No. 22-1621

United States Court of Appeals
for the Federal Circuit

DRAGON INTELLECTUAL PROPERTY LLC,
Plaintiff–Cross-Appellant,
v.
DISH NETWORK L.L.C.,
Defendant-Appellant,
v.
ROBERT E. FREITAS, FREITAS & WEINBERG LLP,
Respondents – Appellees.

DRAGON INTELLECTUAL PROPERTY LLC,
Plaintiff–Cross-Appellant,
v.
SIRIUS XM RADIO INC.,
Defendant – Appellant,
v.
ROBERT E. FREITAS, FREITAS & WEINBERG LLP,
Respondents – Appellees.

On Appeal from the United States District Court for the District of Delaware, Nos. 1:13-cv-02066-RGA, 1:13-cv-02067-RGA, Hon. Richard G. Andrews

BRIEF OF THE HIGH TECH INVENTORS ALLLIANCE AS AMICUS CURIAE IN SUPPORT OF DISH NETWORK AND REHEARING EN BANC

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August 19, 2024

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 29(a) and 47.4, counsel for HTIA certifies that:

1. The full name of the party that I represent is High Tech Inventors Alliance
2. There are no real parties in interest of the party that I represent
3. There are no parent corporations or publicly held companies that own ten percent or more of the stock of the party that I represent
4. No other law firms, partners, or associates who have not entered an appearance in this appeal either appeared for the party that I represent in the originating court or are expected to so appear in this Court
5. I do not know of any case in this or any other court or agency that will directly affect or be directly affected by this Court's decision in this case
6. No disclosure regarding organizational victims in criminal cases or debtors or trustees in bankruptcy cases is required under Fed. R. App. P. 26.1(b) or (c).

August 19, 2024 */s/ Joseph Matal*

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INTEREST OF AMICUS CURIAE

The High Tech Inventors Alliance (HTIA) represents leading technology providers and includes some of the most innovative companies in the world. HTIA's member companies are some of the world's largest funders of research and development, collectively investing more than $165 billion in these activities annually. They are also some of the world's largest patent owners and have collectively been granted nearly 350,000 patents.

HTIA companies are frequent targets of baseless patent lawsuits and abusive litigation. In many such cases, the nominal plaintiff is an underfunded shell company whose attorney both controls the litigation and benefits from it. HTIA has a strong interest in ensuring that such attorneys can be held accountable under 35 U.S.C. § 285. [1]

[1] No counsel for any party wrote any part of this brief. No party other than amicus curiae's members contributed any money that was intended to fund the preparation or submission of this brief.

ARGUMENT

I. Because § 285 is intended to control the conduct of litigation, it allows an award to be made against counsel

In support of its conclusion that liability for attorney's fees under 35 U.S.C. § 285 does not extend to a lawyer whose conduct made a case "exceptional," the panel relied on the Supreme Court's decision in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), which interpreted 28 U.S.C. § 1927 and the civil rights fee-shifting statutes. *See Dragon Intellectual Prop. v. DISH Network L.L.C.*, 101 F.4th 1366, 1373 (Fed. Cir. 2024). The panel also relied on the Fourth Circuit's decision in *In re Crescent City Estates, LLC*, 588 F.3d 822, 825 (4th Cir. 2009), which applied *Roadway Express* to 28 U.S.C. § 1447(c) (authorizing an award of attorney's fees if a case that was removed to federal court is remanded to state court). *See Dragon*, 101 F.4th at 1373.

Roadway Express does not support exempting attorneys from liability under § 285—indeed, it commands the opposite result. The Supreme Court held in that case that attorneys fees could not be awarded under § 1927 because at that time, the statute referred only to "costs" and not "attorneys fees." *See* 447

U.S. at 757-761.[2] The Court also concluded that an award against an *attorney* was not allowed under 42 U.S.C. §§ 2000e–5(k) & 1988, which authorize fee shifting in civil rights cases. *See id.* at 761. The Court held that the latter statutes do not permit awards against attorneys because they simply allot fees to whoever prevails in a case—and that there is "nothing in the legislative records of those provisions that suggests that Congress meant to control the conduct of litigation." *Id.*

Roadway Express thus requires two things for a statute to allow fee awards against counsel: the statute must expressly refer to attorneys fees, and it must be intended "to control the conduct of litigation."

Section 285 satisfies both criteria. In addition to its express reference to attorneys fees, there can be no doubt that § 285 authorizes awards based on how litigation has been conducted: it allows fees to be awarded when a case is "exceptional" because of "the substantive strength of a party's litigating position . . . or the unreasonable manner in which the case was litigated." *Octane*

[2] Congress subsequently amended § 1927 to expressly authorize awards of attorneys fees. *See Morris v. Adams-Millis Corp.*, 758 F.2d 1352, 1357 n. 7 (10th Cir. 1985).

Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 554 (2014). Section 285 is intended to regulate litigation behavior.

Roadway Express is consistent with the overwhelming weight of authority holding that when the litigation is abusive or frivolous, it is often the attorney who is to blame. Thus when Rule 11 sanctions are required, "[c]ourts seek to allocate sanctions between the attorney and the client according to their relative responsibility for the Rule 11 violation." *Borowski v. DePuy*, Inc., 850 F.2d 297, 305 (7th Cir. 1988). As the Federal Practice and Procedure treatise emphasizes, the attorney alone should be held liable for those aspects of the litigation that are subject to his control and expertise:

> [W]hen the offending conduct concerns the scope or quality of the counsel's competence—especially when the material is beyond the understanding of the client or when the client is unaware of the attorney's wrongful conduct—counsel alone should be sanctioned.

5A Fed. Prac. & Proc. Civ. § 1336.2 (4th ed.) Consequences of Litigation Misconduct—Parties Sanctionable: Counsel; Law Firms; Clients.

The panel in this case at least accepted that making counsel liable for fees makes sense when a § 285 award is based on

"counsel's manner of litigating," *Dragon*, 101 F.4th at 1373, but it suggested that the client rather than the attorney should be liable where (as here) the award is based on the party's "substantive litigation position." *Id.* Courts have held, however, that the lawyer rather than the client bears responsibility for legal arguments and theories. Thus "[c]ourts generally impose sanctions entirely on counsel when the attorney has failed to research the law or is responsible for sharp practice." *Borowski*, 850 F.2d at 305; *see also id.* ("[T]he attorney and not the client should bear the sanction for filing papers which violate Rule 11 by being unsupported by existing law, or as an attempt to modify well-settled law.") (citations omitted); *Tacoronte v. Cohen*, 654 F. App'x 445, 451 (11th Cir. 2016) (holding that when a party's legal theories are not supported by existing law, it is improper to sanction the client rather than the attorney).

Indeed, in the ordinary case, an attorney's control over litigation is so pervasive that some courts have held that the lawyer is *presumptively* liable for baseless or frivolous litigation, with awards against the client permitted only in exceptional circumstances. *See* Fed. Prac. & Proc. § 1336.2 ("Imposing a sanction on a represented client has been met with disfavor by

some courts, even though the plain wording of Rule 11 expressly allows sanctions to be imposed on the client as well as the signing attorney."); *United States v. Milam*, 855 F.2d 739, 743 (11th Cir. 1988) ("Although we have approved in general the practice of levying a fine on the represented party in addition to ordering a party to pay attorney's fees, we suggest that fining a represented party is a very severe sanction that should be imposed with sensitivity to the facts of the case and to the party's financial situation.") (citation omitted).

Finally, a review of § 285 awards entered in the last few years makes clear that many of them are based on conduct that is attributable to the litigating attorneys, not the client. *See, e.g.*, *Trustees of Columbia Univ. v. Gen Digital Inc*., No. 3:13cv808, at 19 (E.D. Va. Oct. 20, 2023) (awarding § 285 fees based on the "extensive and unprecedented record before this Court as to the disquieting conduct of both sets of [the party's] attorneys"); *In re PersonalWeb Techs. LLC*, 85 F.4th 1148, 1154 (Fed. Cir. 2023) (affirming award of fees for advancing legal arguments that were "clearly untenable based on established Federal Circuit precedents"); *Alternative Petroleum Techs. Holdings Corp v. Grimes*, No. 3:20-cv-00040-MMD-CLB, at 5 (D. Nev. Jul. 25, 2022)

(awarding § 285 fees on account of the "unreasonable litigation tactics Plaintiffs' counsel employed in this case").[3]

As defendant-appellant DISH has noted, other litigation-conduct statutes that are silent as to who is liable for fees have been interpreted to allow awards against attorneys. *See* Petition at 4-5, 7. There is no basis for creating a "clear statement" rule that shields attorneys from the consequences of their litigation conduct under such statutes. Every other court in every other context has followed the Supreme Court's guidance in *Roadway Express*: when a statute sanctions baseless or abusive litigation,

[3] *See also Soar Tools, LLC v. Mesquite Oil Tools, Inc*., No. 5:19-CV-243-H, at 9-10 (N.D. Tex. Feb. 9, 2022) (awarding § 285 fees "based on . . . misrepresentations, unforthcoming conduct, and repeated failures to correct [an] error despite numerous warnings" and "litigation conduct [that] was negligent beyond excusable attorney error"); *EagleView Techs., Inc. v. Xactware Sols., Inc*., No. 1:15-cv-07025, at 56 (D.N.J. Feb. 16, 2021) (awarding § 285 fees because of an attorney's repeated efforts to introduce "impermissible evidence, either directly or in the form of innuendo and inference," despite "repeated admonitions" from the court); Ryan Davis, "5 Things We've Learned In 5 Years Since Octane Fitness," Law360, May 14, 2019 (noting that "scenarios [that] are likely to result in fee awards" include "changing legal theories multiple times without a good reason, submitting numerous arguments only to abandon them late in a case, . . . reasserting theories a judge has rejected," and "filing numerous lawsuits and reaching for low value settlements without regard to the merits of the case.").

an award may potentially—if not presumptively—be entered against the attorney who is responsible.

II. Section 1927 and Rule 11 are not substitutes for § 285

The panel grounded its holding that attorneys are immune from liability under § 285 partly in its judgment that 35 U.S.C. § 1927 and Federal Rule of Civil Procedure 11 "are more appropriate vehicles to recover fees from counsel." *Dragon*, 101 F.4th at 1373. This is a mistake. Section 1927 and Rule 11 are different statutes that serve different purposes than § 285—most importantly, they do not address the combined course of unreasonable conduct that § 285 targets.

Rule 11 sanctions focus on individual filings signed by an attorney. As the Second Circuit has explained, "Rule 11, perforce, cannot be invoked unless some signed pleading, motion, or other paper is filed." *United States v. Int'l Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., AFL-CIO*, 948 F.2d 1338, 1344 (2nd Cir. 1994) (citation omitted).

Section 1927 addresses the undue *multiplication* of litigation. "By its terms, § 1927 looks to unreasonable and vexatious multiplications of proceedings; and it imposes an obligation on attorneys throughout the entire litigation to avoid dilatory tactics."

Id. at 1345 (citations omitted). In addition, § 1927 employs an elevated standard: "Bad faith is the touchstone of an award under this statute." *Id.*

Section 285, by contrast, targets unreasonable "litigation position[s]" or the "manner in which the case was litigated." *Octane Fitness*, 572 U.S. at 554. In practical terms, this means that § 285 can proscribe a course of behavior that does not amount to bad faith and in which no single act, standing alone, would be sanctionable. Rather, § 285 allows a court to consider the entire course of a party's unreasonable conduct. *See, e.g.*, *Chamberlain Grp. LLC v. Overhead Door Corp*., 2:21-CV-00084-JRG, at 10 (E.D. Tex. Apr. 4, 2023) ("[M]uch of the conduct [the opposing party] complains of would not give rise to an exceptional case status if considered alone and separately but the Court finds that taken together within the totality of the circumstances, this case stands out and is exceptional."); *Hospira, Inc. v. Fresenius Kabi USA*, LLC, No. 16 C 0651, at 2 (N.D. Ill. Feb. 15, 2022) (finding that the weakness of a party's litigation position alone did not justify § 285 award, but that the combination of litigation acts did).

The different roles played by § 285, § 1927, and Rule 11 are confirmed by the fact that courts awarding § 285 fees frequently

find that the same course of conduct does *not* justify an award under § 1927 or Rule 11. *See, e.g.*, *QuickLogic Corp. v. Konda Techs*., Inc., No. No. 21-cv-04657-EJD, at 8, 11 (N.D. Cal. Jul. 12, 2024) (entering a § 285 award but finding that the elevated threshold for a § 1927 award was not met); *Viavi Sols. Inc. v. Platinum Optics Tech. Inc*., No. 20-cv-05501-EJD, at 8-9 (N.D. Cal. Mar. 19, 2024) (same); *Ortiz & Assocs. Consulting, LLC v. VIZIO, Inc*., No. 3:23-CV-00791-N, at 2 (N.D. Tex. Feb. 27, 2024) (same); *Pop Top Corp. v. Rakuten Kobo Inc*., No. 0-cv-04482-DMR, at 5-7 (N.D. Cal. Jan. 28, 2022) (awarding § 285 fees for advancing baseless theories but declining to enter § 1927 sanctions because the party did not multiply proceedings); *Niazi Licensing Corp. v. St. Jude Medical S.C., Inc*., No. 17-cv-5096 (WMW/BRT), at 4-5 (D. Minn. Oct. 25, 2021) (denying Rule 11 sanctions for substantive and procedural reasons but awarding § 285 fees for unreasonably prolonging litigation and advancing unreasonable arguments).[4]

[4] *See also* "Trends in attorney fees and sanctions decisions in 2020 Q4," Thomson Reuters, April 15, 2021 (noting that sanctions under § 1927 and Rules 11, 30, and 37 are awarded at a lower rate, which "reflect[s] the higher bars and procedural impediments associated with non-§ 285 motions").

III. The panel's decision immunizes attorneys who conduct litigation through underfunded shell companies

The panel's approach rips a gaping hole in § 285. It is a reality of modern patent litigation that much of it is conducted via limited liability companies that have no substantial assets and that are funded via non-recourse loans provided by their attorneys. The lawyer *is* the plaintiff in these cases.

These lawyers structure their business to ensure that there can be no recovery from the nominal plaintiff. In a recent case, when an HTIA company indicated that it would seek § 285 fees after the plaintiff conceded that its infringement theory was frivolous but continued to litigate, counsel responded: "Good luck collecting money from a rock."

In all cases, it is nearly impossible to make the showing of actual fraud that is required to pierce the corporate veil.[5] If § 285 cannot be enforced against an attorney who controls and benefits from the litigation, in many cases it cannot be enforced at all.

[5] *See Thrift v. Estate of Hubbard*, 44 F.3d 348, 353 (5th Cir. 1995) ("Proving that a corporation is the alter ego of a shareholder alone is not enough; in order to pierce the corporate veil, the obligee must also demonstrate fraud by and direct personal benefit to the obligor.").

A recent decision from the Northern District of Texas illustrates this phenomenon. The court awarded fees against the plaintiff's law firm because the plaintiff was an underfunded shell company that was structured to evade accountability under § 285:

> Th[e] post-judgment evidence indicates that InvestPic is a sham or shell entity that is designed and intended to avoid liability. Allowing a party to purposefully use a shell company to pursue patent infringement claims unacceptably circumvents that attorney fee provisions of § 285. With InvestPic owning essentially no assets and maintaining a near-zero balance in its bank account, the members of InvestPic made InvestPic judgment-proof and insulated themselves from any liability caused by their actions.

SAP America, Inc. v. InvestPic, LLC, 3:16-CV-02689-K, at 5 (N.D. Tex. Mar. 23, 2021).

In that case, the court was able to fashion a remedy that ensured that the conduct prohibited by § 285 was punished. Under the panel decision, this will no longer be possible. Absent review by the full Court, the next time that a plaintiff like InvestPic—a "shell entity that is designed and intended to avoid liability"—brings baseless or abusive patent litigation, it will be impossible to enforce § 285 against the actors who directed and benefited from such litigation.

CONCLUSION

The Court should rehear this case en banc and reverse the panel's decision.

Respectfully submitted,

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Dated: August 19, 2024

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for amicus curiae certifies that this brief:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 36(g)(3) and Federal Circuit Rule 29(b) because it contains 2541 words, including footnotes and excluding the parts of the brief exempted by Federal Circuit Rule 32(b) and Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface and style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this document has been prepared using Microsoft Office Word and is set in the Verdana font in a size equivalent to 14 points or larger.

Dated: August 19, 2024 */s/ Joseph Matal*