United States Court of Appeals for the Federal Circuit

2016-1794

NANTKWEST, INC.,

Plaintiff-Appellee,

v.

JOSEPH MATAL, PERFORMING THE FUNCTION AND DUTIES OF THE UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia in No. 1:13-cv-01566-GBL-TCB, Judge Gerald Bruce Lee

CORRECTED EN BANC BRIEF OF *AMICUS CURIAE* THE INTELLECTUAL PROPERTY LAW ASSOCIATION OF CHICAGO IN SUPPORT OF NANTKWEST, INC., PLAINTIFF-APPELLEE

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January 23, 2018

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CERTIFICATE OF INTEREST

Counsel for *Amicus Curiae* The Intellectual Property Law Association of Chicago certifies as follows:

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

   The Intellectual Property Law Association of Chicago

2. The name of the real party in interest represented by us is:

   None.

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

   None.

4. The names of all law firms and the partners, counsel or associates that appeared for the *amicus curiae* now represented by us in the trial court or are expected to appear in this Court are:

McDermott Will & Emery LLP	Banner & Witcoff, Ltd.
Margaret M. Duncan	Robert H. Resis
David Mlaver	Charles W. Shifley

5. The title and number of any case known to us 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 are:

   The Court decided another appeal in this case, *NantKwest, Inc. v. Lee*, 686 F. App'x 864 (Fed. Cir. 2017). The Court has also stayed the appeal in *Realvirt v. Matal*, No. 17-1159, pending resolution of this appeal. *See Realvirt*, D.I. 55. The Intellectual Property Law Association of Chicago is not aware of any other pending or related cases within the meaning of Federal Circuit Rule 47.5(b).

January 23, 2018

/s/ *Margaret M. Duncan*
Margaret M. Duncan

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STATEMENT OF INTEREST[1]

The Intellectual Property Law Association of Chicago ("IPLAC") respectfully submits this brief as amicus curiae in support of NantKwest, Inc., plaintiff-appellee.

Founded in 1884, the Intellectual Property Law Association of Chicago is the country's oldest bar association devoted exclusively to intellectual property matters. Located in Chicago, a principal locus and forum for the nation's authors, artists, inventors, scholarly pursuits, arts, creativity, research and development, innovation, patenting, and patent litigation, IPLAC is a voluntary bar association of over 1,000 members with interests in the areas of patents, trademarks, copyrights, and trade secrets, and the legal issues they present. Its members include attorneys in private and corporate practices before federal bars throughout the United States, from law firm attorneys to sole practitioners, corporate attorneys, law school professors, law students, and judges,[2] as well as the U.S. Patent and Trademark Office and the U.S. Copyright Office. IPLAC members prosecute thousands of

[1] This brief has not been authored in whole or in part by counsel for a party. No person or entity, other than Amicus, its members or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] Although over 30 federal judges are honorary members of IPLAC, none was consulted on, or participated in, this brief.

patent applications and litigate many patent lawsuits in Chicago and across the country.[3]

IPLAC represents both patent holders and other innovators in roughly equal measure. In litigation, IPLAC's members are split roughly equally between plaintiffs and defendants. As part of its central objectives, IPLAC as a not-for-profit is dedicated to aiding in the development of intellectual property law, especially in the federal courts. A principal aim is to aid in the development and administration of intellectual property laws and the manner in which the courts and agencies including the United States Patent and Trademark Office ("PTO") apply them. IPLAC is also dedicated to maintaining a high standard of professional ethics in the practice of law, providing a medium for the exchange of views on intellectual property law among those practicing in the field, and educating the public at large.

[3] In addition to the statement of footnote 1, after reasonable investigation, IPLAC believes that (a) no member of its Board or Amicus Committee who voted to prepare this brief, or any attorney in the law firm or corporation of such a member, represents a party to this litigation in this matter; (b) no representative of any party to this litigation participated in the authorship of this brief; and (c) no one other than IPLAC, or its members who authored this brief and their law firms or employers, made a monetary contribution to the preparation or submission of this brief.

ISSUE PRESENTED

Did the panel in *NantKwest, Inc. v. Matal*, 860 F.3d 1352 (Fed. Cir. 2017) correctly determine that 35 U.S.C. § 145's "[a]ll the expenses of the proceedings" provision authorizes an award of the United States Patent and Trademark Office's attorneys' fees?

SUMMARY OF ARGUMENT

The Federal Circuit panel incorrectly reversed the district court by interpreting "all the expenses of the proceedings" under 35 U.S.C. §145 to clearly and explicitly authorize awarding the PTO pro rata shares of the salaries of the PTO attorneys and paralegals who worked on the district court proceedings. The *en banc* panel should first reaffirm that the American Rule applies to § 145's analysis, and, second, correctly find that the phrase "all expenses of the proceedings" is not sufficiently clear and explicit to authorize fee-shifting.

The Court should interpret § 145 under the American Rule because it is the baseline principle from which all alleged fee-shifting statutory provisions are analyzed. The Supreme Court has never narrowed the American Rule to require that fee-shifting statutes explicitly reference a "prevailing party" for the Rule to be applicable. Because no binding decisions narrow the American Rule's scope, the Rule should apply to § 145.

The Court also is precluded from awarding attorneys' fees to the PTO because "[a]ll the expenses of the proceedings" in § 145 is at best ambiguous with respect to fee-shifting, and the American Rule requires clear and explicit authorization of fee-shifting to award fees. The term "expenses" is not clearly and explicitly broad enough to include fees on its own, and the language modifying "expenses" in § 145 fails to provide the necessary clarity under the American Rule. The term "all" defines the proportion of expenses paid, and the phrase "of the proceedings" limits the scope of expenses to those incurred at the district court.

Furthermore, the legislative history of § 145 is unclear and ambiguous as to whether Congress intended to require each applicant filing an action under § 145 to pay the PTO's fees regardless of the case's outcome. A scheme where all applicants pay the PTO's attorneys' fees in all cases not only places reasonable applicants on equal footing with those making unreasonable claims, but also fails to account for other provisions under which a district court may award fees. Congress more likely endorsed a two-tiered disincentive scheme, in which all applicants seeking review under § 145 would be responsible for the PTO's "expenses" and not attorneys' fees, leaving district courts with the discretion to award fees in appropriate cases under other statutory provisions or inherent power of the district courts.

Because § 145 is ambiguous with respect to fee-shifting, it fails to clearly and explicitly deviate from the American Rule. Therefore, the Court should not award the PTO its attorneys' fees as included within § 145's "all the expenses of the proceedings."

ARGUMENT

I. THE AMERICAN RULE APPLIES TO 35 U.S.C. § 145

The American Rule is a "bedrock principle" of American jurisprudence under which "each litigant pays his/her own attorneys' fees, win or lose, unless a statute . . . provides otherwise." *Baker Botts v. ASARCO, LLC*, 135 S. Ct. 2158, 2164 (2015) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252-53 (2010)). The American Rule serves as the "basic point of reference" for awards of attorneys' fees regardless of whether or not a fee-shifting provision makes reference to a "prevailing party." *See id.* at 2166 (applying the American Rule to a statute purporting to shift fees in the "unusual manner" of awarding them to a potentially unsuccessful litigant, even though fee-shifting provisions commonly award fees to a "prevailing party" or a "successful litigant"). Thus, the Court should apply the American Rule to § 145 in the present case.

The panel majority in this case correctly applied the American Rule to § 145 despite expressing "substantial doubts" that the Rule applied absent an express reference to a "prevailing party." *See NantKwest, Inc. v. Matal*, 860 F.3d 1352,

1355 (Fed. Cir. 2017). The majority's doubts mirrored those of the Fourth Circuit, *id.* (citing *Shammas v. Focarino*, 784 F.3d 219, 223 (4th Cir. 2015), *cert. denied sub nom. Shammas v. Hirshfeld*, 136 S. Ct. 1376 (2016)), and originated from a narrow but non-limiting formulation of the American Rule announced by the Supreme Court in *Alyeska Pipeline*. *See NantKwest*, 860 F.3d at 1355-56 (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975)); *see also Shammas*, 784 F.3d at 223 (citing *Alyeska Pipeline*, 421 U.S. at 247 (stating that a "prevailing party may recover fees from a non-prevailing party" under customary fee-shifting provisions)). Relying on *Alyeska Pipeline*, the Fourth Circuit held that a Lanham Act provision[4] did not "operate against the backdrop of the American Rule" absent an explicit reference to a "prevailing party." *See Shammas*, 784 F.3d at 223 (citing *Alyeska Pipeline*, 421 U.S. at 247).

Alyeska Pipeline does not stand for this narrow construction of the American Rule; it stands for the proposition that only Congress has the authority to authorize fee-shifting. *See Alyeska Pipeline*, 421 U.S. at 263 ("Congress itself presumably has the power . . . to allow attorneys' fees under some [provisions], but not others."); *see also id.* at n.37 (stating that Congress may award fees to either party, neither party, only to the plaintiff, or only to the defendant, so long as the

[4] *See* 15 U.S.C. § 1071(b)(3) ("[U]nless the court finds the expenses to be unreasonable, all the expenses of the proceeding shall be paid by the party bringing the case, whether the final decision is in favor of such party or not.")

circumstances are specified.). Furthermore, *Alyeska Pipeline*'s "prevailing party" discussion is intended to clarify the backdrop of the American Rule's creation and departure from the "English Rule," the latter of which always awards fees to prevailing parties. *Id.* at 247-64 (discussing Congressional mandates eradicating the "English Rule" and implementing the presumption of awarding fees to neither party irrespective of outcome). The Supreme Court's *Alyeska Pipeline* decision does not support the proposition that an explicit reference to a "prevailing party" is necessary for a statute to operate and be reviewed against the backdrop of the American Rule.

Here, the *en banc* panel should apply the American Rule to its analysis of § 145 and reject the narrowing limitations placed on the Rule in *Shammas* because the Supreme Court never explicitly narrowed the scope of the American Rule. On the contrary, the Court in *Baker Botts* endorsed a broader construction of the American Rule than *Shammas* by interpreting a Bankruptcy Code provision under the Rule, even though the provision failed to reference a prevailing party.[5] Thus, even though fee-shifting provisions commonly reference a "prevailing party," it does not follow that the American Rule ceases to apply when a statute fails to

[5] *Baker Botts*, decided on June 15, 2015, issued almost two months after *Shammas*, decided on April 23, 2015, and although *Baker Botts* did not expressly overrule *Shammas*, *see Booking.com v. Matal*, 1:16-cv-425 (LMB/IDD), slip op. at *6-*7 (E.D. Va. Oct. 27, 2017), *Baker Botts* does not limit the American Rule's application based on an explicit reference to a "prevailing party."

reference a "prevailing party." *See NantKwest*, 860 F.3d at 1355 (applying the American Rule to § 145, while stating that Congress intended patent applicants to pay PTO "expenses" under § 145 "whether they win or lose"); *see also id.* at 1363-65 (Stoll, C.J., dissenting) (citing fee-shifting provisions commonly referencing prevailing parties but endorsing the potential for provisions to "represent a particularly unusual divergence from the American Rule" by awarding fees to non-prevailing parties (emphasis added)). Section 145 is alleged to shift attorneys' fees from one party to another, and the American Rule should apply to this provision.

II. SECTION 145 IS UNCLEAR AND AMBIGUOUS WITH RESPECT TO FEE-SHIFTING AND FAILS TO OVERCOME THE AMERICAN RULE'S PRESUMPTION AGAINST FEE SHIFTING

The Court should find that the phrase "[a]ll the expenses of the proceedings" is not sufficiently clear and explicit regarding fee-shifting to rebut the American Rule's presumption against awarding attorneys' fees. While the use of phrases like "attorneys' fees" or "prevailing party" are not necessary for fee-shifting, the statute must otherwise "evince[ ] intent to provide for such fees." *Key Tronic Corp. v. United States*, 511 U.S. 809, 815 (1994). This requires language that clearly and explicitly overrides the American Rule. *Id.* at 817-18. Section 145 is at best ambiguous regarding fees. The Court should not read this ambiguity to clearly and explicitly award the PTO attorneys' fees in all actions under § 145.

The term "expenses" in § 145 is ambiguous regarding whether it encompasses attorneys' fees, much less a pro rata share of PTO salaries, and is reasonably interpreted as not authorizing fees. The ambiguity of "expenses" is highlighted by several citations in the briefs and judicial opinions in this case assessing whether "expenses" is sufficiently clear and explicit to override the American Rule's presumption against fee-shifting.

If Congress intended to shift fees under § 145, Congress would have provided iron-clad certainty in doing so, especially given the extreme deviation from the American Rule created by awarding pro rata shares of salaries of the PTO's attorneys and paralegal working on the matter regardless of the outcome of the case. For example, while neither "prevailing party" nor "successful litigant" are required to implicate the American Rule, Congress' keen awareness of the clarity and specificity required to authorize fee-shifting results in their usage of these phrases almost every time. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983) ("[V]irtually every one of the more than 150 existing federal fee-shifting provisions predicate fee-shifting on *some* success by the claimant.") (emphasis in original); *see also Baker Botts*, 135 S. Ct. at 2164 (recognizing that deviations from the American Rule "tend to authorize the award of a 'reasonable attorney's fee' or 'litigation costs,' and usually refer to a 'prevailing party'"). *See also* 35 U.S.C. § 285 (fee-shifting provision in the American Invents Act

permitting the court "in exceptional cases" to "award reasonable attorney fees to the prevailing party."). However, in § 145, Congress chose the ambiguous term "expenses."

Clarity and specificity is required to deviate from the American Rule. Because "all the expenses of the proceedings" in § 145 is reasonably interpreted as not shifting attorneys' fees, this Court should not award them.

Additionally, the context in which § 145 uses the term "expenses" does not resolve the lack of clarity and ambiguity in the statute. In particular, neither the word "all" nor the phrase "of the proceedings" clarifies or broadens the intended meaning of the word "expenses" to clearly and explicitly include attorneys' fees.

First, the word "all" simply identifies the portion of "expenses" applicants must pay and does not elucidate whether the term includes attorneys' fees. To the contrary, the statute's requirement that "[a]ll the expenses . . . *shall* be paid" suggests that the Office has never, as it now claims, had discretion to demand only a portion of "the expenses." This suggests that the "expenses" paid by litigants for the last 170 years, which <u>*never*</u> included fees, was "all the expenses." *See Brief for Appellant* at 16, *NantKwest, Inc. v. Matal*, 860 F.3d 1352 (Any doubt over the meaning of "expenses" was clarified with the term "all," which "clearly indicat[ed] that the common meaning of the term 'expenses' should not be limited," (citing *Shammas*, 784 F.3d at 222)); *see also Brief of Plaintiff-Appellee NantKwest, Inc.* at

46, *NantKwest, Inc. v. Matal*, 860 F.3d 1352 (When this Court characterized § 145's "expenses" as an economic deterrent to applicants, it did so "at a time when, for over 170 years, the PTO, district courts, and Congress had *never* interpreted "expenses" to authorize attorneys' fees.").

Second, "of the proceedings" is a limitation on the scope of "expenses," and not a phrase clearly broadening "expenses" to include fees. The phrase simply limits "expenses" to those incurred during district court proceedings; preventing inconsistent results in actions under § 145 and appeals under § 141.[6]

Section 145 is ambiguous at best with respect to fee-shifting. This ambiguity permits reasonable interpretations of § 145 to exclude fee-shifting, and the Court should not award fees or pro rata portions of salaries of the PTO's attorneys and paralegal under § 145 absent a clear and explicit Congressional mandate to do so.

III. THAT CONGRESS MIGHT HAVE CHOSEN AMONG SEVERAL DISINCENTIVE SCHEMES SUPPORTS FINDING AMBIGUITY IN 35 U.S.C. § 145 AND PRECLUDES AWARDING THE PTO FEES

Reference to the legislative purpose of § 145 does not resolve the ambiguity in the statute because Congress was free to choose among several plausible disincentive schemes. More specifically, this Court's conclusion in *Hyatt* that Congress intended § 145 to impose a "heavy economic burden" on applicants

[6] *See* 35 U.S.C. § 141 (omitting an award of expenses while providing for appeals from the PTO directly to the Federal Circuit).

seeking district court review, *see NantKwest*, 860 F.3d at 1355 (citing *Hyatt v. Kappos*, 625 F.3d 1320, 1337 (Fed. Cir. 2010) (en banc)), does not imply that Congress intended § 145's "expenses" to include attorneys' fees, much less a pro rata share of the PTO's attorney and paralegal salaries, to maximize the economic burden as a deterrent to every patent applicant in every such case.

The PTO's transition to a user-funded business model does not imply that Congress *sought to tie each and every* operational cost of the Office to the users most directly responsible for incurring it. *See Brief for Appellant* at 19, *NantKwest, Inc. v. Matal*, 860 F.3d 1352 ("[Fee shifting under § 145] is particularly important now that the PTO, at Congress's discretion, operates entirely as a user-funded agency,"), *but see Brief of Plaintiff-Appellee NantKwest, Inc.* at 44, *NantKwest, Inc. v. Matal*, 860 F.3d 1352 ("This justification [of the PTO transitioning to a user-funded agency] ignores that in the face of over 170 years of the PTO *never* seeking attorneys' fees, Congress mandated that the PTO become an entirely user-funded agency *without* amending § 145 to clearly authorize attorney's fees.").

A legislative scheme under which attorneys' fees are always shifted unfairly punishes good-faith litigants whose claims may require a high number of attorneys' hours to litigate. At the same time, such a scheme counterintuitively places bad-faith litigants in equipoise with good-faith litigants by requiring both to

pay the full measure of attorneys' fees. A better view of § 145 is that it excludes fees from "expenses" and employs a two-tiered scheme whereby all litigants bear the "heavy economic burden" of non-fee expenses, while bad-faith or unreasonable litigation is further deterred by provisions that explicitly authorize fee-shifting.

The PTO may still be entitled to collect attorneys' fees under multiple fee-shifting statutes if applicants litigate unreasonably or in bad faith. First, the Patent Statute has a fee-shifting provision at the district court "in exceptional cases," *see* 35 U.S.C. § 285, to deter bad faith litigation and litigation misconduct. Nothing in § 285 restricts its scope only to infringement cases.[7] Second, district courts retain their inherent powers permitting fee awards in cases of bad faith litigation and litigation misconduct. Third, 28 U.S.C. § 1927 authorizes courts to make counsel personally liable for fees to prevent counsel from unreasonably or vexatiously multiplying proceedings. Because of the inherent and statutory powers permitting courts to award fees when warranted, it is plausible that Congress envisioned a

[7] "Section 285 … authorizes a district court to award attorney's fees in patent litigation." *Octane Fitness v. Icon Health & Fitness*, 134 S. Ct. 1749 (2014). A § 145 action is "patent litigation," a litigation over a patent, whether it is to be granted or not. The PTO may or may not consider § 285 to apply to § 145 actions, but whether it does is at least an open question. Motivated to recover fees in § 145 actions, the PTO could and should take up the case that § 285 applies; in doing so, it would focus its energies where they should be applied, on exceptional cases. As in *Octane Fitness*, the cases for which the PTO could obtain fees would broadly and appropriately include the § 145 cases which "[stand] 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." *Octane*, 134 S. Ct. at 1756.

two-tiered disincentive scheme rather than the single-tiered, automatic approach mandating that all litigants pay the PTO's fees, regardless of case outcome.

Similarly, the PTO's transition to a user-funded model fails to necessitate shifting fees in every § 145 action because Congress could have approached user-funding under § 145 in multiple ways. Specifically, Congress could have assigned the relatively predictable non-fee costs to applicants invoking § 145 as a constant disincentive, while simultaneously defraying the "high and uncertain costs" of attorneys' fees or pro rata portions of PTO salaries among all of the PTO's users, in something of an insurance model. *See NantKwest*, 860 F.3d 1365-66 (Stoll, C.J., dissenting). Economics teaches that insurance-like models are appropriate where an "insured" faces a very small chance of incurring a very large expense,[8] just as the PTO faces a very small chance of incurring § 145 case fees among the millions of patent applications it handles, and just as individual patent applicants face a very small chance of needing a § 145 action to present new evidence.

Because Congress plausibly intended to spread the variable and unpredictable cost of attorneys' fees across the PTO's larger user base to maintain a predictable disincentive for "all the expenses" that excludes fees, the Court should not find sufficient evidence to authorize an award of attorneys' fees under § 145 simply because Congress transitioned the PTO to a user-funded agency.

[8] *See* Karl Borch, The Economic Theory of Insurance at 261-63 (1964), *available at* https://www.casact.org/library/astin/vol4no3/252.pdf.

CONCLUSION

For the reasons above, the Court should clarify that the proper interpretation of "expenses" in 35 U.S.C. § 145 does not include attorneys' fees and reject any definition that includes fee shifting, which is not clearly or explicitly set forth in the statute.

Respectfully submitted,

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Dated: January 23, 2018

CERTIFICATE OF SERVICE

I, Margaret M. Duncan, certify that on January 23, 2018, a copy of the CORRECTED EN BANC BRIEF OF AMICUS CURIAE THE INTELLECTUAL PROPERTY LAW ASSOCIATION OF CHICAGO IN SUPPORT OF NANTKWEST, INC., PLAINTIFF-APPELLEE was electronically filed with the Clerk of Court using the CM/ECF System, which will serve via email notice of such filing to all counsel registered as CM/ECF users, including the following principal counsel for the parties:

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All counsel appearing at the time of this filing, will be served by CM/ECF notice only.

Dated: January 23, 2018

/s/ Margaret M. Duncan
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), Counsel for *Amicus Curiae* The Intellectual Property Law Association of Chicago certifies that, according to the Microsoft Word® processing program used to prepare this brief, this brief contains 3,474 words, not including the table of contents, table of citations, and certificates of counsel.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: January 23, 2018

/s/ *Margaret M. Duncan*
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