

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

CSP TECHNOLOGIES, INC.,)	
)	
Plaintiff,)	
)	
vs.)	4:11-cv-00029-RLY-TAB
)	
SUD-CHEMIE AG,)	
SUD-CHEMIE, INC.,)	
AIRSEC S.A.S.,)	
CLARIANT PRODUKTE)	
DEUTSCHLAND GMBH,)	
CLARIANT CORPORATION, and)	
CLARIANT PRODUCTION (FRANCE))	
S.A.S.,)	
)	
Defendants.)	

ENTRY ON DEFENDANTS’ MOTION FOR ATTORNEY FEES

Defendants, Süd-Chemie AG, Süd-Chemie, Inc., Airsec S.A.S., Clariant Produkte Deutschland GMBH, Clariant Corporation, and Clariant Production (France) S.A.S., move for an award of reasonable attorney fees incurred between the court’s claim construction ruling and the entry of judgment of noninfringement, totaling approximately \$475,000. Plaintiff, CSP Technologies, Inc., opposes the motion. For the reasons set forth below, the court **DENIES** Defendants’ motion.

I. Background

CSP is a leading innovator in the field of plastic packaging, and is the owner of United States Patent No. 7,537,137, entitled “Resealable Moisture Tight Container Assembly For Strips And The Like Having A Lip Snap Seal” (the “137 patent”). As the

title of the patent suggests, the patent relates to substantially moisture-tight container and lid assemblies that can be used to store and package moisture-sensitive items, such as diagnostic test strips, using desiccant entrained polymer technology. Defendants are competitors of CSP in this field, and are the owners of the Accused Products, the Handy Active Tubes®, which are vial-shaped containers. CSP alleged that the Defendants are infringing claims 1-5 and claim 7 of the '137 patent by, *inter alia*, manufacturing, selling and/or importing the Accused Products into the United States.

Claims 1 and 7 are independent claims, and recite, in pertinent part:

1. *A substantially moisture tight* container and lid assembly for storing and packaging moisture-sensitive items comprising: an assembly with a container and a lid,
 - a) the lid is attached by a hinge to *an upper housing portion of the container*, the lid has an outer periphery that extends over at least a portion of the container, the lid is provided with a skirt that extends downwardly therefrom,
 - b) the container has a container base, and a sidewall extending upwardly from the container base,

The parties filed their respective motions for summary judgment on the same day (November 12, 2012) they filed their briefs on claim construction regarding the meaning of four disputed claim terms. As is relevant to the present motion, Defendants argued that, based upon their interpretation of those disputed claim terms, Defendants' Accused Products did not literally infringe claims 1-5 and 7 of the '137 patent.

After the parties' motions for summary judgment were fully briefed, the court issued its Entry on Claim Construction. The court adopted all of CSP's claim limitations

but one: “upper housing portion of the container.”¹ Following the court’s claim construction ruling, CSP moved for leave to file a supplemental response to Defendants’ motion for summary judgment because, pursuant to the court’s claim construction, Defendants’ Accused Product did not literally infringe the ‘137 patent, as the claims covered a two-piece container and not a one-piece container. Defendants asserted that CSP was precluded from pursuing this theory of infringement based on the disclosure-dedication doctrine (subject matter disclosed in specification but not claimed) and the claim vitiation doctrine (literal and substitute limitations not interchangeable, etc.). Following oral argument on this issue, the court found in favor of the Defendants and granted their motion for summary judgment of noninfringement.

On March 22, 2016, the Federal Circuit affirmed the court’s claim construction of “upper housing portion of the container” because “the intrinsic record unambiguously restricts the term to literally encompass only two-piece embodiments.” *CSP Techs., Inc. v. Süd-Chemie AG*, ---Fed. Appx.---, 2016 WL 1118549, at *4 (Fed. Cir. 2016). The Federal Circuit also affirmed the court’s grant of summary judgment of non-infringement based on the disclosure-dedication doctrine. *Id.* at *5. Defendants’ motion for attorney fees followed.

¹ As is relevant to the present motion, the court’s Entry on Claim Construction construed the term “an upper housing portion of the container” as “an upper housing portion of the container that is separate and distinct from the container base” – the construction advocated by Defendants.

II. Legal Standard

The Patent Act authorizes the court to award “reasonable attorney fees to the prevailing party” in “exceptional cases.” 35 U.S.C. § 285. 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.” *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*,² 134 S.Ct. 1749, 1756 (2014). Whether a case is exceptional is to be determined on a “case-by-case” basis, “considering the totality of the circumstances.” *Id.* In exercising its discretion, the court may “consider a nonexclusive list of factors, including frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” *Id.* n.6 (internal quotation marks and citation omitted). A party seeking fees must prove a case is exceptional by a preponderance of the evidence. *Id.* at 1758.

III. Discussion

Defendants argue they are entitled to fees from the date of the court’s claim construction ruling (June 3, 2013) to the entry of judgment of noninfringement (February 6, 2014). According to Defendants, CSP brought this case for “the sole purpose of

² Prior to *Octane Fitness*, the Federal Circuit limited fee shifting to cases in which the prevailing party demonstrated, by clear and convincing evidence, either (1) litigation misconduct, such as willful infringement, fraud or inequitable conduct; or (2) the litigation is objectively baseless and brought in subjective bad faith. *Brooks Furniture Mtg., Inc. v. Dutailier Int’l, Inc.*, 393 F.3d 1378, 1381 (Fed. Cir. 2005), *abrogated by Octane Fitness*, 134 S.Ct. at 1756-58.

stifling legitimate competition by harassing its competitor Süd-Chemie and forcing Süd-Chemie to expend money and resources in its own defense.” They further argue that, once the court construed the asserted claims of the ‘137 patent to require a two-piece container, any reasonable patentee would have stipulated to noninfringement. Rather than concede defeat, they continue, CSP engaged in vexatious litigation tactics by advancing an “untenable theory of infringement under the doctrine of equivalents.”

Defendants’ arguments are nothing more than unsupported accusations. There is no evidence that CSP did not reasonably believe that it had a legitimate infringement case against Süd-Chemie and thus, there is no evidence that CSP brought this case to harass Süd-Chemie. For example, during prosecution of the ‘137 patent, CSP specifically stated that the claims covered were supported by Figure 10, which is a one-piece vial. (Filing No. 100, CSP’s Claim Construction Brief at 13-14). This same argument was advanced in CSP’s claim construction brief. (*Id.*). And in the court’s Entry on Claim Construction, the court specifically noted, “The crux of the parties’ dispute centers again on whether the disputed claim language contemplates one-piece containers with a lid (CSP), or whether this language contemplates two-piece containers with a lid (Süd-Chemie).” (Filing No. 126, Entry on Claim Construction at 13). Furthermore, CSP’s claim constructions were all adopted by the court except for the term “upper housing portion of the container.” Simply because the court did not adopt CSP’s construction of “an upper housing portion of the container” does not render CSP’s infringement case “unfounded” as asserted by Defendants.

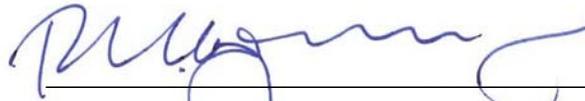
Once the court issued its Entry on Claim Construction, CSP was not required to concede defeat on summary judgment because the court's construction of "upper housing portion of the container" foreclosed its literal infringement claim. Pursuant to the parties' Case Management Plan, the parties could amend their summary judgment briefing and evidence following the court's Entry on Claim Construction. CSP moved for leave to supplement its response, and the Magistrate Judge granted the motion. CSP then filed a supplemental brief in opposition addressing, with expert evidence, Defendants' motion for summary judgment under the doctrine of equivalents. Defendants filed a reply, and the court granted CSP leave to file a surreply to address the disclosure-dedication doctrine first raised by Defendants in their reply.

CSP's theory of infringement was not baseless, frivolous, or objectively unreasonable. Indeed, the issues presented prompted the court to order oral argument. Although the court ultimately found the evidence was not sufficient to withstand summary judgment, after extensive briefing and oral argument, there is no evidence to suggest that CSP (or its expert) advanced an equivalents theory merely to prolong these proceedings. On the contrary, CSP's substantive positions and conduct are well within the norms of patent litigation.

IV. Conclusion

The court finds this case is not exceptional. Accordingly, Defendants' Motion for Attorney Fees (Filing No. 226) is **DENIED**.

SO ORDERED this 5th day of July 2016.



RICHARD L. YOUNG, CHIEF JUDGE
United States District Court
Southern District of Indiana

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