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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

_____		X
GARFUM.COM CORPORATION	Plaintiff,	: Civil Action No. 1:14-cv-05919-JEI-KMW
		: :
vs.		: Plaintiff's Opposition to Defendant's Motion
		: for Fees
		: :
REFLECTIONS BY RUTH d/b/a BYTEPHOTO.COM		: :
	Defendant.	: :
_____		X

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**GARFUM.COM CORPORATION'S OPPOSITION TO
DEFENDANT'S MOTION FOR ATTORNEYS' FEES**

I. INTRODUCTION

Garfum.com's conduct in this case does not even come close to meeting the "exceptional case" standard, and, therefore, Defendant's Motion should be denied. In fact, the self-serving assessment of the case that Defendant advances in the Motion is wrong in nearly every respect. Garfum.com is not a "patent bully;" it is not a "patent troll;" and it is not a "non-practicing entity." Garfum.com is a legitimate small business that attempted to enforce its valid and enforceable patent rights.

A small, family owned business, Garfum.com has been developing a website for sharing multimedia content since 2007. Realizing that the website implemented a novel way of organizing and sharing large amounts of multimedia content, Michael Garofalo, the owner of Garfum.com submitted a provisional patent application. The provisional patent application resulted in U.S. Patent No. 8,209,618 (the "'618 Patent" or "patent-in-suit"). A continuation application—U.S. Patent Application No. 13/531,615(the "'615 Application")—is pending from the '618 Patent. The claims of the '615 Application are nearly identical to those of the '618 Patent and, tellingly, the USPTO has not rejected them under 35 U.S.C. § 101 (it is mandated to apply the same *Alice* standard as the District Court). Garfum.com expended very significant time and in nearly of \$600,000.00 in developing its website and obtaining the '618 Patent. In fact, Garfum.com practices the invention claimed in the '618 Patent on its own website.

In 2014, Garfum.com brought suit against Defendant for patent infringement. Once it became clear that Defendant's revenues were less than expected, Garfum.com offered to settle the matter for nominal amounts, not wanting to set a precedent of giving away a license to its patent for free. It offered to give a license to the patent for \$5,000.00. After this offer was rejected,

Garfum.com offered a license for \$2,500.00.¹ This offer was also rejected. These offers were not based on the cost of defense, but rather were far less than the cost of defense. They were based on Defendant's present and expected future revenues.

Having failed to obtain a license—and realizing that it could not afford to continue to litigate against a party backed by the EFF and its unlimited resources—Garfum.com attempted to resolve this case through a mutual dismissals. At this point, the true unreasonable actor in the case was revealed. Defendant rejected Garfum.com's offers to dismiss the case, both with and without prejudice, unless Garfum.com would stipulate to something that both it and the USPTO don't believe—that the '618 Patent is invalid. It became clear that the case could not be resolved because Defendant and the EFF would not settle unless they eliminated a patent that they determined, in their unilateral judgment, was invalid and "stupid." In light of these facts, Defendant's Motion must be denied.

II. STATEMENT OF FACTS

1. Garfum.com was founded by Michael Garofalo on May 26, 2012. The company owns and operates a website, www.garfum.com, that Mr. Garofalo had been developing since 2007 and that embodied a new and useful way of sharing multimedia content among a plurality of users. The new and useful technique implemented by Garfum.com allowed the users to obtain the most relevant content without having to specifically search for it. Declaration of Michael Garofalo, attached hereto as Exhibit 1, at ¶ 2.

2. On, June 26, 2007, Michael Garofalo filed U.S. Provisional Patent Application No. 60/946,336 (the "'336 Application"), which covered the new and useful inventions implemented

¹ During the negotiations, Defendant secured pro bono counsel from the Electronic Frontier Foundation ("EFF") and Mr. Daniel Nazer, its "Mark Cuban Chair to Eliminate Stupid Patents."

on www.garfum.com. Ex. 1 at ¶ 3. The '618 Patent resulted from the '336 Application. *Id.* The '615 Application is a continuation of the '618 Patent filed on June 25, 2012. *Id.*

3. In 2014, the U.S.P.T.O. issued its Interim Guidance on Patent Subject Matter Eligibility (“Interim Eligibility Guidance”). The Interim Eligibility Guidance, is attached hereto as Exhibit 2. The Interim Eligibility Guidance provides a “flowchart illustrating the subject matter eligibility analysis for all claims” (*i.e.*, machine, composition of matter, manufacture and process claims). This analysis is to be used during examination for evaluating whether a claim is drawn to patent-eligible subject matter.” Ex. 2 at ¶ 1.

4. Applying this guidance—and contravening the self-serving arguments put forth by Defendant—the U.S.P.T.O. has not rejected the claims of the '336 Application under 35 U.S.C. § 101. Ex. 1-A. In fact, the only substantive rejection of the claims was for double patenting.

5. Garfum.com filed the instant lawsuit alleging infringement of the '618 Patent on September 23, 2014, along with three other lawsuits against other infringers. *See Garfum.com Corporation v. Skinnycorp, LLC*, Case No. 3:14-cv-5922 (D. N.J., 2014); *Garfum.com Corporation v. Ourstage, Inc.*, Case No. 3:14-cv-5921 (D. N.J. 2014); and *Garfum.com Corporation v. Golozo, LLC*, Case No. 3:14-cv-5923 (D. N.J. 2014). Of those cases, only the instant case remains active.

6. From the outset, Garfum.com made numerous efforts to resolve this matter. Declaration of Austin Hansley, attached hereto as Exhibit 3, at ¶ 4.

7. Garfum.com initially offered a license to the patent-in-suit for \$50,000.00. *Id.* Subsequently, Defendant provided documentation revealing annual revenues of \$12,500.00. *Id.* Since this revenue figure was dramatically less than anticipated—and since it did not want to set a precedent of giving away licenses to its intellectual property for free—Garfum.com reduced its

offer for a fully pain up license to \$5,000.00. *Id.*; Ex. 1 at ¶ 6. After this offer was rejected, Garfum.com lowered its license demand to \$2,500.00. Ex. 3 at ¶ 4.

8. One week later, on February 13, 2015, Defendant—who had by then secured pro bono counsel and patronage through the EFF—filed a Motion to Dismiss under 35 U.S.C. § 101. *Id.* at ¶ 5.

9. Realizing that pursuing the case further did not make any financial sense in light of the low potential damages and that it did not have the financial wherewithal to engage in protracted litigation against a party backed by the EFF and its unlimited resources, Garfum.com then offered to resolve this case through mutual dismissals, essentially a walk away. Ex. 1 at ¶ 7; Ex. 3 at ¶ 6. Defendant refused the offer of a walk away without also receiving a stipulation that the patent-in-suit is invalid. Ex. 3 at 6.

10. Garfum.com does not believe the patent-in-suit is invalid. Ex. 1 at ¶ 8. This is a position the U.S.P.T.O appears to support. *Id.*

11. Unwilling to stipulate to invalidity, but realizing it could not afford proceed with litigation, Garfum.com offered to pay a portion of Defendant's attorneys' fees if Defendant would provide a breakdown of its fees and costs. Ex. 3 at ¶ 7. Defendant refused to provide a breakdown of its fees and costs but stated that it would not seek fees if, and only if, Garfum.com would stipulate to invalidity of the patent-in-suit. *Id.*

12. On April 6, 2015, Garfum.com filed its Response to Defendant's Motion to Dismiss, and on April 13, 2015, Defendant filed its Reply in support of its Motion to Dismiss. *Id.* at ¶ 8.

13. Having essentially run out of options, Garfum.com issued a Covenant Not to Sue to Defendant and moved to dismiss its claims and Defendant's counterclaims. The Motion to Dismiss was granted on May 22, 2015. *Id.* at ¶ 9.

14. On June 2, 2015, Defendant contacted Garfum.com's counsel and stated that it would seek fees in excess of \$70,000.00 unless Garfum.com agreed to pay \$10,000.00. Ex. 3 at ¶ 10.

15. Defendant then filed this Motion.

III. STATEMENT OF THE LAW

Section 285 of the Patent Act provides that the "court in exceptional cases may award reasonable attorneys fees to the prevailing party." 35 U.S.C. § 285. Thus a defendant must show two things: (1) that the case is an "exception case"; and (2) that they are a "prevailing party". In *Octane Fitness* the Supreme Court defined an "exceptional" case as one "that stands out from others with respect to the substantive strength of a party's litigation position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014). The Supreme Court provided further guidance, stating the determination should be made on a case-by-case basis, considering the "totality of the circumstances." *Id.*

The Federal Circuit has provided guidance to courts as to determining when a party is a "prevailing party." In short, the courts are to "apply the general principle that to be a prevailing party, one must receive at least some relief on the merits, which alters . . . the legal relationship of the parties." *Inland Steel Co. v. LTV Steel Co.*, 364 F.3d 1318, 1320 (Fed. Cir. 2004) (*citing Former Employees of Motorola Ceramic Prods. v. United States*, 336 F.3d 1360, 132 (Fed. Cir. 2003)). The *Inland Steel* court went further to explain what types of relief qualified. *Id.* at 1321

(noting that a dismissal with prejudice on the party of plaintiff does not necessarily make the defendant a prevailing party.); *see also Dean v. Riser*, 240 F.3d 505, 511 (5th Cir. 2001) (holding that a court must determine that the suit was voluntarily dismissed by plaintiff on the merits). Court's in this circuit have held that "to be a prevailing party, that party must win a dispute within the case in favor of it that materially alters the legal relationship between the parties at the time of the judgement." *Vehicle Operations Techs. LLC v. Ford Motor Co. et al.*, Case No. 13-539-RGA (D. Del. July 1, 2015). Each of these must be shown by the moving party by a preponderance of the evidence. *Octane Fitness*, 134 S. Ct. at 1758.

Court's in this circuit have held, that the only way to determine what is "exceptional" is by comparing it to those cases that have come before. "As long as the test for awarding attorney's fees turns on whether the case is 'exceptional,' the Court is obligated to consider the instant case in comparison to the full panoply of patent cases with which it has been involved, and needs to assess if the instant case is in some meaningful sense "uncommon," "rare," or "not ordinary." *Ateliers De La Haute-Garonne v. Broetje Automation, USA Inc., et al.* Case No. 1:09-cv-598 (D. Del., Mar. 30, 2015) In that vein, since *Octane Fitness*, this Court has issued a single opinion dealing with this issue. *See Lugus IP LLC v. Volvo Car Corp. et al.*, Case No. 1:13-cv-2906 (D. N.J., Mar. 3, 2015). In *Lugus* this Court held awarded fees under § 285 because Plaintiff had, for 2 years, persisted in asserting a patent which required automatic retraction of a seat, against a defendant whose seats required manual operation. *Id.* at *9. The remaining courts in the 3rd District have issued 18 other rulings involving § 285 since *Octane Fitness*. Of those 18 rulings, only 8 were granted out right. Of those 8, one was granted where plaintiff failed to investigate before filing and filed suit despite a clear disclaimer in the file history (*Vehicle Operations Tech. LLC v. Ford Motor Co.*, Case No. 13-539-RGA (D. Del. July

1, 2015), one for filing suit without ownership of the patent (*Alzheimer's Inst. Of America, Inc., v. Avid Radiopharmaceuticals, et al.*, Case No. 10-6908 (D. Pen. March 30, 2015)), another for suing a licensed party and then failing to produce the license for 18 months (*Summit Data Systems, LLC v. EMC Corp. et al.*, Case No. 20-749-GMS (D. Del. Sept. 25, 2014)), and another for proffering an implausible infringement theory (*Chalumeau Power Systems LLC v. Alcatel-Lucent, et al.*, Case No. 11-1175-RGA (D. Del. Sep. 12, 2014)).

In contrast, one court in this District held that “in a case where settlements were reached with other parties, and the court did not construe the claim terms, or resolve multiple discovery disputes, or resolve motions to dismiss or for summary judgment, to characterize the circumstances as exception is exceptionally presumptuous[.]” *Computer Software Protection, LLC v. Adobe Systems Incorporated*, Case No. 12-451-SLR (D. Del. Mar. 31, 2015).

IV. ARGUMENT

A. This Case Is Not Exceptional Because Garfum.com Litigated Reasonably

This case is not exceptional because Garfum.com conducted itself reasonably through the entire course of the litigation. Regarding infringement, Garfum.com performed an adequate pre-suit investigation, Defendant has not complained of Garfum.com's claim for infringement. Furthermore, the patent-in-suit is valid. Garfum.com believes the patent to be valid and, as will be explained in greater detail below, recent activity by the U.S.P.T.O supports validity of the patent-in-suit. Additionally, Garfum.com's numerous attempts to resolve this matter demonstrate that it acted reasonably throughout the litigation. Its initial demand of \$50,000.00 was based on what it expected Defendant's revenues to be. Ex. 3 at ¶ 4. When Garfum.com discovered that Defendant's revenues were substantially lower than expected, Garfum.com lowered its demand by 90%, to \$5,000.00. *Id.* When this licensing attempt failed, Garfum.com lowered its offer by

another 50%, to \$2,500.00. *Id.* When this attempt failed—and realizing that continued litigation would be fruitless—Garfum.com offered a walk-away. Each of these offers was rejected by Defendant. Although Garfum.com was able to negotiate settlements in the other three simultaneously filed cases, it was not able to resolve this matter because—as it became abundantly clear—Defendant and its patron the EFF had their own agenda to push. It is, therefore, absolutely clear that this case is not exceptional and Defendant’s Motion should be denied.

B. The Actions That “Stand Out From The Others” In This Case Are Defendant’s And The EFF’s

The only litigant in this matter that has exhibited behavior justifying “exceptional case” treatment is Defendant. Defendant, along with its patron the EFF, has unequivocally tried to strong-arm Garfum.com into adopting a position that Garfum.com does not believe—that the patent-in-suit is invalid. It is clear that Daniel Nazer, the EFF attorney representing Defendant and the so-called “Mark Cuban Chair to Eliminate Stupid Patents,” has unilaterally decided that the patent-in-suit is “stupid” and, therefore, thwarted all efforts to resolve this matter that didn’t include capitulation on this point. However, Garfum.com (and, as will be explained more fully below, the U.S.P.T.O) disagree with Mr. Nazer’s position. Garfum.com should not be sanctioned when the roadblock to an amicable resolution of this matter was an unreasonable demand made by Defendant, the EFF, and Mr. Nazer. In fact, in its Motion, Defendant reasserts its 35 U.S.C. § 101 argument in great detail (devoting many more pages to the § 101 discussion than any discussion of Garfum.com’s conduct). Rather than repeat its responsive arguments here, Garfum.com incorporates by reference its Opposition to Defendant’s Motion to Dismiss, Doc. No. ___, as if fully set forth herein. Needless to say, Defendant’s invalidity position was contested. The mere fact that Defendant, the EFF and Mr. Nazer believe something to be true does not make it so. Garfum.com should not be penalized here for refusing to capitulate to their unreasonable demands.

C. This Case Is Not Exceptional Because The Patent-In-Suit Is Valid

Defendant incorrectly surmises that the patent-in-suit is invalid, and that Garfum.com was or should have been aware of this. Motion at 16. However, in its Opposition to Defendant's Motion to Dismiss, Garfum.com explained the reasons why the patent-in-suit is valid. *See* Doc. No. Garfum.com will not recite those arguments here verbatim, but rather incorporates them by reference as if set forth herein. In sum, the '618 Patent discloses a specific method for solving a specific problem with computer networks, *i.e.*, the problem of sharing multimedia files among a plurality of users of a computer network. The '618 Patent presents a method that improves the functionality of databases by allowing them to present the most relevant content to users. Traditional databases using conventional methods could not deliver the most relevant content, *e.g.*, funniest videos, to users. The invention of the '618 Patent presents a novel method to improve this functionality. Therefore, the '618 Patent is directed to patent eligible subject matter.

The U.S.P.T.O has implicitly reached the same conclusion. Applying the exact same standard that a district court is obligated to apply to nearly identical claims, the U.S.P.T.O has found the claims of the '615 Application to be patentable. By way of example, claim 1 of both the '618 Patent and the '615 Application are recited below:²

² The sole difference between the claims is the '615 Application claims basing rankings off a gathered rating measure of a summary of points, rather than just on a summation of points. The only additional independent share this same minor difference.

'618 Patent	'615 Application
1. A method for sharing multi-media content among a plurality of users in a computer network consisting essentially of:	1. A method for sharing multi-media content among a plurality of users in a computer network comprising:
creating a plurality of user accounts, each of the user accounts corresponding to one of the plurality of users, and having a plurality of interactive features including a first feature that permits the user to upload the multi-media content to the computer network;	creating a plurality of user accounts, each of the user accounts corresponding to one of the plurality of users, and having a plurality of interactive features including a first feature that permits the user to upload the multi-media content to the computer network;
forming a user network including one or more of the plurality of user accounts in communication with one or more other user accounts and to the uploaded multi-media content via the computer network;	forming a user network including one or more of the plurality of user accounts in communication with one or more other user accounts and to the uploaded multi-media content via the computer network;
categorizing the uploaded multi-media content in accordance with the subject matter of the uploaded multi-media content;	categorizing the uploaded multi-media content in accordance with the subject matter of the uploaded multi-media content;
organizing the uploaded multi-media content in a competitive format; and	organizing the uploaded multi-media content in a competitive format; and
establishing a hierarchy for the uploaded multi-media content within the competitive format by implementing a competitive measurement system;	establishing a hierarchy for the uploaded multi-media content within the competitive format as a function of a competitive measurement system;
wherein the competitive measurement system consists of:	wherein the competitive measurement system comprises consists of:
enabling each user to designate a single point to one of a plurality of multi-media content for each one of a plurality of competitive rounds; and	enabling each user the users, over a first time period, to designate a single point to one of a plurality of multimedia content for each one of a plurality of competitive rounds; and
ranking a position in the hierarchy for the uploaded multi-media content based on a summation of points.	ranking a position in the hierarchy for the uploaded multimedia content based on the gathered rating measures a summation of points.

As can be seen from even a cursory review, these claims are nearly identical and the differences between them do not relate to substantial limitations. The U.S.P.T.O. applied the same two-part analysis from *Alice Corp.* (also called the *Mayo* test)—the very same analysis that this Court would perform in determining validity under § 101—to the '615 Application claims and found them

patent eligible. Ex. 1-A. In fact, the only rejections that the U.S.P.T.O. made against the claims of the '615 Application are for double patenting with respect to the claims of the '618 Patent. This makes a simple conclusion readily apparent: if the U.S.P.T.O. could find that nearly identical claims are patent eligible under the very same patent eligibility test that this Court would apply, it is reasonable to conclude the '618 Patent is valid. Accordingly, this case is not exceptional and Defendant's Motion should be denied.

D. Defendant Is Not Entitled To Fees Because It Is Not The Prevailing Party

Defendant is not a "prevailing party" under § 285 because it has not obtained court ordered relief in its favor. To be a "prevailing party" a court must change the legal relationship of the parties; a voluntary change in the conduct of the parties does not create a "prevailing party" even if the result is the sought-after relief. *Buckhammon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) ("A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change."). Applying this principle to patent litigation, other district courts have held that when a party receives a covenant not to sue rather than the relief it sought by court order, the prevailing party requirement of section 285 is not met. *In re Columbia Univ. Patent Litig.*, 343 F. Supp. 2d 35, 49 (D. Mass. 2004) ("While Columbia's covenant not to sue is a form of voluntary conduct that accomplishes the major part of what the plaintiffs sought to achieve in these lawsuits, they have received no relief from the court on the merits of their claims. They are, therefore, not prevailing parties for the purposes of § 285."); *see also HTC Corp. v. Tech. Props.*, 2014 U.S. Dist. LEXIS 99971, *9-19 (N.D. Cal. July 21, 2014). The District of Delaware recently agreed with this rule, holding that when the court has not issued a substantive ruling and a case is voluntarily dismissed, the prevailing party requirement of section 285 is not met.

Pragmatus Telecom LLC v. Newegg Inc., 2014 U.S. Dist. LEXIS 101402, *6–9 (D. Del. July 25, 2014).

In this case, Defendant cannot recover attorney’s fees under section 285 because it has not obtained court ordered relief in its favor. Garfum.com voluntarily granted Defendant a covenant not to sue. Defendant’s counterclaims were dismissed on Garfum.com’s motion. Defendant has not even received the relief it sought, a declaration of invalidity. Furthermore, the court has not construed any of the claim terms, nor has there been any opposed motion decided by the Court. There has been no substantive decision in favor of Defendant. Thus, Defendant is not a prevailing party and therefore fails to satisfy a prerequisite to recover attorney’s fees under 38 U.S.C. § 285.

V. CONCLUSION

This is not an exceptional case. Garfum.com litigated reasonably from the outset. It was only Defendant’s unreasonable demand that Garfum.com stipulate to invalidity of the patent-in-suit that has brought the case to its present status. Garfum.com should not be sanctioned for Defendant’s unwillingness to litigate reasonably. Furthermore, Defendant’s invalidity argument is belied by the U.S.P.T.O. and Garfum.com’s opposition to Defendant’s Motion to Dismiss. Accordingly, Defendants’ Motion should be denied.

Dated: July 27, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system. Any other counsel of record will be served by electronic mail, facsimile, and/or first class mail on this date.

/s/ Lawrence C. Hersh
Lawrence C. Hersh