2021 – 2049; 2024 – 1084; 2024 – 1159

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PAUL E. ARLTON AND DAVID J. ARLTON,

Plaintiffs-Appellants

v.

AEROVIRONMENT, INC.,

Defendant-Cross-Appellant

Appeals from the United States District Court for the
Central District of California in
Case No. 2:20-cv-07438-AB-GJS, Judge Andre Birotte, Jr.

CORRECTED, DEFENDANT-CROSS-APPELLANT AEROVIRONMENT'S REPLY BRIEF

Dated: September 17, 2024

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 21-2049; 24-1084; 24-1159

Short Case Caption Arlton v. Aerovironment, Inc.

Filing Party/Entity AeroVironment, Inc.

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INTRODUCTION

This is a quintessential example of an exceptional case where the need for deterrence warrants the award of attorneys' fees. Time and again, the Arltons' conduct demonstrates that they believe the rules do not apply to them. Regardless of what Section 1498 and this Court's precedents unequivocally provide, they insist on continuing to litigate in the wrong court against the wrong litigant. They multiply the proceedings through unauthorized motions and ill-considered sur-replies. And, above all else, they steadfastly refuse to accept that the Government can exercise its eminent domain power and authorize and consent to infringement of their patent at any time—including during the pendency of this appeal.

Indeed, the Arltons have reinforced that this is an exceptional case through their conduct in prosecuting this appeal. For instance, Federal Rule of Appellate Procedure 29(a)(2) explicitly authorizes the United States to "file an amicus brief without the consent of the parties or leave of court." Fed. R. App. P. 29(a)(2). Yet, when the United States filed an amicus brief, the Arltons immediately informed the parties of their intent to move to strike the United States's amicus brief. The United States alerted the Arltons to the fact that their motion to strike was prohibited by Federal Circuit Rule 27(e), Appellants' Non-Confidential Motion to Strike in Part the Brief for United States as *Amicus* Curiae, ECF No. 33-2, but the Arltons filed their motion anyway, requiring the United States and the Court to address the

Arltons' procedurally-barred motion. ECF No. 29. Unsurprisingly, the Court denied the motion to strike. ECF No. 34.

Similarly, this Court's rules prohibit using the reply brief on a cross-appeal to subvert the word limits that ordinarily apply to the Appellant's reply brief. *See* Practice Notes to Fed. Cir. R. 28.1 ("In the third brief, moreover, the reply argument on the appeal issues should not exceed the length that would be permitted if there were no cross-appeal."). The Arltons, however, disregarded this rule and filed a sixty-eight-page response and reply brief, of which only nine pages addressed cross-appeal issues. By AeroVironment's estimation, the material specifically addressing the Arltons' appeal issues exceeds 10,000 words—nearly half-again the 7,000 word limit typically applicable to reply briefs. *See* Fed. Cir. R. 32(b)(1).

The Arltons have shown that nothing short of a fee award will deter them. For the reasons stated below and in AeroVironment's principal brief, ECF No. 26, the District Court's decision to deny AeroVironment's motion for attorneys' fees should be reversed.

ARGUMENT

Under the standard set forth in *Octane Fitness*, a district court is to determine whether a case is "exceptional" under 35 U.S.C. § 285 by "considering the totality of the circumstances." *Octane Fitness, LLC v. ICON Health & Fitness*, *Inc.*, 572 U.S. 545, 554 (2014). The Arltons argue that the District Court correctly recited this

standard. But reciting the correct legal standard is not enough; the District Court has to actually apply it. The record demonstrates that the District Court instead considered the Arltons' conduct and litigation position in isolation, rather than evaluating the totality of the circumstances. The Arltons repeated this error in their response and reply brief, defending the District Court's individual assessments rather than defending their conduct as a whole. ECF No. 38. When considered as a whole, however, the record shows that this is an exceptional case for the reasons explained in AeroVironment's principal brief.

In addition, the Arltons argue that the Court should ignore the policy considerations underlying Section 1498. As the Supreme Court emphasized in *Octane Fitness*, however, "[t]here is no precise rule or formula for making these determinations." 572 U.S. at 554 (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994)). Section 1498 is intended not only to shield contractors from liability, but also "to relieve private Government contractors from expensive litigation with patentees." *Astornet Techs. Inc. v. BAE Sys., Inc.*, 802 F.3d 1271, 1277 (Fed. Cir. 2015) (quoting *TVI Energy Corp. v. Blane*, 806 F.2d 1057, 1059-60 (Fed. Cir. 1986)). This protects the Government's interest in ensuring that contractors will not avoid doing business with the federal government out of a concern that they will be "exposed to expensive litigation." *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 342-43 (1928). Contrary to the Arltons' assertions otherwise, these

policy considerations are clearly relevant to the deterrence rational for fee-shifting under Section 285.

Finally, the Arltons argue that they have not waived their challenge to the reasonableness of AeroVironment's fee request because they made generalized objections to the amount of fees. This is insufficient. To preserve a challenge to the amount of fees, the Arltons needed to present "evidence challenging the accuracy and reasonableness of the hours charged." *Blum v. Stenson*, 465 U.S. 886, 892 n.5 (1984). Because they failed to do so below, they have waived their ability to challenge the reasonableness of AeroVironment's fee request.

I. The District Court Failed To Consider The Totality Of The Circumstances.

The Arltons argue that the "mere fact that the district court used exemplars of the conduct it evaluated and did not detail in its opinion the assessment of every fact it weighed is not a basis to conclude that it did not consider the totality of the circumstances." ECF No. 38 at 56. While it is true that the "failure to explicitly discuss every issue or every piece of evidence does not alone establish that the [district court] did not consider it," *Novartis AG v. Torrent Pharms. Ltd.*, 853 F.3d 1316, 1328 (Fed. Cir. 2017), that is not AeroVironment's position. Rather, AeroVironment contends that the record as a whole demonstrates that this case is exceptional and that the District Court only reached a contrary conclusion by considering the Arltons' conduct piecemeal. ECF No. 26 at 61-66.

Moreover, the fact that the District Court recited the correct legal standard does not shield its decision from scrutiny, as the Arltons seem to suggest. ECF No. 38 at 55-56. "When determining whether a court committed legal error in selecting the appropriate legal standard, [the reviewing court] determine[s] which legal standard the tribunal applied, not which standard it recited." *Dell Fed. Sys., L.P. v. United States*, 906 F.3d 982, 992 (Fed. Cir. 2018); *see also United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 577 (1985)) (en banc) (A trial court abuses its discretion where it identifies the correct legal standard but "the trial court's application of the correct legal standard was (1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'").

Citing *Stone Basket Innovations, LLC v. Cook Medical LLC*, 892 F.3d 1175, 1181 (Fed. Cir. 2018), the Arltons also argue that "AeroVironment's own conduct," justifies the District Court's decision to deny fees. ECF No. 38 at 57-58. This argument is meritless. In *Stone Basket*, this Court explained that an accused infringer's "failure to provide early, focused, and supported notice of its belief that it was being subjected to exceptional litigation behavior" is a "factor" that a district court may consider under the totality of the circumstances in making an exceptionality determination. *Id.*; *see also Thermolife Int'l LLC v. GNC Corp.*, 922 F.3d 1347, 1358 (Fed. Cir. 2019) ("We have held that the lack of the early notice

described in *Stone Basket* can support a denial of attorney's fees, and that the presence of such notice, followed by continuation of litigation, can be a factor in justifying an award of attorney's fees.") (citations omitted).

Unlike the movant in *Stone Basket*, and consistent with *Thermolife*, AeroVironment notified the Arltons early on that it considered their conduct exceptional and repeatedly reiterated its position throughout the proceedings. Appx872-873, Appx884-892. Indeed, in their response to AeroVironment's repeated warnings, the Arltons acknowledged that AeroVironment had repeatedly alerted them of its intent to seek attorneys' fees, but boldly asserted that "the Arltons w[ould] not go away based on AeroVironment's mere say-so that everything they do is government sanctioned, especially not in the face of such egregious infringement." Appx881-882. Of course, it was not "AeroVironment's mere say-so" that it was operating with the Government's authorization and consent to any infringement, but rather the express language of the contracts, which AeroVironment provided to the Arltons, and which they apparently decided to ignore. Appx881-882. Indeed, the Arltons refused to alter course even after the Government itself intervened to confirm its authorization and consent by filing a statement of interest below and an amicus brief in this court.

The Arltons also ignored multiple, additional opportunities to course-correct. For instance, on February 3, 2021, AeroVironment again informed the Arltons "that

AeroVironment intends to seek its attorneys' fees given the exceptional nature of this case" and "that AeroVironment's attorney expense is going to increase markedly due to briefing summary judgment and this discovery dispute." Appx892. Thus, "if the Arltons wish[ed] to explore a negotiated settlement to this case," AeroVironment asked that they "make an appropriate offer no later than the close of business of Tuesday, February 9, 2021, before AeroVironment incurs significant additional expense," otherwise, AeroVironment "plan[ned] to file our summary judgment motion with the Court by February 12, 2021." *Id.* The Arltons' counsel responded, acknowledging that AeroVironment intended to seek its fees in this case, but insisting that the case move forward. Appx894-897. AeroVironment filed its motion on February 16, 2021, presenting the exact argument that it had repeatedly previewed to the Arltons from the beginning of the case.

Moreover, the District Court offered no reasoning to support its statement that "'Terry' . . . should have been disclosed to Plaintiffs" during initial discovery. Appx21. The Arltons' complaint accused a single product—Ingenuity—of infringement, and the manufacture and use of Ingenuity was clearly immunized by Section 1498. The Arltons' complaint did not identify Terry—nor could it, as Terry was not completed until April 11, 2021, after the summary judgment hearing. Appx796-799.

Despite the narrowness of their complaint, the Arltons served sweeping discovery requests that asked for discovery regarding the "accused product," which they initially defined as "any products consisting of or incorporating the technology of the '763 patent." The Arltons later broadened its requests to include not only products that use a non-rotating main mast as claimed in the '763 patent, but also any "equivalent non-rotating structure." Appx426, Appx481. AeroVironment objected to the Arltons' definition of "accused product" as overbroad and disproportionate to the claims and defenses in the case, consistent with this Court's instruction that plaintiffs should not be permitted to "conduct 'fishing expeditions' in hopes of finding products that might be infringing to oppose summary judgment." *Moore U.S.A., Inc. v. Standard Reg. Co.*, 229 F.3d 1091, 1116 (Fed. Cir. 2000) (cleaned up).

In short, the District Court reversibly erred in failing to consider the totality of the circumstances in its decision to deny fees under Section 285. Because the District Court did not correctly apply the relevant legal standard, the court's denial of fees was an abuse of discretion.

II. The Totality Of Circumstances Shows That This Case Is Exceptional Under Section 285.

The Arltons contend that AeroVironment asks this Court to reweigh the evidence it presented to the District Court. Not so. Rather, AeroVironment argues that the District Court failed to consider the totality of circumstances surrounding

the Arltons' conduct in this case, and that when the evidence is considered in its totality, it compels the conclusion that this case is exceptional. The Arltons' arguments to the contrary are unavailing.

First, the Arltons argue that the arguments in this appeal "make clear the question presented by the Arltons is not simply whether the Government consented to AeroVironment's infringement but whether such consent could be properly given in view of the Government's contractual and statutory obligations pursuant to the SBIR statute." ECF No. 38 at 61. Despite the District Court's statements about the Arltons' "compelling case" and efforts to distinguish caselaw, however, the Arltons' SBIR argument is objectively meritless, as the Court can determine for itself without deferring to the District Court's legal assessments.

Next, the Arltons argue that "the timeline of the disclosures regarding the Government's consent affirmatively demonstrate that the Arltons litigated reasonably," arguing that the Ingenuity subcontracts were not produced immediately after the case was filed and that the United States did not file its Statement of Interest until February 17, 2021. ECF No. 38 at 61 n. 20.

The record belies this argument, as the Arltons refused to desist in advancing their meritless position even after receiving the subcontracts and the Government's statement of interest, both of which unequivocally confirmed the Government's authorization and consent. Whatever basis existed for the Arltons to file suit in the

first instance (and AeroVironment maintains that there was none) evaporated with the filing of the Government's statement of interest. Yet, the Arltons have continued to litigate regardless of the explicit authorization and consent provided multiple times over by the United States.

The Arltons also assert that AeroVironment's statement "that the Arltons' summary judgment opposition argument was 'a previously-undisclosed theory'" is astounding given that AeroVironment, in violation of the relevant local rule, never sought to meet and confer with the Arltons before filing its motion for summary judgment. Appx335 at n.6. This issue was not raised below, so it is waived. It is also incorrect. AeroVironment met and conferred with the Arltons on its intended summary judgment motion during the Parties' initial Rule 23(f) conference and included a statement indicating its intent to seek early summary judgment in the Parties' Joint Rule 26(f) Report. Appx108-127. The Arltons likewise included a statement explaining their opposition to early summary judgment in the Joint Rule 26(f) Report. *Id.* The Court issued a scheduling order explicitly authorizing AeroVironment's motion. Appx729-743.

The Arltons argue that they were "forced to seek leave to file a sur-reply because AeroVironment introduced several inaccuracies into the record in its reply brief" regarding the *Lite Machines Corp. v. United States*, 143 Fed. Cl. 267 (2019), decision. ECF No. 38 at 63. In reality, it was the Arltons' decision not to address

their own case in their summary judgment opposition brief that necessitated their sur-reply. The fact that AeroVironment brought this clearly relevant authority to the District Court's attention did not justify the Arltons' sur-reply.

Moreover, while the Arltons take issue with AeroVironment's characterization of the Arltons' decision to intentionally conceal the *Lite Machines* decision from the District Court, ECF No. 38 at 63 n.22, the record is clear that the Arltons knew of this plainly relevant authority and made an intentional decision not to cite it in their summary judgment opposition brief. Indeed, the Arltons admit in their appellate briefs that they "refrained from discussing, mentioning, or referring [the district court] to the [*Lite Machines*] matter, to avoid any confusion about their compliance with security protocols." *Id.* The Arltons' admission that the *Lite Machines* decision is publicly available undermines their excuse.

The Arltons' attempt to defend their lack of diligence in researching the legal principles applicable to Section 1498 immunity is similarly unavailing. In fact, they concede that they "truthfully responded to the district court's question regarding whether the timing of the Government's consent mattered for purposes of the application of Section 1498 and their request for discovery," admitting that they "[had]n't researched that from a legal matter." ECF No. 38 at 65 (citing Appx752). Instead, they argue "that question is irrelevant." Not only is this argument wrong, but it also demonstrates why this case is exceptional.

For the last fifty years, this Court has consistently and unequivocally held that the Government may grant authorization and consent *at any time*. *See Hughes Aircraft Co. v. United States*, 534 F.2d 889, 901 (Ct. Cl. 1976); *Advanced Software Design Corp. v. Fed. Rsrv. Bank*, 583 F.3d 1371, 1377-78 (Fed. Cir. 2009). Accordingly, the Government's statement of interest confirming that it authorized and consented to any alleged infringement connected to Ingenuity conclusively resolved any question of whether the Arltons could continue to litigate their patent claims against AeroVironment in the Central District of California.

Yet, the Arltons still press on, seeking to "set the historical record straight," ECF No. 38 at 4-5, despite the fact that correction of the historical record is not a remedy for patent infringement. The Arltons' continued insistence on litigating in the wrong court and against the wrong party, despite the plain authorization and consent of the United States, all the while simultaneously seeking their exclusive remedy for the same alleged wrongdoing in the right court against the right party, makes this case exceptional.

III. The Arltons Fail To Show Why The Court Should Be Precluded From Considering The Underlying Purpose Of Section 1498 In Assessing Whether An Award Of Fees Is Appropriate.

The Arltons argue that the "underlying purpose of Section 1498 does not render this case exceptional," and that "the policy objectives behind Section 1498 . . . cannot convert every case where a defendant successfully asserts that statute as

an affirmative defense into an exceptional one." ECF No. 38 at 58. AeroVironment does not argue that *every* successful Section 1498 defense merits an award of attorneys' fees under 35 U.S.C. § 285; rather, AeroVironment contends that the policy objectives underlying Section 1498 are one factor to be considered as part of the totality of circumstances that merits an award of fees in *this* case.

As the Supreme Court emphasized in *Octane Fitness*, "[t]here is no precise rule or formula for making these determinations." 572 U.S. at 554 (quoting *Fogerty,* 510 U.S. at 534). One of the factors that should be considered in determining whether a case is exceptional, however, is the "need in particular circumstances to advance considerations of compensation and deterrence." *Id.* at n.19.

Section 1498's goal of deterring opportunistic lawsuits against federal contractors dovetails with Section 285's goal of deterring frivolous suits. The Arltons offer no reason why those goals should not be considered in tandem as part of the totality of circumstances warranting an award of fees here.

The Arltons speculate that "AeroVironment's subcontracts appear to indemnify AeroVironment against all patent-related legal expenses," and therefore, it is "not even apparent that AeroVironment has any unreimbursed legal expenses at all." ECF No. 38 at 58-59. The Arltons did not raise this argument below, and it is therefore waived. Had the issued been raised, AeroVironment could have introduced evidence showing that none of its legal fees have been reimbursed by the

Government, or anyone else, and that it has borne 100% of the cost of its defense of the Arltons' ill-conceived infringement suit.

Moreover, the contract provisions that the Arltons cite do not provide for indemnification. Rather, the prime contract between NASA and the California Institute of Technology for operating the Jet Propulsion Laboratory provides that Caltech's litigation expenses are allowable costs under the prime contract. Appx163. The prime contract, however, does not require this provision to be flowed down to subcontractors, and AeroVironment's subcontracts do not include any provision for making litigation expenses reimbursable under those subcontracts. Appx163, Appx169.

Even if the Government were indemnifying AeroVironment against the Arltons' claims, it would not help the Arltons' cause. Courts have held in analogous circumstances that the recovery of attorneys' fees can include fees that the prevailing party is not legally obligated to pay. *See Hitkansut LLC v. United States*, 142 Fed. Cl. 341, 355 (2019), *aff'd*, 958 F.3d 1162 (Fed. Cir. 2020) ("[U]nder 28 U.S.C. § 1498(a), the patent owner's costs consist of attorneys' fees that the owner may not be legally obligated to pay."). Moreover, the Arltons do not explain why the Government should pay twice to defend against the Arltons' infringement claims as a result of their insistence on litigating this case in the wrong court.

IV. The Arltons Have Waived Any Challenge To The Reasonableness Of AeroVironment's Requested Fees.

The Arltons contend that they have not waived their challenge to the reasonableness of AeroVironment's fee request because they "have challenged entire swaths of AeroVironment's litigation costs as unreasonable." ECF No. 38 at 66. That, however, is exactly the problem: the Arltons have "made only generalized objections to the amount of the fees awarded, without any 'evidence challenging the accuracy and reasonableness of the hours charged.'" *Martinez v. Roscoe*, 100 F.3d 121, 124 (10th Cir. 1996) (quoting *Blum*, 465 U.S. at 892 n.5). Therefore, they have waived their right to challenge the reasonableness of the incurred fees. *Id.*

CONCLUSION

For the foregoing reasons, and the reasons stated in AeroVironment's principal brief, the District Court's decision to deny AeroVironment's motion for attorneys' fees should be reversed.

Dated: September 17, 2024

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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