

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ENDOTACH LLC,)
)
Plaintiff,)
)
vs.) No. 1:13-cv-01135-LJM-DKL
)
COOK MEDICAL INCORPORATED,)
)
Defendant.)

ORDER ON DEFENDANT'S MOTION FOR ATTORNEYS' FEES

Pending in this patent litigation case is Defendant Cook Medical Incorporated's ("Cook's") Motion for Attorneys' Fees. Dkt. No. 239. Cook prevailed in the litigation when this Court found against Plaintiff Endotach LLC on its complaint that Cook infringed two of Endotach's patents. It is no mystery that in order for Cook to prevail on its claim for attorney fees it must show that this patent litigation was "exceptional." 35 U.S.C § 285. In *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014), the Supreme Court defined an exceptional case as "one that stands out from others with respect to the substantive strength of a party's litigation position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." 134 S. Ct. at 1757.

Among the factors Cook asks the Court to address is the early dismissal of the case for failure to name the proper plaintiff. It is true that this litigation stumbled at the start as the ownership of the patents in suit was sorted. While all may have benefited from a more thorough investigation in this area prior to filing, Endotach's attorneys' effort to name the proper owner was neither negligent nor obstructive.

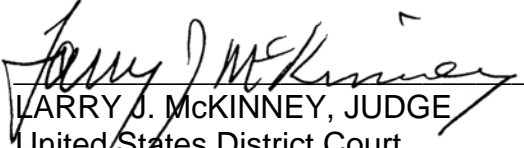
In addition, the allegation in this litigation parallel the usual patent litigation in this Court's experience. Opposing experts often do not agree. Science can lose out to advocacy even among honest and well-qualified experts. Opposing parties rarely agree on the timeliness and thoroughness of discovery. Damage requests begin with the best day the plaintiff can reasonably imagine. Trial strategies often do not mirror realistic assessment taking all risks into account. Most patent cases allege willfulness. This Court will not hold that if willfulness is alleged and should not reasonably have been, the case for that reason by itself becomes exceptional.

Further, attorneys in patent cases often move expert testimony toward litigation goals without collusion with the witness. Cook offers insufficient evidence for this Court to conclude that in the examination of its experts, Endotach attorneys either set a goal of or achieved the result of manipulation of testimony, a result that this Court has decried in the past and will in the future.

While there were circumstances that arose during the course of this litigation that were not ideal, this Court finds that the issues, taken one by one or in combination, cannot support a conclusion that this is an exceptional case under 35 U.S.C. § 285. For these reasons, Cook's Motion for Attorneys' Fees Pursuant to 35 U.S.C § 285 and Federal Rule of Civil Procedure 54 is **DENIED**. Dkt. No. 239.

IT IS SO ORDERED this 9th day of December, 2015.

Distribution attached.


LARRY J. MCKINNEY, JUDGE
United States District Court
Southern District of Indiana

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