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November 15, 2019

Peter R. Marksteiner
Clerk of Court
United States Court of Appeals
For the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Re: *Dragon Intellectual Property, LLC v. DISH Network L.L.C.*,
No. 19-1283, 19-1284:
Response of Freitas & Weinberg LLP, Robert E. Freitas, and Jason S. Angell to Defendants-Appellants' Notice of Supplemental Authority

Dear Mr. Marksteiner:

B.E. Technology, L.L.C. v. Facebook, Inc. does not overcome the controlling authority requiring affirmance, and does not support an argument that a party can obtain "prevailing party" status based on success in another forum.

When a case becomes moot on appeal, the judgment under review is vacated, and the underlying case is dismissed as moot. *U.S. v. Munsingwear, Inc*., 340 U.S. 36, 40-41 (1950). The prior judgments were vacated here, and vacatur was not challenged on appeal. "The point of vacatur is to prevent an unreviewable decision 'from spawning any legal consequences,' so that no party is harmed by what we have called a 'preliminary adjudication.'" *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (quoting *Munsingwear*, 340 U.S. at 40). Vacatur and termination for mootness do not "spawn" a "prevailing party."

A litigant does not "prevail" by succeeding in another forum. *B.E.* concluded that the mootness dismissal of a district court proceeding made Facebook a prevailing party. (This is inconsistent with the *Munsingwear* rule, and cannot occur under the governing "prevailing party" standard. *See CRST v.*

E.E.O.C., 136 S. Ct. 1642, 1646 (2016); *Rice Services Ltd. v. U.S.*, 405 F.3d 1017, 1028 n.6 (Fed. Cir. 2005).) The comment in *B.E.* that "mootness decision was made possible by [] winning a battle on the merits before the PTO" was not a holding that winning an administrative proceeding makes a litigant a "prevailing party" in district court. Also, Facebook did not win the administrative proceeding. Facebook's petition was ordered dismissed by this Court when a PTAB decision in favor of Microsoft was affirmed. *B.E. Tech., L.L.C. v. Google, Inc.*, 2016 U.S. App. LEXIS 20591, at *3 (Fed. Cir. Nov. 17, 2016). The Court's comment was not a repudiation of the established law providing that "prevailing" means prevailing in the proceeding in issue. *See Klamath Siskiyou Wildlands Ctr. v. U.S. BLM*, 589 F.3d 1027, 1033-35 (9th Cir. 2009); *Lui v. Comm'n on Adult Entm't Establishments*, 369 F.3d 319, 327-28 (3d Cir. 2004).

When a judgment is vacated and a case terminated for mootness, no "legal consequences" ensue. "Prevailing" means prevailing in district court.

Sincerely,

/s/Robert E. Freitas
Robert E. Freitas
Freitas & Weinberg LLP

Attorneys for Respondents-Appellees
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CERTIFICATE OF SERVICE

It is certified that copies of the foregoing has been served via electronic mail transmission addressed to the persons at the address below:

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