No. 2015-1103

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SUMMIT DATA SYSTEMS LLC,
Plaintiff-Appellant,

v.

NETAPP INC.,
Defendant-Appellee.

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

BRIEF FOR *AMICI CURIAE* ASKELADDEN L.L.C., DELL INC., HUAWEI TECHNOLOGIES CO., LTD., KASPERSKY LAB, LIMELIGHT NETWORKS, INC., NEWEGG INC., QVC, INC., SAP AMERICA, INC., SAS INSTITUTE INC., SYMMETRY LLC, AND XILINX, INC. IN SUPPORT OF DEFENDANT-APPELLEE NETAPP INC.

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April 6, 2015

CERTIFICATE OF INTEREST

Counsel for *amici* certifies the following:

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

Askeladden L.L.C., Dell Inc., Huawei Technologies Co., Ltd., Kaspersky Lab, Limelight Networks, Inc., Newegg Inc., QVC, Inc., SAP America, Inc., SAS Institute Inc., Symmetry LLC, and Xilinx, Inc.

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

N/A

3. All parent corporations and any public companies that own 10 percent or more of the stock of the parties represented by me are:

Askeladden L.L.C. is a wholly owned subsidiary of The Clearing House Payments Company L.L.C.

Dell Inc. is a privately owned by Michael Dell and Silver Lake.

Huawei Technologies Co., Ltd. is wholly owned by Huawei Investment & Holding Co., Ltd.

Kaspersky Lab ZAO is a wholly owned subsidiary of Kaspersky Lab Ltd.

Investment entities affiliated with Goldman, Sachs & Co. own over 10 percent of Limelight Networks, Inc.

QVC is a wholly owned subsidiary of Liberty Interactive Corporation.

SAP America, Inc. is a wholly owned subsidiary of SAP SE.

Newegg Inc., SAS Institute Inc., Symmetry LLC, and Xilinx, Inc. have no parent corporations, and there are no public companies that own 10% or more of them.

4. The names of all law firms and the partners or associates that appeared for the parties now represented by me in the trial court or are expected to appear in this Court are:

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Amici curiae Askeladden L.L.C., Dell Inc., Huawei Technologies Co., Ltd., Kaspersky Lab, Limelight Networks, Inc., Newegg Inc., QVC, Inc., SAP America, Inc., SAS Institute Inc., Symmetry LLC, and Xilinx, Inc. (collectively "*Amici*") respectfully submit this brief in support of Defendant-Appellee NetApp Inc. ("NetApp").

INTEREST OF *AMICI CURIAE*[1]

Amici, their affiliates, or the industries they represent have all been subjected to meritless patent suits, have been burdened by the high-cost of defending against such litigation, and regularly face settlement demands in these meritless cases and the dilemma of either paying the high cost of defense or paying less to settle. *Amici* thus have a substantial interest in using fee shifting to discourage plaintiffs from filing meritless suits.

SOURCE OF AUTHORITY TO FILE

Amici have attached this brief to a motion for leave of the Court to file as *amici*.

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

SUMMARY OF ARGUMENT

This decade has seen not only a general increase in patent litigation but also a dramatic increase in abusive patent litigation practices. Far too many patent assertion entities have leveraged the high cost of patent litigation and the structural advantages of not being practicing entities or using shell companies to assert patents to force nuisance value settlements from defendants. This "sue everyone and sort it out later" approach to litigation has overly burdened defendants who currently face all of the litigation risk. Post-*Octane* fee shifting under § 285 provides a countervailing force that can effectively deter such meritless suits. Such fee shifting is especially appropriate where patentees fail to adequately investigate their existing licenses and accuse already licensed products. To best apply § 285, district courts should be encouraged to consider a patentee's pattern of behavior across litigation "campaigns," as discussed in this Court's *Eon-Net* decision. Patterns of abusive behavior should weigh heavily in favor of awarding fees. Lastly, a patentee's voluntary dismissal with prejudice should not preclude fee shifting under § 285 where it would be otherwise appropriate. Such a procedural bar is inconsistent with existing precedent and sound public policy.

ARGUMENT

I. AN INFLUX OF MERITLESS PATENT LITIGATION HAS BURDENED OPERATING COMPANIES AND COURTS

There has been a significant uptick in patent litigation over the last decade. For example, patentees filed 5,012 suits in 2014, a slight decrease from the year prior but still almost twice as many as just five years ago. Owen Byrd & Brian Howard, *2014 Patent Litigation Year in Review*, LEX MACHINA, 2015, at 1. Many of these suits are being filed in Delaware, which remains the second most popular district with over three times as many patent suits as the next most popular. *Id.* at 5. Patent assertion entities ("PAEs") account for much of this increased activity and make up the top ten plaintiffs by suits filed. *Id*. at 18. Acacia, specifically, which wholly owns Summit Data Systems ("Summit"), filed the most cases and sued the most defendants of any PAE over the last five years. *2014 NPE Litigation Report*, RPX CORPORATION, 2014, at 4, 29–30, *available at* http://www.rpxcorp.com/wp-content/uploads/2014/12/RPX_Litigation_Report_2014_FNL_03.30.15.pdf.

Many plaintiffs, especially PAEs, face little risk themselves in litigation because they are "immune to counterclaims for patent infringement, antitrust, or unfair competition." *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1327 (Fed. Cir. 2011). They also have little in the way of discovery costs, unlike operating companies. *Id*. Their use of numerous shell/subsidiary companies helps to facilitate this, just as Acacia has done with Summit here. Even in the rare event that a case proceeds long enough to invalidate a patent, a PAE tends not to be harmed because its "patents protect[] only settlement receipts, not [] products." *Id*. at 1328.

Far too many plaintiffs have leveraged these advantages and the high cost of litigating to force defendants into settling meritless suits. *See id.* at 1327–28. Attorneys' and expert fees can be significant, providing ample leverage for settlement. Even where less than $1,000,000 is at risk, the median cost of patent litigation in 2013 was $350,000 through the end of discovery and $700,000 total. AM. INTELLECTUAL PROP. LAW ASS'N LAW PRACTICE MGMT. COMM., REPORT OF THE ECONOMIC SURVEY 34, I-129–I-132 (2013). When any more is at risk, these values more than double to $1,000,000 and $2,000,000 respectively at the low end and $3,000,000 and $5,500,000 respectively at the high end. *Id.* Expert fees are also substantial, often costing hundreds of thousands of dollars. *See, e.g.*, *MarcTec, LLC v. Johnson & Johnson,* 664 F.3d 907, 910 (Fed. Cir. 2012) (affirming an award of expert fees for $809,788.02). Plaintiffs, on the other hand, and especially PAEs, face substantially lower costs shared across all of the complaints they file or use contingency fee arrangements.

When confronted with a meritless suit, these realities leave defendants with the dilemma of settling for anything less than the cost of litigation or defending at great cost. Such inequalities and abusive litigation practices have strained defendants and the resources of the judiciary. However, fee shifting under § 285 can help to rebalance litigation risks and deter meritless suits.

II. FEE SHIFTING CAN DETER THE FILING OF MERITLESS LAWSUITS

In light of *Octane*, § 285 can better deter the filing and prosecution of meritless and abusive suits. In requiring both subjective bad faith and objectively baseless litigation, the *Brooks Furniture* test was held to be "overly rigid." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1754, 1756 (2014) (citing *Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc.*, 393 F.3d 1378, 1381 (Fed. Cir. 2005)). Qualifying conduct under it was often independently sanctionable. *See id*. at 1756 ("[T]he first category of cases . . . appears to extend largely to independently sanctionable conduct.). This rigidity effectively allowed plaintiffs to engage in abusive, but not independently sanctionable, litigation practices without fear of repercussion and created perverse economic incentives for patentees, to the detriment of the patent system. However, *Octane* specifically emphasizes the need to consider compensation and deterrence in awarding fees. *Id*. at 1756 n.6. Its more flexible standard allows district courts to balance many of the inequalities discussed above and economically disincentivize the filing and prosecution of meritless suits. Judicious use of § 285 will also drive early and fair settlement resolutions.

This case provides an example of the need to emphasize deterrence. Summit's entire position is that it "did the right thing" in dismissing the suit when it became "uneconomical" to continue. (Summit Br. at 17.) However, the "right thing" was to never have brought suit at all or to have at least dismissed as early as possible. Unlike many of the cases Summit cites, nothing changed factually in the intervening discovery period. For example, Summit learned no new facts about NetApp's products that altered Summit's infringement position. *See, e.g.*, *Larchmont Engineering, Inc. v. Toggenburg Ski Center, Inc.*, 444 F.2d 490, 491 (2d Cir. 1971) (discussing how pretrial discovery revealed certain weaknesses in plaintiff's claims). Instead, NetApp compared the belatedly fleshed out infringement positions from Summit's expert report, which relied on Microsoft products, to the RPX license. Summit should have done and disclosed that analysis sooner and cannot now use that delay to justify the correctness of its actions. This analysis should have focused on whether Summit's sizeable and well-compensated licensing agreement with RPX, one of the largest defensive patent aggregators, covered a major technology company and its products, on which Summit was solely relying for infringement purposes.[2]

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[2] Summit also argues that the use of § 285 would have a chilling effect on dismissals. (Summit Br. at 40.) However, deterrence under § 285 altogether

Acacia's litigation practices are part of a pattern of abusive litigation tactics. Acacia has previously attempted to extract settlement money from a downstream business after having granted licenses to upstream component suppliers. For example, Acacia's conduct here mirrors that in a suit against Comcast. *See Brilliant Optical Solutions LLC v. Comcast Cable Communications, LLC*, No. 1:13-CV-00886-REB-KMT (D. Colo. March 27, 2015) (awarding attorneys' fees). There, Acacia similarly withheld the existence of licenses, forcing Comcast to incur substantial costs.

Conduct such as this arises out of Acacia's business model, which treats patent litigations as commodities. During its earning calls, Acacia regularly boasts about the use of trial dates as leverage to drive revenue and extract settlements or "revenue events," as Acacia calls them. *Acacia Research's Matthew Vella on Q2 2014 Results – Earnings Call Transcript*, SEEKING ALPHA (Jul. 25, 2014, 12:56 AM), http://seekingalpha.com/article/2342005-acacia-researchs-actg-matthew-vella-on-q2-2014-results-earnings-call-transcript (attributing quarterly performance to "the association of revenues with trial dates" and "the operational leverage of our business model."; acknowledging that "trial dates are historically correlated to revenue events"); *Acacia Research's CEO Discusses Q4 2013 Results – Earnings Call Transcript*, SEEKING ALPHA (Feb.

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prevents the filing or extended prosecution of meritless suits like Summit's.

21, 2014, 12:16 PM), http://seekingalpha.com/article/2039043-acacia-researchs-ceo-discusses-q4-2013-results-earnings-call-transcript (same). Patent litigations for Acacia are thus not disputes between entities to be resolved on the merits but are commodities and revenue streams for investors.[3]

Courts should discourage the abuses of the judicial system described above. Such plaintiffs generally approach litigation with a "sue everybody and sort it out later" approach. "Sorting it out" often, improperly, falls to defendants, which are too often the only litigants facing any risks. Section 285 provides a countervailing force and thus a workable deterrence mechanism in such cases.

III. A CASE IS PRESUMPTIVELY EXCEPTIONAL WHERE A PATENTEE ACCUSES RECENTLY LICENSED PRODUCTS

Commentators have recognized the need to apply fee shifting in such cases: "Other indications of potential bullying include litigants who assert a patent claim when the rights to it have already been granted through license . . . ." Randall R. Rader, Colleen Chien & David Hricik, *Make Patent Trolls Pay in Court*, N.Y. TIMES (June 4, 2013) (going on to discuss fee shifting solutions), *available at* http://www.nytimes.com/2013/06/05/opinion/make-patent-trolls-pay-in-

[3] This is yet another example of Acacia putting business considerations ahead of its legal and ethical obligations. *See, e.g.*, Dynamic 3D Geosolutions LLC v. Schlumberger Limited, No. A-14-CV-112-LY (W.D. Tex. March 31, 2015) (dismissing case with prejudice after disqualifying all attorneys because Acacia had hired defendant's in-house counsel and then sued defendant using this acquired confidential information).

court.html. In such cases, patentees doubly and improperly monetize, as almost certainly happened here, with all but one other defendant having settled at the time NetApp discovered this licensing issue. This follows from the patentee's shotgun litigation approach and leaving defendants to "sort out" the details, as discussed above. These harms are exacerbated when the patentee fails to disclose the existence of a critical, and ultimately dispositive, license for over a year and a half, as fees continue to mount. Fee shifting is thus necessary to discourage such practices and to provide victims of such abuse some small measure of remedy.

Summit was responsible for adequately investigating the implications of the RPX license. Summit passes blame to everyone but itself. It blames RPX, not even a party to this case, for not taking action. (Summit Br. at 27.) It blames NetApp for not discovering the issue sooner. (*Id.* at 41–45.) Summit blames everyone but its own practice of suing everyone and letting the defendants "sort it out," which is bound to produce results like this case and *Comcast*. The most active patent licensing entity in the U.S. should be responsible for knowing which entities it has previously licensed. That responsibility should always lie with the patentee, not its targets.

IV. DISTRICT COURTS SHOULD BE PERMITTED TO CONSIDER A PLAINTIFF'S PAST NUISANCE-VALUE LITIGATION IN DECIDING WHETHER TO AWARD ATTORNEYS' FEES

A strong patent system is vital to continued innovation in the United States.

But abusive assertion practices that aim to extract serial nuisance-value settlements from weak patents and weak infringement theories undermine real innovation and lead to tremendous strain on party and judicial resources. Identifying and deterring campaigns of nuisance-value litigation is therefore a legitimate and important use of § 285.

In *Eon-Net*, this Court emphasized that a district court may consider a plaintiff's actions throughout its broader litigation campaign in deciding whether an "extraordinary case" exists for purposes of § 285. *See* 653 F.3d at 1327–28. The Court held that where these actions reveal that the plaintiff's motivation is to "exploit[] the high cost to defend complex litigation to extract . . . nuisance value settlement[s]," that fact should weigh heavily in favor of an award. *See id.* at 1327. This holding is consistent with, and indeed underscored by, the Supreme Court's more recent holding in *Octane* that district courts applying § 285 should "consider[] the totality of the circumstances" in deciding whether to award attorney's fees under § 285, including litigants' "motivation, . . . and the need in particular circumstances to advance considerations of compensation and deterrence." *See* 124 S. Ct. at 1756 & n.6 (quotation marks omitted). This Court should therefore affirm that both *Eon-Net* and the district court's analysis in this case, which relied upon *Eon-Net*, are correct in light of both Supreme Court precedent and public policy considerations.

A. Campaigns of Serial, Meritless Nuisance Suits Impose Significant and Unjustified Costs on Operating Companies.

Meritless patent suits, brought in order to extract nuisance-value settlements, pose a threat to the economy and to the patent system. This threat is magnified by the tendency of certain plaintiffs to bring many such nuisance suits serially, as part of concerted "campaigns" of nuisance litigation. The Court in *Eon-Net* was therefore correct in encouraging district courts to view individual controversies through the lens of plaintiffs' larger litigation practices.

This Court observed in *Eon-Net* that liberal discovery rules provide plaintiffs "the ability to impose disproportionate discovery costs on" accused infringers, thereby "increasing the nuisance value that an accused infringer would be willing to settle for in a patent infringement case." *Eon-Net*, 653 F.3d at 1327. This concern has been echoed by at least one Justice of the Supreme Court. *See Bilski v. Kappos*, 561 U.S. 593, 655 (2010) (Stevens, J., concurring in the judgment) ("Even if a business method patent is ultimately held invalid, patent holders may be able to use it to threaten litigation and to bully competitors, especially those that cannot bear the costs of a drawn out, fact-intensive patent litigation.").[4]

[4] *See also Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 719 (Fed. Cir. 2014) (Mayer, J., concurring) ("The scourge of meritless infringement claims has continued unabated for decades due, in no small measure, to the ease of asserting

Consistent with these warnings, commentators have documented a tendency among certain plaintiffs to bring nuisance suits with the hope of extracting a quick settlement, rather than with any good-faith belief that the patent could be litigated successfully to judgment on the merits. One study of the financial industry, for example, observed that "a plaintiff may rationally initiate a losing suit" if "the defendant has greater costs in litigating disputes or if the defendant's costs are more front-end loaded." Josh Lerner, *The Litigation of Financial Innovations*, 53 J.L. & ECON. 807, 812 (2010). Another study, which focused on technology start-up companies, similarly found that "many small companies settle such claims . . . whatever the merit, because they could not afford to defend them." Colleen Chien, *Startups and Patent Trolls*, 17 STAN. TECH. L. REV. 461, 477 (2014). A third study, based on interviews with plaintiffs' attorneys, identified a class of litigators who build their practice around settlement offers that are a factor of ten or more below the cost of defense. David L. Schwartz, *The Rise of Contingency Fee Representation in Patent Litigation*, 64

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such claims and the enormous sums required to defend against them . . . . Given the staggering costs associated with discovery, '*Markman*' hearings, and trial, it is hardly surprising that accused infringers feel compelled to settle early in the process." (citing *Eon-Net*, 653 F.3d at 1326–1327)); Randall R. Rader, *The State of Patent Litigation*, 21 FED. CIR. B.J. 331, 337 (2012) ("Our courts are already in danger of becoming an intolerably expensive way to protect innovation or prove freedom to operate. These vast expenses can force accused infringers to acquiesce to non-meritorious claims. This only serves as an unhealthy tax on innovation and open competition." (footnote omitted)).

ALA. L. REV. 335, 369–71 (2013). The U.S. Department of Commerce, finally, has observed that "many invalid patents are never challenged" and that "low-quality [patents] can nonetheless be profitably asserted against genuine innovators in litigation," in part due to "the extremely high cost associated with patent litigation." U.S. Dep't of Commerce, *Patent Reform: Unleashing Innovation, Promoting Economic Growth & Producing High-Paying Jobs* 5 (2010).[5]

A critical feature of much patent litigation, including nuisance suits, is that individual lawsuits are often brought as part of larger "campaigns" in which the same or related patents are asserted against multiple defendants. *See generally* RPX Corp., *supra*, at 38 (defining a "campaign" as including "all cases filed by the same plaintiff . . . where each case has at least one patent or family member of a patent in common with another case in the campaign"); *see also* Brief for Askeladden L.L.C. as Amicus Curiae, *Intellectual Ventures I LLC v. Capital One, N.A.*, Nos. 2014-1506, -1515 (Fed. Cir. Oct. 21, 2014), at 3–4 (describing an extensive campaign by one plaintiff targeting numerous banks). The average new campaign initiated by a patent plaintiff in 2014 targeted six different

[5] Empirical research suggests that PAEs are particularly likely to bring meritless suits in order to obtain quick settlements. Suits brought by non-practicing entities are far more rarely litigated to judgment than patent suits as a whole. PricewaterhouseCoopers LLP, *2014 Patent Litigation Study* 2 (2014). Most non-practicing entity cases terminated in 2014 had spent half a year or less on the district court's docket. RPX Corp., *supra*, at 6.

defendants—a number that has increased or remained unchanged in recent years, even as new limits on joinder of parties have dramatically reduced the average number of defendants in each individual lawsuit. *See* RPX Corp., *supra*, at 8.

While not all multi-defendant campaigns are nuisance-suit campaigns, the campaign model of patent litigation lends itself to nuisance suits. Apart from providing quick and easy revenue, nuisance suits can also play a strategic role in an extended litigation campaign: For example, strike suits against small defendants frequently result in "'tiny base, large rate'" licenses that can be used to support a high royalty rate in subsequent suits against larger defendants, and can be offered as objective evidence of nonobviousness. *See* Chien, *supra*, at 467, 477–78; Schwartz, *supra*, at 368–69.[6] Experienced plaintiffs can also streamline the settlement-extraction process by developing a "schedule" of settlement offers that eliminates the need for protracted negotiation, and ensures that each defendant will be presented with a price within its nuisance range. *See Eon-Net*, 653 F.3d at 1327 (describing the use of such a "license fee schedule" in a campaign of nuisance litigation). Litigation campaigns therefore offer nuisance

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[6] This Court has recognized this practice, warning that past licenses are not always probative evidence of nonobviousness "because it is often cheaper to take licenses than to defend infringement suits." *See Iron Grip Barbell Co. v. USA Sports, Inc.*, 392 F.3d 1317, 1324 (Fed. Cir. 2004) (quotation marks omitted).

litigants both leverage and economy of scale.[7]

B. District Courts Should Be Permitted to Consider a Plaintiff's Past Nuisance-Value Settlements in Deciding Whether to Award Attorneys' Fees.

As explained above, the harm that nuisance suits impose is magnified when such suits are brought as part of larger campaigns. At the same time, the fact that bad-faith patent suits often travel in packs provides a powerful tool for identifying such suits: As this Court recognized in *Eon-Net*, nuisance suits can sometimes be recognized by the company they keep. Therefore, district courts should be permitted, and indeed encouraged, to consider a plaintiff's past assertion activity in deciding whether a suit was brought as a nuisance suit.

1. District Courts' Fee-Shifting Authority Is Critical to Combatting Nuisance Litigation.

The fee-shifting provision of 35 U.S.C. § 285 is an important weapon for combatting abusive patent litigation because it places critical powers in the hands of the actor best-positioned to identify abusive litigation, at the best time for identifying such litigation, and in a manner that is equally accessible to all

[7] Nuisance suits also impose unjustified costs on the judicial system. *See Eon-Net*, 653 F.3d at 1327 ("Meritless cases like this one unnecessarily require the district court to engage in excessive claim construction analysis before it is able to see the lack of merit of the patentee's infringement allegations."); *Summit*, 2014 WL 4955689, at *4 ("At best, [Summit's] argument states they were careless in … embarking on a lawsuit spanning several years and costing the parties and the court countless resources.").

defendants.

The Supreme Court and this Court have approved the use of § 285 as a tool for combatting nuisance litigation. In *Octane*, the Supreme Court instructed district courts to "consider[] the totality of the circumstances" when applying § 285, and identified among the relevant "'factors'" the litigants' "'motivation . . . and the need in particular circumstances to advance considerations of compensation and deterrence.'" *Octane*, 134 S. Ct. at 1756 & n.6. This Court's decision in *Eon-Net*, although issued before *Octane*, conforms to that guidance. In *Eon-Net*, this Court warned that "the appetite for licensing revenue cannot overpower a litigant's . . . obligation to file cases reasonably based in law and fact and to litigate those cases in good faith," and held that a § 285 award may be justified where, among other circumstances, the plaintiff "brought th[e] action in bad faith, specifically to extract a nuisance value settlement by exploiting the high cost imposed on [the defendant] to defend against [the plaintiff's] baseless claims." *Eon-Net*, 653 F.3d at 1328. *Eon-Net* thus identified a plaintiff's unchecked "appetite for licensing revenue" as one type of "'motivation'" that may justify a fee award, and prescribed § 285 as a tool for accomplishing both "compensation and deterrence.'" *See Octane,* 134 S. Ct. at 1756 & n.6; *Eon-Net,* 653 F.3d at 1328.

Among the virtues of § 285 as a tool for combating nuisance litigation is that it places the responsibility for identifying such litigation in the right hands, and at the right time. District courts are well qualified to identify abusive litigation and to order fee shifting as a remedy, having "live[d] with the case" since its inception. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014); *Eon-Net*, 653 F.3d at 1324. Unlike legislatures and appellate courts, which may struggle to craft general rules that identify "bad actors" *a priori*, district courts are invested with the discretion to identify these "bad actors" on a case-by-case basis, after the litigation has run its course. *See Octane*, 124 S. Ct. at 1756; Daniel Roth, *Patent Litigation Attorneys' Fees: Shifting from Status to Conduct*, 13 CHI.-KENT J. INTELL. PROP. 257, 259 (2013); *see also* Randall R. Rader, *The State of Patent Litigation*, 21 FED. CIR. B.J. 331, 344 (2012) ("[I]t is difficult to control the troll . . . in advance because [it] cannot really be identified until [its] abuse is already over . . . . The troll . . . only emerge[s] after the case is over . . . .").

Moreover, because patent litigation is heavily concentrated in just a few judicial districts, the judges of those courts are particularly well equipped to identify the exceptional cases in which a plaintiff's "appetite for licensing revenue . . . overpower[s its] obligation to file cases reasonably based in law and fact and to litigate those cases in good faith." *See Eon-Net*, 653 F.3d at 1328. Two districts alone—the Eastern District of Texas and the District of Delaware—

accounted for 45% of new patent suits filed in 2013. *See Patent Cases Rise, With Two Courts Leading the Nation*, Administrative Office of the U.S. Courts (Apr. 21, 2014), http://news.uscourts.gov/patent-cases-rise-two-courts-leading-nation (reporting that these districts accounted, respectively, for 1533 and 1377 of the nation's 6401 new patent suits in 2013).[8] Judges on both courts have endorsed fee shifting as a means for combatting nuisance suits. Judge Davis of the Eastern District of Texas has observed, in the related Rule 11 context:

> [T]his Court has some concerns about plaintiffs who file cases with extremely weak infringement positions in order to settle for less than the cost of defense and have no intention of taking the case to trial. Such a practice is an abuse of the judicial system and threatens the integrity of and respect for the courts. Often in such cases, a plaintiff asserts an overly inflated damages model, seeking hundreds of millions of dollars, and settles for pennies on the dollar, which is far less than the cost of defense. Where it is clear that a case lacks any credible infringement theory and has been brought only to coerce a nuisance value settlement, Rule 11 sanctions are warranted.

Raylon LLC v. Complus Data Innovations, Nos. 6:2009-cv-00355, -00356, -00357, slip op. at *5 (E.D. Tex. Mar. 9, 2011) (denying Rule 11 sanctions), *rev'd*, 700 F.3d 1361 (Fed. Cir. 2012) (reversing denial of Rule 11 sanctions and

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[8] These two districts account for an even higher percentage of non-practicing entity filings—70% of new suits filed in 2014—and are among the five districts that together accounted for over 40% of all judicial decisions involving non-practicing entities between 1995 and 2013 (along with the Northern District of Illinois, the Southern District of New York, and the Northern District of California). *See* RPX Corp., *supra*, at 21; PricewaterhouseCoopers LLP, *supra*, at 18.

remanding for § 285 determination). And in the case under appeal, Judge Sleet of the District of Delaware found that "Summit's practice of extracting settlements worth a fraction of what the case would cost to litigate supports a finding of exceptionality." *Summit*, 2014 WL 4955689, at *4. These opinions represent the type of judicial "experience" that should inform the application of § 285, *Highmark*, 134 S. Ct. at 1749, and confirm that fee shifting is a critical tool for combating nuisance litigation.

Finally, fee shifting is a particularly valuable weapon against nuisance suits because it is equally accessible to large and small defendants. In this regard, fee shifting stands apart from other useful tools for stemming abuse, including administrative post-grant review of patents (which can cost the petitioner hundreds of thousands of dollars, with no prospect for recovering those costs) and limitations on joinder of parties (which can deprive small defendants of the cover provided by a deep-pocketed co-defendant). *See* Chien, *supra*, at 484. Fee shifting, by contrast, rewards the defendant—whether large or small—who stands and fights.

2. Past Nuisance-Value Settlements Are a Reliable Indicator of Bad-Faith Litigation.

The existence of prior settlements for values well below the cost of defense can be ***one*** reliable indicator that a plaintiff has litigated in bad faith, alongside other indicia. *See Eon-Net*, 653 F.3d at 1327–28. Both this Court in *Eon-Net* and the district court in the case under appeal concluded ***first*** that the claims in question were substantively meritless, independent of any past assertion practices. *See id.* at 1326; *Summit*, 2014 WL 4955689, at *4; Summit Br. at 31.[9] Under *Octane*, a particularly meritless legal claim may by itself "sufficiently set [the case] apart from mine-run cases to warrant a fee award." *Octane*, 124 S. Ct. at 1757. Yet in both cases, the courts took the further step of considering whether the claim was also brought in subjective bad faith. *Eon-Net*, 653 F.3d at 1326–27; *Summit*, 2014 WL 4955689, at *4–5.[10] In both cases, the courts inferred from the plaintiff's pattern of extracting settlements for less than the cost of defense that the claims before them had been brought in bad faith. *Eon-Net*, 653 F.3d at 1326–27; *Summit*, 2014 WL 4955689, at *4–5. This factual inquiry into the plaintiff's "'motivation'" is explicitly endorsed by *Octane*, 124 S. Ct. at 1356 n.6, and the factual inference the courts made regarding that motivation is amply supported by the evidence reviewed above regarding the tendency of nuisance suits to be brought as part of larger nuisance-suit campaigns.

Summit counters that such an inference is inappropriate where the plaintiff has extracted settlements from "only a handful" of previous defendants. (Summit

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[9] Summit's assertion that "sometimes even meritorious claims do not justify large settlements" (Summit Br. at 31) is therefore irrelevant, since in each of these cases, the court specifically found that the plaintiff's claims were ***not*** meritorious.

[10] In *Eon-Net*, this additional inquiry was mandated by this Court's pre-*Octane* case law. *Eon-Net*, 653 F.3d at 1324.

Br. at 32.) The district court found that Summit had extracted settlements from at least five defendants—each for a fraction of the median cost of litigating a small patent suit, and for no more than an eighth of the costs that NetApp actually incurred in defending this suit. *See Summit*, 2014 WL 4955689, at *2, *4–5. The absolute number of defendants targeted in Summit's campaign was average for a patent litigation campaign, but the consistency with which Summit settled for nuisance value—or less—strongly suggests that Summit "acted in bad faith by exploiting the high cost to defend complex litigation." *Eon-Net*, 653 F.3d at 1327.

Summit also suggests that "[t]he very existence of *Eon-Net* as precedent provides accused infringers with greater leverage to negotiate lower settlement amounts, which causes more cases to fall within the parameters of *Eon-Net* itself—a vicious circle." (Summit Br. at 33 n.9.) As *Eon-Net* itself noted, however, nuisance-value settlements are often the result not of arms-length negotiation between the parties, but rather of "license fee schedule[s]" developed by plaintiffs. 653 F.3d at 1327. Where this pattern does not hold true, and the previous settlements in fact reflect the fair market value of the patented technology, the plaintiff is the party best positioned to demonstrate this fact to the court.[11]

[11] The district court here found that Summit's licenses were dictated by a "settlement payment schedule" similar to the one at issue in *Eon-Net*. *Summit*,

By urging this Court to overturn *Eon-Net*, Summit Br. at 33 n.9, Summit presumably seeks a *per se* rule barring district courts from considering plaintiffs' past assertion and settlement practices in deciding whether a case is "extraordinary" for purposes of § 285. Such a rule would not only be illogical—it would also be contrary to the Supreme Court's holding in *Octane*, which empowered district courts to "determine whether a case is 'exceptional' in the case-by-case exercise of their discretion, considering the totality of the circumstances," and encouraged them to take into account considerations of "'motivation, . . . compensation[,] and deterrence.'" *Octane*, 124 S. Ct. at 1756 & n.6. The Court should therefore reject this suggestion and reaffirm that past nuisance-value settlements are a highly reliable indicator that a subsequent suit was brought in bad faith.

V. DISMISSAL WITH PREJUDICE DOES NOT FORECLOSE AN AWARD OF FEES UNDER § 285

After already conceding NetApp is a prevailing party for purposes of § 285, Summit asks the Court to reconsider that conclusion. Summit further argues that voluntary dismissal should have foreclosed on a fee award, even if the case is otherwise exceptional. (Summit Br. at 35 n.10, 35–41.) However, Federal Circuit

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2014 WL 4955689, at *4. Even in the absence of an explicit "schedule," however, this Court should defer to district courts' factual determination that past settlements were nuisance-value settlements. *See Highmark*, 134 S. Ct. at 1748 & n.2.

precedent and policy considerations dictate otherwise.

A. NetApp is the prevailing party under Federal Circuit precedent.

Whether a party is a prevailing party under § 285 is a question of substantive patent law. *Highway Equip. Co. v. FECO, Ltd.*, 469 F.3d 1027, 1032 (Fed. Cir. 2006) ("[T]he question of the effect of a dismissal with prejudice on 35 U.S.C. § 285 is a matter of Federal Circuit law."). In *Highway*, the Court held:

> [D]ismissal with prejudice, based on the covenant and granted pursuant to the district court's discretion under Rule 41(a)(2), has the necessary judicial imprimatur to constitute a judicially sanctioned change in the legal relationship of the parties, such that the district court properly could entertain [defendant's] fee claim under 35 U.S.C. § 285.

Id. at 1035; *accord Power Mosfet Technologies, L.L.C. v. Siemens AG*, 378 F.3d 1396, 1416 (Fed. Cir. 2004) ("The dismissal of a claim with prejudice . . . is a judgment on the merits under the law of the Federal Circuit."). In coming to this conclusion, the *Highway* Court examined the Supreme Court's decision in *Buckhannon* and stated, "[T]he critical focus is not on the defendant's voluntary change in conduct, but rather whether there is a 'judicially sanctioned change in the legal relationship of the parties.'" *Highway*, 469 F.3d at 1033 (quoting *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 605 (2001)). While admittedly addressing only § 285 and not the threshold prevailing party question, Summit only offers its voluntary change in conduct as evidence. However, *Highway* and the present case are nearly identical factually: both arose out of Rule 41(a)(2) and occurred after a single judicial decision "against" the ultimate prevailing party. In both, the judicially sanctioned dismissal with prejudice changed the parties' legal relationships, and the Federal Circuit has required nothing more.

A "prevailing party" does not require an intervening decision on the merits. The sole focus of the Supreme Court's test in *Buckhannon* is on the "judicially sanctioned change in the legal relationship of the parties." 532 U.S. at 605. Under it, any intervening decisions or lack thereof are generally irrelevant, and a party can still be the prevailing party even when it loses the only intervening decision on the merits. *Highway*, 469 F.3d 1033–36. Plaintiffs, including Summit, nevertheless continue to argue the import of such facts. (*E.g.*, Summit Br. at 36–37.) For example, in *Highway*, the plaintiff argued that the defendant should be denied fees under § 285 because it "did not receive judicial relief on the merits . . . ." *Highway*, 469 F.3d at 1033. District courts have also denied fees under §285 on this basis, even when finding sufficiently exceptional conduct to warrant fee shifting under their inherent powers. *See, e.g.*, *Parallel Iron LLC v. NetApp Inc.*, No. CV 12-769-RGA, 2014 WL 4540209, at *3 (D. Del. Sept. 12, 2014). The Federal Circuit, however, has rejected this argument and affirmed a defendant's prevailing party status even where the only intervening merits decision went against the defendant. *Highway*, 469 F.3d at 1030, 1033. Because the relevant precedent focuses on the ultimate change in legal relationship, intervening decisions or a lack thereof are not determinative, and any other result artificially limits the reach of § 285.

Highway also applies even where a plaintiff's reasons for dismissal with prejudice are clear. At least one court has distinguished *Highway* on this basis. *Parallel Iron LLC v. NetApp Inc.*, No. CV 12-769-RGA, 2014 WL 4540209, at *3 (D. Del. Sept. 12, 2014) ("[U]nlike in *Highway Equip.*, where there was no reason given for the motion to dismiss, here it is clear that the Stipulation of Dismissal was required as a result of a third-party licensing agreement."). The Federal Circuit in *Highway* analyzed and distinguished *Rice Services, Ltd. v. United States*, 405 F.3d 1017 (Fed. Cir. 2005). In *Rice*, the "voluntary action was taken outside the proceedings, was not designed to be judicially enforceable, and resulted in a dismissal *without* prejudice," all of which followed from the plaintiff's clear explanation. *Highway*, 469 F.3d at 1034 (emphasis added). The *Highway* court contrasted those facts with the ones before it, where the trial court was prompted to dismiss *with prejudice* in part because of the plaintiff's lack of explanation *to the contrary*. *See id.* at 1035. As such, the court's dismissal with prejudice acted to change the parties' legal relationship, and the plaintiff's lack of explanation simply prompted this change. The lack of explanation is thus unimportant ultimately, and a plaintiff can also explicitly state a desire to change the parties' legal relationship by seeking a dismissal *with prejudice*, as was done here.

In short, Federal Circuit precedent has required little to qualify a defendant as a prevailing party. That NetApp is a prevailing party here is no injustice, as that determination merely qualifies NetApp to seek fees under § 285. The substantive "exceptional case" test remains.

B. Voluntary dismissal should not insulate a plaintiff from an adverse award of fees.

Summit argues that voluntarily dismissing its suit in "good faith" protects it against a fee award, even if the case is otherwise exceptional, and that a contrary outcome would lead to protracted litigation. (Summit Br. at 35–39.) In Summit's view, it should escape a fee award as a reward for proper conduct. (*Id.* at 35.) The "reward" for correcting improper conduct, however, is preventing the accrual of additional fees.[12] Any broader rule would provide an escape hatch permitting abusive behavior and vitiate the application of § 285 where it is needed most, leaving defendants with pyrrhic victories in meritless suits.

[12] Moreover, a plaintiff who unreasonably drags litigation out past the point where the meritlessness of its claims becomes apparent exposes both itself and its counsel to even more severe sanctions than an award of fees under § 285. *See* 28 U.S.C. § 1927 (authorizing courts to impose costs on attorneys "who so multipl[y] the proceedings in any case unreasonably and vexatiously"); Fed. R. Civ. P. 11(b)(1),(c)(1) (authorizing sanctions against an attorney or party that files papers "for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation").

Requiring a judgment on the merits would also protract suits without affecting their outcome. Summit argues that “[p]arties should be incentivized to dismiss cases where appropriate” and that allowing fee shifting after voluntary dismissal would cause plaintiffs to instead push toward trial. (Summit Br. at 38–39.) However, in the context of determining whether dismissal with prejudice makes a defendant a prevailing party, the Federal Circuit foresaw the opposite effect:

> To hold that . . . there has been no disposition on the merits would undermine the purpose of Rule 41 to encourage a plaintiff’s voluntary dismissal under such terms as to avoid prejudice. Such a holding would imply that the only way for a defendant to obtain a disposition on the merits would be to oppose a dismissal and proceed to litigation on the merits, and would encourage the litigation of unreasonable or groundless claims.

Highway, 469 F.3d at 1035. This reasoning applies equally here in the context of a voluntary dismissal. Rule 41(a) specifically contemplates preventing prejudice to the parties, which would allow defendants to seek summary judgment. (In fact, here NetApp sought leave to file a motion for summary judgment shortly before dismissal.) But forcing summary judgment would further waste time and resources without any corresponding benefit. Once the activity qualifying the case as exceptional has occurred, the courts should be able to award fees whether the dismissal followed a voluntary dismissal or a summary judgment decision. A contrary decision invites waste and abuse.

Denying any chance of recovery under § 285 after a plaintiff voluntarily dismissed its suit with prejudice would leave defendants nothing but pyrrhic victories in meritless cases. As discussed above, when confronted with a meritless suit, defendants face the dilemma of settling for anything less than the cost of litigation or litigating at great expense. Some plaintiffs have further leveraged the lopsided, upfront costs of discovery with the goal of forcing early settlements while assuming little risk. The possibility of incurring fees under § 285 has the potential to help balance the litigants' positions and discourage meritless suits. However, disallowing a defendant's potential recovery after a voluntary dismissal with prejudice eliminates any chance of balance, especially where the most abusive litigation strategies always end in settlement or dismissal before trial. Such a result is manifestly unjust and would all but force defendants to settle regardless of the underlying merits of the case.

Summit's call for a *per se* rule barring district courts from awarding attorney's fees in the absence of a ruling on the merits is also contrary to binding Supreme Court authority. In *Octane*, the Supreme Court disapproved of non-statutory *per se* rules governing the availability of attorneys' fees, holding that § 285 "imposes one and only one constraint on district courts' discretion to award attorney's fees in patent litigation: The power is reserved for 'exceptional' cases." 124 S. Ct. at 1755–56; *see also id.* at 1756 ("District courts may determine whether a case is 'exceptional' in the case-by-case exercise of their discretion, considering the totality of the circumstances."). Summit argues, troublingly, that dismissal should preclude a fee award "whether or not the case meets the Supreme Court's more liberal test of 'exceptionality.'" (Summit Br. at 37.) This Court should reject Summit's invitation to defy the Supreme Court.

The proper time for a plaintiff to conduct a reasonable investigation into the merit of its claims is ***before*** filing suit. *See Q-Pharma, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1300–03 (Fed. Cir. 2004). Adopting the rule proposed by Summit would give a plaintiff who files a meritless lawsuit one free shot to bring its claim, hope that the defendants will cave to its settlement demands, and if not, drop the case before it can suffer an adverse ruling. Neither precedent nor public policy justifies such a rule.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the judgment of the district court be affirmed.

DATED: April 6, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(c)(7), I hereby certify that the body of this brief, beginning with page 1, and ending with the last line of the Conclusion on page 29, including headings, footnotes, and quotations, complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d). The brief contains 6981 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, in Times New Roman, size 14-point font.

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This is to certify that on April 6, 2015, copies of the foregoing Brief for *Amici Curiae* Askeladden L.L.C., Dell Inc., Huawei Technologies Co., Ltd., Kaspersky Lab, Limelight Networks, Inc., Newegg Inc., QVC, Inc., SAP America, Inc., SAS Institute Inc., Symmetry LLC, and Xilinx, Inc. in Support of Appellee NetApp Inc. was served on counsel for Plaintiff-Appellant Summit Data Systems LLC and counsel for Defendant- Appellee NetApp Inc. via the Court's ECF system and via electronic mail upon the following:

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