

No. 20-56008
(to be heard in conjunction with No. 20-55439)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOMADIX, INC.

Plaintiff-Appellee,

v.

GUEST-TEK INTERACTIVE ENTERTAINMENT LTD.

Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of California
No. 2:19-cv-04980-AB-FFM
Hon. André Birotte Jr.

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Appellant Guest-Tek Interactive Entertainment Ltd. certifies that no parent corporation or any publicly held corporation owns 10% or more of its stock.

Date: January 5, 2021

/s/ Thomas D. Warren

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Guest-Tek Interactive Entertainment Ltd.

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INTRODUCTION

After granting summary judgment and a permanent injunction to the appellee, Nomadix, Inc., the district court awarded it nearly \$1.1 million in attorneys' fees for an 11-month, single-count breach of contract action. The award of attorneys' fees was in error and should be reversed.

First, as set forth in the appellant's briefs in the underlying appeal No. 20-55439, the grant of summary judgment and a permanent injunction to Nomadix should be reversed. As the attorneys' fee award was based on a prevailing party clause in the parties' license agreement, the attorneys' fee award should be similarly reversed.

Second, the district court erred in including in the award Nomadix's attorneys' fees for work performed in the administrative proceedings before the Patent Trial and Appeal Board ("PTAB"). Under the license agreement, the prevailing party is entitled only to fees incurred in the district court action. Nomadix also was not entitled to attorneys' fees for its unsuccessful motion for a preliminary injunction or for its in-house counsel's actions as a corporate liaison.

The Court should vacate the award of attorneys' fees and costs.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1332. The district court entered final judgment on April 22, 2020, and appeal No. 20-55439 followed. The

district court granted Nomadix's motion for attorney's fees on August 6, 2020, and entered its judgment for attorneys' fees and costs on September 11, 2020. 1-ER-4–14, 1-ER-2–3. This appeal timely followed on September 29, 2020. 2-ER-169–73. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1).

ISSUES PRESENTED

1. The award of attorneys' fees was based on a prevailing party clause in the license agreement. As set forth in the underlying appeal, the district court erred in granting summary judgment and a permanent injunction to Nomadix and the judgment should be reversed, in which case Nomadix will no longer be a prevailing party. Should the attorneys' fee award be similarly reversed?
2. The license agreement provides that attorneys' fees may be awarded only for work done in the district court case. Did the district court err in awarding more than \$660,000 in attorneys' fees to Nomadix from the inter partes review ("IPR") proceedings?
3. Nomadix's unsuccessful motion for a preliminary injunction did not advance its position in the district court, and in fact strengthened Guest-Tek's arguments against granting a permanent injunction. Did the district court err in awarding attorneys' fees to Nomadix for that unsuccessful effort?

4. In-house counsel's actions as a corporate liaison are not compensable in an award of attorneys' fees. Did the district court err in awarding in-house counsel attorney's fees for their actions as corporate liaison?

STATEMENT OF THE CASE

I. Litigation and PTAB Petitions Preceding the Underlying Lawsuit

Nomadix sued Guest-Tek in October 2016, alleging that Guest-Tek had underpaid royalties under their license agreement. Complaint, *Nomadix, Inc. v. Guest-Tek Interactive Entm't Ltd.*, No. 2:16-cv-08033-AB-FFM (C.D. Cal. Oct. 28, 2016), ECF No. 1. That case is still pending. In December 2017, Guest-Tek started filing a series of IPR petitions before the PTAB, challenging the validity of certain of Nomadix's licensed patents. 2-ER-75. Nomadix participated in the PTAB proceedings, never asserting that the IPR proceedings violated the license agreement's forum-selection clause, and never seeking to enjoin Guest-Tek's actions. See Supplemental Complaint, *Nomadix, Inc. v. Guest-Tek Interactive Entm't Ltd.*, No. 2:16-cv-08033-AB-FFM (C.D. Cal. Oct. 28, 2016), ECF No. 274.

Over the course of the next 18 months, Guest-Tek filed additional IPR petitions challenging certain aspects of Nomadix's patents, and Nomadix continued to participate in the PTAB proceedings until the PTAB found that Guest-Tek had established a reasonable likelihood that Guest-Tek would prevail with respect to at least one of the challenged patent claims. 2-ER-137–38.

At that point, faced with the likelihood of losing before the PTAB, Nomadix decided to assert that the PTAB proceedings violated the license agreement's forum-selection clause. 2-ER-146–49.

But it was too late to assert a claim based on the forum-selection clause in the 2016 lawsuit, so in June 2019, Nomadix had to bring a new case—this case. 2-ER-105–06, 2-ER-161–68. This case involved a single claim for breach of the license agreement's forum-selection clause for which the factual record already had been developed in the 2016 case. Nomadix represented to the district court that its sole breach of contract claim was “simple.” 2-ER-112.

II. District Court Decisions Prior to the Award of Attorneys' Fees and Costs

In September 2019, shortly after filing the complaint, Nomadix sought a preliminary injunction. 2-ER-141–60. The district court denied the motion, holding that Nomadix failed to show that a denial of a preliminary injunction would result in irreparable harm or that money damages could not cure any alleged breach of the forum-selection clause. 2-ER-136–40. The district court noted that “Nomadix's claim of irreparable harm is undercut by its approximately 18-month delay” in bringing this action and moving for a preliminary injunction. 2-ER-136–40.

In November 2019, Nomadix moved for summary judgment, contending that Guest-Tek's PTAB petitions breached the forum-selection clause because they were not brought in the Central District of California. 2-ER-76–90. Briefing on

summary judgment concluded that same month. 2-ER-55. In January 2020, the district court granted the summary judgment motion, even though the forum-selection clause did not cover agency proceedings and neither IPR proceedings nor the PTAB existed at the time the license agreement was signed. 2-ER-46–54.

Nomadix waited to move for a permanent injunction until after the district court granted summary judgment. 2-ER-26. By the time the motion for a permanent injunction was briefed in April 2020, the IPR proceedings had been fully briefed and argued and were awaiting decision. 2-ER-33–34. Days before the PTAB was to render its decision, the district court granted a permanent injunction and ordered the parties to move to withdraw the IPR proceedings. 2-ER-22–25.

III. Nomadix Moves for Attorneys’ Fees Under the License Agreement

In May 2020, Nomadix moved for \$1,228,633 in attorneys’ fees. Nomadix’s motion was based on the forum-selection clause, which provides for attorneys’ fees for the prevailing party. 2-ER-20–21, 2-ER-16–19, 3-ER-250–76. The provision states that “[t]he Parties agree that the prevailing Party in such District Court or Superior Court action will be entitled to reimbursement by the losing Party for any and all legal fees and costs incurred by the prevailing Party in preparing for and conducting such action.” 3-ER-296; *see also* Cal. Civ. Code § 1717(a) (party entitled to reasonable fees for enforcing contract that contains prevailing party fee provision).

Of the more than \$1.2 million that Nomadix sought, most of it was for things that should not have been recoverable. \$663,433, more than half of the fee request, was for Nomadix's lawyers' work in the IPR proceedings, not the district court case. 3-ER-237. Nomadix also sought \$18,800 for time that in-house counsel acted as a corporate liaison, as well as expert witness fees and administrative tasks fees of \$129,323. 3-ER-243–44, 1-ER-9–10. It also sought \$130,053 in fees associated with its unsuccessful motion for preliminary injunction. 3-ER-245.

The district court denied Nomadix's request for \$129,323 for expert witness fees and administrative tasks. 1-ER-8, 10. But it erroneously allowed the other fees, resulting in a total award of \$1,099,310. 1-ER-14. This appeal followed.

SUMMARY OF THE ARGUMENT

Because the district court erred in granting summary judgment and a permanent injunction, Nomadix should not have been the prevailing party below, and the attorneys' fees award should be vacated for the same reasons.

Moreover, the district court erred in awarding Nomadix nearly \$1.1 million dollars for attorneys' fees for a single-count breach of contract action that was resolved in less than a year. Most significantly, the district court wrongly awarded more than \$660,000 in attorneys' fees incurred by Nomadix in the IPR proceedings, as the license agreement allows for reimbursement only of fees incurred in the district court case itself.

The district court also erred in awarding fees for Nomadix's unsuccessful preliminary injunction motion. The court held, without analysis, that losing the preliminary injunction motion was a "necessary step" for Nomadix to become the prevailing party below. But the fact that the district court denied the former and granted the latter manifests that the former was not a "necessary step" to achieve the latter. Indeed, losing the preliminary injunction motion, if anything, made Nomadix's case for a permanent injunction weaker.

Finally, the district court wrongly allowed Nomadix to recover attorneys' fees for its in-house counsel when they acted in their capacity as corporate liaison, not as members of the trial team.

Subtracting out these impermissible amounts, Nomadix's attorneys' fees are approximately \$287,024. This figure is reasonable, if not generous, given that this case was an offshoot of the 2016 case that only involved one cause of action, in which the record already had been developed, and where it was litigated from start to finish in 11 months. It was, in Nomadix's own words, "simple." 2-ER-112.

STANDARD OF REVIEW

The district court's grant of attorneys' fees is reviewed for an abuse of discretion. *SOFA Entm't, Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273, 1277 (9th Cir. 2013).

ARGUMENT

I. Should the Court Reverse and Vacate the Underlying Judgment, It Should Vacate the Attorneys' Fee Award as Well.

The license agreement provides that the prevailing party be reimbursed for attorneys' fees it incurred in the district court case. As set forth in Guest-Tek's briefs in appeal No. 20-55439, the judgment below should be reversed and the permanent injunction vacated, in which case Nomadix is not the prevailing party, and the attorneys' fee award should be vacated as a result. *See Lovell ex rel. Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 373–74 (9th Cir. 1996) (vacating award of attorneys' fees because the Court reversed judgment for plaintiff on the merits).

II. The District Court Erred in Awarding Nomadix Attorneys' Fees Incurred in the IPR Proceedings Because the License Agreement Entitles a Prevailing Party Only to be Reimbursed for Attorneys' Fees Incurred in the District Court Case.

Of the \$1.1 million in attorneys' fees awarded by the district court, \$663,433 was for attorneys' fees from the IPR proceedings. The district court's award of these fees, which constituted more than half of the fee request, violated the plain terms of the license agreement. 1-ER-7–8, 3-ER-296.

The forum-selection clause provides that “the prevailing Party in such District Court or Superior Court action will be entitled to reimbursement by the losing Party for any and all legal fees and costs incurred by the prevailing Party in preparing for and conducting such action.” 3-ER-296.

By its terms, then, the agreement allows a prevailing party only to recover attorneys' fees incurred by it in the "district court action." *See Weiland v. Am. Airlines, Inc.*, 778 F.3d 1112, 1114 (9th Cir. 2015) ("Such operations' refers back to the language 'covered operations' . . ."). "If contractual language is clear and explicit . . ., the plain meaning governs." *GGIS Ins. Servs., Inc. v. Superior Court*, 168 Cal. App. 4th 1493, 1506 (2008); Cal. Civ. Code § 1638. California Civil Code section 1717, which governs contractual attorneys' fees provisions, similarly provides that attorneys' fees may be recovered on breach-of-contract claims only for the "prosecution or defense of those claims." *Scott Co. of Cal. v. Blount, Inc.*, 20 Cal. 4th 1103, 1109 (1999).

The district court nevertheless held that the attorneys' fees incurred by Nomadix in the IPR proceedings were awardable because Guest-Tek brought those proceedings in breach of the forum-selection clause, requiring Nomadix to defend the IPR proceedings while seeking to enforce the forum-selection clause. 1-ER-7–8. "Nomadix is entitled to recover fees for the IPR proceedings in which it defended itself while it sought enforcement of the License Agreement through this lawsuit." 1-ER-8.

But the district court was mixing apples and oranges. If Nomadix were required to spend money in another proceeding because Guest-Tek breached the license agreement, that money would be compensable, if at all, as *damages*. And the recoverability of those damages would be independent of whether there was an attorneys' fee provision in the contract.

Indeed, in granting Nomadix a permanent injunction, the district court specifically identified Nomadix's attorney's fees in the PTAB as a potential form of monetary damages. "Although money damages may compensate Nomadix for its litigation expenses in the PTAB, such damages would not secure to Nomadix its whole rights under the forum selection clause[.]" 2-ER-24.

Accordingly, Nomadix could have sought recovery of its legal expenses in the PTAB as compensatory damages, in addition to seeking a permanent injunction. But Nomadix elected only to seek an injunction, presumably to bolster its claim that money damages were inadequate. 2-ER-26–45. ("Nomadix's out-of-pocket expenses for dealing with Guest-Tek's PTAB petitions . . . would come nowhere close to providing Nomadix the full benefit of the bargain."). Having failed to seek damages, however, it cannot attempt to shoehorn the PTAB litigation expenses into the attorney's fee provision in the license agreement, which plainly limits fees to those incurred in the district court.

There is another flaw in the district court's reasoning. The district court found that the PTAB expenses were awardable under the attorney's fee provision because Nomadix engaged in the PTAB proceedings to preserve its forum-selection clause challenge. 1-ER-7–8. But Nomadix did not even contemplate filing suit based on the forum-selection clause until May or June 2019, some 18 months after the IPR proceedings had begun. 2-ER-161. Accordingly, even under the district court's analysis, it should not have awarded Nomadix its fees in the PTAB proceedings.

III. The District Court Erred in Awarding Attorneys' Fees for Nomadix's Unsuccessful Preliminary Injunction Motion Because It Was Not a Necessary Step in Obtaining a Permanent Injunction.

Guest-Tek sought to exclude from the award \$130,053 in attorneys' fees that Nomadix spent on its unsuccessful motion for a preliminary injunction, based on the principle that “a plaintiff who is unsuccessful at a stage of litigation . . . is entitled to attorney's fees even for the unsuccessful stage” only if the unsuccessful stage “was a necessary step to her ultimate victory.” *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991).

The district court declined to exclude these fees, holding without analysis that Nomadix's preliminary injunction motion was a “necessary step” in obtaining a permanent injunction. 1-ER-10.

In fact, there was nothing in the record to support the district court’s conclusory finding. As Nomadix conceded below, “[p]reliminary injunctions and permanent injunctions are ‘distinct forms of equitable relief that have different prerequisites and serve entirely different purposes.’” 2-ER-42 (citing *Lermer Ger. GmbH v. Lermer Corp.*, 94 F.3d 1575, 1577 (Fed. Cir. 1996)). As such, the Court “cannot construe the plaintiffs’ request for a permanent injunction at the end of the case as necessarily incorporating a request for a preliminary injunction pendente lite.” *Lermer Ger. GmbH*, 94 F.3d at 1577.

Because a preliminary injunction is not a prerequisite for a permanent injunction, the district court erred in concluding that Nomadix’s unsuccessful motion for a preliminary injunction was a necessary step in prevailing below. To the contrary, the district court’s findings in denying the motion for a preliminary injunction—namely, that monetary damages provided a sufficient form of relief and that Nomadix had sat on its rights by waiting for 18 months to assert its claim for injunctive relief—undermined, rather than furthered, its claim to permanent injunctive relief. 2-ER-139–40.

IV. The District Court Should have Excluded In-House Counsel Fees When Acting as a Corporate Liaison.

In-house counsel time spent acting as a liaison to the client, as opposed to as a member of the trial team, is not recoverable. *See Milgard Tempering, Inc. v. Selas Corp. of Am.*, 761 F.2d 553, 558 (9th Cir. 1985) (in-house counsel “acting

only as liaison” to the client not entitled to a fee award; in-house counsel must be “actively engaged in preparation of the case for trial” for fees to be recoverable.

Burger King Corp. v. Mason, 710 F.2d 1480, 1499 (11th Cir. 1983) (same).

Guest-Tek sought the exclusion of fees submitted by Nomadix’s in-house counsel, and identified five categories of tasks that it contended fell into the “corporate liaison” category: (1) discussions with Nomadix management, (2) drafting and circulating talking points for Nomadix senior management, (3) creation of budgets, presentations, and other deliverables to Nomadix’s board of directors, (4) meetings with Nomadix’s CFO to discuss “litigation budget and strategy,” and (5) attendance at a hearing, but only “to listen to oral arguments.” 3-ER-244.

Nomadix disputed that categories 1 and 5 above constituted “corporate liaison” activities. With respect to categories 2–4, which related to in-house counsel time for CFO meetings, budgets, talking points, presentations, and other deliverables for senior management and the board, Nomadix did not directly dispute that they were “corporate liaison” activities, saying instead that Guest-Tek had failed to cite case law to support its position. But Guest-Tek had done so, citing to *Milgard*. 3-ER-243. Nomadix continued, arguing that “[e]ven assuming such work is not recoverable, tasks 2–4 account for only \$18,800 of the requested [in-house counsel] fees,” which totaled \$111,600. 3-ER-221. *See Planned*

Parenthood Fed'n of Am. V. Ctr. For Med. Progress, 16-CV-00236-WHO, 2020 WL 7626410, at *5 (N.D. Cal. Dec. 22, 2020) (in-house counsel's time was not compensable for tasks such as advising affiliates about status and strategy of litigation, seeking guidance for and making strategic decisions, and performing initial factual investigation); *BladeRoom Grp. Ltd. v. Emerson Elec. Co.*, No. 5:15-cv-01370, 2020 WL 1677328, at *5 (N.D. Cal. Apr. 6, 2020) (reducing in-house counsel's fees by 55% because time spent acting as a client liaison or representative was not compensable).

The district court refused to reduce the attorney fee award by \$18,800, however, citing California law for the proposition that courts “discern no basis for discriminating between counsel working for a corporation in-house and private counsel engaged with respect to a specific matter or on retainer.” 1-ER-9 (citing *PLCM Grp. v. Drexler*, 22 Cal. 4th 1084, 1091 (2000)).

But that proposition that in-house counsel fees in preparing a case for trial are reimbursable was never in dispute or at issue below. The relevant question was whether in-house counsel fees are reimbursable when they are *not* preparing the case for trial. And on that point, Ninth Circuit law mandates that such fees are not warranted. Accordingly, the district court erred when it failed to reduce the in house counsel's fee award by \$18,800.

CONCLUSION

As the underlying judgment should be vacated, so too should the award of attorneys' fees and costs. Alternatively, the Court should reduce the \$1,099,310 attorneys' fee award by \$812,286 (\$663,433 for the IPR proceedings, \$130,053 for the unsuccessful preliminary injunction motion, and \$18,800 for the in-house counsel corporate liaison fees), resulting in a fee award of \$287,024.

Date: January 5, 2021

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Ninth Circuit Rule 32-1 because this brief contains 3,138 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Date: January 5, 2021

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**STATEMENT OF RELATED CASES
UNDER CIRCUIT RULE 28-2.6**

Nomadix, Inc. v. Guest-Tek Interactive Entertainment Ltd., No. 20-55439, is the underlying appeal on the merits, appealing the grant of summary judgment and a permanent injunction to appellee Nomadix, Inc.

Date: January 5, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: January 5, 2021

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