Appeal Nos. 2017-2411, -2414

United States Court of Appeals
for the
Federal Circuit

GUST, INC.,

Plaintiff-Appellee,

– v. –

ALPHACAP VENTURES, LLC, RICHARD JUAREZ,

Defendants,

– v. –

GUTRIDE SAFIER LLP,

Movant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN CASE NO. 1:15-CV-06192-DLC AND 1:16-CV-01784-DLC HONORABLE DENISE COTE, SENIOR JUDGE

AMICUS CURIAE BRIEF OF ACUSHNET, GARMIN, RED HAT, SAP, SAS, SYMMETRY, AND VIZIO SUPPORTING APPELLEE

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CERTIFICATE OF INTEREST

Counsel for *amici curiae* certify the following:

1. The full name of every party or *amicus* represented by us is:

    Acushnet Company; Garmin International, Inc.; Red Hat, Inc.; SAP, Inc.; SAS Institute, Inc.; Symmetry LLC; VIZIO, Inc..

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by us is:

    Not applicable.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus curiae* represented by us are:

    Acushnet Holdings Corp.; Fila Korea Ltd.; Garmin Ltd.; T. Rowe Price Associates, Inc.; The Vanguard Group, Inc.

4. The names of all law firms and the partners or associates that appeared for the party or *amici* now represented by this firm in the trial court or agency or are expected to appear in this court are:

    Peter J. Brann
    David Swetnam–Burland
    Stacy O. Stitham
    BRANN & ISAACSON

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.

    None.

Dated: December 22, 2017

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INTEREST OF *AMICI CURIAE*

Amici Curiae Acushnet Company; Garmin International, Inc.; Red Hat, Inc.; SAP, Inc.; SAS Institute, Inc.; Symmetry LLC; and VIZIO, Inc. ("*Amici*") have been on the front lines fighting what they believe to be frivolous patent infringement lawsuits filed by non–practicing entities. *Amici* know first–hand that these non–practicing entities often are thinly capitalized, and thus judgment proof. Accordingly, even if *Amici* can demonstrate at the end of the day that lawsuits against them were sufficiently meritless or unreasonably litigated to warrant the award of attorneys' fees under 35 U.S.C. § 285, *Amici* cannot actually recover their attorneys' fees from these shell companies. Such entities, therefore, have little to lose and everything to gain by aggressively asserting non–meritorious patent claims against *Amici* and others, and *Amici* have little to gain from defending even the worst such cases just to obtain an expensive Pyrrhic victory instead of taking a cost–of–litigation settlement. In order to deter the unreasonable litigation of frivolous patent claims, *Amici* support the use of 28 U.S.C. § 1927 to award attorneys' fees and costs against litigation counsel who improperly pursue inappropriate claims on behalf of insubstantial clients.

Pursuant to Fed. R. App. P. 29 and Fed. Cir. R. 29, *Amici* states that all parties consented to the filing of this brief. Additionally, no party's counsel authored this brief in whole or part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no third party contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

Amici have no basis to second–guess the exercise of discretion by the district court to award attorneys' fees and costs against plaintiff's counsel, Gutride Safier LLP, pursuant to 28 U.S.C. § 1927, and thus see no reason for this Court to disturb that result. Instead, *Amici* write from an independent vantage point to emphasize why it is important for district courts to have discretion under 28 U.S.C. § 1927 to award such attorneys' fees and costs.

Following *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014), parties increasingly filed, and courts increasingly awarded, attorneys' fees and costs under 35 U.S.C. § 285 against plaintiffs that pursued, or improperly litigated, patent cases. Such plaintiffs are frequently, if not usually, non–practicing entities.

A significant portion of patent litigation is brought by non–practicing entities, which by definition do not make, use, or sell products. Many are newly–formed limited liability companies structured to contain few or no assets other than the patents that are being asserted against defendants. In addition to creating well–recognized asymmetries that make it far more difficult and expensive for defendants to litigate a patent case—disclosure and discovery burdens falling more heavily on defendants—the use of shell companies with few or no assets generally shields the limited liability company's investors from sanctions in the event that a court finds a case satisfies the high bar of being "exceptional" under 35 U.S.C. § 285.

Thus, the fee–shifting mechanism for "exceptional" cases under Section 285 is of limited use in deterring non–practicing, judgment–proof entities from filing, and then pursuing aggressively, meritless patent cases. From time to time, legislation has been proposed intended to address this lacuna, but, to date, most courts have not found a truly effective deterrent for dealing with meritless patent claims brought by judgment–proof non–practicing entities.

Faced with this dilemma, the district court here found that plaintiff's counsel bore substantial responsibility for improperly pursuing baseless claims pursuant to 28 U.S.C. § 1927. Particularly for non–practicing entities in which contingency counsel play a significant role in both funding and profiting from patent litigation, they should also be held responsible if such litigation is meritless and abusive. Section 1927 can and should provide an important bulwark to Section 285 in order to deter the worst abuses of patent litigation.

ARGUMENT

COURTS SHOULD HAVE DISCRETION TO IMPOSE SANCTIONS AGAINST COUNSEL IN APPROPRIATE CASES BECAUSE SANCTIONS AGAINST NON–PRACTICING ENTITIES ARE INEFFECTIVE.

Sanctions under 35 U.S.C. § 285. In *Octane Fitness LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014), the Supreme Court unanimously held that an "exceptional" patent case under 35 U.S.C. § 285 means "simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." After the Court clarified the standard for awarding attorneys' fees in patent cases, the number of fee petitions tripled, and the number of fee awards quadrupled. *See* Jeffrey B. Mills, *Patent Litigation Two Years After Octane Fitness: How to Enhance the Prospect of Recovering Attorneys' Fees*, 45 AIPLA Q.J. 27, 30–31 (Winter 2017).

A cursory review of the busiest patent districts reveals that non–practicing entities structured as limited liability companies are frequent—if not the most frequent—targets of fee petitions and fee awards under Section 285. *See, e.g., Iris Connex, LLC v. Dell, Inc.,* 235 F. Supp. 3d 826 (E.D. Tex. 2017); *eDekka LLC v. 3balls.com, Inc*., 2015 WL 9225038 (E.D. Tex. Dec. 17, 2015); *Summit Data Systems, LLC v. EMC Corp*., 2014 WL 4955689 (D. Del. Sept. 25, 2014); *Segan LLC v. Zynga Inc*., 131 F. Supp. 3d 956 (N.D. Cal. 2015); *Shipping and Transit*

LLC v. Hall Enterprises, Inc., 2017 WL 3485782 (C.D. Cal. July 5, 2017); *Shipping and Transit LLC v. 1A Auto, Inc.*, 2017 WL 5001445 (S.D. Fla. Sept. 26, 2017) (report and recommendation), *accepted*, 2017 WL 4993383 (S.D. Fla. Oct. 20, 2017); *Lumen View Tech. LLC v. Findthebest.com, Inc.*, 24 F. Supp. 3d 329 (S.D.N.Y. 2014), *aff'd in relevant part,* 811 F.3d 479 (Fed. Cir. 2016). Time and again, limited liability companies sue operating companies for alleged infringement of the only assets held by the limited liability company, namely, the patents–in–suit.

Indeed, courts often distinguish Section 285 fee petitions against operating companies from the "'prototypical exceptional case' that involves a non–practicing entity filing a lawsuit 'merely to extract a settlement from the alleged infringer.'" *SHFL Entertainment, Inc. v. Digideal Corp.*, 2016 WL 5219464, *1 (D. Nev. July 7, 2016) (report and recommendation), *accepted*, 2016 WL 5110246 (D. Nev. Sept. 18, 2016) (quoting *JS Products, Inc. v. Kabo Tool Co.,* 2014 WL 7336063, *4 (D. Nev. Dec. 22, 2014)); *see also LendingTree, LLC v. Zillow, Inc.*, 54 F. Supp. 3d 444, 460 (W.D.N.C. 2014) ("Finally—and significantly—this case is readily distinguishable from those cases involving non–practicing entities whose sole business model is to acquire patents and litigate rights associated with the patents, usually in an attempt to obtain a settlement or license with the allegedly infringing company.").

To be sure, the mere fact that the plaintiff is a non–practicing entity is not a basis for imposing attorneys' fees under Section 285:

> As Judge Bryson recently noted, "[i]f a party can reasonably hope for success on the merits of its claim, it does not matter whether that party is a non–practicing entity, whether it sues numerous defendants, or whether it settles its claims for relatively small sums. The 'exceptional case' finding turns mainly on whether the claim is plausible or objectively baseless."

DietGoal Innovations, LLC v. Wegmans Food Mkts., Inc., 126 F. Supp. 3d 680, 686 (E.D. Va. 2015) (brackets added by Court and quoting *DietGoal Innovations, LLC v. Chipotle Mexican Grill, Inc.*, 2015 WL 1284826 (E.D. Tex. Mar. 20, 2015)); *accord YYZ, LLC v. Pegasystems, Inc.*, 2016 WL 1761955, *1 n.3 (D. Del. May 2, 2016).

Nevertheless, courts have frequently followed this Court's lead in cases filed by non–practicing entities that, and, after finding the asserted patent claims are extremely weak, have found "indicia of extortion," namely, the filing of such suits against a plethora of defendants, which are then quickly followed by a quick settlement at a price far lower than the cost to defend the litigation. *See Eon–Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1326–27 (Fed. Cir. 2011), *cert. denied*, 566 U.S. 988 (2012); *accord Rothschild Connected Devices Innovations, LLC v. Guardian Protection Serv., Inc.*, 858 F.3d 1383, 1389–90 (Fed. Cir. 2017); *My Health, Inc. v. ALR Tech., Inc.*, 2017 WL 6512221, *5 (E.D. Tex. Dec. 19, 2017).

If courts are increasingly willing to award attorneys' fees for "exceptional" cases against non–practicing entities for filing frivolous cases following *Octane Fitness*, one would think that would solve the problem. But one would be wrong. To understand why, we briefly explore the substantial role of non–practicing entities in patent litigation today, and why the nature and structure of non–practicing entities prevent Section 285 from being an effective deterrent.

The Role of Non–Practicing Entities in Patent Litigation. By 2014, approximately two–thirds of all patent cases were brought by non–practicing entities. *See* Council of Economic Advisers, *The Patent Litigation Landscape: Recent Research and Developments*, 3 (March 2016). While the percentage has declined somewhat since then, non–practicing entities still represent a formidable portion of the plaintiff pool. *Cf.* Lauren Cohen, *et al*., *"Troll" Check? A Proposal for Administrative Review of Patent Litigation*, 97 B.U.L. Rev. 1775, 1796 (2017) (non–practicing entities have driven most of the dramatic growth in patent litigation).

Additionally, "recent large–sample empirical evidence suggests that, on average, entities such as [non–practicing entities] buy and litigate lower quality patents." *Id*. (brackets added).

> The patents [non–practicing entities] assert are seemingly different in quality from those asserted by [practicing entities] (in particular, on average [non–practicing entities] assert patents that [are] broader and

> closer to expiry). Moreover, [non–practicing entities] assert patents more aggressively than [practicing entities] do.

Lauren Cohen, *et al.*, *Patent Trolls: Evidence from Targeted Firms*, 31 (Feb. 2, 2017) (*available at* https://www.utdallas.edu/~ugg041000/patentlitigation.pdf) (brackets added). "[Non–practicing entities] appear to bring lower–quality lawsuits." *Id*. at 36 (brackets added). This conclusion is reinforced by the fact that non–practicing entities are less successful than others when patent cases are actually litigated. *See* Mark Lemley, *Missing the Forest for the Trolls*, 113 Colum. L. Rev. 1117, 1120 (2013); PriceWaterhouseCoopers, *2017 Patent Litigation Study: Change on the Horizon?* 16 (2017) (average success rate of cases brought by non–practicing entities 11% lower than those brought by practicing entities).

Most patent cases brought by non–practicing entities, however, are not litigated, but rather are settled. *See, e.g.*, Federal Trade Commission ("FTC"), *Patent Assertion Entity Activity*, 4 n.6 (2016) (FTC study found that two–thirds of non–practicing entity lawsuits settle within one year). They not only are settled, but generally are settled for less than the cost–of–litigation. The FTC found, using its subpoena power, that non–practicing entities routinely price patent litigation settlements at less than $300,000, which not coincidentally is below the lower range of early–stage litigation costs of defending a patent infringement suit. *See id.* at 88–90 (2016); *see also id*. (30% of litigation settlements are less than $50,000). Because 77% of such settlements "fell below a *de facto* benchmark for the nuisance cost of litigation[,]" *i.e.*, less than $300,000, "[t]his suggests that discovery costs, and not the technological value of the patent, may set the benchmark for settlement value" in such cases. *Id*. at 10 (brackets added).

The end result is an "industry [that] has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees." *Commil USA, LLC v. Cisco Sys., Inc*., 135 S. Ct. 1920, 1930 (2015) (brackets added and quoting *eBay Inc. v. MercExchange, L.L.C.,* 547 U.S. 388, 396 (2006) (Kennedy, J., concurring)). "But the appetite for licensing revenue cannot overpower a litigant's and its counsel's obligation to file cases reasonably based in law and fact and to litigate those cases in good faith." *Eon–Net*, 653 F.3d at 1350. The judge with the largest patent caseload in the country, Judge Gilstrap, describes how these tactics induce low–quality, bad faith, litigation:

> eDekka's litigation history in this District—which includes filing strikingly similar lawsuits against over 200 defendants—reflects an aggressive strategy that avoids testing its case on the merits and instead aims for early settlements falling at or below the cost of defense.
>
> ***
>
> The Court finds that it is reasonable to conclude that eDekka acted with the goal of "exploiting the high cost to defend complex litigation" to extract "nuisance value settlement[s]" from defendants. … Such tactics contribute significantly to the Court's finding that this case is "exceptional."

eDekka LLC v. 3balls.com, Inc., 2015 WL 9225038, *4 (E.D. Tex. Dec. 17, 2015) (ellipsis added and quoting *Eon–Net*, 653 F.3d at 1326–28).

The issue, then, is whether plaintiffs can be deterred from filing weak patent claims and then quickly settling those cases for less than the cost–of–litigation. The threat of attorneys' fees awarded for "exceptional" cases under 35 U.S.C. § 285 is supposed to deter such plaintiffs. But the Damocles sword of a potential fee award for pursuing weak patent cases proves illusory for non–practicing entities due to their structure.

The Structure of Non–Practicing Entities. By definition, non–practicing entities do not make, use, or sell products, and they typically have few or no other assets than the patents–in–suit. *See* Peggy P. Ni, *Rethinking Finality in the PTAB Age*, 31 Berkeley Tech. L.J. 557, 563 (2016). Non–practicing entities tend to be "thinly capitalized. Many had between one and three individual owners, often with no other employees and no offices outside of their owners' homes." FTC, *Patent Assertion Entity Activity*, *supra,* at 47. As this Court's mandamus cases demonstrate, non–practicing entities' entire existence is often episodic, ephemeral, and an artifact of litigation. *See, e.g., In re Zimmer Holdings, Inc.*, 609 F.3d 1378, 1381 (Fed. Cir. 2010) (no employees); *see also In re Microsoft Corp.*, 630 F.3d 1361, 1362 (Fed. Cir. 2011) (no employees in single office); *In re Verizon Business Network Servs. Inc.*, 635 F.3d 559, 561–62 (Fed. Cir. 2011) (no employees in its office; documents created from prior litigation); *In re Toyota Motor Corp.*, 747 F.3d 1338, 1339 (Fed. Cir. 2014) (newly created subsidiary of Acacia shared an office with other subsidiaries of Acacia). Suffice it to say, non–practicing entities are often no more than a Potemkin Village.

Such "businesses" rely on their insubstantiality to pursue the benefits of litigation without facing its costs. "As a non–practicing entity, Eon–Net was generally immune to counterclaims for patent infringement, antitrust, or unfair competition because it did not engage in business activities that would potentially give rise to those claims." *Eon–Net*, 653 F.3d at 1327. In other words, non–practicing entities "commonly act through shell companies whose only asset is a single patent. All litigation is filed through these shell entities, so when they assert their rights in the patent in question, they leave no assets vulnerable to countersuit." Ashli Weiss, *An Insight into the Apparel Industry's Patent Troll Problem*," 6 Hastings Sci. & Tech. L.J. 121, 127–28 (2014); *accord* Peggy P. Ni, *supra*, 31 Berkeley Tech. L.J. at 563.

To preserve the advantages of a shielded structure, when a non–practicing entity grows to a certain size, it typically will farm out its newly–acquired patents to a number of newly–created shell companies. *See* Ryan Hauer, *Another Attempt at Patent Reform: S.1013 The Patent Abuse Reduction Act of 2013*, 24 DePaul J. Art, Tech. & Intell. Prop. L. 367, 371 (Spring 2014). The web of subsidiaries may be hydra–headed. For example, Intellectual Ventures was estimated several years ago to have 1,276 shell companies holding 8,000 U.S. patents and 3,000 U.S. patent applications. *See* Robin Feldman & Tom Ewing, *The Giants Among Us*, 2012 Stan. Tech. L. Rev. 1, 25 (2012).

This setup has the intended benefit of shielding both the larger parent and the investors from risk, such as court–ordered sanctions, countersuit, and, importantly for present purposes, attorneys' fees:

> Sophisticated trolls sue using shell companies created for the specific purpose of shielding their investors from liability and scrutiny. Structured correctly, the entity need not be connected to the corporation's sponsors or its assets. Faced with a sanction or attorney's fee award against it, the LLC could go bankrupt rather than pay the penalty. … If fee–shifting awards and sanctions can be avoided in this way, they will be. Indeed, such concerns apparently have already provided an incentive for them to be set up in this way. Acacia has established subsidiaries to handle its litigations so that "the original patent owners—and other partner companies—are shielded from risk" and Intellectual Ventures incorporates shell companies for its patent purchases.

Colleen V. Chien, *Reforming Software Patents*, 50 Hous. L. Rev. 325, 382–83 (2012) (ellipses added and footnotes omitted); *see also Summit Data Sys., LLC v. EMC Corp.*, 2014 WL 4955689, *4 (D. Del. Sept. 25, 2014) (awarding attorneys' fees against Acacia subsidiary because its "practice of extracting settlements worth a fraction of what the case would cost to litigate supports a finding of exceptionality"); *Novartis Corp. v. Webvention Holdings LLC*, 2015 WL 6669158, *6–7 (D. Md. Oct. 28, 2015) (non–practicing entity attempted to dissolve limited liability company after attorneys' fee petition filed).

A district court recently found evidence in a case to substantiate many of the concerns expressed above by commentators. In *Iris Connex, LLC v. Dell, Inc.*, 235 F. Supp. 3d 826, 833 (E.D. Tex. 2017), Judge Gilstrap expressed concern that the plaintiff was structured to shield the real party–in–interest from any liability under 35 U.S.C. § 285, and thus allowed discovery on the attorneys' fee petition. Indeed, in its fee petition, the defendant "presented evidence that strongly implied that Iris Connex was an intentionally empty shell company and, as a consequence, had no capacity to pay such fees even if the case were ultimately declared to be exceptional." *Iris Connex,* 235 F. Supp. 3d at 832.

Discovery confirmed that *Iris Connex* is a poster child for the abuses in this area. It was a limited liability company that the court described as a "shell corporation" with one asset, namely, the patent–in–suit. *Id.* at 833. The plaintiff, in turn, was the wholly–owned subsidiary of another "shell corporation." *Id.* Both shell corporations filed for bankruptcy after the fee petitions were filed. *Id*. at 837–38. The district court made numerous findings to support its conclusion that the plaintiff was an empty shell structured to avoid paying attorneys' fees in the event that the lawsuit "went south," *id*. at 859, including these factors: the plaintiff was formed shortly before filing suit; had no assets (other than the patent); had no working capital; had no employees; had no bank account until after it filed suit; had no other purpose than pursuing its rights under the patent; and all of its actions were controlled by the undisclosed principal who owned the parent shell company. *Id*. at 840–42. Although the court primarily found the case to be exceptional based on the weakness of the asserted patent claim (accompanied by the telltale nuisance settlement offers), the court also found the case to be exceptional, in part, because the hidden power behind the throne "made an intentional decision to create and undercapitalize Iris Connex as an empty shell." *Id*. at 851.

We should note, however, that after finding the undisclosed principal jointly and severally liable for attorneys' fees under 35 U.S.C. § 285, and after imposing sanctions on the counsel for improper claim construction under Fed. R. Civ. P. 11, the court nevertheless declined to impose additional sanctions on counsel under 28 U.S.C. § 1927. *See Iris Connex,* 235 F. Supp. 3d at 852–58. Although the *Iris Connex* court exercised its discretion in that case not to award attorneys' fees under Section 1927, more importantly for present purposes, the court there concluded that it *had* discretion to consider whether attorneys' fees were appropriate under Section 1927.

The problem of unchecked litigation by subsidiaries specifically designed to hold the asserted patent and nothing else has periodically garnered the interest of lawmakers:

> [T]here must be a mechanism to ensure that recovery of fees will be possible even against judgment–proof shell companies. The recovery of award provision that I drafted is intended to ensure that shell companies primarily in the business of asserting and enforcing patents in litigation cannot escape potential liability for attorney's fees if they are found to have pursued an unreasonable case. Those deemed interested parties may either voluntarily submit to the court's jurisdiction and become liable for any unsatisfied fees awarded in the case, or opt–out by renouncing sufficient interest related to the litigation, or do nothing.

Senator Orrin Hatch, Remarks to Senate (July 31, 2014) (*available at* http://www.hatch.senate.gov/public/index.cfm/2014/7/hatch-patent-trolls-must-be-a-priority) (brackets added); *see also* Jennifer H. Burdman & William J. Sauers, *The State of Patent Law: The Interplay of Recent, Pending, and Proposed Changes*, 27 No. 10 Intell. Prop. & Tech. L.J. 9, 15 (2015) (discussing proposed House bill to allow district court to join another interested party that has a direct financial interest in the patents when a party is unable to pay an award of attorneys' fees and has no substantial interest in the litigation beyond asserting the patent). Although Congress has recognized the problem, to date, Congress has not enacted a law to solve the problem.

As *Iris Connex* illustrates, non–practicing entities often are structured to shield themselves and their principals from liability. *See Iris Connex,* 235 F. Supp. 3d at 843–44 (discussing who may be held liable); *cf. Gust, Inc. v. AlphaCap Ventures, LLC*, 226 F. Supp. 3d 232, 246–47 (S.D.N.Y. 2016) (declining to find principal liable). Thus, Section 285 alone cannot deter judgment–proof non–

practicing entities and their members from filing and aggressively litigating baseless patent lawsuits. Courts can stop such lawsuits, however, by holding the persons actually responsible for filing and aggressively litigating such lawsuits, namely, counsel for the judgment–proof non–practicing entities.

The Role of Counsel for Non–Practicing Entities. In its comprehensive study of litigation conducted by non–practicing entities (which it calls "patent assertion entities" or "PAEs"), the FTC found that counsel often have an outsized role in such litigation:

> *Litigation PAEs frequently employed contingency fee counsel. For some Litigation PAEs, the contingency fee agreements had the effect of distributing most of the proceeds from assertion to outside attorneys. Some Responding PAEs indicated to the FTC that their outside attorneys exercised considerable autonomy and discretion in identifying defendants and negotiating licenses*. Alternatively, some Litigation PAEs had similar relationships with other types of outside consultants or advisors who received the majority of their proceeds in return for their services. *In these cases, the Litigation PAE itself had little effective control over its own patent assertion activity*. The residual proceeds retained by the PAE in such cases were often nominal, and the listed managers of the PAE had only a nominal role in the management of patent acquisition or assertion.

FTC, *Patent Assertion Entity Activity*, *supra,* at 52 (emphasis added). In the "typical" strategy, the non–practicing entity "use[s] a shell company to buy and enforce a patent[,]" and "[t]he attorney that represents the [non–practicing entity] shell company will usually front the costs of litigation and work on a contingency fee basis." Ryan Hauer, *supra*, 24 DePaul J. Art, Tech. & Intell. Prop. L. at 390 (brackets added). Some commentators have gone even further, and have argued that counsel for these hollow shells are the real wizards behind the curtain:

> In many instances, these limited liability companies are owned by the patent litigators doing the suing. These plaintiffs have few or no assets other than the patents themselves, the out–of–pocket expenses of litigation being fronted by the lawyers, and the lawyers' fees being entirely contingent upon settlement payments.

Peter Schechter, *Guest Editorial: Throwing Trolls Off the Bridge*, Patently–O, (March 10, 2013) (*available at* https://patentlyo.com/patent/2013/03/guest-editorial-throwing-trolls-off-the-bridge.html).

It is for this reason that defendants forced to incur the expenses of litigation in defending unsupportable claims should be able to hold accountable the litigation counsel who framed, fueled, and facilitated those arguments in the expectation of a contingency payout. Having expected to share in the reward, counsel for non–practicing entities should also anticipate sharing the risk.

Pursuant to 28 U.S.C. § 1927, a district court may shift reasonable attorneys' fees to any attorney who multiplies the proceedings in any case "unreasonably" and "vexatiously." As the district court below found, unreasonable, vexatious litigation under Section 1927 can—and should—include baseless patent litigation.

Certainly, not every failed patent lawsuit is an opportunity to collect attorneys' fees from the opposing party *or* from its counsel. Section 285's "exceptional case" standard still is a high bar; and so is the standard under Section

1927. But the *option* of holding counsel jointly and severally liable in abusive lawsuits must remain a tool in a court's toolkit for policing abusive litigation, or there will be little to stop judgment–proof non–practicing entities from filing and aggressively litigating meritless patent lawsuits in an effort to extract cost–of–litigation settlements.

CONCLUSION

Amici Curiae urge the Court to affirm the order awarding attorneys' fees and costs entered below.

Dated: December 22, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 22, 2017, I filed the foregoing with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

Dated: December 22, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), counsel for the undersigned *Amici Curiae* certify that this brief complies with the type–volume limitation. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f) & Fed. Cir. R. 32(b), the brief contains 4,216 words.

The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32 (g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: December 22, 2017

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