UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 15-04424-AG (AJWx)	Date	March 30, 2018
Title	ATEN INTERNATIONAL CO. v. UNICLASS TECHNOLOGY ET AL.		

Present: The Honorable	ANDREW J. GUILFORD	
Lisa Bredahl	Not Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	

Proceedings: **[IN CHAMBERS] ORDER RE DEFENDANT'S MOTION FOR EXCEPTIONAL CASE DETERMINATION UNDER 35 U.S.C. § 285 (DKT. 479)**

Before the Court is Defendants Uniclass Technology Co., Ltd., Electronic Technology Co., Ltd. of Dongguan Uniclass, Airlink 101, Phoebe Micro Inc., Broadtech International Co., Ltd. D/B/A/ Linkskey, Black Box Corporation, and Black Box Corporation of Pennsylvania's (collectively, "Defendants") Motion to Declare this Case Exceptional Under 35 U.S.C. § 285. (Dkt. 479.) Plaintiff ATEN International ("ATEN") has filed an Opposition (Dkt. 483) and Defendants have filed a Reply (Dkt. 484).

Defendants had also filed an Application to the Clerk to Tax Costs. (Dkt. 473.) Plaintiff filed objections (Dkt. 480) and Defendants responded to those objections (Dkt. 482). After the Hearing on Defendants' Motion, Defendants filed a Second Application to the Clerk to Tax Costs that appended a Joint Stipulation from the parties stating that they agreed to Defendants' Revised cost request. (Dkts. 488, 488-1.)

Defendants' Motion (Dkt. 479) is DENIED. Plaintiff's objections to Defendants' Application to the Clerk to Tax Costs are DENIED AS MOOT.

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1. LEGAL STANDARD

Section 285 of the Patent Act provides that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." 35 U.S.C. 285. "[A]n 'exceptional' case is simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014). Accordingly, "[d]istrict courts may determine whether a case is 'exceptional' in the case-by-case exercise of their discretion, considering the totality of the circumstances." *Id.* Relevant factors may include: frivolousness, motivation, objective unreasonableness (both in factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence. *Id.* "[A] case presenting either subjective bad faith or exceptionally meritless claims may sufficiently set itself apart from mine-run cases to warrant a fee award." *Id.* A party must prove its entitlement to fees by a preponderance of the evidence. *Id.* at 1758.

2. ANALYSIS

2.1 Timeliness of Defendants' Motion and Application for Costs

Plaintiff first urges the Court not to consider Defendants' Motion or Defendants' Application to Tax Costs at all, arguing that both were filed untimely. (Dkt. 483 at 1–2; Dkt. 480 at 1–2.) Plaintiff doesn't argue that it's suffered any prejudice as a result of the couple of hours of delay in the filing of Defendants' Motion. And while maybe it's more notable that Defendants' Application to Tax Costs came a few weeks after the 14-day Local Rule deadline, Defendants' delay was apparently due to a mistaken belief that Plaintiff had agreed to an extension of time for Defendants to file both their Motion and their Application to Tax Costs. (*See* Dkt. 482 at 1.) This is evidenced by the fact that Defendants filed their Application on the agreed deadline for Defendants to file their Motion. Again, Plaintiff doesn't argue that it's suffered any prejudice as a result of this late filing. Under the current circumstances, the Court excuses Defendants' purported untimeliness and considers the merits of the disputes on Defendants' Motion and Application to Tax Costs.

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2.2 Defendants' Motion for Attorney Fees

After the conclusion of an eight-day jury trial in this case, the jury ultimately returned a verdict finding that Defendants' accused products did not infringe the asserted claims of Plaintiffs' four asserted patents either directly or indirectly. (Dkt. 448.) The jury further found that the asserted claims of two of the asserted patents were invalid. (*Id.*) The Court, however, granted Plaintiff's Motion for Judgment as a Matter of Law as to one of the two invalidated patents, finding insufficient evidence in the record to support the jury's finding that Defendants had met their burden of proving invalidity by clear and convincing evidence. (*See* Dkt. 481.) Plaintiff does not dispute that on the current record, Defendants are the prevailing party and thus entitled to seek attorney fees. (*See generally*, Dkt. 483); *see* 35 U.S.C. § 285.

Defendants bring a litany of arguments that Plaintiff's conduct, both leading up to and during this lawsuit, was exceptional and thus entitles Defendants to attorney fees. (*See generally*, Dkt. 479-1.) The whole slew of Defendants' position and arguments are best encapsulated by one very long sentence in the Introduction section of Defendants' reply brief:

> ATEN's disproportionate litigation strategy included accusing 127 products without investigating the products or claims, forum shopping to relitigate settled claim construction issues and avoid this Court, asserting an erroneously issued patent claim, accusing different products from the ones its expert examined and refusing to amend its contentions when it was notified of this mistake, switching counsel over five times without ensuring continuity, presenting a damages case that relied on "multiple layers of guesswork," filing Final Infringement Contentions in violation of the Court's Standing Patent Rules ("S.P.R."), presenting contradictory expert opinions that obfuscated its infringement and validity positions, attempting to change agreed-upon product groupings days before trial, outspending any potential recovery to overwhelm a small competitor, and other misbehavior that unnecessarily increased costs for the Court, the public, and Defendants.

(Dkt. 484 at 1–2.) Plaintiff disputes these characterizations of its actions and motivations in litigating this case. (*See generally*, Dkt. 483.)

At first glance, Defendants' list of purported atrocities looks onerous. But Defendants' supporting arguments reveal that for the most part, Defendants would fault Plaintiff for rather unexceptional behavior. From the Court's perspective, Defendants' strategy with its § 285 Motion seems to be to throw out as many different aspects of Plaintiff's behavior as it can to support its fee request and "see what sticks." But it would be both tedious and wasteful for the Court to consider each and every individual tree when it should be looking at the landscape in the bigger forest. It's the *totality* of the circumstances that matters, not each circumstance considered in isolation. *Octane Fitness, LLC*, 134 S. Ct. at 1756. And while perhaps true that Plaintiff had some shortcomings in its litigation and pre-litigation conduct and positions, the Court is unconvinced that those shortcomings amount to a showing that Plaintiff's behavior was exceptional, amounting to the type of unreasonableness discussed in *Octane*.

Although not the only factor, *Octane* urges courts to think about the need in particular circumstances to advance considerations of compensation and deterrence. The Court is not persuaded that either of those considerations exist here. Instead, some rhetorical questions came to mind during a review of Defendants' insistent arguments:

- Should a patent owner be precluded from bringing all of its patent infringement disputes, simply because there are a lot of them? Aren't there avenues for the Court and the parties to streamline litigation in those instances, if properly sought out by a party or parties?
- Assuming a plaintiff has a legal basis to sue in a particular forum, should a plaintiff be deterred from choosing to sue in that forum, even absent evidence of malintent?
- Should a party be punished for choosing to change counsel? And related to that question, is it really that hard to 1) create a written record of communications (and agreements) with opposing counsel; and 2) remind (new) opposing counsel of that written record during later correspondence?

- Does a party act unreasonably when it refuses to agree to move a trial date, where the opposing party has a dispositive motion pending (opposed by the party) that the opposing party thinks will resolve issues related to the trial?
- Does a plaintiff act unreasonably when, after discovery has closed and the parties have already conducted a source code review, plaintiff and defendant agree that plaintiff can do additional source code review, and plaintiff agrees to pay for costs associated with the additional source code review?

There was a single question, however, that kept reemerging:

- If Plaintiff's position was really that much of a problem or put that much of an unreasonable burden on Defendants, why didn't Defendants raise the issue with the Plaintiff or the Court (sooner)?

A party cannot simply hide under a rock, quietly documenting all the ways it's been wronged, so that it can march out its "parade of horribles" after all is said and done. That is the tenor of many of Defendants' arguments here. Or alternatively, where Defendants did come forward at some point and challenged Plaintiff's positions with some success, Defendants have not proven that they have been exceptionally wronged--they got at least some of the relief they sought. And Plaintiff's behavior was not exceptional simply because it lost on those issues.

Probably the most concerning of Defendants' arguments, and the only one the Court will specifically address, is the notion that Plaintiff failed to conduct an adequate pre-filing investigation. (*See* Dkt. 479 at 3–5; Dkt. 484 at 3–5.) Defendants' scatter-shot approach to this specific argument is typical of much of Defendants' Motion, so it also serves as a good example in that regard. Defendants' prelitigation argument relies on connecting the dots from actions Plaintiff took during litigation. For instance, Defendants argue that Plaintiff filed insufficient initial infringement contentions, Plaintiff stalled in disclosing its final infringement theories, and Dr. Lavian improperly failed to inspect all of the accused products. (Dkt. 479 at 3–4.) In opposition, Plaintiff states it "conducted a good-faith pre-filing investigation and filed this lawsuit after Uniclass breached a license agreement involving some of the asserted patents." (Dkt. 483 at 4 (emphasis in original) (citing Tr. Ex. 5).) Plaintiff also addresses Defendants' particularized arguments, including an emphasis that

Dr. Lavian only joined the case after Plaintiff's original technical expert died, and thus was not involved in any pre-filing investigation. In reply, Defendants fault Plaintiff for not including evidence such as a declaration from an expert to support its assertion that it conducted an adequate pre-filing investigation.

First and foremost, Defendants' affirmative arguments regarding the sufficiency of Plaintiff's original infringement contentions and late-disclosed infringement theories leads the Court to again ask its number one reemerging question. (*I.e.*, why didn't Defendants raise its concerns with the contentions sooner?). The Court doesn't believe Defendants' belated arguments regarding Plaintiff's contentions are sufficient to prove that Plaintiff conducted an insufficient pre-filing investigation. Second, also notably, Defendants don't re-raise the point about Dr. Lavian. Enough said there. Defendants simply haven't persuasively proven, by a preponderance of the evidence, that Plaintiff failed to conduct an adequate pre-filing investigation. Importantly, the burden is on Defendants–not Plaintiff–to make such a showing on this Motion.

At the hearing, Defendants re-emphasized four additional arguments from their brief to support their argument that Plaintiff made an inadequate pre-filing investigation. But these arguments similarly focused on picking apart small details of the litigation and Plaintiff's conduct. For instance, Defendants argued that Plaintiff improperly asserted a particular claim of a particular patent (that also had other asserted claims) for four months. In the grand scheme of litigation, four months is not always a significant amount of time. This is particularly true where, as here, it was a single claim out of the many claims Plaintiff chose to assert. Similarly, Defendants would fault Plaintiff for arguing claim construction positions for a particular patent because the Court adopted an earlier construction rather than engaging with Plaintiff's arguments. Defendants have not explained how Plaintiff was to know that the Court would ultimately make that choice rather than reconsidering the previous constructions. Defendants' remaining arguments similarly fail to demonstrate that, considering the totality of the circumstances, Plaintiff's behavior was exceptional.

After considering the parties' arguments, evidence, and the totality of the circumstances, the Court finds that Defendants have not shown by a preponderance of the evidence that this is an exceptional case and that Defendants are entitled to attorney fees. Defendants' Motion is DENIED.

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2.3 Defendants' Application to Tax Costs

Defendants sought costs for numerous items. Plaintiff raised some objections. The only item that Defendants responded about involves witness travel expenses during trial. At the hearing, the Court ordered Defendants to file supplemental documentation to support their position on these expenses. Instead, Defendants filed a Second Application to the Clerk to Tax Costs that included a Joint Stipulation by the parties to accept Defendants' Revised Application. (Dkts. 488, 488-1.) The Court DENIES Plaintiff's objections as MOOT.

3. CONCLUSION

Defendants' Motion (Dkt. 479) is DENIED. Plaintiff's objections to Defendants' Application to the Clerk to Tax Costs are DENIED AS MOOT.