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VIA ECF

Peter R. Marksteiner
Circuit Executive and Clerk of Court
United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W., Room 401
Washington, D.C. 20439

Re: *Network-1 Technologies, Inc. v. Hewlett-Packard Company, Hewlett Packard Enterprise Company*, Nos. 18-2338 (Lead), -2339, -2395, -2396

Dear Colonel Marksteiner:

In its Rule 28(j) letter, HP asserts that *Windy City* supports HP on estoppel and that the invalidity verdict “should be reinstated.” Letter 2. HP is wrong for four reasons.

First, the Court need not decide estoppel to affirm the no invalidity judgment. HP’s asserted prior art—which was fully presented at trial before the estoppel ruling—lacked two key claim elements and therefore failed as a matter of law. Yellow 33-44. This ground for affirmance is unrelated to estoppel and cannot possibly be impacted by *Windy City*.

Second, just as *Windy City* cannot unwind past IPRs where new issues were joined, it cannot excuse HP’s failure to raise all its arguments back when those new arguments were permitted. Whatever the proper reading of section 315(c) *today*, HP had every opportunity to assert new grounds *back when it sought to join the IPR*. Yellow 46-49. That was the state of the law when HP acted. HP’s decision not to exploit all available options (which indeed *were* available at the time) confirms that estoppel applies.

Third, waiver forecloses HP’s reliance on *Windy City*. “[A]rguments not raised before the district court are waived.” *Martco Ltd. P’ship v. Wellons, Inc.*, 588 F.3d 864, 877 (5th Cir. 2009). Similarly, “arguments not raised in the opening [appellate] brief are waived,” even for *constitutional* infirmities. *Customedia Techs., LLC v. Dish Network Corp.*, 941 F.3d 1174, 1175 (Fed. Cir. 2019). Both waivers apply here. This issue was well known long before HP filed its briefs in this case. If HP wished to argue that section 315(c) precluded “new issues” in “existing proceeding[s]” (Letter 1-2), it had every chance to make that argument in its district-

court and appellate briefing. Instead, HP conceded that “Section 315(c) permits issue joinder” and elected to make different arguments. Red 56 (emphasis added). It is too late now for an about-face.

Fourth, *Windy City* has no bearing on Network-1’s alternative argument for a new trial: A patent cannot be invalidated by inadmissible non-prior art, and the centerpiece of HP’s validity case—the Fisher System—was held to be precisely that. Yellow 52-57.

Respectfully submitted,

/s/ Gregory S. Dovel

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cc: All counsel of record (via ECF)