

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 14-01918 JVS (JCGx) Date April 1, 2015

Title Dzinesquare, Inc. V. Armano Luxury Alloys, Inc., et al.

Present: The James V. Selna  
Honorable

Karla J. Tunis  
Deputy Clerk

Not Present

Court Reporter

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

**Proceedings: (IN CHAMBERS) Order Granting Defendant Armano Luxury Alloys Inc.'s Motion for Attorney Fees (Fld 2-24-15)**

Pursuant to 35 U.S.C. § 285 and 15 U.S.C. § 1117, Defendant Armano Luxury Alloys, Inc. ("Armano") moves for an award of attorney fees and non-taxable costs following summary adjudication of the patent infringement and trade dress claims asserted by Plaintiff Dzinesquare, Inc., dba 2 Crave ("2 Crave"). (Mot. Att'ys' Fees, Docket ("Dkt.") No. 49.) 2 Crave opposes (Opp'n Mot. Att'ys' Fees, Dkt. No. 52), and Armano has replied. (Reply Mot. Att'ys' Fees, Dkt. No. 56.)

For the following reasons, the Court **GRANTS** Armano's Motion for Attorneys' Fees.

**I. Background**

This action arose out of the parties' competing sales of after-market wheels for motor vehicles. 2 Crave markets, advertises, manufactures, and sells various types of after market wheels that it identifies by using a wheel number such as the No. 2, No. 7, and No. 21 wheels that were at issue in this case. (Compl., ¶¶ 4-5, Dkt. No. 1; see generally Lowe Decl. Supp. Mot. Summ. J. Remaining Claims, Exs. 3, 11-19, Dkt. Nos. 36-4, 36-5, 36-8-36-16.) On March 13, 2014, 2 Crave initiated this action against Armano and alleged eight claims, including: (1) infringement of U.S. Patent No. D689,809 S ("809 Patent"); (2) federal trade dress infringement; (3) federal trade dress dilution; (4) state trade dress dilution; (5) common law unfair competition; (6) state unfair and deceptive trade practices; (7) common law misappropriation; and (8) state false and misleading statements. (Compl.)

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On December 22, 2014, the Court granted Armano’s motion for partial summary judgment on 2 Crave’s patent infringement claim and held that the ‘809 Patent was invalid pursuant to the on-sale bar, public-use bar, and printed-publication bar of 35 U.S.C. § 102(a)(1). (See generally Order Granting Partial Summ. J. (“Patent Claim SJ Order”), Dkt. No. 35.) Although discovery cut-off was not until June 1, 2015 and expert discovery cut-off was not until August 17, 2015 (Scheduling Conf. Mins., Dkt. No. 15), Armano moved for summary judgment of 2 Crave’s seven remaining claims on January 6, 2015. (Not. Mot. Summ J. Remaining Claims, Dkt. No. 36.) The Court granted Armano’s motion in its entirety on February 9, 2015 essentially because 2 Crave had failed to provide sufficient evidence demonstrating a genuine dispute of material fact regarding any of its remaining claims. (See generally Order Granting Summ. J. (“Remaining Claims SJ Order”), Dkt. No. 44.)

As a result of both summary judgment orders in its favor, Armano now seeks attorney fees and non-taxable costs on the basis that 2 Crave’s patent and trade dress claims constitute an exceptional case.

## II. Legal Standards

### A. Attorney Fees Under the Patent Act

Pursuant to 35 U.S.C. § 285 of the Patent Act, “[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party.” In April 2014, the U.S. Supreme Court adopted a new test for what constitutes an exceptional case. See Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749 (2014). Rejecting the Federal Circuit’s more rigid test, the Supreme Court held that an 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.” Id. at 1756. The Supreme Court further instructed that “[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. Sanctionable conduct under Federal Rule of Civil Procedure 11 is not the benchmark because “a district court may award fees in the rare case in which a party’s unreasonable conduct—while not necessarily independently sanctionable—is nonetheless so ‘exceptional’ as to justify an award of fees.” Id. at 1756–57. The Supreme Court further held that the moving party need only show by a preponderance of

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the evidence that it is entitled to fees under § 285. Id. at 1758.

B. Attorney Fees Under the Lanham Act

Under § 35(a) of the Lanham Act, “[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party.” 15 U.S.C. § 1117(a). The Lanham Act does not define “exceptional cases.” The Ninth Circuit Court of Appeals has instructed that “[a]n action may be considered exceptional ‘[w]hen a plaintiff’s case is groundless, unreasonable, vexatious, or pursued in bad faith.’” Secalt S.A. v. Wuxi Shenxi Const. Machinery Co., Ltd., 668 F.3d 677, 687 (9th Cir. 2012) (quoting Stephen W. Boney, Inc. v. Boney Servs., 127 F.3d 821, 827 (9th Cir. 1997)). Moreover, “[t]he line distinguishing exceptional cases from non-exceptional cases is far from clear” and can be “especially fuzzy where the defendant prevails due to plaintiff’s failure of proof.” Secalt, 668 F.3d at 687.

However, in light of Octane Fitness, the Third Circuit Court of Appeals imported the Supreme Court’s definition of “exceptional case” into its interpretation of § 35(a) of the Lanham Act for three reasons. Fair Wind Sailing, Inc. v. Dempster, 764 F.3d 303, 314 (3d Cir. 2014). First, the attorney’s fee provision analyzed in Octane Fitness, 35 U.S.C. § 285, is identical to the fee provision in § 35(a) of the Lanham Act. Fair Wind Sailing, 764 F.3d at 314. Second, in explaining the ordinary uses of “exceptional,” the Supreme Court cited a D.C. Circuit case which interpreted the term in “the Lanham Act’s identical fee-shifting provision.” Id. (citing Octane Fitness, 134 S. Ct. at 1756 (citing Noxell Corp. v. Firehouse No. 1 Bar-B-Que Rest., 771 F.2d 521, 526 (C.A.D.C. 1985))). Third, Congress “referenced § 285 in passing § 35(a).” Fair Wind Sailing, 764 F.3d at 314 (citing S. Rep. No. 93–1400 at 2, reprinted in 1974 U.S.C.C.A.N. 7132, 7133).

The Ninth Circuit has yet to take up this issue and no California federal district court has yet to adopt the reasoning of Fair Wind Sailing. However, courts in the Northern and Central Districts of California have applied the Octane Fitness exceptional case definition in conjunction with the Ninth Circuit’s pre-Octane Fitness definition when considering whether to award attorney fees under the Lanham Act. See Apple Inc. v. Samsung Elecs. Co., No. 11-CV-1846-LHK, 2014 U.S. Dist. LEXIS 117494 at \*52–54 (N.D. Cal. Aug. 20, 2014) (concluding case was not exceptional and denying attorney fees for plaintiff that prevailed on trade dress dilution claims in jury trial); Memory Lane, Inc. v. Classmates Int’l, Inc., 2014 U.S. Dist. LEXIS 63961 at \*4–5 (C.D. Cal. May 18,

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2014) (concluding case was not exceptional and denying attorney fees for defendant that prevailed after jury trial on false designation of origin claims). The Court agrees with this approach and analyzes whether 2 Crave's trade dress infringement and trade dress dilution claims are an exceptional case under both definitions.

III. Discussion

A. Exceptional Case Determination for 2 Crave's Patent Claim

2 Crave asserted that Armano infringed its design patent. (Compl. ¶¶ 44–48.) Armano moved for partial summary judgment that the '809 Patent was anticipated by prior art and thus invalid under 35 U.S.C. § 102(a). (Mem. P. & A. Supp. Mot. Partial Summ. J., Dkt. No. 29-1.) On three grounds, the Court agreed the '809 Patent was invalid. (Patent Claim SJ Order 5–12.) After finding that 2 Crave's No. 21 Wheel embodied the '809 Patent, the Court concluded that the '809 Patent was invalid under the on-sale bar, the public-use bar, and the printed-publication bar of § 102(a)(1). (Id.) In other words, Armano established by clear and convincing evidence that over a year prior to the effective filing date of the '809 Patent, 2 Crave had offered for sale and sold, made publicly accessible, advertised, and displayed a wheel that embodied the '809 Patent. (Id.)

Not only did Armano meet the high clear and convincing evidence burden, but 2 Crave provided no evidentiary support in response. 2 Crave failed to provide a Statement of Genuine Disputes, as required by Local Rule 56-2, and failed to cite to materials in the record. (Id. at 6.) 2 Crave even admits in its present Opposition Brief that the '809 Patent was invalid and that it does not oppose Armano's contentions that 2 Crave's patent infringement claims were objectively baseless. (Opp'n Mot. Att'ys' Fees, 6:17–25.) "To be objectively baseless, the infringement allegations must be such that no reasonable litigant could reasonably expect success on the merits." Dominant Semiconductors Sdn. Bhd. v. OSRAM GmbH, 524 F.3d 1254, 1260 (Fed. Cir. 2014) (citation and internal quotation marks omitted). In light of 2 Crave's failure to cite to any evidence in opposing Armano's motion for partial summary judgment as well as the Court's conclusion that the '809 Patent was invalid on three separate grounds, it is clear that "no reasonable litigant" could have reasonably expected success on this claim.

Thus, the substantive strength of 2 Crave's litigation position was either very

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minimal or nonexistent. Here, such a weak litigating position is alone sufficient to conclude that 2 Crave's patent infringement claim "stands out from others" and is an exceptional case meriting attorneys' fees under 35 U.S.C. § 285. See Octane Fitness, 134 S. Ct. at 1756.

B. Exceptional Case Determination for 2 Crave's Trade Dress Claims

2 Crave primarily raises two arguments that its trade dress claims do not constitute an exceptional case: (1) the Octane Fitness exceptional case definition does not apply to Lanham Act claims; and (2) 2 Crave was not able to perform a full investigation and complete discovery because Armano filed its motion for summary judgment prior to the discovery cut-off date. (Opp'n Mot. Att'ys' Fees, 4-6, 9-13.) Both arguments fail. First, the Court concludes that 2 Crave's trade dress claims constitute an exceptional case under both the Octane Fitness and Ninth Circuit pre-Octane Fitness definitions. Second, 2 Crave's dearth of evidence to support either trade dress claim does not appear to be a result of a premature motion by Armano, but by 2 Crave's failure to produce evidence that it should have possessed independently of discovery.<sup>1</sup>

1. **Trade Dress Infringement**

In analyzing 2 Crave's trade dress infringement claim, the Court sought to determine whether 2 Crave could raise a triable dispute of fact as to whether it had proof of secondary meaning of the product's claimed dress. (Remaining Claims SJ Order 4-9); see also Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205, 215-16 (2000); Art Attacks Ink, LLC v. MGA Entertainment Inc., 581 F.3d 1138, 1145 (9th Cir. 2009). The Court looked at the five possible types of evidence which a plaintiff could use to prove secondary meaning, as enumerated in Filipino Yellow Pages, Inc. v. Asian Journal

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<sup>1</sup> The Court further notes that although Armano filed its motion for summary judgment of remaining claims about five months prior to the discovery cut-off of June 1, 2015 (Scheduling Conference Mins.), 2 Crave had the opportunity to engage in discovery, at the latest, since the Scheduling Conference on July 28, 2014. (See Order Setting Rule 26(f) Scheduling Conference 2, Dkt. No. 11 ("[I]t is advisable for counsel to begin to conduct discovery actively before the Scheduling Conference.")) Moreover, it did not seek to continue the motion on the ground that it needed additional discovery to oppose the motion until *after* the Court issued its tentative ruling in favor of Armano rather than seek to do so in its opposition to the motion. See Fed R. Civ. P. 56(d); (Tr. Feb. 9, 2015 Oral Args. 7:5-8:5.)

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Publ'ns, Inc., 198 F.3d 1143, 1151 (9th Cir.1999). But the Court concluded that only one of the five types of evidence “support[] an inference of secondary meaning.” (Remaining Claims SJ Order 8–9.) The Court also noted:

And most importantly, although 2 Crave has presented evidence supporting an inference of intentional copying, in light of Armano’s evidence that its products were advertised, marketed and labeled for sale with Armano’s own trademarks, it is unreasonable to infer from any intentional copying of the design that 2 Crave’s product design had acquired secondary meaning.

(Id. at 8.)

2 Crave’s failure to create a genuine dispute regarding this claim despite that it could have provided five different types of evidence suggests the very weak litigating position of 2 Crave’s trade dress infringement claim. Moreover, the evidence that was lacking does not appear to be evidence that Armano had or could have had in its possession, but evidence that 2 Crave should have possessed regardless of discovery. For example, the Court concluded that 2 Crave failed to provide evidence of the effectiveness of its advertising effort, industry-wide sales data, and 2 Crave’s relative position in its respective market. (Id. at 10–11.) These are all items of information that one would expect a business to be capable of obtaining on its own. (See Tr. Feb. 9, 2015 Oral Args. 9:23–11:14, Dkt. No. 47.)

## 2. Trade Dress Dilution

For its trade dress dilution claim, 2 Crave had to show that its mark was famous or “widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner.” 15 U.S.C. § 1125(c)(2)(A); Jada Toys, Inc. v. Mattel, Inc., 518 F.3d 628, 634 (9th Cir. 2008). This fame had to extend beyond a mere niche market to the general consuming public of the United States as a whole. See Urban Home, Inc. v. Cordillera Inv. Co., LLC, No. CV 13-08502 GAF JEMX, 2014 WL 3704031, at \*6 (C.D. Cal. June 19, 2014). The only evidence that 2 Crave provided to meet this requirement was that it had sales totaling \$51,000,000 since 2007. (Remaining Claims SJ Order 9–10.) As the Court previously stated, this “falls

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woefully short of the threshold . . . required to support a claim of trade dress dilution.” (Id. at 10.)

Thus, similar to its trade dress infringement claim, 2 Crave’s dearth of evidence to at least create a genuine dispute regarding its claim indicates a very weak litigation position. Based on the profound weakness of 2 Crave’s litigating position for both trade dress claims, they “stand out from others” and are exceptional under the Octane Fitness definition. See Octane Fitness, 134 S. Ct. at 1756. The claims additionally meet the Ninth Circuit’s pre-Octane Fitness definition for an exceptional case because the claims are clearly groundless and unreasonable in light of 2 Crave’s lack of evidence to support its claims.<sup>2</sup> See Secalt, 668 F.3d at 687–89 (affirming an exceptional case determination because plaintiffs’ claims were unreasonable given their “utter failure of proof”). Therefore, regardless of the applicable definition, 2 Crave’s trade dress claims constitute an exceptional case meriting attorney fees under 15 U.S.C. § 1117(a).<sup>3</sup> This is not a case in which the line between an exceptional case and non-exceptional case is “especially fuzzy.” See Secalt, 668 F.3d at 687.

C. Calculation of Attorney Fees and Non-Taxable Costs

1. **Attorneys’ Fees**

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<sup>2</sup> The Court clarifies that its conclusion is limited to finding that the trade dress claims are only groundless and unreasonable, but not vexatious or pursued in bad faith. See Secalt, 668 F.3d at 687.

<sup>3</sup> 2 Crave argues that a separate action before this Court, The Burlington Ins. Co. v. Armano Luxury Alloys, Inc., et al., Case No. 2:15-cv-1504, indicates bad faith by Armano because the plaintiff in that case is Armano’s insurer and is seeking reimbursement of defense costs, declaratory judgments regarding duty to defend and duty to indemnify, equitable contribution, and equitable indemnity against various defendants including 2 Crave. (Opp’n 18:25–19:6; see also Compl., Dkt. No. 1, Case No. 2:15-cv-1504.) Pursuant to Federal Rule of Evidence 201(b) and Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001), overruled on other grounds, Galbraith v. Cnty. of Santa Clara, 307 F. 3d 1119, 1125 (9th Cir. 2002), the Court takes judicial notice of this action because it is a matter of public record and the facts are not subject to reasonable dispute. (See RJN Supp. Opp’n Mot Att’y’s’ Fees, Dkt. No. 52-3.) It is not clear how the filing of this case indicates bad faith by Armano, or that Armano is trying to also seek attorneys’ fees in this action, when Armano is a defendant in the action. Moreover, 2 Crave is only named as a defendant for the claim of declaratory judgment regarding the duty to indemnify. (Id. at ¶¶ 41–45.) 2 Crave fails to explain how this subjects it to potential liability for additional attorneys’ fees to Armano. Thus, this action does not disturb the Court’s conclusion to award Armano attorneys’ fees.

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Armano seeks an award of \$222,235.00 in attorneys' fees. (Mot. Att'ys' Fees 20–25.) 2 Crave objects to Armano's failure "to distinguish how many of the total hours were dedicated to the patent claim versus the Lanham Act claims." (Opp'n Mot. Att'ys' Fees 1.)

When calculating the amount of fees that should be awarded pursuant to § 1117(a), the Court must differentiate between the work performed for Lanham Act claims and non-Lanham act claims because "a prevailing party in a case involving Lanham Act and non-Lanham Act claims can recover attorneys' fees only for work related to the Lanham Act claims." Gracie v. Gracie, 217 F.3d 1060, 1069–71 (9th Cir. 2000). Similarly, § 285 "applies only to infringement actions." Cal. E. Labs., Inc. v. Gould, 896 F.2d 400, 403 (9th Cir. 1990).

Armano may only seek the total fee amount if it can show that its state law claims were "so intertwined" with its Lanham Act or patent infringement claims. Gracie, 217 F.3d at 1069 (Lanham Act); Interspiro USA, Inc. v. Figgie Int'l, Inc., 18 F.3d 927, 933 (Fed. Cir. 1994) (patent infringement).

In its order granting summary judgment of the remaining claims in favor of Armano, the Court noted that the parties agreed that 2 Crave's common law unfair competition, state unfair and deceptive trade practices, and state false and misleading statements claims depended upon the trademark claims. (Remaining Claims SJ Order 10.) 2 Crave's federal and state law trade dilution claims were subject to the same analysis. (Id. at 9.) The Court granted summary judgment on 2 Crave's remaining common law misappropriation claim because the parties agreed that it was unsupported by the evidence. (Id. at 10.)

An examination of 2 Crave's allegations of common law misappropriation reveals that this claim was also dependent on 2 Crave's allegations of trade dress infringement. 2 Crave expressly did not oppose Armano's motion for summary judgment on its common law misappropriation claim after Armano noted that 2 Crave's "common law misappropriation claim is based on the same appropriation of intellectual property alleged in its trade dress claim." (Mem. P. & A. Opp'n Mot. Summ. J. Remaining Claims 1, 17, Dkt. No. 38-1; Mem. P. & A. Supp. Mot. Summ. J. Remaining Claims 23–24, Dkt. No. 36-1.)



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Based on the foregoing, the Court concludes that 2 Crave's state law claims were so intertwined with its Lanham Act and patent infringement claims that an award of the total cost incurred in defending this action is warranted under § 1117(a) and § 285.

Next, the Court must determine whether the requested award is reasonable. To determine a reasonable attorneys' fee award, the Court multiplies the number of hours reasonably expended on the litigation by the reasonable hourly rate.<sup>4</sup> Hensley v. Eckerhart, 461 U.S. 424, 433–34 (1983). The party seeking attorneys' fees must submit evidence substantiating and documenting the hours worked and hourly rates charged. Id. The Court may reduce an attorneys' fee award where the documentation is lacking or where the hours billed were excessive, redundant, otherwise unnecessary, or not reasonably expended. Id.

Armano's requested award is reasonable. Counsels' hourly rate is reasonable in light of their experience in intellectual property litigation and in light of prevailing rates in the community. (See Lowe Decl. Supp. Mot. Att'ys' Fees ¶¶ 18–33, Dkt. No. 49-1.) The reasonableness of the total fee is further supported by Armano's evidence of comparable costs of litigating a patent infringement or trademark action in Los Angeles. (Lowe Decl. Supp. Mot. Att'ys' Fees ¶¶ 31–32, Ex. 40.)

2 Crave's allegations that Armano engaged in over-billing, superfluous motion practice, and blackmail are baseless. (See Opp'n Mot. Att'ys' Fees 17.) Armano has filed three motions in this case including this one, all of which were decided in its favor. What 2 Crave characterizes as blackmail is Armano's offer to negotiate a settlement and dismissal. (See Bae Decl. Supp. Opp'n Mot. Att'ys' Fees ¶ 5, Ex. U, Dkt. No. 52-2.)

Accordingly, Armano is awarded requested attorneys' fees in the amount of \$222,342.50.<sup>5</sup>

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<sup>4</sup> If anything, rates from \$275 to \$350 per hour may be at the low end of the range for intellectual property litigation in this community. (See Lowe Decl. Supp. Mot. Att'ys' Fees ¶¶ 18–23, Dkt. No. 49-1.)

<sup>5</sup> The Court cannot replicate Armano's computation of fees as presented on pages 22–23 of its Motion. Specifically, the Court notes that Mr. Lowe reportedly worked 157.6 hours at a rate of \$325 per hour, which equals \$51,220 and that Mr. White worked 438.4 hours at a rate of \$275 per hour, which equals \$120,560. The Court has confirmed its calculation with reference to the detailed billing

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2. **Costs**

Armano seeks an award of \$4,354.79 in non-taxable costs. After the Court has made a determination that a case is exceptional under 35 U.S.C. § 285, a prevailing party is entitled to an award of non-taxable costs. Central Soya Co., Inc. v. Geo. A. Hormel & Co., 723 F.2d 1573, 1577–78 (Fed. Cir. 1983). However, the Court’s calculation of non-taxable costs results in a total of \$4,324.79. (See Lowe Decl. Supp. Mot. Att’ys’ Fees , Ex. 37, Statement No. 11, p. 11, cf. Ex. 39.) Accordingly, Armano is awarded \$4,324.79 in costs.

IV. **Conclusion**

For the foregoing reasons, the Court **GRANTS** Armano’s Motion for Attorneys’ Fees because 2 Crave’s patent infringement and trade dress claims constitute an exceptional case. The Court awards Armano \$222,342.50 in attorneys’ fees and \$4,324.79 in costs, for a total of \$226,667.29.<sup>6</sup>

**IT IS SO ORDERED.**

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statements at Lowe Decl. Supp. Mot. Att’ys’ Fees, Exs. 37–38. The Court has adjusted Armano’s fee award to reflect this correction.

<sup>6</sup> At oral argument, Armano noted that it also requested prejudgment interest on the attorneys’ fees. Armano orally cited Cal. Civ. Code § 3289(b) as authority for the Court to grant that request. This statute is inapplicable here and Armano cites no other authority. The Court thus declines to award Armano prejudgment interest.