**United States Court of Appeals**
**For the Federal Circuit**

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**TRAXCELL TECHNOLOGIES, LLC,**
*Plaintiff-Appellant*

**v.**

**AT&T INC.,**
*Defendant*

**SPRINT COMMUNICATIONS COMPANY LP, SPRINT SPECTRUM, LP, SPRINT SOLUTIONS, INC., VERIZON WIRELESS PERSONAL COMMUNICATIONS, LP,**
*Defendants-Appellees*

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2023-1246, 2023-1436

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Appeals from the United States District Court for the Eastern District of Texas in No. 2:17-cv-00718-RWS-RSP, 2:17-cv-00719-RWS-RSP, 2:17-cv-00721-RWS-RSP, Judge Robert Schroeder, III.

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CORRECTED PETITION FOR REHEARING EN BANC OF *Plaintiff–Appellant* TRAXCELL TECHNOLOGIES, LLC

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## CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4(a) and Federal Rule of Appellate Procedure 26.1, counsel for Appellant Traxcell Technologies, LLC ("Traxcell") certifies the following:

1. The full name of every party represented by the undersigned is Traxcell Technologies, LLC.

2. None/Not Applicable

3. None/Not Applicable

4. The names of all law firms and the partners or associates that appeared for Traxcell Technologies, LLC in the District Court or are expected to appear in this Court are:

William P. Ramey, III
Ramey LLP

Not expected to appear in the Court for the entities:

John Thomas
Stephen Loftin
Donald Hopkins Mahoney III
Delona Laxton

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal. See Fed. Cir. R. 47. 4(a)(5) and 47.5(b).

1. *Traxcell Technologies, LLC v. Nokia of America Corp. et al.*, 2:18-cv-0412 pending in the Eastern District of Texas.

6. None/Not Applicable

Date: July 28, 2023

/s/ William P. Ramey, III
William P. Ramey, III

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**RULE 35(b) STATEMENT**

Based on my professional judgment, I believe the panel decision found at *Traxcell Techs., LLC v. AT&T Inc.*, No. 2023-1246, 2023 WL 4503520, at *1 (Fed. Cir. July 13, 2023) ("Panel Decision") is contrary to the following decision of the Supreme Court of the United States Supreme Court or the precedent of this Court:

(1) *United States v. Raddatz,* 447 U.S. 667, 674, 100 S. CT. 2406, 2411, 65 L. ED. 2D 424 (1980), concerning the application of Title 28, U.S.C. §636(b), whether a Magistrate's Report & Recommendation is final before the *de novo* determination of a District Court, and consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court's decisions;

(2) *United States v. Cooper*, 135 F.3d 960, 963 (5th Cir. 1998); and,

(3) *Donaldson v. Ducote*, 373 F.3d 622, 624 (5th Cir. 2004);

and,

based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance:

(1) Is a timely objected to Magistrate Judge's Report & Recommendation, not yet adopted or approved by a District Court pursuant to Title 28 U.S.C.

§636(b), a final ruling for purposes of Title 35 U.S.C. §285?[1] Does the reliance on properly filed objections to a Magistrate's Report & Recommendation for maintaining an infringement theory, while also advancing an alternate infringement theory taking into account the Magistrate's Order, illustrate a disregard of the Magistrate Judge's Order for purposes of finding a case exceptional under 35 U.S.C. §285?

(2) Is an objected to Magistrate Ruling, whether by Order or by Report & Recommendation, a final ruling such that a party should know its position is unreasonable before adopted or approved by a District Court?[2]

Date: July 28, 2023

/s/ William P. Ramey, III
William P. Ramey, III

[1] *Cooper,* 135 F.3d at 963.
[2] *Raddatz,* 447 U.S. AT 674, 100 S. CT. AT 2411, 65 L. ED. 2D 424.

# I. ARGUMENT

## A. Statement of the Course of Proceedings

On October 31, 2017, Traxcell Technologies, LLC ("Traxcell") alleged infringement of claims from four patents; United States Patent No. 8,977,284 ("the '284 patent"),[3] United States Patent No. 9,520,320 ("the '320 patent");[4] United States Patent No. 9,642,024 ("the '024 patent")[5] (collectively referred to as the "SON Patents"); and, United States Patent No. 9,549,388 ("the '388 patent" or "Navigation Patent")[6] (collectively "the Asserted Patents") against Appellees. The Asserted Patents are related through a common specification and the SON Patents generally relate to systems and methods for improving communication between wireless communications devices by optimizing radio frequency communications and the '388 patent generally relates to navigation of a wireless device.

On December 11, 2019. the District Court overruled Traxcell's objections filed May 15, 2019[7] to the Magistrate Judge's Report & Recommendation[8] in the related *Huawei* Case ("Huawei R&R"), involving a subset of the Patents-in-Suit,

[3] Appx000118.
[4] Appx000274.
[5] Appx000591.
[6] Appx000274.
[7] Appx007638.
[8] Appx007629.

thereby granting summary judgment on issues that ultimately were dispositive as to Appellees Sprint and Verizon.[9]

Sprint and Verizon moved separately for summary judgment of non-infringement ("Sprint's Motion"[10] and "Verizon's Motions"[11]). On October 7, 2019, Magistrate Judge Payne recommended summary judgment for the *Sprint* Case[12] and the *Verizon* Case[13] and on April 15, 2020, the District Court affirmed Judge Payne for the *Sprint* Case and the *Verizon* Case.[14]

Sprint[15] and Verizon[16] then moved for an award of attorneys' fees under Section 285. Magistrate Judge Payne issued a Memorandum Order awarding fees in the *Sprint* Case[17] and the Verizon Case.[18] Traxcell timely objected to the Memorandum Order in the *Sprint* case[19] and the *Verizon* Case.[20] The District Court issued an Order overruling Traxcell's Objections to the award of attorneys' fees in the *Sprint* Case[21] and the *Verizon*

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[9] Appx000800.
[10] Appx003702.
[11] Appx002264 and Appx010764.
[12] Appx008105.
[13] Appx008088 and Appx008068.
[14] Appx009955.
[15] Appx009978.
[16] Appx010183.
[17] Appx000092.
[18] Appx000103.
[19] Appx010677.
[20] Appx010689.
[21] Appx000115

Case.[22] Appeal was taken and the decision of the District Court was affirmed by a Rule 36 affirmance on July 13, 2023.[23] This petition followed**.**

### B. Argument Why Neither The Sprint Case Nor The Verizon Case Qualifies As "Exceptional"

As a matter of law, neither the *Sprint* Case nor the *Verizon* Case qualifies as "exceptional" within the meaning of 38 U.S.C. § 285. The Panel Decision affirmed under Rule 36 Judge Schroeder's Orders which ordered Traxcell to "pay to Sprint its fees from August 1 to December 31, 2019, which amount to a total of $784,529.16" and to "pay Verizon's attorney's fees from August 1, 2019 through October 31, 2019, which amount to a total of $489,710.00." Judge Schroder, and because of the Rule 36 affirmance, the Panel Decision found both cases "exceptional" on precisely the same basis: "Traxcell continued to pursue theories that it knew or should have known were baseless because, according to the Panel Decision, "Traxcell should have known its patent infringement theories were unsupported when the Court issued its May 15, 2019 report and recommendation on summary judgment in the *Huawei* case (*Traxcell Tech., LLC v. Huawei Tech. USA Inc.*, 2:17-cv-42-RWS-RSP, Report & Recommendation Docket No. 386, adopted

[22] Appx010797.
[23] *Traxcell Techs., LLC v. AT&T Inc.*, No. 2023-1246, 2023 WL 4503520, at *1 (Fed. Cir. July 13, 2023).

Docket No. 411), which involved claim constructions for 'location' and 'first computer.'"

On its face, this reasoning cannot withstand scrutiny. The cited "report and recommendation on summary judgment in the *Huawei* case" was issued on May 15, 2019, well before the August 1, 2019, start of the period for which the Panel Decision found that "Traxcell should have known its patent infringement theories were unsupported." Thus, if that report and recommendation had been **final** — if that document had represented the District Court's **considered judgment** on the relevant patent infringement issues — then Traxcell might reasonably be charged with advancing "baseless" theories and filing "meritless" motions when it litigated the *Sprint* Case and *Verizon* Case in a manner contrary to that report and recommendation.

But as a matter of law, that report and recommendation was **not** final, and it was **not** the considered judgment of the District Court. To the contrary, it is well-established by the United States Supreme Court that the recommendation of a Magistrate Judge is not a final decision and does not in any way dispose of a party's claims. Rather, for dispositive motions like the motion for summary judgment in the *Huawei* Case, a "party dissatisfied with a Magistrate Judge's decision may instead obtain- relief by objecting to the Magistrate Judge's Findings and Recommendations, thereby compelling the District Court to review his objections

*de novo*." Traxcell did just that in the *Huawei* Case, and Judge Schroeder did not resolve Traxcell's objection until **December 11, 2019**. No judge has suggested that Traxcell advanced baseless theories or filed meritless motions after that date. Indeed, both the *Sprint* Case and *Verizon* Case were stayed on October 8, 2019, and so Sprint and Verizon incurred **none** of their awarded fees after December 11, 2019.

During oral argument before the Panel of this Court, at 22 minutes and seven seconds, Judge Hughes provided that "… Judge Payne is not some brand new Magistrate he's been around since well before I got on this court you know that." Appellant agrees that Judge Payne is highly experienced.[24] However, the experience of the Magistrate Judge is not a factor under §636(b). It is black letter law that a Magistrate's Ruling is not final until approved by a District Court.[25] It was error for the Panel Decision to base its fee award *entirely* upon rulings that were not final. The Rule 36 affirmance unfortunately is likely to discourage further review. However, further review *en banc* is necessary because the Panel Decision eviscerates the statutory authority allowing review of a Magistrate Judge's Ruling. Under the Panel Decision's reasoning, a Magistrate Judge's Ruling that is properly objected to can serve as the basis of a §285 fee award without more, without the review afforded

[24] In fact, one of the more difficult parts of these cases is maintaining objections and being told by a judge that is greatly respected that his orders are being ignored. Appellant only sought a ruling on the objections and never meant any disrespect.
[25] *See id.*

by statute. The Panel Decision is not saved by providing that other factors also made the case exceptional as each of those other all occurred after Traxcell filed its timely objections.

The attorney fee orders should be reversed.

### C. There Was No Final Order In The Related Huawei Case Until December 11, 2019

The Issues Presented in this Petition can be reduced to whether a Magistrate Judge's Order is final before pending objections are ruled upon by a District Court and whether a party's reliance on its pending objections to maintain an infringement theory can make a case exceptional when alternate infringement theories are advanced that take into account the Magistrate Court's ruling. While a district court is afforded discretion in awarding fees under 35 U.S.C. §285, that discretion is not unlimited and should be based on whether the District Court's decision commits legal error or is based on a clearly erroneous assessment of the evidence.[26] Here, the District Court stated, and the Panel Decision wholly approved, that it based its decision to award fees because "Traxcell continued to pursue theories that it knew or should have known were baseless. It filed meritless motions [and argued/, constantly reurging] positions that had already been rejected. Traxcell's conduct, when viewed considering the totality of the circumstances, renders this case

[26] *Highmark Inc.,* 572 U.S. at 1748 n.2.

exceptional under 35 U.S.C. § 285."[27] However, the District Court did not make the *Huawei* Case final until December 11, 2019, when it ruled on Traxcell's properly filed objections. How could Traxcell be charged with knowing any of its positions were baseless until a ruling from the District Court? Section 636(b)(1) provides none.

### D. The Panel Decision Awarded Attorneys' Fees For a Period of Time When There Was no Final Order.

This case is only out of the ordinary because there were no final rulings on any motion until after summary judgment was recommended by Magistrate Judge Payne in the *Sprint* Case and *Verizon* Case,[28] and after the case was stayed.[29] A Section 285 award of attorneys' fees is supposed to be for those rare cases that stand out from the rest due to a party's unreasonable conduct or exceptionally weak case.[30] The lack of district court action on Traxcell's objections through the recommendation to grant summary judgment[31] put Traxcell in a position of having to choose between dismissing its entire case while it had properly asserted objections outstanding or continuing the litigation. Traxcell chose to continue the litigation by

[27] Appx010797 at 3; Appx000115 at 3.
[28] Appx008068, Appx008088 and Appx008105.
[29] Appx008145.
[30] *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 555, 134 S. Ct. 1749, 1756–57, 188 L. Ed. 2d 816 (2014)
[31] Appx008105.

advancing an alternate infringement theory that took into account the Magistrate Court's Orders and maintaining its original infringement theories subject to its objections, which seems reasonable as a Magistrate's Recommendation "does not ***in any way*** 'dispose of' a party's claims."[32]

Magistrate Judge Payne ordered Traxcell to pay Sprint its attorneys' fees from August 1, 2019 to December 31, 2019 ("Attorneys' Fee Award Period") pursuant to 35 U.S.C. §285, which Judge Payne explained was after July 22, 2019, the date the Court determined that the case became exceptional.[33] However, the July 22, 2019 Order from Judge Payne did not become final until April 15, 2020, the date the District Court overruled the objections to the report & recommendation and denied as moot all other relief sought.[34] Further, the Attorneys' Fee Award Period includes time after Judge Payne stayed the case on October 8, 2019.[35] Thus, there should have been no litigation activity and no fees incurred after October 8, 2019, as the case was stayed.

Judge's Payne's Memorandum Order found Traxcell's litigation conduct was exceptional after he denied Traxcell's Motion to Supplement its infringement

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[32] *United States v. Cooper,* 135 F.3d 960, 963 (5th Cir.1998) (discussing the general grant of authority to magistrate judges when a case is referred under 28 U.S.C. § 636(b) (emphasis added)).
[33] Appx002035 at 11.
[34] Appx009954.
[35] Appx008145.

contentions and assert infringement under the doctrine of equivalents.[36] However, Judge Schroeder both adopted Judge Payne's Memorandum Order[37] and appears to change the event that allegedly caused Traxcell's case to become exceptional to when Judge Payne issued his Report and Recommendation that summary judgment be granted in the *Huawei* Case.[38] However, Judge Schroeder did not overrule Traxcell's objections and adopt Judge Payne's Report & Recommendation in the *Huawei* case until December 11, 2019 which was after summary judgment was recommended[39] and the case stayed.[40] As such, there was no order overruling Traxcell's objections during the pendency of the *Sprint* Case or the *Verizon* Case. While often creating severe lag times[41] in final rulings,[42] until a District Court rules on objections, a Magistrate's Ruling is not final.

In fact, this is a well-established rule, that a Magistrate Judge's order is not "final"….[43] "The recommendation of Magistrate Judge is not a final decision and does not ***in any way*** 'dispose of' a

[36] Appx000092 at 11.
[37] Appx000115 at 43.
[38] Appx000115 at 3; Appx0101797 at 3.
[39] Appx008105; Appx008088; Appx008068.
[40] Appx008145.
[41] The lag times in the present case caused hardship on the parties as there were no final rulings.
42 Traxcell fully appreciates that FRCP, Rule 72 creates expense for both plaintiffs and defendants.
[43] *Donaldson v. Ducote*, 373 F.3d 622, 624 (5th Cir. 2004).

party's claims."[44] A dissatisfied party may obtain relief by objecting to the Magistrate Judge's findings and recommendations, thereby compelling the District Court to review his objections *de novo*.[45] Stated another way, a Magistrate Judge's Order only becomes final once the District Court makes it final.[46] This is exactly what Traxcell did, it filed objections. Therefore, as Traxcell objected to Judge Payne's Order Recommending Summary Judgment in the *Huawei* case, there was no disposition of any of Traxcell's claims until Judge Schroeder ruled on the objections on December 11, 2019[47] and no final claim construction rulings until at least October 9, 2019 when Judge Schroeder overruled Traxcell's objections to the claim construction order.[48] As such, as there were no final orders until after the case was stayed, it belies belief that Traxcell was unreasonable in maintaining its infringement theories in the *Sprint* Case or *Verizon* Case, subject to its objections.

The objections to Judge Payne's identified event for when Traxcell should have known it had no case, the ruling on the Motion to Supplement and Assert Infringement under the Doctrine of Equivalents, was not made final by the District

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[44] *United States v. Cooper,* 135 F.3d 960, 963 (5th Cir.1998) (discussing the general grant of authority to magistrate judges when a case is referred under 28 U.S.C. § 636(b) (emphasis added)).
[45] *See* 28 U.S.C. § 636(b)(1)(C); *cf.* FED.R.CIV.P. 72(b).
[46] *See Stripling v. Jordan Prod. Co.,* 234 F.3d 863, 868 (5th Cir.2000).
[47] Appx000800.
[48] Appx008146.-

Court until April 15, 2020, which is six months after Report & Recommendation for summary judgment in the *Sprint* Case[49] and the *Verizon* Case.[50] Thus, regardless of all else, Traxcell did not have a final ruling on any of the events that were identified by the Court as being the point in which Traxcell should have known it did not have a case. How can orders that are not final serve as the basis for finding a case exceptional in this specific factual scenario?[51]

Factually there were no orders from the District Court affirming or overruling Traxcell's objections and legally the Magistrate Judge's orders were not final. While Section 285 gives discretion to a District Court to award fees, this Court should correct such an obvious misapprehension of the facts and misapplication of the law. To not do so would make a Magistrate Judge the equivalent of a District Court Judge and render 28 U.S.C. § 636(b), and the accompanying Rule 72 of the Federal Rules of Civil Procedure, unnecessary. Such a result seems absurd. Traxcell fully agrees that the facts of this case are voluminous, but there were no final orders. Either 28 U.S.C. § 636(b) means something or it does not.

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[49] Appx008105.
[50] Appx008164.
[51] While Traxcell could have moved to stay the case, Sprint likewise could have moved to stay the case. Neither did and rather performed under the scheduling order in the case. As both parties could have stayed the case, Traxcell not moving to stay the case, should not serve as a consideration for a finding of exceptionality, as both parties would share equal blame.

There is no allegation that Traxcell litigated vexatiously, rather, Sprint had to engage in litigation, including responding to Motions,[52] filing summary judgment motions and challenging expert opinions,[53] engaging in fact and expert discovery,[54] and preparing for trial.[55] These are all expenses that would be expected in a normal litigation. None of this expense is out of the ordinary. In fact, much of this expense was incurred because Sprint opposed Plaintiff's motions and requested relief at every turn. Moreover, Sprint could have moved to stay the case but did not. Likewise, Verizon's arguments in its Motion for Fees are based on Traxcell's maintenance of its positions from the Objected to Magistrate Orders.[56]

## III. CONCLUSION AND RELIEF SOUGHT

Traxcell Technologies, LLC seeks a reversal and rendering that the case is not exceptional through an *en banc* rehearing. Section 285 has grown to a point where it needs some control if it renders 28 U.S.C. §636(b)(1) irrelevant.

Date: July 28, 2023

Respectfully submitted,

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[52] Appx009976 at 6-7.
[53] Appx009976at 6-7.
[54] Appx009976 at 6-7.
[55] Appx009976 at 6-7.
[56] Appx010183 at 7-11.

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**ATTORNEYS FOR TRAXCELL TECHNOLOGIES, LLC**

## CERTIFICATE OF SERVICE

I certify that I served a copy on counsel of record on July 28, 2023, by electronic means (by email or CM/ECF).

By: /s/ William P. Ramey, III
William P. Ramey, III

## CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(B)

The undersigned counsel of records for Defendants-Appellants, Traxcell Technologies, LLC, certifies that this Principal Brief of Defendants-Appellants complies with the typeface requirement provided in Rule 32(a)(5) and type-volume limitation provided in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. In preparing this certificate, I relied on word-count program of Microsoft Word 2023. This Brief contains 2905 words.

Dated: July 28, 2023 By: /s/ William P. Ramey, III
William P. Ramey, III