

1 the Complaint, Plaintiff alleged one claim of direct and indirect infringement of United
2 States Patent Number 8,081,169 (“the ‘169 Patent”). Specifically, Plaintiff alleged
3 Defendants “sell and/or offer to sell touchscreens (‘Henghao Panels’) which are used
4 in various devices such as smartphones, tablets, and computers[.]” (Compl. ¶ 6.)
5 Plaintiff also alleged “Defendants have actively induced their customers such as Acer
6 Co. (‘ACER’), Dell Computer, Inc. (‘DELL’) and Hewlett Packard Inc. (‘HP’) to make,
7 use, and sell products that practice one or more claims of the Patent-in-Suit in this
8 judicial district.” (*Id.* ¶ 8.)

9 On September 26, 2014, defense counsel informed Plaintiff’s counsel that they
10 had investigated the allegations of the Complaint and found no evidence to support
11 Plaintiff’s claims against Auscom. (Docket No. 35-4.) Defense counsel requested that
12 Plaintiff either identify the evidence supporting its claims against Auscom or dismiss
13 Auscom from the case. (*Id.*)

14 In response, Plaintiff’s counsel stated that Auscom was a subsidiary “and on this
15 information and belief Auscom markets and sells products in the U.S.A.” (Docket No.
16 35-6 at 7.)² Plaintiff’s counsel went on to state, “That being the case we can ask your
17 client sign a document [including discovery demands and a covenant not to sue] and can
18 certainly dismiss the complaint against Auscom.” (*Id.* at 2, 7.)

19 After further discussion, defense counsel declined to sign the document, and
20 reiterated their request for evidence supporting Plaintiff’s claims against Auscom and
21 Bizcom. (*Id.* at 4.) Plaintiff’s counsel did not provide any evidence to support its
22 claims, but stated their offer to dismiss the Complaint against Auscom remained open,
23 and was extended to Bizcom, provided those Defendants signed Plaintiff’s proposed
24 document. (*Id.* at 2-3.) Defendants declined to sign the document, and reiterated their
25 request for evidence to support Plaintiff’s claims against Auscom and Bizcom.

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28 ² The page numbers cited here are those assigned by the Court’s CM/ECF
system.

1 Counsel engaged in further discussions, but did not reach a resolution.
2 Defendants then filed their Answers to the Complaint.

3 On December 5, 2014, Magistrate Judge Karen S. Crawford issued an order
4 setting the Early Neutral Evaluation Conference for February 11, 2015. That order
5 required all parties to be personally present for the Conference, “and legally and
6 factually prepared to discuss settlement of the case. Full authority to settle means that
7 the individuals at the ENE be authorized to fully explore settlement options and to agree
8 at that time to any settlement terms acceptable to the parties.” (Docket No. 18 at 2.)
9 Prior to the ENE, Plaintiff requested that its representative and sole employee Jessica
10 Chen be allowed to appear by telephone rather than in person. Judge Crawford denied
11 that request, so Plaintiff brought Merrick Andrew Wadsworth to the ENE instead. Mr.
12 Wadsworth testified that he was a “close friend” of Plaintiff’s counsel Nihat
13 Bayramoglu and an independent contractor for Plaintiff, although he was unsure of
14 Plaintiff’s line of business, the types of products Plaintiff developed, whether Plaintiff
15 sold, manufactured or licensed any products, and Plaintiff’s ownership. (Decl. of
16 Carlos Espinoza in Supp. of Mot. (“Espinoza Decl.”), Ex 1.) The cases did not settle
17 at the ENE, and in the order following the ENE, Judge Crawford reiterated,

18 that in the future, when this Court does require the personal appearance of
19 a party representative (for example, at a settlement conference), plaintiff
20 Digital Empire must send a representative who is an owner or a principal
21 of the company with decision-making authority. ... A consultant retained
for the purpose of representing the plaintiff at Court proceedings is not an
acceptable party representative.

22 (Docket No. 25 at 2.)

23 On March 2, 2015, Plaintiff identified the accused products in the case as the
24 Acer Aspire V5 and Asus K200MA notebooks. During the parties’ Rule 26(f)
25 conference, defense counsel informed Plaintiff’s counsel that Compal was not involved
26 with those products. (Docket No. 35-9 at 8.) Defense counsel requested that Plaintiff
27 identify an accused product to support its claims against Compal and Bizcom, and
28 Plaintiff identified four Dell products. (*Id.* at 7.)

1 In conjunction with its identification of those products, Plaintiff inquired whether
2 Defendants would be willing to allow Plaintiff to file an amended complaint. (*Id.*)³
3 Defendants refused, based at least in part on their investigation, which revealed that
4 Bizcom was not involved with the newly identified Dell products. (*Id.* at 2-3.) Plaintiff
5 then offered to “drop Bizcom from the case and proceed against Henghao and Compal.”
6 (*Id.* at 2.) Plaintiff asked, “Would Henghao and Compal oppose the amended complaint
7 in that instance?” (*Id.*) Defendants stated they would oppose, and Plaintiff proceeded
8 to file its motion.

9 In that motion, Plaintiff sought leave to amend to (1) correct spelling errors, (2)
10 clarify the scope of Defendants’ infringement and (3) dismiss Auscom from the case
11 without prejudice. Defendants did not oppose the first and third amendments, but did
12 oppose the second. After considering the relevant factors, the Court granted the motion
13 with respect to the first and third amendments, but denied the motion with respect to the
14 second proposed amendment because it would have been prejudicial to Defendants and
15 was arguably untimely and futile. Plaintiff filed its First Amended Complaint in
16 accordance with the Court’s order on June 19, 2015.

17 After Plaintiff filed its First Amended Complaint, Defendants filed a motion to
18 compel discovery from Plaintiff. The discovery sought included information about
19 Plaintiff’s pre-suit investigation.

20 While that motion was pending before Judge Crawford, and less than three weeks
21 after filing the First Amended Complaint, Plaintiff filed a motion to dismiss its case
22 against Defendants with prejudice. The following day, Plaintiff filed a motion to stay
23 the case pending a ruling on the motion to dismiss. Defendants did not oppose the
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25 ³ Plaintiff first raised the issue of filing an amended complaint in February while
26 the parties were discussing the dismissal of Auscom from the case. (Docket No. 35-7
27 at 2-3.) In that discussion, Plaintiff stated it “would like to dismiss Auscom from the
28 case.” (*Id.* at 2.) However, Plaintiff proposed that dismissal be accomplished through
the filing of an amended complaint that omitted Auscom as a Defendant. (*Id.*) Plaintiff
stated the amended complaint would also allow it to “[c]orrect misspellings and address
information for Compal and Henghao[.]” and “[c]larify[] the scope of the infringement
claims[.]” (*Id.*)

1 motion to stay, with one exception: They wanted a ruling on their pending motion to
2 compel discovery related to Plaintiff’s pre-suit investigation and Plaintiff’s corporate
3 formation. After considering the issue, the Court granted the motion to stay with the
4 exception of Defendants’ discovery requests directed to those two specific issues.
5 Judge Crawford then granted Defendants’ motion to compel Plaintiff to provide further
6 responses to those discovery requests.

7 After that order issued, Plaintiff’s counsel filed an *ex parte* motion to withdraw
8 from their continued representation of Plaintiff. The Court denied that motion on
9 August 26, 2015.

10 In a separate order, the Court granted Plaintiff’s motion to dismiss this case, and
11 in an amended order issued the following day, clarified that the dismissal was subject
12 to Plaintiff’s compliance with Judge Crawford’s order on the motion to compel. After
13 Judge Crawford ruled on a second motion to compel Plaintiff to provide further
14 discovery responses, Defendants filed the present motion for fees and costs.

15 II.

16 35 U.S.C. § 285

17 As mentioned above, Defendants rely on two statutes and the Court’s inherent
18 power in support of their request for fees and costs. The first of those statutes is 35
19 U.S.C. § 285, which provides: “The court in exceptional cases may award reasonable
20 attorney fees to the prevailing party.” 35 U.S.C. § 285. A “central aim” of this statute:

21 is to prevent an alleged infringer from suffering a “gross injustice.” The
22 injury to the alleged infringer is the focus ... § 285 “is remedial and for the
23 purpose of compensating the prevailing party for the costs it incurred in
24 the prosecution or defense of a case where it would be grossly unjust ... to
require it to bear its own costs.” Again, it is clear that the aim of § 285 is
to compensate a defendant for attorneys’ fees it should not have been
forced to incur.

25 *Kilopass Tech., Inc. v. Sidense Corp.*, 738 F.3d 1302, 1313 (Fed. Cir. 2013) (internal
26 citation omitted).

27 Until recently, the Federal Circuit held a case was not exceptional unless there
28 was misconduct during the litigation or in securing the patent, or “both (1) the litigation

1 is brought in subjective bad faith, and (2) the litigation is objectively baseless.” *Octane*
2 *Fitness, LLC v. Icon Health & Fitness, Inc.*, ___ U.S. ___, 134 S.Ct. 1749, 1754 (2014).
3 The Federal Circuit also stated that a showing of exceptional case must be established
4 by clear and convincing evidence. *Id.*

5 In *Octane Fitness*, the Supreme Court rejected both of those holdings. It found
6 the Federal Circuit’s substantive test was “overly rigid” and “too restrictive.” *Id.* at
7 1756-67. Instead, the Court held that an exceptional case:

8 is simply one that stands out from others with respect to the substantive
9 strength of a party’s litigation position (considering both the governing
10 law and the facts of the case) or the unreasonable manner in which the
11 case was litigated. District courts may determine whether a case is
12 “exceptional” in the case-by-case exercise of their discretion, considering
13 the totality of the circumstances.

14 *Id.* at 1756. The Supreme Court also rejected the Federal Circuit’s imposition of a clear
15 and convincing standard on the exceptional case inquiry, finding instead that the
16 applicable burden of proof is preponderance of the evidence. *Id.* at 1758.

17 Here, Defendants assert they are the prevailing parties, and this case is
18 exceptional such that attorneys’ fees are appropriate. Plaintiff disputes Defendants are
19 the prevailing parties, and that the case is exceptional.

18 **A. Prevailing Party**

19 In a case such as this where the plaintiff voluntarily dismisses its claims against
20 the defendant, “[t]he dispositive issue is ... whether the dismissal with prejudice had
21 sufficient judicial imprimatur to constitute a ‘judicially sanctioned change in the legal
22 relationship of the parties.’” *Highway Equip. Co. v. FECO, Ltd.*, 469 F.3d 1027, 1034
23 (Fed. Cir. 2006) (quoting *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep’t of*
24 *Health and Human Res.*, 532 U.S. 598, 605 (2001)). In *Highway Equipment*, the
25 Federal Circuit concluded, as a matter of patent law, that a dismissal with prejudice,
26 based on a covenant not to sue “and granted pursuant to the district court’s discretion
27 under Rule 41(a)(2), has the necessary judicial imprimatur to constitute a judicially
28 sanctioned change in the legal relationship of the parties, such that the district court

1 properly could entertain [the defendant's] fee claim under 35 U.S.C. § 285.” *Id.* at
2 1035.

3 Here, Plaintiff did not execute a covenant not to sue Defendants in the future, but
4 the dismissal with prejudice under Rule 41(a)(2) carries the same effect. Plaintiff cites
5 non-binding case law to support its position that Defendants are not prevailing parties,
6 (*see* Opp’n to Mot. at 17), but it fails to address *Highway Equipment*, which holds
7 directly to the contrary. *See also RB Rubber Prods. v. ECORE Int’l, Inc.*, No. 3:11-cv-
8 319-AC, 2012 U.S. Dist. LEXIS 33193, at *41 (D. Ore. 2012) (defendant was
9 prevailing party where plaintiff voluntarily dismissed patent infringement claims
10 against defendant); *Bioxy, Inc. v. Birko Corp.*, 935 F.Supp. 737, 744 (E.D.N.C. 1996)
11 (“The defendants, having obtained from plaintiff a voluntary dismissal with prejudice,
12 are considered prevailing parties.”) In light of *Highway Equipment*, this Court finds
13 Defendants are prevailing parties, and thus turns to consider whether this case is
14 exceptional.

15 **B. Exceptional Case**

16 As stated above, an exceptional case under § 285 “is simply one that stands out
17 from others with respect to the substantive strength of a party’s litigation position
18 (considering both the governing law and the facts of the case) or the unreasonable
19 manner in which the case was litigated.” *Octane Fitness*, 134 S.Ct. at 1756. Whether
20 a case is exceptional depends on the totality of the circumstances, and requires the court
21 to exercise its discretion on a case-by-case basis. *Id.* “In exercising that discretion,
22 courts may consider, among other factors, ‘frivolousness, motivation, objective
23 unreasonableness (both in the factual and legal components of the case) and the need
24 in particular circumstances to advance considerations of compensation and deterrence.’”
25 *Printeron, Inc. v. BreezyPrint Corp.*, No. H-13-3025, 2015 U.S. Dist. LEXIS 152163,
26 at *4 (S.D. Tex. Nov. 10, 2015) (quoting *Octane Fitness*, 134 S.Ct. at 1756 n.6). Courts
27 may also consider “whether a party knew or willfully ignored evidence of the claims’
28 meritlessness; whether the meritlessness could have been discovered by basic pretrial

1 investigation; or whether the meritlessness was made clear early in the litigation.” *Id.*
2 at *6.

3 Here, Defendants raise several arguments in support of their position that this
4 case is exceptional. First, they argue Plaintiff failed to conduct an adequate pre-suit
5 investigation. “In patent infringement cases, a reasonable pre-suit investigation
6 ‘requires counsel to perform an objective evaluation of the claim terms when reading
7 those terms on the accused device.’” *Walker Digital, LLC v. Google Inc.*, No. 11-311-
8 RGA, 2015 U.S. Dist. LEXIS 118284, at *3 (D. Del. Sep. 4, 2015) (quoting *Eon-Net*
9 *LP v. Flagstar Bancorp*, 653 F.3d 1314, 1329 (Fed. Cir. 2011)). *See also Checkpoint*
10 *Systems v. All-Tag Sec. S.A.*, No. 01-2223, 2015 U.S. Dist. LEXIS 109284, at *10-11
11 (E.D. Penn. Aug. 18, 2015) (quoting *Q-Pharma, Inc. v. Andrew Jergens, Co.*, 360 F.3d
12 1295, 1300-01 (Fed. Cir. 2004)) (“A party must ‘interpret the asserted patent claims and
13 compare the accused device with those claims before filing a claim alleging
14 infringement.’”)

15 In this case, Plaintiff provided details about its pre-suit investigation in its
16 discovery responses and in response to the present motion. In discovery, Plaintiff
17 stated:

18 The pre-filing investigation included analyzing publicly available
19 information, reviewing the patent, reviewing the patent prosecution
20 history, conducting an infringement analysis, reviewing websites, sales
21 information, and other sources to determine the technologies used in
products and the products’ suspected manufactures [sic] or ODM’s [sic],
purchasing products for analysis, analyzing those products, and creating
claim charts to show infringement.

22 (Espinoza Decl., Ex. 8 at 100-01.) Plaintiff also stated, in response to another
23 interrogatory concerning the circumstances under which Plaintiff discovered that
24 Defendants were infringing, “Gokalp Bayramoglu, acting as an attorney for Digital
25 Empire browsed the internet and other publicly available information to determine that
26 OGS touch panels were being made and assembled by the Defendants.” (*Id.* at 102.)
27 In supplemental responses to these interrogatories, Plaintiff expounded on its pre-filing
28 investigation, stating:

1 Digital Empire searched internet sources including websites and news
2 articles. Henghao's own website explained in detail some stack ups and
3 boasted of Henghao's One Glass Solution (OGS) Touch Panels. These
4 OGS panels are the same technology covered in Digital Empire's Patent
5 and so Digital Empire looked into finding end products created by the
6 Defendants. Using Compal's own annual report, Digital Empire was able
7 to ascertain that Compal was a supplier for Acer and Asus Notebook
8 computers, including notebook computers with touch panels. Digital
9 Empire was also able to find news articles that showed Henghao was a
10 supplier for 15.6 inch touch panels. Another news articles [sic] disclosed
11 that Henghao was supplying OGS touch panels to Acer for notebook
12 products. Based on the combination of Henghao's own admissions on its
13 website, Compal's own annual reports showing Asus and Acer as
14 Compal's customers, public information that Henghao was making certain
15 sized touch panels and public information that Henghao was supplying
16 OGS touch panels to ACER: Digital Empire formed a reasonable belief
17 that the Acer Aspire V5-571 and ASUS K200MA 11.6 were using
18 Henghao's touch panels and Compal was assembling these products while
19 Bizcom and Auscom were marketing them and importing them to the
20 U.S.A. Digital Empire purchased the two products named above and
21 reverse engineered them in a laboratory with a very powerful microscope
22 to fully understand the stack up of the touch panel and see if the touch
23 panels were in fact infringing. After the tests and generating claim charts,
24 Digital Empire was able to confirm that the touch panels did indeed
25 infringe on Digital Empire's patent. Once Digital Empire had good
26 information pointing to Compal, Henghao, and their subsidiaries'
27 involvement in the products along with reverse engineering and claim
28 charts showing infringement, Digital Empire filed suit against Defendants.

16 (Espinoza Decl., Ex. 12 at 138.) Plaintiff stated “[a]ll investigation was conducted by
17 Jessica Chen and checked by Gokalp Bayramoglu.” (*Id.* at 141.) (*See also* Espinoza
18 Decl., Ex. 7) (Plaintiff's response to Defendants' request for production of documents
19 relating to Plaintiff's pre-filing investigation).

20 Defendants acknowledge that Plaintiff conducted some kind of investigation into
21 the Acer and Asus products mentioned above prior to filing this case. Plaintiff asserts
22 that investigation led it to believe that Defendants were involved with those products,
23 but Defendants dispute that assertion. They argue the documents Plaintiff relies on are
24 Chinese-language documents that have not been translated to English and are thus
25 unacceptable for filing, and more importantly, they do not support Plaintiff's assertion
26 that Defendants were involved with these products.

27 Absent an English translation of the documents Plaintiff relies on, the Court is
28 unable to test the veracity of Plaintiff's claims that these documents tie Defendants to

1 the accused products. Indeed, without an English translation of the documents, there
2 is no evidence to support Plaintiff's assertion that Defendants were involved with the
3 accused products. The only evidence before the Court is that submitted by Defendants,
4 which demonstrates that Defendants were not involved with the accused products. (*See*
5 Decl. of Tien Do in Supp. of Mot.) (stating Bizcom not involved with accused products)
6 (Decl. of Andy Liu in Supp. of Mot.) (stating Henghao not involved with accused
7 products) (Decl. of Forrest Chen in Supp. of Mot.) (stating Compal not involved with
8 accused products). Plaintiff's failure to put forth any admissible evidence that
9 Defendants were involved with the accused products supports a finding that Plaintiff
10 failed to conduct an adequate pre-suit investigation into the facts of this case, and more
11 specifically, whether Defendants were involved with the accused products.

12 Plaintiff's pre-filing conduct, however, is not the only basis for Defendants'
13 argument that this case is exceptional. Defendants also argue Plaintiff's post-filing
14 litigation conduct was unreasonable, warranting an exceptional case finding.
15 Specifically, Defendants assert Plaintiff refused to dismiss its claims despite their
16 assertions and evidence that Defendants were not involved with the accused products.⁴

17 With respect to Auscom, Defendants informed Plaintiff Auscom was not
18 involved with the accused products in September 2014, approximately two months after
19 the Complaint was filed. Based on that representation, Plaintiff appeared willing to
20 dismiss Auscom from the case, but then tied that dismissal to its request for leave to
21 amend the Complaint, a request that Defendants declined and the Court ultimately
22 denied, save for the request to dismiss Auscom. That dismissal did not take effect until
23 June 9, 2015, and resulted in an additional nine months of involvement in this case by

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25 ⁴ Defendants assert Plaintiff engaged in other litigation misconduct warranting
26 an exceptional case finding, namely, advocating baseless claim construction positions
27 and filing motions to compel irrelevant discovery. Although the parties submitted their
28 preliminary joint filings prior to the Markman hearing, the Court never reached the
issue of claim construction, and thus, declines to address Defendants' argument about
Plaintiff's claim construction positions. The Court also declines to address Defendants'
argument about the motions to compel, as those motions were handled by Magistrate
Judge Crawford. Neither of those arguments is necessary to the Court's findings,
however, as explained below.

1 Auscom despite the parties' apparent agreement that it was not involved with the
2 accused products.

3 With respect to Bizcom, Defendants informed Plaintiff that Bizcom was not
4 involved with the accused products by at least October 2014. (*See* Docket No. 35-6 at
5 4.) Based on that representation, Plaintiff appeared willing to dismiss Bizcom, (*id.* at
6 2), but that dismissal was never filed, and Bizcom was renamed as a Defendant in the
7 First Amended Complaint and remained in the case until it was finally dismissed on
8 August 25, 2015, ten months later.

9 Regarding Compal, Defendants informed Plaintiff that it was not involved with
10 the accused products by at least March 6, 2015. (Docket No. 35-8 at 2.) Plaintiff failed
11 to provide any evidence to the contrary, but instead identified other accused products
12 that allegedly supported its claims against Compal. (Docket No. 35-9 at 7.)⁵ Like
13 Bizcom, Compal remained in the case until the August 25, 2015 dismissal.

14 Finally, with respect to Henghao, Defendants requested that Plaintiff provide
15 information to support its claims against Henghao, but that request also went
16 unanswered. (*Id.* at 2-3.) Like Compal and Bizcom, Hengao remained in the case until
17 August 25, 2015.

18 This evidence reflects that from the outset of this case, Defendants either
19 represented to Plaintiff or provided evidence that they were not involved with the
20 accused products. With those representations or evidence, Defendants either requested
21 that they be dismissed from the case or that Plaintiff provide evidence to support its
22 claims against Defendants. Plaintiff appeared to agree that Auscom was not involved
23 with the accused products, and yet it failed to dismiss Auscom from the case, choosing
24 instead to tie that dismissal to its request for leave to file an amended complaint, which
25 was granted nine months after Plaintiff learned that Auscom was not involved. As for
26 Bizcom and Compal, Plaintiff appeared to agree they were not involved with the

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28 ⁵ One of those products, the Dell XPS13, was released after the Complaint was
filed, and thus, could not have formed the basis for Plaintiff's allegations in the
Complaint.

1 accused products, but it refused to dismiss those Defendants from the First Amended
2 Complaint. Henghao was also included in the First Amended Complaint despite
3 Plaintiff’s failure to point to any evidence to support its involvement with the accused
4 products. All of these Defendants were forced to remain in the case until Plaintiff
5 “examined the possible expenses from protracted litigation and concluded that it is in
6 the best interest for the company to cease all legal activities related” to the case.
7 (Docket No. 57-1 at 2) (Decl. of Jessica Chen in Supp. of Mot. to Dismiss ¶ 2.) The
8 Court did not grant Plaintiff permission to do so until August 25, 2015, more than one
9 year after the Complaint was filed, and several months after Plaintiff either agreed that
10 Defendants were not involved with the accused products or refused to provide evidence
11 to the contrary. This conduct, like the inadequate pre-filing investigation discussed
12 above, also supports a finding that this case is exceptional. *See Eltech Systems Corp.*
13 *v. PPG Indus.*, 903 F.2d 805, 811 (Fed. Cir. 1990) (“Where, as here, the patentee is
14 manifestly unreasonable in assessing infringement, while continuing to assert
15 infringement in court, an inference is proper of bad faith, whether grounded in or
16 denominated wrongful intent, recklessness, or gross negligence. The alternative, abuse
17 of the courts through manifestly unreasonable lawsuits based on uninvestigated
18 allegations, would constitute a blot on the escutcheon of the law and a violation of Rule
19 11, Fed. R. Civ. P.”); *Taurus IP, LLC v. DaimlerChrysler Corp.*, 726 F.3d 1306, 1327
20 (Fed. Cir. 2013) (establishing rule “that a case can be found exceptional when a party
21 prolongs litigation in bad faith.”) In light of this finding, Defendants are entitled to
22 recover their fees under § 285.

23 **III.**

24 **28 U.S.C. § 1927**

25 In addition to moving for fees under § 285, Defendants request that the Court
26 award them fees and costs under 28 U.S.C. § 1927. This statute provides:

27 Any attorney or other person admitted to conduct cases in any court of
28 the United States or any Territory thereof who so multiplies the
proceedings in any case unreasonably and vexatiously may be required

1 by the court to satisfy personally the excess costs, expenses and
2 attorney's fees reasonably incurred because of such conduct.

3 28 U.S.C. § 1927. “[S]ection 1927 sanctions must be supported by a finding of
4 subjective bad faith’ which ‘is present when an attorney knowingly or recklessly raises
5 a *frivolous* argument, or argues a meritorious claim for the purpose of harassing an
6 opponent.” *B.K.B. v. Maui Police Department*, 276 F.3d 1091, 1107 (9th Cir. 2002)
7 (quoting *In re Keegan Mgmt. Co.*, 78 F.3d 431, 436 (9th Cir. 1996)).

8 Here, Defendants raise several arguments in support of their request for fees and
9 costs under § 1927. Specifically, they argue Plaintiff (1) failed to bring a qualified
10 representative to the ENE, (2) filed a groundless motion for leave to amend, (3) refused
11 to dismiss the case after learning Defendants were not involved with the accused
12 products, (4) filed a retaliatory motion to compel, (5) refused to participate in the filing
13 of a joint discovery motion, which required Defendants to file an *ex parte* motion and
14 (6) failed to provide adequate supplemental discovery responses. As discussed above,
15 the Court agrees with Defendants that Plaintiff refused to dismiss this case despite
16 assurances and evidence from Defendants that they were not involved with the accused
17 products. The Court also finds Plaintiff's pre-filing investigation

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1 was inadequate.⁶ Both courses of conduct were unreasonable and vexatious, and
2 support an award of fees and costs under § 1927.⁷

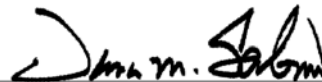
3 **IV.**

4 **CONCLUSION AND ORDER**

5 For these reasons, the Court grants Defendants' motion for fees and costs.
6 Defendants shall file their opening brief on the amount of fees and costs requested on
7 or before January 8, 2016. Plaintiff shall file its opposition brief on or before January
8 22, 2016, and Defendants shall file their reply brief on or before January 29, 2016.

9 **IT IS SO ORDERED.**

10 DATED: December 11, 2015

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12 HON. DANA M. SABRAW
13 United States District Judge

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18 ⁶ In light of these findings, the Court declines to address in detail Defendants'
19 other asserted bases for its request for fees and costs. The Court notes, however, that
20 Mr. Wadsworth's participation in the ENE was curious, to say the least. Although
21 Plaintiff insists Mr. Wadsworth's participation was legitimate, the record supports
22 Defendants' argument that he was ill-informed about the parties and the case, and
23 served as little more than a warm body able to accept a settlement "in the ballpark of
24 a million dollars." (Espinoza Decl., Ex. 1 at 19.)

25 Also, with respect to the motion for leave to amend, the Court disagrees with
26 Defendants that it was groundless, but notes that Plaintiff's suggestion that Defendants
27 requested the amendment is not supported by the record. Rather, the record reflects
28 Defendants repeatedly asked Plaintiff to identify which of Defendants' products were
at issue, and when Plaintiff identified products, Defendants informed Plaintiff they were
not involved with those products. The record before the Court reflects that Plaintiff
raised the possibility of filing an amended complaint, and it was Plaintiff that requested
Defendants' permission for that filing, not Defendants. Defendants repeatedly
requested that Plaintiff dismiss the case due to its failure to identify accused products
tied to Defendants. They did not request Plaintiff file an amended complaint.

⁷ Plaintiff's conduct described above is also sufficient to award sanctions under
the Court's inherent power. *See B.K.B.*, 276 F.3d at 1108 (sanctions may be imposed
under the Court's inherent authority "if the court specifically finds bad faith or conduct
tantamount to bad faith. . . including recklessness when combined with an additional
factor such as frivolousness, harassment, or an improper purpose.")