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13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 SAN FRANCISCO DIVISION

16 MEDIA QUEUE, LLC,
 17 Plaintiff,
 18 v.
 19 NETFLIX, INC., et al.
 20 Defendants.
 21

) Case No. 3:09-cv-01027-SI

) **MEDIA QUEUE’S OPPOSITION TO**
) **NETFLIX’S MOTION FOR FINDING**
) **OF EXCEPTIONAL CASE AND**
) **AWARD OF ATTORNEY FEES**

) Hearing Date: April 2, 2010
) Hearing Time: 9:00 a.m.
) Courtroom 10, 19th Floor
) Hon. Susan Illston

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1 Plaintiff Media Queue, LLC (“Media Queue”) hereby submits its Opposition to Netflix’s
2 Motion for Finding of Exceptional Case and Award of Attorney Fees (Dkt. No. 212). Media Queue
3 respectfully requests that the Court deny Netflix’s motion in its entirety for the following reasons:

- 4 • Netflix has not proven that this is an “exceptional” case that would merit the
5 extraordinary remedy of an award of attorney fees;
- 6 • This is patent infringement suit that Media Queue approached with the requisite
7 degree of care, planning, and investigation; and
- 8 • Media Queue’s good faith conduct during this litigation weighs against awarding
9 attorney fees to Netflix.

10 11 **I. INTRODUCTION**

12 Netflix is attempting to obtain more than \$1 million dollars from Media Queue by arguing
13 that this garden variety patent infringement lawsuit is “exceptional.” Netflix’s argument
14 improperly relies on hindsight reasoning from a favorable claim construction order. Yet, Media
15 Queue’s claims were brought in good faith and its infringement reads were based on viable claim
16 construction arguments and principles. This case is not exceptional just because Netflix obtained a
17 favorable claim construction at the district court level. Through its arguments, Netflix seeks to
18 have this Court erode the exceptional case requirement prior to awarding fees. Netflix’s attempt to
19 obtain this extraordinary remedy should be rejected.

20 21 **II. ISSUES TO BE DECIDED**

22 Netflix’s Motion boils down to three issues:

- 23 1. Has Netflix proved by clear and convincing evidence that Media Queue’s claims are
24 objectively baseless?
- 25 2. Has Netflix proved by clear and convincing evidence that Media Queue brought this
26 action in subjective bad faith?
- 27 3. If the Court answers both of those questions in the affirmative, then the final question
28 is whether this case warrants the extraordinary remedy of an award of attorney fees to Netflix?

1 **III. RELEVANT BACKGROUND**

2 Netflix and John Gross, inventor of the '243 patent, have a long history. Mr. Gross
3 developed an improvement to the rent movies by mail system and he then commenced negotiations
4 with Netflix in order to license and/or sell his ideas to Netflix. White Decl., Ex. A, Feb. 16, 2006
5 Letter from C. Palermo. Mr. Gross is a licensed patent attorney with nearly 20 years of experience.
6 *Id.*, Ex. B., USPTO Directory. After negotiations broke down between Mr. Gross and Netflix, Mr.
7 Neil Hunt, Netflix's Chief Product Officer, authored a declaration stating that Mr. Gross' invention
8 was anticipated by Netflix's system. *Id.*, Ex. C., Mar. 23, 2007 Letter from C. Palermo. The
9 patent examiner found that Mr. Hunt's declaration was not credible for a host of reasons, not the
10 least of which being a movie, Spiderman, that Netflix claimed to be renting with its allegedly
11 anticipatory system had not been released on DVD at the time Netflix supposedly sent emails
12 regarding that movie. *Id.*, Ex. D., Sept. 20, 2007 Office Action at 2-5. Mr. Gross went on to a file
13 petition to make special in which he accused Blockbuster of infringing his yet to be issued patent.
14 *Id.*, Ex. E., Decl. in Support of Petition to Make Special. The patent office accepted his petition and
15 expedited the prosecution of his patent application. *Id.*, Ex. F., Decision on Petition to Make
16 Special. Due to the breakdown of negotiations between himself and Netflix, Mr. Gross decided to
17 sell his patent rights to Media Queue. Yar Decl. ¶ 6. Media Queue is owned by Kajeer Yar, an
18 experienced patent litigator. *Id.* ¶ 2-4. Mr. Yar thoroughly evaluated the patent prior to purchasing
19 and asserting them against the defendants. *Id.* ¶ 5-7.

20 This case was initially brought in the Eastern District of Oklahoma because (1) Media
21 Queue is located in Oklahoma and (2) it offered the shortest time to trial of all of the Federal
22 District Courts located in Oklahoma. *Id.* ¶ 8. The parties agreed to quickly proceed to trial in
23 approximately one year. Netflix did not communicate to Media Queue or its counsel that it
24 believed the claims-at-suit were objectively baseless or brought in bad faith. Instead, Netflix led
25 the charge to transfer this case to this Court by arguing that important evidence was available in this
26 District. (Netflix Motion to Transfer, Dkt. No. 55 at pg 3-5, 8-9). Shortly after this case was
27 transferred, Netflix sought a protective order arguing that Media Queue did not need to obtain any
28 evidence because defendants could dispose of the case with an abbreviated *Markman* proceeding

1 and motions for summary judgment. Letter Brief Seeking a Protective Order on behalf of Netflix,
2 Dkt. No. 125. The Court rejected Netflix's arguments. Order Denying Netflix's Motion for
3 Protective Order, Dkt. No. 142. Netflix re-urged this procedure at a status conference and the Court
4 allowed Netflix to proceed on an expedited schedule. The Court entered judgment for the
5 defendants a few months later. During the course of this condensed proceeding, Media Queue took
6 one deposition of Netflix and proffered one set of interrogatories.

7 **IV. ARGUMENT**

8 **A. Legal Standard.**

9 An award of attorney fees pursuant to "§ 285 [Title 35, Section 285 of the United States
10 Code] is limited to circumstances in which it is necessary to prevent 'a gross injustice' to the
11 accused infringer." *Forest Labs., Inc. v. Abbott Labs.*, 339 F.3d 1324, 1329 (Fed. Cir. 2003) (citing
12 *Mach. Corp. of Am. v. Gullfiber AB*, 774 F.2d 467, 472 (Fed. Cir. 1985)). Fees are only authorized
13 if the Court finds this to be an "exceptional case." 35 U.S.C. § 285 (hereinafter, "Section 285").
14 "A case may be deemed exceptional when there has been some material inappropriate conduct
15 related to the matter in litigation, such as willful infringement, fraud or inequitable conduct in
16 procuring the patent, misconduct during litigation, vexatious or unjustified litigation, conduct that
17 violates Fed. R. Civ. P. 11, or like infractions." *Brooks Mfg., Inc. v. Dutailier Int'l, Inc.*, 393 F.3d
18 1378, 1381 (Fed. Cir. 2005). "Absent misconduct in conduct of the litigation or in securing the
19 patent, sanctions may be imposed against the patentee ***only if both*** (1) the litigation is brought in
20 subjective bad faith, and (2) the litigation is objectively baseless." *Id.* (emphasis added).

21 "There is a presumption that the assertion of infringement of a duly granted patent is made
22 in good faith." *Id.* at 1382. Accordingly, the movant bears the burden of proving by clear and
23 convincing evidence that that the underlying conduct was improper and the case should be
24 characterized as "exceptional." *Id.* Section 285 requires more than mere negligence on behalf of
25 the patentee; instead, the improper conduct must rise to a level of "studied ignorance." *Int'l*
26 *Automated Sys. v. IBM*, 595 F.Supp.2d 1197, 1216 (D. Utah 2009) (quoting *Eltech Sys. Corp. v.*
27 *PPG Indus.*, 903 F.2d 805, 810 (Fed. Cir. 1990)). "Even for an exceptional case, the decision to
28

1 award attorney fees and the amount thereof are within the district court's sound discretion."
2 *Brooks*, 393 F.3d at 1392.

3
4 **B. Netflix Failed to Show by Clear and Convincing Evidence that this is an**
5 **"Exceptional" Case.**

6 To be eligible for attorney fees, Netflix must first prove by clear and convincing evidence
7 that this case is "exceptional." Because Netflix has not alleged any litigation misconduct by Media
8 Queue, Netflix can only make the required showing by proving *both* that (1) Media Queue's claims
9 are objectively baseless and (2) Media Queue brought this action in subjective bad faith. Netflix
10 has failed to meet its burden on either (let alone both) of these prongs, so the case is not
11 "exceptional" and Netflix may not recover attorney fees.

12
13 **1. Media Queue's Claims Were Grounded in a Reasonable Interpretation**
14 **of the Patent.**

15 Section 285 establishes a "rigorous" standard for proving objective baselessness. *Visto*
16 *Corp. v. Sproqit Techs., Inc.*, No. C-04-0651 EMC, 2007 WL 160942, at *3 (N.D.Cal. Jan. 17,
17 2007). Where the issue of infringement hinges primarily on claim construction, courts have denied
18 attorney fees when the "asserted [claim] constructions . . . were not so outside the realm of
19 possibility that they could be deemed frivolous." *Id.* at *4. As this Court has explained:

20 Given the vagaries often inherent in the claims construction process, it appears to be
21 the exception, and not the rule, for a court to find terms of a patent so obvious on its
22 face, and thus the construction offered by a party so obviously unreasonable, that
sanctions under § 285 would be warranted.

23 *Id.* at *5.

24 In the instant case, the Court's claim construction ruling is central to Netflix's contention
25 that Media Queue's claims were objectively baseless. In that ruling, the Court rejected Netflix's
26 arguments that two of claims at issue were indefinite. In addition, the Court repeatedly found the
27 true claim construction to lie somewhere between the proposals offered by the parties. Claim
28 Construction and Summary Judgment Order ("Order") at 12:14-15, Dkt. No. 200 ("The Court finds

1 that while plaintiff’s construction is overly broad, defendants’ construction is too narrow.”); *Id.* at
2 14:16-17 (“Again, the Court finds that while plaintiff’s construction of the claim term is overly
3 broad, defendants’ construction is too narrow.”).

4 Media Queue’s positions were in accord with the sound principles of claim construction.
5 For example, when construing the phrase “authorized by the subscriber” in claims 13 and 23,
6 Media Queue relied on the well founded claim differentiation principle in the landmark case
7 *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (*en banc*), which presumes that an
8 independent claim does not include the limitation added by a claim that depends from it. (*See*
9 Media Queue’s Opening Claim Construction Brief (“Opening Construction Brief”) at 8, Dkt. No.
10 160.) Because dependent claim 17 added the limitation that the trigger event be “based on... a
11 numerical value provided by said subscriber,” Media Queue applied the claim differentiation
12 principle and reasonably surmised that

13 [i]f the authorization step of claim 13 required the subscriber to elect the queue
14 replenishment control rules, including the trigger event and the quantity of items on
15 which it is based (after being presented a choice among multiple options), then claim
16 17 would fail to add a meaningful additional limitation to claim 13, making claim 17
17 superfluous.

18 *Id.* Media Queue again relied on *Phillips* when construing “a separate set of queue replenishment
19 control rules” in claims 13 and 23. (*See* Media Queue’s Claim Construction Reply Brief
20 (“Construction Reply Brief”) at 11, Dkt. No. 177.) To rebut Netflix’s proposed construction
21 requiring “automatic” features, Media Queue noted that “the clear language of the specification
22 shows that it is permissible to ‘merely alert the subscriber to the queue deficiency.’” *Id.* (quoting
23 ‘243 patent at 14:6-8). Media Queue then reasonably concluded that “things can happen
24 automatically, but the claims do not *require* anything to happen automatically... because [according
25 to *Phillips*] it is not necessary to construe claims in such a way as to force the claims to be capable
26 of achieving all of the ideas recited in the specification.” *Id.* (emphasis in original). Admittedly,
27 the Court was not persuaded by these and similar arguments when construing these claims,
28 resulting in a claim construction adverse to Media Queue’s infringement contentions and summary
judgment in favor of Netflix. Such a ruling, however, does not make these arguments objectively

1 baseless. *See e.g., Vehicle IP, LLC v. GMC*, No. 07-cv-345-bbc, 2008 U.S. Dist. LEXIS 43426
2 (W.D. Wis. June 2, 2008).¹

3 Rather than attacking the claim construction tenets employed by Media Queue, Netflix rests
4 its argument on the Court's treatment of statements made by the inventor Mr. Gross to the United
5 States Patent and Trademark Office ("PTO") during prosecution. In its claim construction order,
6 the Court interpreted the phrase "a separate set of queue replenishment control rules" in
7 independent claims 13 and 23 to require "automatic[... modification," based in part on Mr. Gross'
8 statement that "a user can set up a set of rules which *automatically* cause a modification." Order at
9 16 (emphasis in original).) The Court agreed with Media Queue that automatic modification is an
10 option, but it also disagreed with Media Queue by finding that this option must be presented to the
11 user. *Id.* at 16:11-13 ("Although a subscriber may choose not to benefit from the automatic queue
12 replenishment feature, the subscriber still has to be presented with this option, and a computer must
13 determine whether the subscriber has selected this option."). The Court came to this conclusion
14 only after examining both the claim language and the intrinsic evidence. *Id.* That the Court was
15 ultimately not persuaded by Media Queue's interpretation of this claim is not enough by itself to
16 clearly and convincingly show baselessness. As such, Netflix cannot establish that Media Queue's
17 proposed construction was "so outside the realm of possibility that [it] could be deemed frivolous."
18 *See Visto*, 2007 WL 160942 at *4.²

19 Netflix goes on to attack Media Queue's infringement positions as baseless. Media Queue
20 advanced infringement allegations supported by its view of the claims. The fact that the Court later
21 disagreed with Media Queue's claim interpretation does not make its infringement allegation
22 baseless. Media Queue's position is that there are a number of different "queue replenishment
23 control rules" and "notification rules" present in Netflix's system. Some of these rules may

24 ¹ Notably, Media Queue is appealing the Court's claim construction ruling and subsequent
25 summary judgment grant to the Federal Circuit. Notice of Appeal, Dkt. No. 217. If Media Queue's
26 position is so untenable, as Netflix urges, one might ask why Media Queue would go to such
lengths and expense to appeal.

27 ² It is also telling that Blockbuster, a defendant impacted as much as Netflix by the Court's
28 claim construction, has not moved this Court for an award of its fees.

1 implicate items present in the prior art. However, these are not the only elements of the disputed
2 claims. Netflix's argument boils down to this: if the prior art contained elements A and B, then the
3 assertion of a patent that claims elements A, B, C, D & E must be baseless. This is erroneous and
4 rests on an incorrect application of basic patent law. As with many inventions, the '243 patent
5 builds upon the prior art. The '243 patent takes some known features and elevates them through the
6 use of Mr. Gross' creativity and innovation. The PTO thoroughly examined Mr. Gross' application
7 and granted it – with full knowledge of the Netflix system, despite the declaration of Netflix' Chief
8 Product Officer, and with full knowledge of the Hastings reference. For example, during the
9 prosecution of the '243 patent, the Examiner repeatedly found that

10 Hastings discloses a method for renting items where the customer sets up a
11 rental queue. A set of queue replenishment rules are employed to determine if
12 the ordering of the titles in the queue should be changed. ... [However, n]ot
disclosed is a set of notification rules that will notify the subscriber when the
ordering of the queue has been changed by monitoring the queue.

13 White Decl., Ex. G, Office Action Sept. 9, 2005 pg 6; *see also* White Decl., Ex. H, Office Action
14 Mar. 20, 2006 pg 3. Thus, it is not improper or surprising that some of the things that Media Queue
15 has cited as queue replenishment control rules may have existed in a prior Netflix system.

16 Furthermore, in the reexamination of the '243 patent that is currently ongoing, the PTO has
17 already confirmed the patentability of two of the claims asserted against Netflix (claims 16 and 18).
18 White Decl., Ex J., Feb. 3, 2010 Office Action.

19 Netflix has not reached the very high bar required to prove that Media Queue's positions
20 were objectively baseless. In *Computer Docking Station Corp. v. Dell, Inc.*, 519 F.3d 1366, 1380
21 (Fed. Cir. 2008) the Federal Circuit illustrated the height of this bar when it affirmed a district court
22 finding that a case was not exceptional despite the plaintiff's argument for a position that
23 contravened a clear disavowal made by the patentee during prosecution. 519 F.3d 1366, 1380 (Fed.
24 Cir. 2008). In its analysis, the Court examined other relevant factors, such as "the closeness of the
25 question, pre-filing investigation and discussions with the defendant, and litigation behavior." *Id.* at
26 1379. Ultimately, the patentee's serious efforts to evaluate the likelihood of success on its patent
27 claims before filing suit outweighed its representations before the PTO. *Id.* at 1380. In particular,
28 the patentee's pre-filing investigation of the patent and accused infringing devices, testing of the

1 accused products, licensing discussions with defendants, and preparation of infringement charts for
2 the defendants convinced the Court that the litigation was not objectively baseless. *Id.*

3 Similarly, when applying the pre-filing factors considered in *Computer Docking* to this
4 dispute, it is apparent that Media Queue's conduct was not objectively baseless. Before Media
5 Queue acquired the '243 patent, the inventor Mr. Gross engaged in serious pre-suit investigations
6 during prosecution of the patent itself. First, after filing his application, Mr. Gross and Netflix
7 engaged in pre-suit negotiations over a potential acquisition of the application and related
8 applications. White Decl., Ex. A. Second, after negotiations with Netflix ceased, Mr. Gross further
9 investigated Netflix's system and found that it likely infringed upon his claims. To protect his
10 interests, on January 3, 2007, Mr. Gross gave formal notice to Netflix under Title 35, Section
11 154(d) of the United States Code, in which he outlined the features he believed to infringe upon his
12 claims. *Id.* Ex. I, Jan. 3, 2007 Letter from N. Gross. Third, Netflix responded with a letter to Mr.
13 Gross indicating that Netflix believed the '243 claims to be invalid because they were anticipated
14 by Netflix's prior use and that Mr. Gross had a duty to submit the declaration to the PTO. *Id.*, Ex.
15 C. Though Mr. Gross disputed Netflix's allegations, he submitted Netflix's letter to the PTO for
16 their independent review. In a lengthy critique, the patent examiner agreed with Mr. Gross that
17 Netflix's anticipation contentions were simply not credible. *Id.*, Ex. D at 2-5. Fourth, in an attempt
18 to accelerate the prosecution, Mr. Gross filed a Petition to Make Special in which he
19 demonstrated—without filing suit—that another defendant, Blockbuster, was currently infringing
20 the claims of his application. *Id.* Ex. E. The Petition was granted and the infringement contentions
21 in that chart are similar to Media Queue's infringement contentions advanced during the current
22 litigation. *Id.*, Ex. F.

23 When Media Queue eventually acquired this patent, it was aware of all of the pre-filing
24 investigation conducted by Mr. Gross. Yar Dec. ¶ 6-7. Thus, Media Queue knew and claimed the
25 benefit of Mr. Gross' pre-suit activity, including licensing negotiations with Netflix, an
26 infringement assessment by Mr. Gross based on Netflix's system, an independent invalidity
27 assessment by the PTO based on Netflix prior use, and an independent infringement assessment by
28 the PTO based on Blockbuster's system. *Id.* ¶ 7. Additionally, Media Queue and its attorneys

1 conducted their own serious assessment of the Netflix system and the ‘243 patent before bringing
2 the current action. *Id.* ¶ 3-5, 9. Taken together, this pre-suit activity demonstrates that Media
3 Queue’s contentions were not objectively baseless.

4 Furthermore, the cases that Netflix relies upon to establish that this case is exceptional are
5 clearly distinguishable. These cases—*Microstrategy Inc. v. Crystal Decisions, Inc.*, 555 F. Supp.
6 2d 475 (D. Del. 2008) and *iLOR, LLC v. Google, Inc.*, No. 5:07-109-JMH, 2009 WL 3367391 (E.D.
7 Ky. Oct. 15, 2009)—both involved proposed claim constructions that contradicted representations
8 before the PTO, but the conclusions reached by the courts in those cases were heavily dependent on
9 the facts at issue.

10 For instance, in *Microstrategy*, the accused infringer produced strong evidence of invalidity
11 and the patentee “failed to reassess the merit of its claims under the [asserted] patent, and instead,
12 proceeded without any evidence to the contrary.” 555 F. Supp. 2d at 480. Further, after the
13 patentee learned that the report of its expert contained factual inaccuracies, the patentee waited six
14 months before producing an unauthorized supplemental report with a new infringement theory and
15 failed to provide any explanation for its expert’s mistakes or the delay. *Id.* at *482 (“Such conduct
16 by [the patentee] supports bad faith....”).

17 Likewise, in *iLOR* the disavowed constructions later relied on as a basis for the patentee’s
18 infringement theories were blatant and egregious, and extended beyond the confines of the PTO to
19 the general public. 2009 WL 3367391 at *4. The patentee expressly and unequivocally disavowed
20 essential features to overcome prior art rejections, the Examiner later relied on those disavowals in
21 allowing the claims, and prior to commencing the lawsuit, the patentee’s CEO publicly cited the
22 lack of those features as differentiating the patentee’s product from the infringer’s product. *Id.* at
23 *3-4. Faced with such obvious and unbounded disclaimers, it is not surprising that the found “that
24 iLOR was aware or should have been aware of the fatal flaws in its theory of the case.” *Id.* at *4.

25 Media Queue’s conduct does not reach the level of the egregious conduct observed in the
26 cases cited by Netflix. As the court in *iLOR* noted, “there is no sanction for simply being wrong or
27 reaching the opposite conclusion from that ultimately reached by the Court.” *Id.* at *2. Netflix,
28

1 however, asks the Court to find precisely that and award attorney fees for nothing more than
2 successfully defending against a garden variety infringement suit.

3 Finally, it is telling that Netflix requests such a significant amount of attorney fees to reach
4 “a reasonably prompt summary judgment” on claims it considers “baseless.” (See Netflix’s Motion
5 for Finding of Exceptional Case and Award of Attorney Fees (“Netflix’s Motion”) at 8, Dkt. No.
6 212 (requesting \$1,035,077.19 in attorney fees and \$77,067.10 in costs).) If Media Queue’s claims
7 were as blatantly frivolous as Netflix believes, it is unlikely that Netflix would have authorized the
8 spending of over a million dollars defending them. *See, e.g., Welker Bearing Co. v. Phd, Inc.*, No.
9 06-13345, 2009 WL 799213, at *3 (E.D.Mich. Mar. 24, 2009) (finding no “indicia of frivolous or
10 objectively baseless litigation” after noting Defendant’s request for \$635,783 in attorney fees);
11 *WNS Holdings, LLC v. United Parcel Serv., Inc.*, No. 08-cv-275-bbc, 2009 WL 3617643, at *4
12 (W.D. Wis. Oct. 29, 2009) (“Moreover, it is suspect that this case was so obviously baseless after
13 the court’s claim construction ruling when one considers the \$1.9 million defendant spent in fees
14 and costs after the ruling.”). Netflix treated Media Queue’s claims with the seriousness that such
15 claims merited. For Netflix to now argue that those claims were objectively baseless is at odds with
16 its conduct in litigation.

17

18 **2. Media Queue’s Claims Were Brought in Good Faith.**

19 Netflix has provided no evidence of subjective bad faith by Media Queue, let alone clear
20 and convincing evidence. Netflix asks this court to infer bad faith from the fact that its letter brief
21 to the Court outlined the same grounds upon which the Court granted later summary judgment.
22 (Netflix’s Motion at 3 (“Thus, Media Queue not only *should* have known that its claims were
23 baseless, it *did know* because Netflix spelled out the flaws in Media Queue’s theory of
24 infringement.”) (emphasis in original).)³ In other words, Netflix seeks to impute bad faith merely
25 because Media Queue continued litigating in the face of a brief that ultimately proved successful
26

27 ³ However, it should be noted that the Court denied the relief requested in Netflix’s letter
28 brief. Order Denying Protective Order, Dkt. No. 142.

1 before this Court. But Netflix’s “position is based on the benefit of hindsight, which is an improper
2 basis by which to find bad faith.” *Addventure Prods, Inc. v. Smoothreads, Inc.*, No. 07CV2025-
3 MMA, 2009 WL 3248097, at *3 (S.D.Cal. Oct. 8, 2009); *see also WNS Holdings*, 2009 WL
4 3617643 at *3 (“Defendant’s exceptional case contention is based entirely on the hindsight
5 adoption of this court’s construction of the... patents. More than this is required to prove by clear
6 and convincing evidence that plaintiff pursued this litigation in bad faith.”).

7 While it is true that a patentee prolonging litigation in bad faith may be relevant to whether
8 a case is exceptional, the relevant time frame typically begins *after* claim construction. *See, e.g.*,
9 *Computer Docking*, 519 F.3d at 1380; *WNS Holdings*, 2009 WL 3617643 at *3. In this case,
10 Media Queue did nothing to prolong the district court litigation after the adverse claim construction
11 ruling. Claim construction and summary judgment were issued in a single order, and all parties
12 jointly prepared an order of judgment. Further evidence of Media Queue’s good faith is that it
13 immediately stipulated to a non-moving defendant’s non-infringement under this Court’s claim
14 construction.⁴

15 Media Queue’s refusal to abandon its litigation position after Netflix’s letter brief merely
16 illustrates that Media Queue disagreed with Netflix’s claim construction and non-infringement
17 arguments. This is not bad faith. Only after the Court construed the claims was it evident that
18 Media Queue’s infringement arguments could not succeed. Furthermore, although the Court
19 disagreed with Media Queue’s claim construction arguments, the Court did not fully accept
20 Netflix’s arguments either. (*See Claim Construction Order at 8-17.*) The Court not only rejected
21 Netflix’s primary contentions that the ‘243 patent’s claims were too indefinite to be construed, but
22 also found Netflix’s alternative constructions to be “too narrow.” *See id.* at 13-14. Thus, neither
23 party fully appreciated the scope of the claims prior to claim construction. Media Queue should not
24 be charged with bad faith for disagreeing with Netflix’s position and pursuing an alternative claim
25

26 ⁴ Defendant Greencine did not participate in the claim construction briefing, nor did it file a
27 motion for summary judgment. Despite Greencine’s inaction, Media Queue stipulated that
28 Greencine did not infringe under the Court’s claim construction ruling and did not prolong this case
once it became clear that its infringement theory was not being accepted by the Court.

1 construction by the Court. *See, e.g., Pixion, Inc. v. Placeware, Inc.*, No. C 03-02909 SI, 2005 WL
2 3955890, at *4 (N.D.Cal. Apr. 22, 2005) (“Prior to claim construction, it was not yet clear what the
3 scope of the invention was, and the fact that the Court’s claim construction ultimately resulted in a
4 finding of non-infringement does not make [patentee’s] claim baseless.”).

5 Netflix also tries to impute bad faith by characterizing Media Queue as a non-practicing
6 entity that bought the patent solely for litigation. In *Addventure*, however, the court found this
7 argument to be “completely without merit.” *See* 2009 WL 3248097 at *3. The court could find no
8 legal support or policy reason to support the contention that “acquiring a patent, and subsequently
9 attempting to enforce one’s rights under that patent, is tantamount to bad faith.” *Id.* This is
10 especially true here, where Media Queue was aware of Netflix’s involvement in the prosecution of
11 the patent, including the failed licensing attempts and Mr. Gross’ subsequent infringement analysis.
12 Furthermore, Netflix asserts that “Media Queue had little incentive *not* to litigate even the most
13 tenuous positions” because “Media Queue does not produce or sell products.” (Netflix’s Motion at
14 8 (emphasis in original).) Netflix’s argument is utterly illogical and unsupported by current law. It
15 is notable that Netflix did not cite a single case to support this argument. This is because no such
16 case exists. In order to treat a small entity like Media Queue in a different manner than a large
17 company like Netflix it would require a change to current law. An entity like Media Queue that has
18 no sources of revenue other than licensing royalties has every incentive ***not to*** litigate tenuous
19 positions or bring weak claims. Unlike Netflix, which has multiple streams of revenue from which
20 it can pay legal fees and expenses, Media Queue has no such luxury. Instead, Media Queue must
21 balance the cost and risk associated with a lawsuit against the possible benefit to be obtained from a
22 positive judgment or settlement agreement. Media Queue is a small company and it did not enter
23 lightly into litigation with the largest companies in the industry. Irrational or reckless litigation
24 decisions could destroy the value of Media Queue’s one asset, its intellectual property. As such,
25 Media Queue took very seriously its obligation to enter into good faith litigation.

26 The burden, however, is on Netflix to *prove* bad faith, not merely to imply it. To the extent
27 that Netflix seeks to impute bad faith based on the parties’ relative sizes, *Brooks* makes clear that
28 size differences should not enter the bad faith analysis. 393 F.3d at 1384 (“A duly granted patent is

1 a grant of the right to exclude all infringers, not just those of comparable size.”). As stated above,
2 Media Queue brought the original case in Oklahoma because Mr. Yar lived and worked in the area
3 and each of the defendants’ was subject to personal jurisdiction there—for instance both Netflix
4 and Blockbuster had physical facilities in the state. Mr. Yar’s decision to file in the Eastern District
5 was a function of its relatively uncrowded docket and its quick time to trial. Yar Decl. ¶ 8. His
6 office was less than a forty-five minute drive from the courthouse. *Id.* Media Queue also filed the
7 original case before the Federal Circuit’s *T.S. Tech* decision so there can be no assertion that Media
8 Queue’s actions flew in the face of controlling authority. In short, there was nothing baseless about
9 the decision to file in Oklahoma and nothing that would amount to litigation misconduct. The
10 decision was simply borne out of the desire to litigate close to home in a venue that had a quick
11 time to trial.

12
13 **C. Even if This Were an “Exceptional” Case, It Does Not Warrant Attorney Fees.**

14 Before attorney fees may be awarded, Netflix must first prove that this is an exceptional
15 case by showing that Media Queue’s claims were objectively baseless and brought in subjective
16 bad faith. Netflix’s arguments fall short of the clear and convincing evidence standard required for
17 this threshold finding, precluding an award of attorney fees. But even if this case were found
18 exceptional, the award of attorney fees is not mandatory and remains in the Court’s sound
19 discretion. “Denying defendant its fees merely maintains the *status quo* under the general rule that
20 the prevailing party absorbs its own costs. Granting defendant its fees would be the exception to
21 the rule, not the other way around.” *WNS Holdings*, 2009 WL 3617643 at *4. Here, Media Queue
22 has litigated this matter in good faith and should not be forced to bear Netflix’s exorbitant attorney
23 fees.

24 When determining whether attorney fees are warranted, the court may consider both
25 tangible and intangible factors, such as the closeness of the case and litigation behavior. *Serio-US*
26 *Indus., Inc. v. Plastic Recovery Techs. Corp.*, 459 F.3d 1311, 1322 (Fed. Cir. 2006). In *Polarity,*
27 *Inc. v. Diversified Techs., Inc.*, No. C-06-0646 EMC, 2006 WL 3456634, at *4 (N.D. Cal. Nov. 29,
28 2006), the Court found an award of attorney fees to be unwarranted, relying on the closeness of the

1 case, litigation tactics, and character of the parties' conduct. As for the issue of closeness of the
2 case, certain "patent limitations were terms likely in need of claim construction and possibly factual
3 development as well." *Id.* at *5. As to the parties' conduct, the Court found good faith when the
4 plaintiff issued a demand letter before filing a claim of infringement. *Id.*

5 Similarly here, these discretionary factors do not support the award of attorney fees. First,
6 claim construction was required to ultimately resolve the question of infringement, and Media
7 Queue advanced sound constructions derived from well established claim construction principles.
8 Second, Media Queue did not file suit until after Netflix had significant interaction with the patent's
9 inventor Mr. Gross. By the time Media Queue acquired the patent and filed suit, Netflix had
10 already engaged in licensing discussions with Mr. Gross, advanced an anticipation defense before
11 the PTO, and was formally notified of Mr. Gross' infringement contentions. Nothing in the facts of
12 the case suggests that Media Queue's conduct either before or during litigation was improper. To
13 the contrary, Media Queue cooperated with every attempt that was proffered by the Defendants to
14 streamline the case by the narrowing of issues.

15 Netflix cites its significant "discovery burdens" relative to Media Queue in support of its
16 request for attorney fees. (Netflix's Motion at 8.) Netflix, however, fails to identify any improper
17 behavior by Media Queue during the discovery process, relying instead on nothing more than the
18 fact that Media Queue does not produce or sell products, which is ironic considering that Netflix,
19 like Media Queue, is also a service-oriented business. Netflix completely fails to mention that
20 Media Queue served only one set of interrogatories and sought only two depositions in this
21 litigation – only one of which was directed towards Netflix. Media Queue's discovery practices
22 were more than reasonable in number and type and speak to Media Queue's good faith during
23 discovery. A small entity such as Media Queue cannot afford to waste time and money with
24 unnecessary discovery or other burdensome tactics. Media Queue simply does not have the
25 resources to wade through mountains of irrelevant information and thus, it focused its efforts on the
26 information essential for the case. For all of these reasons, the Court should not apply the
27 extraordinary remedy of shifting attorney fees to Media Queue in this quite ordinary case.
28

1 **V. CONCLUSION**

2 Media Queue respectfully requests that Netflix's Motion for Finding of Exceptional Case
3 and Award of Attorney Fees be denied because: (1) Netflix has not shown by clear and convincing
4 evidence that Media Queue's claims are objectively baseless, (2) Netflix has not shown by clear
5 and convincing evidence that Media Queue's claims were brought in subjective bad faith, and (3)
6 Media Queue's good faith conduct during this litigation weighs against awarding attorney fees to
7 Netflix.

8
9 Dated: March 12, 2010

ALSTON & BIRD LLP

10 By: /s/ Michael J. Newton
11 Michael J. Newton

12 Attorneys for Plaintiff
13 MEDIA QUEUE, LLC
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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2010, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send electronic notification of such filing to the following individuals:

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I further certify that the foregoing document is being served by e-mail on the following individual and firm e-mail address:

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I declare that I am a member of the bar of this court.

Executed March 12, 2010, at Dallas, Texas.

/s/ Michael J. Newton