Marvell's Opposition to CMU's Motion for Attorney's Fees Pursuant to 35 U.S.C. § 285 [Dkt. 832]

May 1-2, 2013

United States District Court
Western District of Pennsylvania
Civ. No. 2:09-cv-00290-NBF

Marvell Technology Group, Ltd.
Marvell Semiconductor, Inc.

Fee Shifting is Discretionary and Requires at Least a Clear and Convincing Showing of Exceptionality

- Moving party bears the burden of demonstrating by clear and convincing evidence the case is exceptional
  - *Metso Minerals, Inc. v. Powerscreen Int'l Distrib. Ltd.*, 833 F. Supp. 2d 333, 353 (E.D.N.Y. 2011)
- If movant meets this burden, the court, at its discretion, may consider whether it would be equitable to shift fees
  - *Id.*

Attorneys' Fees Are Rare and Require Exceptional Circumstances

- Attorneys' fees are awarded in "limited circumstances" and are "not to become an 'ordinary thing in patent litigation.'"
  - *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 762 F. Supp. 2d 710, 726 (D. Del. 2011) (quoting *Forest Labs., Inc. v. Abbott Labs.*, 339 F.3d 1324, 1329 (Fed. Cir. 2003).
- "'[E]xceptional" is generally defined as 'forming an exception,' 'being out of the ordinary,' 'uncommon' or 'rare.'"
  - *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 372 F. Supp. 2d 833, 848 (E.D. Va. 2005)

Any Marvell Infringement in This Case Was Not Willful

- As demonstrated in:
  - Marvell's motions for judgment as a matter of law and a new trial
    - Dkt. No. 806
  - Marvell's motion for a determination of no willfulness
    - Dkt. Nos. 700, 741
  - Marvell's opposition to CMU's motion for a finding of willfulness and enhanced damages
    - Dkt. No. 833

Setting Aside a Jury's Finding of Willfulness Typically Ends a Claim for Attorneys' Fees

"Given the court's conclusion that plaintiff did not satisfy the objective prong of the willfulness analysis, he cannot rely on the jury's willfulness finding to demonstrate the exceptional nature of this case. . . . The court therefore concludes plaintiff has not established that an award of attorney's fees is warranted."

Voda v. Medtronic Inc., 2012 WL 4470644, at *10 (W.D. Okla. Sept. 27, 2012).

"Accentra heavily relies on the jury's finding of willful infringement . . . to argue that it is entitled to attorney's fees, but the Court has set aside [those finding for lack of objective willfulness], removing willfulness as a basis for a finding the case exceptional."

Accentra Inc. v. Staples, Inc., 851 F. Supp. 2d 1205, 1237 (C.D. Cal. 2011).

A Finding of Willfulness Does Not "Typically Result" in Attorneys' Fees

"[E]ven where willful infringement is proven, a case may or may not, be deemed exceptional under Section 285"

Metso Minerals, Inc. v. Powerscreen Int'l Distrib. Ltd., 833 F. Supp. 2d 333, 352 (E.D.N.Y. 2011).

"With respect to the verdict of willful infringement, although [the jury's willfulness] finding was sustained by the district court, the court declined to enhance damages or award attorney fees, stating that the issues were 'sufficiently close' and the defenses not frivolous. . . . We do not discern abuse of discretion in the court's decision not to enhance damages."

Edwards Lifesciences AG v. CoreValve, Inc., 699 F.3d 1305, 1314 (Fed. Cir. 2012).

A Finding of Willfulness Does Not "Typically Result" in Attorneys' Fees

- The weight of authority clearly and undisputedly points against shifting fees based on willfulness alone
  - *Transclean Corp. v. Bridgewood Servs., Inc.*, 290 F.3d 1364, 1377-79 (Fed. Cir. 2002)
  - *Modine Mfg. Co. v. Allen Grp., Inc.*, 917 F.2d 538, 543 (Fed. Cir. 1990)
  - *Judkins v. HT Window Fashions Corp.*, 704 F. Supp. 2d 470, 483-84 (W.D. Pa. 2010)
  - *Baum Res. & Dev. Co. v. Univ. of Mass.*, No. 1:02-cv-674, 2009 WL 2095982, at *7-8 (W.D. Mich. July 14, 2009)
  - *Cleancut, LLC v. Rug Doctor, Inc.*, No. 2:08-cv-836, 2013 WL 441209, at *4-5 (D. Utah Feb. 5, 2013)
  - *Boston Scientific Corp. v. Cordis Corp.*, 838 F. Supp. 2d 259, 278-79 (D. Del. 2012)

There is No Litigation Misconduct to Provide a Basis For Fee Shifting

- A demonstration of "exceptional" litigation misconduct requires a "strong showing" of "unethical or unprofessional conduct."
  - *Merck & Co., Inc. v. Mylan Pharm., Inc.*, 79 F. Supp. 2d 552, 556-57 (E.D. Pa. 2000).
  - *MarcTec, LLC v. Johnson & Johnson*, 664 F.3d 907, 916, 919-20 (Fed. Cir. 2012) (quoting *Old Reliable Wholesale, Inc. v. Cornell Corp.*, 635 F.3d 539, 549 (Fed. Cir. 2011))
- This misconduct must be "egregious," "flagrant," or "truly unusual."
  - *Metso Minerals*, 833 F. Supp. 2d at 343 (quoting *Cornell Univ. v. Hewlett-Packard Co.*, No. 01 Civ. 1974, 2009 WL 1405208, at *1 (N.D.N.Y. Mar. 15, 2009) (Rader, J., sitting by designation)).

Misconduct for Attorneys' Fees is Akin To That Required For Sanctions

"The exceptional case requirement bears all the hallmarks of a sanction for litigation misconduct."

Samsung Elecs. Co., Ltd. v. Rambus, Inc., 440 F. Supp. 2d 512, 518 (E.D. Va. 2006).

"As none of the bases for sanctions under 35 U.S.C. §285 . . . the award of sanctions under [this provision] must be set aside."

Waymark Corp. v. Porta Sys. Corp., 334 F.3d 1358, 1365 (Fed. Cir. 2003).

Serious Misconduct Is Required For Attorneys' Fees

- **Examples**:
  - Falsified Evidence
    - *Aptix Corp. v. Quickturn Design Sys., Inc.*, 269 F.3d 1369, 1374-75 (Fed. Cir. 2001)
  - Intentional Destruction of Relevant Documents
    - *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1324-26 (Fed. Cir. 2011)
  - Repeated Violations of a Permanent Injunction Order
    - *Beckman Instruments, Inc. v. LKB Producktor AB*, 892 F.2d 1547, 1551-52 (Fed. Cir. 1989)

Marvell Did Not Contradict Its Documents and Testimony

- CMU incorrectly asserts that Marvell contradicted its own internal documents and sworn testimony that the Accused Simulators operated on actual wave forms obtained from real hard disk drives
  - There is no evidence that the simulators use actual readings from the hard disk drives
  - Marvell's witnesses uniformly testified that the Accused Simulators are not connected to hard disk drives and do not have the capability of reading information from hard disk drives

Testimony of Greg Burd

Q. All right. And then, can you show us on the bottom what the simulator section depicts?

A. Yes. And the bottom is an illustration of a simulation environment which we have. So, basically simulation is just a set of codes which run on a computer. So there is no hard disk drive. There is no media. There is no read head. And there is no chip. Right. So everything is simulated.

So for example, we have a special software which simulates or emulates the electrical signal which is coming from the head. And then, this signal is then exposed to the rest of the code, which once again, runs on the computer and emulates the behavior of a read channel system.

12/17/12 Tr. at 135:21-136:4

Testimony of Zining Wu

Q. Now Dr. Wu, I would like to ask you about Marvell's simulators at a high level. Can you explain what a simulator is?

A. Simulator is a piece of software code that runs simulation, that takes a tack file data file in and runs simulation, and generates some results. So, simulator itself is just a piece of software. It's not a detector.

Q. I'm sorry, what?

A. Its a piece of software. It's not a detector.

12/11/12 Tr. at 322:9-17

Testimony of Zining Wu

Q Okay. Now, you understand that simulators -- those are computer programs, right?

A Correct.

Q And they are capable of using actual signals taken from drives, right?

A No, it's not. You have to capture a signal. It's like taking a photo of the people; so if I look at your photo, it's not the same as I look at you right now.

12/12/12 Tr. at 26:16-23

Marvell Did Not Commit Misconduct by Streamlining its Trial Presentation

- CMU incorrectly asserts that Marvell committed misconduct warranting attorneys' fees by dropping certain invalidity arguments preceding trial
  - Upon discovery of facts that Drs. Kavcic and Moura were aware of material prior art references that were not disclosed to the PTO, Marvell promptly moved for leave to amend its Answer. The Court granted this motion.
  - Upon the Federal Circuit's issuance of its opinion in *Therasense, Inc. v. Becton, Dickinson, & Co.*, 649 F.3d 1276 (Fed. Cir. 2011) which made success unlikely for certain inequitable conduct defenses, Marvell elected to no longer pursue these defenses at trial.

Streamlining Issues for Trial Does Not Demonstrate Misconduct

"The mere fact that an issue was pleaded and then dropped prior to trial does not establish in itself vexatious litigation."

Beckman, 892 F.2d at 1551.

Marvell's Witness Correctly Testified That It Was the First to Internally Build an SoC

- CMU incorrectly asserts that Marvell's witnesses falsely testified that Marvell was the first to internally manufacture an SoC
  - Marvell's witnesses testified that Marvell was the first company to build and manufacture internally using its own components.
  - Although Cirrus Logic built a failed SoC using its customers' components, Marvell was the first company to successfully build an SoC and the first company to do so using its own components.
  - CMU elected not to cross examine these Marvell witnesses on these issues to clarify any misapprehensions it had formed about their testimony

Testimony of Senat Sutardja

not -- it will not destroy -- disturb the fidelity of the analog circuitry.

Q Who was the first company that integrated these different functionalities into an SOC or system on a chip?

A We were the first company in the business that were able to build these chips, okay, internally.

Q And what impact, if any, did the fact that Marvell was the first to build an SOC have on the increasing sales of read

12/11/12 Tr. at 52:10-13

Testimony of Senat Sutardja

Q Was the increase in sales that we see with respect to the SOC and read channel chips due to the MNP technology?

A No.

Q Why do you say that?

A The increase of sales is because we were the first one to build the SOC in the world. We -- even today, there's -- our competitors still do not have an SOC using their own hard disk drive controller. They have an SOC using customer's hard drive disk controller, but none of their on controllers yet in production.

12/11/12 Tr. at 167:7-16

Marvell's Conduct Did Not Cause Delay or Waste So As To Rise to the Level of Litigation Misconduct

- CMU incorrectly asserts that Marvell committed misconduct by delaying production of documents or wasting resources
  - Vexatious litigation tactics require bad faith conduct or frivolous pursuit of claim.
    - *Power Integrations*, 762 F. Supp. 2d at 726.
  - Aggressive litigation is not necessarily vexatious litigation
    - *Id.*
  - CMU cites only disagreements and issues that are routine for litigation of this nature and complexity

More Than "Delay" Is Required For Attorneys' Fees

"Some of the more serious accusations leveled by [plaintiff] are that: [defendant] ignored the Court's instruction . . .; [defendant] presented an inappropriate argument regarding the [validity of the asserted patents] during the infringement phase of the trial; [defendant] **disclosed its infringement and invalidity contentions exceedingly late, well past when they were due and not until after the trial had begun**;

The Court is not persuaded that [defendant's] tactics amount to bad faith conduct or frivolous pursuit of claims. Aggressive litigation is not necessarily vexatious litigation."

Power Integrations, 762 F. Supp. 2d at 726.

CMU, Not Marvell, is Guilty of Litigation Misconduct

So what does Marvell do? They ignore this letter. They simply ignore it. They don't write back and say: We don't infringe or we made a mistake and we have your invention in our chips and let us show you our lab notebooks. They do nothing. They also don't get an opinion of counsel. They don't do what their company policy says they should do. Again, they don't get an opinion of counsel. They just ignore it.

MR. MADISON: Your Honor, I object based on the court's order.

THE COURT: Sustained.

MR. MADISON: Ask the Court to strike Mr. Greenswag's comments.

THE COURT: Those last comments are stricken.

12/20/12 Tr. at 142:16-143:1

CMU, Not Marvell, is Guilty of Litigation Misconduct

MR. GREENSWAG: Thank you, Your Honor.

So, I think I've got an analogy to help you as you deliberate. The invention in this case is like your electronic identity, your credit card numbers, your Social Security number. It's that which are very personal and valuable to you. You devote years to building up your reputation, your credit rating, your standing. One day Marvell sneaks in --

MR. MADISON: Objection, Your Honor. It's improper argument again.

12/20/12 Tr. at 167:21-168:2

MR. MADISON: It's not at all like that, Your Honor, and it's improper as a general matter to put the jury in that situation.

THE COURT: I'm going to sustain the objection, I'm going to strike the argument. You cannot put this jury in the, quote, victim's shoes. That's horn book law.

12/20/12 Tr. at 169:12-17

CMU, Not Marvell, is Guilty of Litigation Misconduct

And what Marvell did was they broke the chain of innovation by not paying the royalties that they now owe. All these years CMU should have been getting royalties, as the -- for the purpose as shown in this 1983 agreement, to fund further research, to lead to further innovation, to fund further research, to lead to further innovation. This is why CMU has been damaged by Marvell's infringement.

Don't allow Marvell to break that chain. The actions of Marvell and the steps they took can be summed up --

MR. MADISON: Excuse me, Mr. Greenswag; side bar.

(At side bar.)

THE COURT: Okay, Mr. Madison is going to be reflecting on my prior order you can't dig deep into all of CMU's contributions to society and mankind.

MR. GREENSWAG: I'm not going anywhere near it; I'm going to the chain of innovation --

THE COURT: We've heard that twice.

...

et cetera, et cetera. Admittedly, this is closing argument; but, Mr. Greenswag, enough is enough. I'm going to pull the hook.

12/20/12 Tr. at 149:13-150:16