

Judge Richard G. Stearns: ELECTRONIC ORDER entered denying 90 Motion for Attorney Fees. Defendants Celgene and Abraxis BioScience (collectively Celgene) move for an award of attorneys' fees pursuant to 35 U.S.C. s. 285. S. 285 provides that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." "[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. District courts may determine whether a case is 'exceptional' in the case-by-case exercise of their discretion, considering the totality of the circumstances." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014). Celgene contends that this case was exceptional because plaintiffs Cephalon and Acusphere (collectively Acusphere) distinguished its invention from the accused Abraxane drug during prosecution to obtain the asserted claims, but then attempted to extend the claim scope to cover Abraxane in this litigation. Specifically, Celgene contends that Acusphere added the "nanoparticles" limitation to distinguish from the Desai prior art, which it contends covered Abraxane, and that Acusphere disclaimed compositions that are encapsulated in a polymeric albumin shell, which Abraxane is. Having reviewed the record of the proceedings, the court finds that, although Celgene prevailed with respect to these disputed claim elements, Acusphere's positions were not so completely lacking in support in fact and law as to be exceptional (nothing in the prosecution history indicates that Acusphere specifically distinguished Abraxane). Moreover, the court finds that Acusphere's litigation conduct was reasonable. Having recognized that the dispute would hinge upon the court's construction of the disputed claim terms, Acusphere agreed to phased discovery to focus first on claim construction issues, and proposed a stipulated judgment of non-infringement after the court's construction in Celgene's favor so that the parties could immediately seek the Federal Circuit's review. These steps shortened what could have been a protracted litigation on the full merits. The court also notes that the Federal Circuit, in deciding in Celgene's favor, did not impose costs against Acusphere. Under these circumstances, Celgene's motion for fees is DENIED. (RGS, int2) (Entered: 08/21/2015)