

Acacia Litigation Tactics Draw Fire From Federal Circuit

By Scott Graham

Acacia Research Corp. should have brought shovels to court Wednesday, given the hole it kept digging before the U.S. Court of Appeals for the Federal Circuit.

The nonpracticing entity argued that it had done nothing wrong in hiring the in-house intellectual property chief from oil services company Schlumberger Ltd. and then suing Schlumberger for patent infringement. But the Federal Circuit judges gave no indication they would reverse a sweeping order that disqualified all of Acacia's in-house lawyers and one of its law firms from the case. Federal Circuit Judge Evan Wallach described Acacia's conduct as "suborn[ing] disloyalty."

Acacia also reiterated a request to drop its appeal of the disqualification order, saying the matter has

been settled. But the judges questioned whether the settlement is final, and were clearly unhappy that Acacia had waited until two days before Wednesday's argument to request dismissal. "Somebody better be prepared to discuss your business model," Wallach said, asking if it could be described as "using litigation as a weapon in and of itself, and then backing away at the last minute."

Even its arguments for dismissal landed Acacia in hot water. The judges questioned whether the company misrepresented settlement terms to make them sound more favorable. "To the extent that your honor understood us to be saying there was a lot of money being paid to Acacia in the settlement, we certainly didn't intend to imply that, and I don't think

we did," Stradling Yocca Carlson & Rauth partner Steven Hanle told the court.

U.S. District Judge Lee Yeakel of Austin disqualified Acacia's entire in-house legal department and outside law firm Collins, Edmonds, Schlather & Tower of Houston from Acacia's patent infringement suit against Schlumberger in 2015. Acacia had hired Charlotte Rutherford, Schlumberger's deputy general counsel for intellectual property in 2013, then sued Schlumberger the following year. Acacia says Rutherford was walled off from the Schlumberger suit, but evidence showed that she had OK'd a recommendation from Collins Edmonds and other Acacia in-house counsel to buy the patent-in-suit and sue Schlumberger for willfully infringing it.

Schlumberger's outside counsel, Latham & Watkins partner Maximilian Grant, asked the Federal Circuit to adopt a rule that would block such conduct throughout Texas and the Fifth Circuit, where many patent cases are litigated. "It's important to provide district courts guidance in their duty to protect the integrity of the legal profession," Grant said. "This isn't about merely confidential information and confidentiality. This is about an attorney's duty of loyalty."

He didn't get any argument from Wallach. "I would say it's also about an attorney's duty not to suborn disloyalty," the judge added.

Hanle argued there was no reason to impute Rutherford's knowledge to Acacia's entire in-house department, which effectively terminated the case. "What if during the Apple-Samsung wars a young in-house attorney at Samsung had gone to Apple," he began.

Wallach stopped him in his tracks. "Let's not do hypotheticals," he said.

Rutherford voted on the recommendation to sue Schlumberger. Why couldn't Acacia's in-house team infer that "she's basing that on confidential information that she had?"

Hanle emphasized from the beginning that Acacia would prefer to dismiss the appeal.

"So in your view is this case settled?" Judge Todd Hughes asked.

Hanle hesitated for a second. "Um, from Acacia's perspective," he began before Hughes cut him off.

"It's troubling to me that you can't answer that with a quick yes or no," the judge said, "but yet you asked us to dismiss the case based on the fact that it's settled. Is it settled or isn't it settled?"

"There is a framework by which it can be settled for a nominal payment on the conclusion of this appeal," Hanle said.

The judges asked both parties to submit copies of the settlement agreement. Hughes told Grant that even if the settlement isn't final, Acacia may still have the right to drop its own appeal. "You're the prevailing party.

You don't have a right to seek review if the case isn't settled," Hughes told Grant.

Grant complained that Acacia characterized the settlement as covering both the patent case and a related Texas anti-SLAPP action in which Rutherford had been awarded \$600,000 in attorney fees. A Texas appellate decision unwound that award, Grant said, and Acacia was creating "a deliberate misimpression for public consumption" that Schlumberger paid Acacia to settle. In fact, the money went "very much in the other direction," he told the court.

Wallach called that allegation "very serious," but Hanle said Grant had overstated it.

"There was an award against Schlumberger in the state court case," he said. "And that is the extent of what we represented in our reply."

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