IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GN NETCOM, INC., Plaintiff, vs. PLANTRONICS, INC., Defendant.	)	C.A. No. 12-cv-1318-LPS

PLAINTIFF GN NETCOM, INC.'S BRIEF IN OPPOSITION TO PLANTRONICS' MOTION FOR ATTORNEYS' FEES

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Dated: December 5, 2017

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NATURE AND STAGE OF PROCEEDINGS

GN filed its Complaint in this matter on October 12, 2012, alleging monopolization, attempted monopolization, concerted action in restraint of trade, and tortious interference with business relations under Delaware common law. D.I. 1. A jury trial was held from October 11, 2017 to October 18, 2017,[1] after which the jury returned a verdict for Plantronics. D.I. 533.

SUMMARY OF ARGUMENT

As a preliminary matter, Plantronics' Motion for Attorney's fees ("Motion") (D.I. 547) is based on the premise that because GN informed Plantronics of its decision to withdraw its tortious interference claim after Day 3 of trial, while its case remained open, and later formally dismissed the claim on Day 5 of trial, it was necessarily a meritless claim. Nothing could be further from the truth. GN has asserted its tortious interference claim consistently since filing its Complaint in 2012, and has always (up through the Pretrial Order) been clear that it was based on the same anticompetitive conduct that formed the basis for its antitrust claims. GN put on substantial evidence at trial from which a reasonable juror could find that Plantronics, through the use of its POD program, tortiously interfered with GN's business relations with those PODs. GN should not be penalized for litigating its tortious interference claim throughout the life of the case and then making the strategic decision to dismiss the claim, with the consent of Plantronics, to simplify the case.

Furthermore, Plantronics' request is without legal basis. Contrary to Plantronics' characterization, 28 U.S.C. § 1927 is a statute that permits the Court to sanction counsel (rather than an individual party) whose conduct is so "unreasonable and vexatious" as to have caused some "multiplication of the proceedings" that resulted in the moving party incurring "excess costs." And, in the Third Circuit and others, the Court can only order sanctions under § 1927 if it

[1] Citations to the trial transcript herein shall be "Trial Day X, at xx:xx."

finds that the offending counsel acted with bad faith. Plantronics' Motion fails on all counts. Plantronics can point to no evidence that by continuing to litigate its tortious interference claim through trial, GN created any multiplication of the proceedings, or that counsel did so recklessly or for the purpose of "harassment," such that its conduct was "unreasonable or vexatious." While Plantronics alleges that GN acted in bad faith and that Plantronics incurred excess costs in having to defend the tortious interference claim, both attacks are easily dismissed. The bottom line is that Plantronics has known since 2012 that it would have to defend against GN's tortious interference claim - a claim based on the same anticompetitive conduct that formed the basis for its antitrust claims - and any costs it incurred in doing so were not "excess" but were part and parcel to its defense in this case.

Finally, even if the Court finds that Plantronics is entitled to some amount of attorneys' fees (it should not), the $877,692 Plantronics has requested is clearly unreasonable. That figure has no connection whatsoever to the amount of time Plantronics actually spent preparing to defend the single tortious interference claim. And, if Plantronics did spend as much time and money preparing to defend the tortious interference claim as it did on each of the four antitrust claims, its decision to do so was wholly unreasonable given the clear predominance of and risk associated with GN's four antitrust claims. Plantronics' Motion should be denied in its entirety.

STATEMENT OF FACTS

GN's Complaint against Plantronics, filed on October 12, 2012, included federal antitrust claims and a state law claim for tortious interference with business relations (the "tortious interference" claim). D.I. 1. GN's Complaint clearly articulated the factual basis for its tortious interference claim. *See id.* at ¶¶ 86-91. On December 5, 2012, Plantronics filed its Motion to Dismiss GN's Complaint for Failure to State a Claim, in which it urged the Court to dismiss

GN's tortious interference claim specifically because "GN Netcom's tortious interference claim *requires allegations of independently wrongful conduct, and it alleges only antitrust violations in that regard*." D.I. 8, D.I. 9 at 2, 19 (emphasis added). In its Answering Brief in Opposition to Defendant's Motion to Dismiss, GN argued that its tortious interference claim was based on Plantronics' alleged antitrust violations.[2] Indeed, the Court's September 23, 2013 Order denying Plantronics' Motion to Dismiss concluded that GN had adequately pled tortious interference after "[h]aving found that GN has adequate alleged[ly] antitrust injury[.]" D.I. 20, at 9. Subsequently, in its Statement of Remaining Issues of Law filed as part of the Pretrial Order in this case, GN spelled out, for the third time, the theory behind its tortious interference claim, which was clearly based on Plantronics' use of the POD agreements to disrupt GN's business relationships with its distributors. *See* D.I. 490, Ex. 4 at 6.

At trial, GN presented sufficient evidence from which the jury could find that Plantronics' use of the POD agreements, and in particular, its prohibition on PODs advertising GN products and its expectation that PODs would flip accounts from GN to Plantronics, constituted tortious interference with GN's business relations with PODs. That evidence included (but was not limited to) evidence that:

- GN's 2008 Indirect Seller Agreement with distributors required them to "*at all times* . . . *diligently promote* the sale of and stimulate and increase interest in the Products [and] [i]n particular . . . [p]romote the Products in accordance with the advertising and promotional initiatives introduced by GN Netcom…";[3]

[2] *See* D.I. 13, at 20 ("While it is true that a plaintiff must plead claims that are independently wrongful, antitrust violations clearly fall within the realm of improper conduct subject to tortious interference claims. As established at length above, *GN has adequately pleaded antitrust violations, all of which support its tortious interference claim.*") (internal citations omitted) (emphasis added).

[3] *See* Defense Ex. 1062 (emphasis added); Trial Day 3, at 655:8-21.

- The POD agreements between Plantronics and PODs prohibited them from advertising GN products or purchasing directly from GN which was contrary to GN's Indirect Seller Agreement terms[4];

- Plantronics knew that certain PODs (such as SKC[5] and TCI[6]) had business relationships or expectancies with GN, including but not limited to GN's Indirect Seller Agreement;

- Plantronics intentionally interfered with GN's relationships with certain of those PODs (such SKC[7] and TCI[8]) by prohibiting them from advertising GN products, which directly interfered with GN's Indirect Reseller Agreements;

- Plantronics also intentionally interfered with GN's relationships with PODs by encouraging them to flip accounts from GN to Plantronics;[9] and

- Plantronics' interference with GN's relationships with PODs caused it damages in the way of lost sales, which was proven by the evidence of actual lost sales that GN presented at trial,[10] and was quantified by Professor Elhauge.[11]

Despite having presented this evidence, GN made the strategic decision that it would not present the tortious interference claim to the jury, and informed Plantronics of that fact. D.I. 548 ("Mot.") at 3 (citing Blumenfeld Decl., ¶ 7). In accordance with that decision, prior to Day 4 of trial, the parties agreed to strike the jury instruction on tortious interference. *See* Trial Day 5, at 1342:13-18. On Day 6 of trial, GN stated it would formalize that agreement for the Court's approval. *See* Trial Day 6, at 1594:25-1595:14; D.I. 538.

[4] Trial Day 2, at 309:21-310:5, 337:2-339:23.
[5] Trial Day 3, at 631:6-14.
[6] Trial Day 2, at 420:17-25.
[7] Trial Day 3, at 644:8-17; 652:1-653:4.
[8] Trial Day 2, at 430:21-431:6.
[9] *See, e.g.*, Trial Day 3, at 662:12-663:25, 650:19-652:5; PX-112; PX-370 (Kelly Ammeen of SKC stating that as a POD, it was SKC's goal to flip accounts to 100% Plantronics).
[10] Trial Day 3, at 663:11-25.
[11] Trial Day 3, at 685:24-686:2 ("First, I quantified the share of the overall market that was foreclosed by these agreements, and I found that it was abasically about half . . . [m]ore precisely, 47 percent.").

ARGUMENT

The Supreme Court has described the so-called American Rule, that "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise," as a "bedrock principle" of law. *Baker Botts LLP v. Asarco LLC*, 135 S. Ct. 2158, 2164 (2015) (quoting *Hardt v. Reliance Std. Life Ins. Co.*, 560 U.S. 242, 252-53 (2010) (internal quotation marks omitted)). It is for this reason that the Supreme Court "will not deviate from the American Rule absent explicit statutory authority." *Id.* (citations and internal quotation marks omitted).

Despite this well-settled principle of law, Plantronics argues that because it had to defend GN's tortious interference claim at trial, it is entitled to an award of attorneys' fees pursuant to 28 U.S.C. § 1927 and/or "the Court's inherent power." Mot. at 2. As explained in detail below, neither § 1927 nor "the Court's inherent power" are applicable or provide any legal basis for awarding Plantronics attorneys' fees in this case. As such, its Motion should be denied.

I GN Cannot Be Sanctioned Or Forced To Pay Any Of Plantronics' Attorneys' Fees Under 28 U.S.C. § 1927.

The only remedy available under 28 U.S.C. § 1927 is a sanction against counsel, not the client, for improper conduct. The statute reads:

> Any *attorney* . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to *satisfy personally* the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 (emphasis added); *Zuk v. Eastern Penn. Psychiatric Institute of the Medical College of Penn.*, 103 F.3d 294, 297 (3d Cir. 1996) ("[T]he statute is designed to discipline *counsel only* and does not authorize imposition of sanctions on the attorney's client.") (emphasis added); *Williams v. Giant Eagle Markets, Inc.*, 883 F.2d at 1191 (3d Cir. 1989) (trial court committed error in imposing attorneys' fees against unsuccessful discrimination plaintiff since

the plaintiff, as a litigant in the action, was not subject to suit under § 1927). By failing to seek relief against the proper party as set forth in the statute, Plantronics' Motion is procedurally flawed and, therefore, should be denied.

Indeed, courts order sanctions pursuant to 28 U.S.C. § 1927 only in circumstances where *counsel* has intentionally engaged in particular bad faith conduct that multiplies the proceedings and causes the non-offending party to incur specific, identifiable, excess costs:

> [Section 1927] limits attorney sanctions imposed thereunder to those situations where an attorney has: (1) multiplied proceedings; (2) unreasonably and vexatiously; (3) thereby increasing the cost of the proceedings; (4) with bad faith or with intentional misconduct.

LaSalle Nat'l Bank v. First Conn. Holding Grp., LLC, 287 F.3d 279, 288 (3d Cir. 2002); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 278 F.3d 175, 180 (3d Cir. 2002); *Hackman v. Valley Fair*, 932 F.2d 239, 242 (3d Cir. 1991); *Williams*, 883 F.2d at 1191; *Baker Industr. Inc. v. Cerberus, Ltd*., 764 F.2d 204, 208 (3d Cir. 1985). The provisions of § 1927 are strictly construed out of a concern that allowing courts to haphazardly sanction counsel pursuant to this section could dissuade zealous, aggressive litigation and improperly chill the assertion of colorable, if creative, claims. *See, e.g*., *LaSalle Nat'l Bank*, 287 F.3d at 289 ("The power to sanction under § 1927 necessarily 'carries with it the potential for abuse, and therefore the statute should be construed narrowly and with great caution so as not to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law.'") (quoting *Mone v. Commissioner*, 774 F.2d 570, 574 (2d Cir. 1985)); *Baker*, 764 F.2d at 208 ("This bad faith requirement is seen necessary to avoid chilling an attorney's legitimate ethical obligation to represent his client zealously[.]") (citations omitted).

Plantronics has not even attempted to argue that GN's counsel in any way acted in a manner that meets this daunting standard. Indeed, its motion does not even request reimbursement of attorney fees from GN's counsel. For these reasons alone, the Motion for fees pursuant to 28 U.S.C. § 1927 should be denied.

II The Court Should Not Grant Plantronics' Motion Under Its "Inherent Power" To Award Attorneys' Fees.

In *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991), the Supreme Court stated that a court has the inherent authority to impose sanctions when a party has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." Even in doing so, however, the Court warned that "[b]ecause of their very potency, inherent powers must be exercised with restraint and caution." *In re Prudential Ins. Co.*, 278 F.3d at 189 (citing *Chambers*, 501 U.S. at 44). Therefore, as the Third Circuit has recognized, "[g]enerally, a court's inherent power should be reserved for those cases in which the conduct of a party or an attorney is egregious and no other basis for sanctions exists." *Martin v. Brown*, 63 F.3d 1252, 1265 (3d Cir. 1995). This is another way of saying that a Court should not exercise its inherent powers to grant an award of attorneys' fees absent a finding that the offending counsel or party acted with willful bad faith. *See In re Prudential Ins. Co.*, 278 F.3d at 181; *Energy Transp. Grp., Inc. v. Sonic Innovations, Inc*., 2011 WL 2222066, at *17 (D. Del. June 7, 2011) (declining to award attorneys' fees under the court's inherent power "given that there has not been a showing of bad faith").

Plantronics offers no conduct by GN that rises to the "egregiousness" standard required for the imposition of sanctions under the Court's inherent power. Even if viewed as separate claim from its antitrust claims (which it was not), GN's tortious interference claim survived a motion to dismiss and a motion for summary judgment. Given these rulings, the claim was clearly a colorable cause of action that GN's counsel was obligated to pursue. There is simply

no basis to sanction GN for pursuing a legitimate claim and then dropping it for strategic reasons before submitting the case to the jury.

Nor do Plantronics' arguments to the contrary have any merit. First, Plantronics makes much of the fact that GN's expert, Professor Elhauge, never offered any opinions on GN's tortious interference claim. Mot. at 5. But why would he, when expert testimony is required only "to help the trier of fact to understand the evidence or to determine a fact in issue." *See Kraft Foods Grp. Brands LLC v. TC Heartland, LLC*, 232 F. Supp. 3d 632, 633 (D. Del. 2017). A claim for tortious interference with business relations has four elements: "the existence of a valid business relation . . . or expectancy; knowledge of the relationship or expectancy on the part of the interferer; an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted." *Accenture Global Servs. GBMH v. Guidewire Software, Inc*., 581 F. Supp. 2d 654, 664 (D. Del. 2008) (citations omitted). As this Court has recognized, tortious interference in particular requires "a fact-intensive determination." *Kickflip, Inc. v. Facebook, Inc.*, 999 F. Supp. 2d 677, 689 (D. Del. 2013). What that fact-intensive determination does not involve, however, is the type of scientific, technical, or other specialized knowledge that requires expert testimony - especially from an expert in the field of economics. In fact, it would be inappropriate to present expert testimony on a topic for which it is not required, such as liability for tortious interference.[12] Because a lay jury is well-equipped to determine liability on

[12] *See, e.g., Webb v. Fuller Brush Co.*, 378 F.2d 500, 502 (3d. Cir. 1967) (preclusion of expert witness testimony was proper where "the jury required no expert guidance in reaching a conclusion as to how a reasonable person should have reacted to what the appellee knew or should have known."); *Andrews v. Metro North Commuter R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989) (expert testimony shall not be directed "to lay matters which a jury is capable of understanding and deciding without the expert's help.") (citing *McGowan v. Cooper Indus., Inc.*, 863 F.2d 1266, 1272 (6th Cir. 1988)); *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1055-56

a simple tort claim such as tortious interference with business relations, Plantronics' argument that GN's failure to present expert testimony as to that claim is nothing more than a red herring.

Plantronics' second, third, and fourth arguments boil down to a suggestion that GN's non-antitrust based tortious interference claim was meritless and that it was "forced to incur considerable expense preparing for trial on [an] alleged separate common law 'theory' that GN was preparing to 'come up with.'" Mot. at 6. Plantronics' theory underlying this argument is that when asked by the Court at the August 29, 2017 *Daubert* / Summary Judgment hearing the hypothetical question of whether GN's tortious interference claim could survive if the Court granted summary judgment on its antitrust claims, GN's counsel stated that it could, and that he "could come up with a theory" to support it. Mot. at 5. In attempting to use this quote against GN, Plantronics is taking GN's counsel's answer to a hypothetical question posed by the Court out of the context in which it was made.

Nothing about counsel's answer to the Court's question contradicts GN's long-standing position that its tortious interference claim was duplicative of its antitrust claims;[13] rather, counsel was merely stating that if the antitrust claims disappeared due to Plantronics' summary judgment motion, GN may still be able to "come up with" an *alternative basis* on which its tortious interference claim could proceed. That is, while its tortious interference claim could be (and was always intended to be) based on Plantronics' violation of the antitrust laws, when asked a hypothetical by the Court, GN's counsel could not rule out that there might be another basis on which the claim could proceed. The notion that Plantronics "was forced to incur considerable

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(4th Cir. 1986); *United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985); *Strong v. E.I. DuPont de Nemours Co.*, 667 F.2d 682, 685-86 (8th Cir. 1981)).

[13] D.I. 13 at 20 ("GN has adequately pleaded antitrust violations, all of which support its tortious interference claim."); D.I. 1 at ¶¶ 86-91; D.I. 490, Ex. 4, at 6.

expense preparing for trial on this alleged separate common law 'theory' that GN was preparing to 'come up with'" is not entitled to serious consideration. Mot. at 6.

Plantronics' fifth argument incorrectly asserts that GN failed to present evidence on its tortious interference claim at trial. Mot. at 6. To the contrary, GN presented abundant evidence from which a reasonable juror could find that Plantronics tortiously interfered with its business relations, including but not limited to evidence that: GN's Indirect Reseller Agreements obligated distributors to diligently advertise GN products;[14] the POD agreements between Plantronics and POD distributors prohibited PODs from advertising GN products or purchasing directly from GN;[15] Plantronics knew that certain PODs also had business relationships or expectancies with GN;[16] Plantronics intentionally interfered with GN's relationships with those PODs by prohibiting them from advertising GN products as required by GN's Indirect Reseller Agreements; Plantronics also intentionally interfered with GN's relationships with PODs by encouraging them to flip accounts to Plantronics;[17] and that Plantronics' interference with GN's relationships with the PODs caused it damages in the way of lost sales, which was proven by the evidence of actual lost sales,[18] which was quantified by Professor Elhauge.[19]

Finally, Plantronics' sixth argument, that GN waited until Day 5 of trial to voluntarily dismiss its tortious interference claim after not presenting any evidence of it in bad faith is nothing more than a rehashing of its previous contentions, all of which are incorrect for the reasons explained. Indeed, it is factually incorrect that GN waited until Day 5 of trial to

[14] *See* Defense Ex. 1062, introduced at Trial Day 3, at 655:8-21.

[15] Trial Day 2, at 309:21-310:5, 337:2-339:23.

[16] *See, e.g.*, Trial Day 3, at 631:6-14 (SKC) and Trial Day 2, at 420:17-25 (TCI).

[17] *See, e.g.*, Trial Day 3, at 662:12-663:25, 650:19-652:5; PX-112; PX-370 (Kelly Ammeen of SKC stating that as a POD, it was SKC's goal to flip accounts to 100% Plantronics).

[18] Trial Day 3, at 663:11-25.

[19] Trial Day 3, at 685:24-686:2 ("First, I quantified the share of the overall market that was foreclosed by these agreements, and I found that it was abasically about half . . . [m]ore precisely, 47 percent.").

withdraw the claim, as Plantronics knew the claim was withdrawn after Day 3 of trial. Thus, there is simply no basis from which the Court could find that GN's counsel acted in willful bad faith by maintaining its tortious interference claim to the conclusion of Day 3 of trial.

GN had ample evidence from which the jury could have found Plantronics tortiously interfered with GN. GN properly pursued this claim and, as often occurs in trials, made the strategic decision to withdraw the claim before it was sent to the jury in order to simplify the issues for the jury's consideration. There is nothing improper with this common trial occurrence and certainly nothing "egregious" that would warrant sanctioning under the Court's inherent powers. Plantronics' Motion should be denied.

III Even If Plantronics Were Entitled To Recover Some Amount Of Attorneys' Fees (It Is Not), The Fees Requested Are Not Reasonable.

The Supreme Court holds that it is a "bedrock principle" that "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise" and that a court shall "not deviate from the American Rule absent explicit statutory authority." *Baker Botts LL*, 135 S. Ct. at 2164. As shown above, there is no statutory or equitable basis for the awarding of Plantronics' fees, and Plantronics' Motion should be denied. However, even were there proper bases for an award of fees attorneys' fees for its alleged preparation of its tortious interference defense (there is not), its request for $877,692 is entirely unreasonable and unsupported.

Plantronics' request for more than $877,692 in attorneys' fees for its work specific to GN's tortious interference claim is clearly unreasonable as it is not connected to the actual work it undertook to defend this claim. Indeed, this point is conceded by Plantronics. Plantronics arrives at this figure by taking its total attorneys' fees and dividing it by four, as if its preparation of the defense to GN's tortious interference claim was equal in scope to its preparation of its defense to each of GN's antitrust claims. (It also assumes that GN only brought three antitrust

claims, which is incorrect as GN asserted four separate antitrust claims.) It is disingenuous to suggest that Plantronics spent anywhere near the amount of time working on its defense against the tortious interference claim as it did on any one of GN's antitrust claims. Conspicuously absent are any billing records or any attorney affidavits showing any time entries related to defense of the tortious interference claims—presumably because such records would quickly demonstrate that the vast majority of the time was focused on the antitrust claims.

Knowing that its records would quickly demonstrate that its request for $877,692 in attorneys' fees is unreasonable as it is not connected to the actual work it undertook to defend against the tortious interference claim, Plantronics' fee request is completely unsupported by any evidence. Plantronics does not provide core evidence such as the hourly rates on which its $877,692 request is based,[20] the rates for similar work in the locality,[21] or that the number of hours it spent on the defense of the tortious interference claim was reasonable.[22] Instead, Plantronics asks the Court to put the cart before the horse and allow an award of $877,692 without any evidence of the reasonableness of this amount. This is not the proper method and for this reason alone the request must be denied. As the Third Circuit has established, "[t]he general rule is that a reasonable hourly rate is calculated according to the prevailing market rates in the community. The prevailing party bears the burden of establishing this by way of satisfactory evidence, 'in addition to [the] attorney's own affidavits.'" *Washington v.*

[20] *See Tobin v. Gordon*, 614 F. Supp. 2d 514, 520 (D. Del. 2009) (plaintiff satisfied showing for statutory right to attorney's fees, and thus was entitled to *reasonable* attorney's fees).

[21] *Id.* at 520-21 ("The reasonable rate is a factual question determined by the evidence in the record and subject to a "calculation according to prevailing market rates in the community.").

[22] *Id.* at 520 ("The determination of the reasonable amount of counsel fees begins with the calculation of the lodestar amount which is equivalent to the appropriate hourly rate multiplied by the reasonable amount of hours expended.").

Philadelphia Cty. Court of Common Pleas, 89 F.3d 1031, 1035 (3d Cir. 1996) (citations omitted). This Court agrees:

> The determination of the reasonable amount of counsel fees *begins with the calculation of the lodestar amount which is equivalent to the appropriate hourly rate multiplied by the reasonable amount of hours expended.* The reasonable rate is a factual question determined by the evidence in the record and subject to a calculation according to prevailing market rates in the community. Initially, the plaintiff has the burden of establishing the reasonable market rate with *evidence beyond his attorney's affidavit*.

Tobin, 614 F. Supp. 2d at 520-21 (internal citations and quotation marks omitted) (emphasis added). Plantronics has not even provided this Court with its attorney's affidavit, let alone the additional evidence that is clearly necessary to justify its fee request. For these reasons, even if Plantronics were somehow entitled to attorneys' fees here (it is not), the amount it has requested is unreasonable given the specific facts of this case and due to Plantronics' complete lack of supporting evidence.

CONCLUSION

For the foregoing reasons, GN respectfully requests that this Court deny Plantronics' Motion for Attorneys' Fees in its entirety.

Dated: December 5, 2017

Respectfully submitted,

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