated that (1) significant discovery had not taken place and (2) the case was resolved on invalidity before any claim construction. (*Id.* at 17). Roadie is wrong and misleading on both points.

a. The District Court Was Not Required to Decide the Issue of Noninfringement.

Roadie’s primary argument on appeal is that the district court was bound to consider whether Roadie infringed the ’336 Patent, even though the ’336 Patent was found invalid prior to a decision on the merits of Bags’ infringement claims (and indeed, before issuing a claim construction order or the completion of discovery). Roadie is incorrect as a matter of law. *SFA Systems, LLC v. Newegg Inc.*, 793 F.3d 1344 (Fed. Cir. 2015) (rejecting the argument that the district court erred when it stated that “evidence of the frivolity of the claims must be reasonably clear without requiring a ‘mini-trial’ on the merits for attorneys’ fees purposes.”). “A district court need not . . . litigate to resolution every issue mooted by summary judgment to rule on a motion for attorney fees.” *Spineology, Inc. v. Wright Med. Tech., Inc.*, 910 F.3d 1227, 1230 (Fed. Cir. 2018). Indeed, at least the Federal Circuit has cautioned “litigants to tread carefully in their complaints about district courts not doing enough” and noted that it will not “force [a] district court, on a motion for attorney fees, to conduct the trial it never had.” *Id.* Nevertheless, that is precisely what Roadie now seeks. (Pet.19) (“Roadie does not fault the district court for not deciding the motion on noninfringement, but Roadie does assert that it was error for the

district court not to fully consider the noninfringement in making the ‘exceptional’ case determination.”)

b. The District Court Correctly Stated That Significant Discovery Had Not Occurred.

With respect to Roadie’s first point, the district court’s characterization of the stage of proceedings was correct. Discovery was not well advanced and in fact, a *Markman* hearing had yet to be completed, no depositions were taken, no experts had been retained, and no meaningful document production had taken place.⁵ Significant discovery still remained and was necessary for Bags to present its infringement case.

Significantly, at the time the ‘339 Patent was held invalid, Roadie had refused to produce the source code for the accused Roadie App. Since most of Roadie’s produced documents did not demonstrate the functionality of the Roadie App and as this case concerns a software application, the source code was entirely relevant to whether or not the Roadie App infringed the patent-in-suit, yet Roadie was not willing to allow Bags to review it. When the conversation of when to schedule a review of the source code occurred, Roadie went silent. Now, surprisingly making the argument again despite previous failure, Roadie attempts to argue that Roadie made the source code available. (Pet.32). For example, Roadie concedes that Bags requested the source code, going so far as to send an email to Roadie with the following:

⁵ Bags concedes that although a *Markman* hearing had not been conducted, the district court did in fact accept Bags’ proposed construction for “selection to hold delivery”; however, only for purposes relating to invalidity.

We will provide the Confidentiality Statement of our chosen expert witness to review Roadie's source code per the Protective Order shortly. Can you confirm the location of this source code? Is it in your office or in Atlanta, GA?

Appx1891. Roadie argues that "Bags never followed up." (Pet.30) (emphasis in original). Yet it was Roadie's failure to timely produce the indisputably responsive source code that prevented Bags from presenting further evidence of infringement. Any unreasonable conduct here lies with Roadie, not Bags.

Each of these factual statements were made to the Federal Circuit who, correctly, deferred to the trial judge's ruling about the stage of discovery. It is not for an appeals court to question the district court's assessment of the status of discovery as that is an issue of fact that Roadie failed to carry the burden of persuasion.

c. The District Court Correctly Stated That Claim Construction Had Not Occurred for the Purposes of Infringement.

Turning to Roadie's second point—the district court was correct in stating that no claim construction had taken place, as the claims had not been construed for the purposes of determining infringement. The district court accepted Bags' proposed construction for the term "selection to hold delivery" only for purposes related to invalidity. It can be reasoned that Judge Andrews gave Bags the benefit of the doubt when it accepted Bags' proposed construction to find the '336 Patent invalid. (App.5a). Judge Andrews never concluded that Roadie did not infringe the '336 Patent because such a determination was not required. Signi-

ificantly, if the district court had chosen to undertake the infringement analysis relating to this supposed claim construction, it would have stated as such.

d. The District Court Was Not Required to Articulate Every Consideration Underlying Its Decision.

Moreover, even though Judge Andrews stated that discovery was not well advanced and no claim construction had taken place, those might not have been the only reasons in which he declined to consider Roadie’s noninfringement position—and he was under no obligation to say so. *See University of Utah v. Max-Planck-Gesellschaft zur Foerderung der Wissenschaften e. V.*, 851 F.3d 1317, 1323 (Fed. Cir. 2017) (“The trial judge was in the best position to understand and weigh these issues. [The Court] had no obligation to write an opinion that reveals [its] assessment of every consideration. This court will not second guess [its] determination.”); *see also Sarif Biomedical LLC v. Brainlab, Inc.*, 725 Fed. Appx. 996, 1000 (Fed. Cir. 2018) (quoting *Max-Planck*, 851 F.3d at 1323).

Notably, Roadie actually admits that the district court considered Bags infringement position by stating that the court “gave encouragement to plaintiffs who ‘fail[ed] to grasp meaningful technological and operational distinctions in the accused product’s functionality.” (Pet.38). While Roadie admits this, the entire quote from the district court’s decision is of value:

The facts [Roadie] puts forth in its briefing *are not inconsistent with the possibility* that [Bags’] counsel, while investigating its case, failed to grasp meaningful technological and operation distinctions in the accused product’s

functionality, such that the ‘evidence’ that was collected may not have been supportive of [Bags’] infringement contentions. I do not find these acts self-evidently to go as far as qualifying as part of a vexatious litigation strategy or pattern of offensive litigation tactics.

(App. 11a) (emphasis added). As such, Bags *may* have missed something, yet any such error *did not* rise to the level of exceptionality. And furthermore, the district court absorbed Bags’ infringement position and concluded that it did not present any poor litigation strategy or litigation misconduct.

It is important to note that the Parties fully briefed the issue of infringement before the district court and before the Federal Circuit. (App.5a) (“I have reviewed the parties’ briefing. (D.I. 134, 136, 138).”); *see also* (App.1a-2a). Thus, these issues were up for consideration before both judicial bodies and were considered before the issuance of either order at issue in this case. The district court specifically found that the case was not “exceptionally meritless” or brought in bad faith, confirmed by the Federal Circuit *per curiam*, after review of this briefing. (App.8a). Indeed, the district court specifically found that this case does not “stand[] out from others.” (App.13a).

“[I]t is often more difficult to determine whether a patent is valid than whether it has been infringed.” *Cardinal Chem. Co. v. Morton Int’l, Inc.*, 508 U.S. 83, 99 (1993). “[O]f the two questions, [validity or infringement,] validity has the greater public importance . . . and the District Court . . . followed what will usually be the better practice by inquiring fully into the validity of this patent.” *Sinclair & Carroll Co. v. Interchemical Corp.*, 325 U.S. 327, 330 (1945).

This consideration is important because a determination of infringement is particular to a specific defendant whereas a determination of invalidity is particular to a specific patent which could potentially affect a multitude of specific defendants. Thus, from a policy perspective, it is important for a district court to analyze validity to maintain quality patents and remove potentially harmful patents that could negatively impact individuals and businesses. The district court was therefore correct in stopping the analysis at invalidity because the public purpose of judicial review had been completed.⁶ Roadie was absolved of any accused wrongdoing and the '336 Patent cannot be asserted against anyone else now or in the future. To investigate further into infringement would be a waste of judicial resources and counter to Fed. R. Civ. P. which seeks to “secure the just, speedy, and inexpensive determination of every action and proceeding.”

Our already overtaxed judicial system would be further bogged down if a bright-line rule was put in place requiring every defense submitted by a defendant to be analyzed as part of the fees analysis. Much like *Fox v. Vice* wherein it was cautioned against trial courts becoming “green-eyeshade accountants” concerning fee calculations, trial courts should not be put to task when they make a determination as to whether a case is reasonable or not, particularly in light of “the district court’s superior understanding of

⁶ This is not to say a review of infringement positions in relation to fee awards should never occur. If, for example, a patent plaintiff wins on its validity position but loses on infringement, the facts and circumstances of the case may still rise to the level of exceptionality.

the litigation.” *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

3. Bags’ Infringement Positions Were Objectively Reasonable

In addition to those reasons articulated by the district court discussed above, Bags’ infringement positions were objectively reasonable and the district court’s determination as such withstand an abuse of discretion review as there was nothing manifestly erroneous about the ruling, as confirmed by the Federal Circuit. Roadie argues that “the claim language, as reinforced by the [Bags] preferred claim construction of ‘selection to hold delivery,’ make it easy to see that Roadie cannot infringe under any scenario.” (Pet.21). Roadie advances several arguments regarding the alleged deficiencies in Bags’ infringement contentions, which are addressed below and considered by the district court and the Federal Circuit *per curiam*.

a. Roadie Misapprehends the Claims.

First, Roadie argues that Roadie does not sell a server computer, deliverer computing device, or a passenger computing device, “all of which are required by the claims.” (*Id.*) However, independent Claim 7 of the ’336 Patent is a method claim which does not require the elements to be sold in order to infringe—“Method claims are only infringed when the claimed process is performed, not by the sale of an apparatus that is capable of infringing use.” *Ormco Corp. v. Align Technology, Inc.*, 463 F.3d 1299, 1311 (Fed. Cir. 2006); *see also Limelight Networks, Inc. v. Akamai Techs., Inc.*, 572 U.S. 915, 924 (2014) (instructing that a “method patent is not directly infringed . . . unless a

single actor can be held responsible for the performance of all steps of the patent.”) Thus, any infringement analysis would have required a look into how Roadie’s app worked; an event that would have occurred through use of Bag’s retained expert had discovery not been ended with the district court’s dismissal.

b. Bags Advanced Reasonable Infringement Theories.

Third, Roadie argues that “[e]ven if all the hardware, and use of it was attributable to Roadie, the claim language, as reinforced by the [Bags] preferred claim construction of ‘selection to hold delivery,’ make it easy to see that Roadie cannot infringe under any scenario.” (Pet.21).

This is entirely not the case and was clearly not persuasive to Judge Andrews or the Federal Circuit. Before this case was filed, Bags conducted a pre-suit investigation, which was incorporated into its infringement contentions, served on January 31, 2018. Reproduced below, Bags’ counsel, Stefan Stein, used the Roadie App to send an item from his law office to his residence.



(Pet.23). Mr. Stein sent a message to the Roadie driver requesting a delivery change from his house (730 Pelican Island Drive) to his neighbor's address further down the street (7303 Pelican Island Drive), akin to changing delivery time or a "hold," a limitation

found in the '336 Patent. The representative limitation of independent claim 7 is:

. . . relaying, through the transceiver, a delivery change to the deliverer computing device responsive to the selection to hold delivery of the piece of baggage using the passenger interface . . .

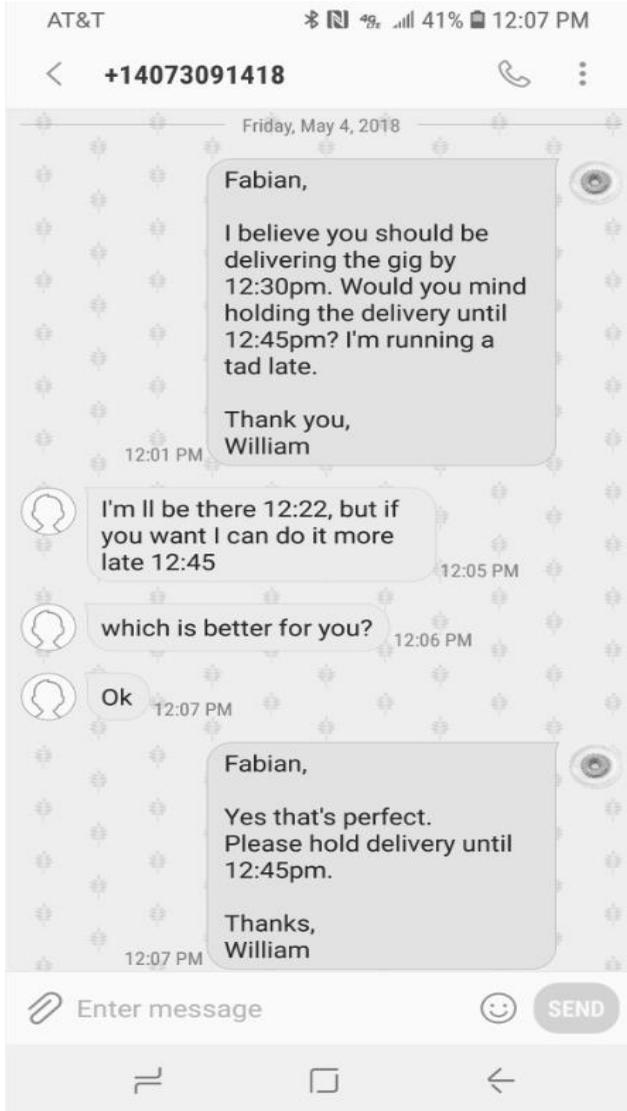
(App.64a) at 13:61–4 (emphasis added). Roadie argues that “although the '336 patent claims require a ‘selection to hold delivery,’ Bags’ infringement evidence is directed instead to a request ‘to change the delivery location.’”⁷ (Pet.22).

Bags has always believed that a “selection to change delivery” encompasses a “selection to hold delivery” because the former would inherently include the latter. Nevertheless, in view of Roadie’s argument that they were not the same, which was included in a letter from Roadie dated March 19, 2018,⁸ Bags conducted another investigation of the capabilities of the Roadie App. (Pet.26). At issue was whether the Roadie App allowed a passenger to initiate a selection to hold delivery until a delayed delivery time. *See generally id.* On May 4, 2018, Bags’ counsel, William Stein,

⁷ Importantly, in its Declaratory Judgment Action, Roadie did not allege noninfringement based upon either the “selection to change delivery” limitation or the “selection to hold delivery” limitation.

⁸ Roadie consistently touted this 9-page letter as a “Rule 11 letter” during litigation at the district court level even though Rule 11 motion practice was never followed due to the absence of serving a Rule 11 motion on Bags. Seemingly, Roadie realized this infirmity well into the litigation and now refers to it as a “nine-page letter.” (Pet.26). This practice appears to contradict Roadie’s argument that Bags was the intimidator in this case.

purposefully left baggage at the Orlando International Airport, whereupon the Roadie App was used to ship the baggage to the Orlando office of GrayRobinson. P.A. (Pet.29).



(Pet.28). As shown above, Bags' counsel was allowed to hold delivery from 12:22 p.m. to 12:45 p.m., in addition to changing the delivery location as elicited in the August 24, 2017 investigation, thereby proving Roadie's noninfringement assertion untrue.

Roadie then argues that these investigations were deficient because "the user did not request a change of delivery location through the Roadie App and through Roadie's servers." (Pet.24). In other words, Roadie argues that Mr. Stein's conversation with the Roadie driver was only within the Apple iMessage mainframe, and did not travel through Roadie's server. (*Id.*) Thus, the question then became whether the communications went through the Roadie server and then to the Roadie driver, or whether the communications went straight to the Roadie driver. *See generally id.* at 24-29.

However, and as shown below, the Roadie App presented a "contact driver" option to Mr. Stein, a fact notably absent from Roadie's Petition. The contact driver option provided a communication option to connect the passenger (Mr. Stein) to the Roadie driver. Since the passenger is not provided with the Roadie driver's number prior to initiating the contact driver option, using the contact driver option necessarily requires a communication to be sent through the Roadie server to initiate the conversation between Mr. Stein and the Roadie driver. As such, *the communication must have gone through Roadie's server at least once*. Whether the subsequent communications were then transmitted through Roadie's servers was a focus point for discovery.

Roadie then argues that "[e]ven if Roadie did provide telephone numbers to its delivery drivers,

which it does not, Bags has zero basis for claiming that a text message drafted by the smartphone user and sent through the smartphone’s default messaging app would pass through a Roadie server.” (Pet.28). In other words, whether the phone number for the delivery driver was his or Roadie’s may have demonstrated that the subsequent messages were sent through Roadie’s servers. Thus, during the May 4, 2018 investigation, Bags’ counsel asked the Roadie driver whether the +14073091418 mobile number as shown was his number or a number supplied by Roadie.⁹ The Roadie driver said half of the time it was his mobile number and the other half the mobile number was supplied by Roadie. It is clear from the facts recited above that Bags’ infringement position was objectively reasonable and did not rise to “exceptional” level such that it stood out from other cases. Judge Andrews made the correct determination.

c. The District Court Clearly and Correctly Distinguished Alcatel.

Roadie argues that Mr. Stein, “committed an ethical violation” by participating in the above investigation because of his contact with Roadie’s independent contractor. (Pet.28-29). As support, Roadie advances the same arguments that the district court and Federal Circuit considered and rejected. Specifically, Roadie cites to *Microsoft Corp. v. Alcatel Business Systems* for the proposition that communicating directly with

⁹ Despite requesting this information on December 18, 2017 in the form of interrogatory No. 1, Bags was never made aware of this fact before the May 4, 2018 investigation. Only after Bags amended its infringement contentions on June 8, 2018 did Roadie respond to the interrogatory on July 30, 2018.

a party represented by another lawyer in the matter about the subject of the representation violates ABA Model Rules of Professional Conduct R. 4.2 despite Judge Andrews's consideration of the case and subsequent admonishment of Roadie's framing of the case's facts. No. 07-090-SLR, 2007 WL 4480632 (D. Del. Dec. 18, 2007) (Robinson, J.); Pet.29-30. Specifically, the district court explained that:

[Bags'] counsel asked a delivery driver whether the mobile number shown on [Roadie's accused product] belonged to him or was a number supplied by [Roadie]. I do not agree that this conduct rises to the level of that observed by the court in *Alcatel*. [Roadie] posits that the 'only meaningful distinction' between the cases is that the employee questioned in *Alcatel* was a company employee and not an independent contractor, as is the case of the delivery driver here. (citations omitted). There are numerous other distinctions, however, including that the delivery driver was not directed to train [Bags'] lawyers as to the operation of the accused product. Nor is there any indication that he was subject to any further questioning about the product. I do not consider asking the delivery driver about the phone number display on the accused product to be equivalent in its seriousness to obtaining a tutorial on the product's administration, use, and configuration, such that it can be said that [Bags'] counsel litigated this case in an offensive or [unreasonable] manner.

(App.12a).

Roadie reiterates the same arguments it raised before the district court and Federal Circuit and again omits several dispositive aspects of *Alcatel* that make it readily distinguishable from the instant proceeding.

First, the employee¹⁰ was questioned during the course of installing the accused software which lasted several days. *Alcatel*, 2007 WL 4480632, at *1, n.1. The employee provided “training on the administration, use and configuration of the [system]” and the attorneys-at-issue “engaged [him] in ongoing conversations where they questioned him about the administration, use and configuration of the [system.]” (*Id.* at *1.) Thus, the questioning was effectively an informal deposition where, importantly, the attorneys-at-issue could ask the employee his opinions over the course of multiple days. Here, the independent contractor was asked one question, which was factual in nature and, regardless of whether an attorney for Roadie was present, the answer would not have changed. Mr. Stein’s one question had no bearing on the nature of the response elicited as opposed to *Alcatel*. Second, the employee in *Alcatel* was “one of a limited number of Alcatel engineers with the experience and training sufficient to install the Alcatel System.” (*Id.* at *1, n.2.)

¹⁰ Judge Robinson stated that the relevant relationship is between the “*employer* and the subject matter of this litigation,” without any discussion relating to an independent contractor. *Alcatel*, 2007 WL 4480632, at *1, n.5 (emphasis added); *see also* Appx1386.

Unlike *Alcatel*, here, the independent contractor was exactly that: an independent contractor having little knowledge of the underpinnings of Roadie's software. He was asked one factual question as opposed to numerous factual and opinion-based questions as in *Alcatel*. Thus, the facts in *Alcatel* and in this case are entirely inapposite and Roadie's reliance on *Alcatel* should be disregarded.

The district court disagreed with Roadie's arguments relating to *Alcatel* and stated that the "facts [Roadie] presents regarding this discussion are highly distinguishable from those of the case involving misconduct which it argues bears 'striking resemblance' to the case at hand." (App. 11a). Roadie then argues that if Rule 4.2 does not apply, Rule 4.1(a), Rule 8.4(c), and Rule 4.3 should apply to Mr. Stein's conduct. (Pet.31). However, Rules 4.1(a), 8.4(c), and 4.3 do not apply because Mr. Stein did not make a false statement, did not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation," and did not represent that he was "disinterested" in accordance with those rules when speaking with the independent contractor, respectively, and no evidence has been presented to conclude otherwise. These arguments were all put before and considered by Judge Andrews before a judgment was rendered. Thus, no ethical violations were committed and the accusation should be disregarded as it relates to a determination on fees under Section 285.

4. Bags' Position on Invalidity Was Objectively Reasonable

Roadie failed to raise patent ineligibility in either its motion to dismiss (standing) in the First Florida

Case filed in July, 2017 or in its initial motion to dismiss (venue) filed November 10, 2017 in the instant case. Rather, Roadie's untimely and hence improper motion to dismiss based upon patent ineligibility was not filed until January 17, 2018, some six (6) months after the first case was filed. Roadie should be estopped from arguing objective unreasonableness inasmuch as patent ineligibility was not so evident to Roadie for six (6) months.

In any event, Roadie's argument regarding objective unreasonableness mainly focuses on the *Finnavations* case, decided by the district court judge in this case: Judge Andrews. However, as Judge Andrews reasoned, the present case is not similar to *Finnavations*. Roadie has continued to hinge its argument only on the fact that the patent in *Finnavations* received four Section 101 rejections, which put the Plaintiff on notice that its claims were of dubious patentability. (Pet.34). Yet again, Roadie's continued reliance on *Finnavations* is lacking in several key aspects. First, the claims in *Finnavations* received "a remarkable *four* separate Section 101 rejections, all occurring after *Alice*." *Finnavations LLC v. Payoneer, Inc.*, No. 18-444-RGA, 2019 WL 1236358. (D. Del. Mar. 18, 2019) (emphasis added). Conversely here, the claims in the '336 Patent received only two separate 101 rejections. The first rejection came before *Alice* and the second after *Alice*, which means that the patent withstood meaningful interpretations of Section 101 and was battle-hardened. Bags therefore was on notice and reasonably believed that it had a stronger patent than the one in *Finnavations*. See 35 U.S.C. § 282(a) (duly issued patents are presumed valid); *Checkpoint Sys.*, 858 F.3d at 1275–76 ("[T]here is a

presumption that an assertion of infringement of a duly granted patent is made in good faith.”) *Homeland Housewares, LLC v. Sorensen Res. & Dev. Trust*, 581 Fed. Appx. 877, 881 (Fed. Cir. 2014) (Bags had “the right to vigorously enforce its presumptively valid patent.”).

Second, the claims in *Finnavations* did not contain any limitations that would make it a “borderline case with an unpredictable result.” *Finnavations*, 2019 WL 1236358, at *2 (“Any reasonable patent attorney with an understanding of Section 101 law could have predicted the outcome.”). Moreover, as explained in *Tangelo IP, LLC v. Tupperware Brands Corp.*, “[t]here was ‘no question’ [in *Finnavations*] that the patent was invalid because the claims were analogous to those struck down in *Alice*.” 2019 WL 2270439, at *2 (D. Del. May 28, 2019). Indeed, the elements of the representative claim in *Finnavations* did nothing more than explain the beginning word in each element. On the other hand, each element of the claims in the ’336 Patent contains numerous limitations that narrow the scope of each element and could reasonably be viewed as valid. Precedent did not leave “no question” as to the ’336 Patent’s validity, leaving room for Bags to advance reasonable arguments.

The *Finnavations* Court even clarified its exceedingly high bar of exceptionality by stating that it has:

resolved scores of Section 101 motions and seen a wide array of validity arguments. Usually the quality of an argument falls somewhere between good and mediocre. Infrequently, I have encountered arguments which I would classify as bad. Plaintiff’s

defense of the validity of the [patent-in-suit] was not just mediocre or bad; it was ugly.

Finnavations, 2019 WL 1236358 at *1, n.2.

In the district court’s memorandum opinion on Roadie’s motion for judgment on the pleadings, there was no language to conclude that Bags’ defense of the validity of the ’336 Patent was even close to the language used in *Finnavations*. Similarly, this strong language was nowhere to be found in the district court’s opinion in denying Roadie’s Section 285 Motion. (App.5a-13a). Thus, *Finnavations* is not applicable to the facts of this case and should be disregarded here as it was at the district court level and at the Federal Circuit.

5. Bags’ Claim Construction Positions Were Consistent Throughout the Case

Roadie’s main argument in this section generally relates to how Bags initially stated that it considered several terms to require claim construction, such as a “server,” “processor,” “transceiver,” “configured,” “baggage information,” “relay,” “passenger computing device,” and “deliverer computing device” (the “8 terms”) and then ultimately proposing only one term for construction—“selection to hold delivery.” (Pet.35). Roadie supports this argument by stating that (1) “[s]witching positions on claim construction like this is clear evidence of bad intent and wrongful motivation and (2) “Roadie would have been required to spend substantial resources for discovery and claim construction briefing.” (*Id.* at 37.)

Turning to the first point—initially viewing terms as requiring construction and then ultimately not

proposing constructions for those terms, does not signify ill intent and Roadie proposes no case authority to support its argument. Furthermore, the seemingly simplistic nature of the eight terms previously mentioned would likely have had agreed-upon constructions, had Bags proposed them for needing construction. This can be inferred from the fact that, as argued with the district court and at the Federal Circuit, the Joint Claim Construction Chart contained four other seemingly simplistic terms that had agreed-upon constructions, namely “baggage,” “passenger,” “destination,” and “reorder/reordering.” Thus, ill intent is absent here on behalf of Bags.

Turning to the second point—Roadie argues that Bags attempted to inject these terms into its response to the Rule 12(c) motion in order to have the “motion either denied, or delayed until after a formal *Markman* hearing.” (Pet.36). First off, the motion was granted. Second, it is implausible that Roadie would spend considerable resources on the eight terms considering the Joint Claim Construction Chart was filed eight months before the *Markman* hearing was scheduled to be held. Bags proposed those eight terms “on March 3, 2018.” (*Id.*) And by May 9, 2018, when the Joint Claim Construction Chart was filed, none of those terms were listed as disputed. (*Id.*) Thus, only two months existed that could contribute towards Roadie spending “substantial resources” on those eight terms, even though eight months existed between the Joint Claim Construction Chart and the calendared *Markman* hearing. Roadie presented no evidence at the district court level or with the Federal Circuit that any resources were spent, much less substantial ones.



CONCLUSION

The district court correctly applied the law and properly exercised its discretion in concluding this case is not exceptional based on the totality of the circumstances. Roadie fails to identify any clearly erroneous factual findings or erroneous views of the law that underlie the district court's decision. In fact, no substantive new argument is presented in an attempt to persuade this Court to overturn Judge Andrews' well-reasoned ruling. This is unsurprising, as Bags neither litigated this case in an unreasonable manner nor pursued substantively weak litigation positions. For the reasons above, the Court should affirm the judgment denying attorneys' fees under 35 U.S.C. § 285.

Respectfully submitted,

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