

LevelUp's Pursuit of Attorney's Fees Goes Up to the Federal Circuit Level

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In an interesting case before Judge Timothy S. Hillman in the District of Massachusetts, a dispute over whether attorney's fees should be granted is moving up to the Federal Circuit. The case brings back before the Federal Circuit the question of the proper standard for granting attorney's fees – a standard that has been in flux at the District Court level in the wake of last year's *Octane Fitness* decision by the Supreme Court.

Boston-based technology startup LevelUp sought attorney's fees for its costs in defending a lawsuit against individual plaintiff Jack Barron, as well as discovery in aid of that motion. The case has moved on a fast track: in July 2013, Mr. Barron filed suit against LevelUp for infringement of a patent claiming methods for communicating messages in order to allow a financial transaction to be performed at a transaction terminal. By September 2013 – before discovery had even started – LevelUp filed a motion for summary judgment, claiming that its products lacked the “transaction terminal” that appeared in each claim of Mr. Barron's patent. After summary judgment was granted in LevelUp's favor last July, LevelUp filed its motion for attorney's fees. LevelUp claimed that Mr. Barron's suit was objectively baseless because its products could not contain the “transaction terminal” required to infringe Mr. Barron's patent. LevelUp further argued that Mr. Barron brought the suit solely for the purpose of extracting a nuisance settlement from LevelUp, focusing heavily on the enormous expense to technology companies of frivolous patent infringement lawsuits.

The Court found in Mr. Barron's favor, noting that he had engaged in months of pretrial investigation prior to bringing suit, and that as this was the first suit he had filed, he was not seeking to merely extract a license from LevelUp.

The case highlights the muddy line separating weaker but viable lawsuits from those that are objectively unreasonable or baseless. Even though the case was settled on a motion for summary judgment filed before discovery had started, the Court found that the suit was not objectively baseless because it was not so far-fetched that no patent owner would consider pursuing it. As this case moves into the appeal stage, clarity from the Federal Circuit on how to evaluate whether a claim is objectively unreasonable or baseless could provide significant help to litigants faced with prosecuting or defending an attorney's fees motion.

The case is *Jack Barron v. SCVNGR d/b/a LevelUp*, No. 13-40084-TSH, in the District of

Massachusetts.

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