

ENTERED

May 08, 2017

David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

SCHOELLER-BLECKMANN
OILFIELD EQUIPMENT AG, *et al.*,
Plaintiffs,

§
§
§
§
§
§
§
§
§

v.

CIVIL ACTION NO. 3:13-0100

CHURCHILL DRILLING TOOLS
(RENTALS), LTD., *et al.*,
Defendants.

MEMORANDUM AND ORDER

This patent case is before the Court on the Motion for Exceptional Case and Attorney’s Fees and Costs Pursuant to 35 U.S.C. § 285 (“Motion for Fees”) [Doc. # 133] filed by Defendant Churchill Drilling Tools (Rentals), Ltd. (“Churchill”), to which Plaintiffs Schoeller-Bleckmann Oilfield Equipment AG (“Schoeller”) and Bico Drilling Tools, Inc. (“Bico”) filed a Response [Doc. # 140], and Churchill filed a Reply [Doc. # 144]. The Court has carefully reviewed the record in this case. Based on this review as well as the application of governing Supreme Court and other binding and persuasive legal authority, the Court **denies** Churchill’s Motion for Fees.

I. BACKGROUND

Schoeller was the owner of U.S. Patent No. 7,866,397 (“the ’397 Patent”), and Bico was an exclusive licensee. On October 9, 2016, Claim 13 of the ’397 Patent, the

only claim at issue in this lawsuit, was invalidated by the Patent Trial and Appeal Board (“PTAB”) of the United States Patent and Trademark Office. On November 9, 2016, the PTAB’s decision was affirmed by the United States Court of Appeals for the Federal Circuit.

Claim 13 of the ’397 Patent relates to the technology of downhole activation tools in the oil and gas industry, specifically a tool utilizing a “deformable activator.” A downhole activation tool is part of a drilling fluid circulation system that enables a drilling operator to manipulate the flow pattern within a drillstring. In certain situations, some or all of the flow of fluid may be diverted out of a side port to bypass the bottom portion of the drillstring. Various devices have been used to activate a bypass tool. These devices include hard balls or darts, plastic balls, and a “ball dart assembly.” Claim 13 of the ’397 Patent describes a device identified as a “deformable activator” as a means to activate the bypass tool.

On April 3, 2013, Plaintiffs filed this lawsuit against Churchill and B&W Drilling Tools, LLC, Churchill’s independent distributor and agent. Plaintiffs alleged infringement by Defendants of Claim 13 of the ’397 Patent. Plaintiffs filed the lawsuit in the Galveston Division of the Southern District of Texas and, on July 19, 2013, Defendants moved to transfer the case to the Houston Division. The Motion to Transfer Venue was denied on October 9, 2013.

The claim construction process began on February 21, 2014, when the parties filed their Joint Claim Construction Statement. Following claim construction briefing, the parties' filed their final Claim Construction Chart on May 30, 2014. A week earlier, on May 23, 2014, Churchill had filed a petition for *inter partes* review ("IPR") with the PTAB.

On June 6, 2014, the case was transferred to the undersigned. At a status conference on June 16, 2014, the Court discussed with counsel the potential effect of the IPR petition being granted. After the petition was granted on October 14, 2014, all parties advised the Court that there was no opposition to a stay of this lawsuit pending completion of the IPR process. As a result, on October 28, 2014, the Court issued an Order [Doc. # 91] staying and administratively closing this case until such time as the IPR process was completed.

On November 16, 2016, the parties notified the Court that the IPR proceeding was complete, with the PTAB having invalidated Claim 13 of the '397 Patent and the Federal Circuit having affirmed that decision. Therefore, by Order [Doc. # 104] entered November 17, 2016, the Court reinstated this case on its active docket and scheduled a conference for November 29, 2016. At the conference, Plaintiffs advised that they intended to dismiss with prejudice all claims asserted in this lawsuit. Plaintiffs then filed a written motion to dismiss their claims against Defendants, and

by Order [Doc. # 110] entered December 5, 2016, the Court dismissed Plaintiffs' claims.

On March 10, 2017, Defendants filed their Motion for Fees. The parties requested, and the Court permitted, an extended briefing schedule for the Motion for Fees. The Motion for Fees has now been fully briefed and is ripe for decision.

II. LEGAL STANDARD FOR AWARD OF FEES UNDER § 285

Section 285 of the Patent Act authorizes a district court to award attorney's fees in patent cases that the Court deems exceptional. The statute provides that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." 35 U.S.C. § 285. Section 285 allows an award of non-taxable costs as well as fees. *See Central Soya Co., Inc. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1578 (Fed. Cir. 1983); *Maxwell v. Angel-Etts of Cal., Inc.*, 53 F. App'x 561, 569 (Fed. Cir. Dec. 13, 2002).

"The Patent Act does not define 'exceptional, so we construe it in accordance with [its] ordinary meaning." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, ___ U.S. ___, 134 S. Ct. 1749, 1756 (2014). To be exceptional, the case must be the exception. Indeed, an "exceptional case" is 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*, 134 S. Ct. at 1756 (emphasis added); *see also Univ. of Utah v. Max-Planck-Gesellschaft Zur Foerderung Der Wissenschaften E.V.*, 851 F.3d 1317, 1322 (Fed. Cir. 2017) (quoting *Octane Fitness*, 134 S. Ct. at 1756). “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*, 134 S. Ct. at 1756; *Bayer CropScience AG v. Dow AgroSciences LLC*, 851 F.3d 1302, 1305 (Fed. Cir. 2017) (quoting *Octane Fitness*, 134 S. Ct. at 1756). “[A]ll aspects of a district court’s § 285 determination” are reviewed for abuse of discretion. *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, ___ U.S. ___, 134 S. Ct. 1744, 1749 (2014); *Univ. of Utah*, 851 F.3d at 1322 (citing *Highmark*, 134 S. Ct. at 1749).

The Supreme Court held that “there is no precise rule or formula for making these determinations, but instead equitable discretion should be exercised in light of the considerations we have identified.” *Octane Fitness*, 134 S. Ct. at 1756 (citing *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994)). In *Fogerty*, in the copyright infringement context, the Supreme Court listed factors for the Court to consider when determining whether fees should be awarded: “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.” *See Fogerty*, 510 U.S. at 534, n.19.

The 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.” *Octane Fitness*, 134 S. Ct. at 1757. Indeed, a “case presenting either subjective bad faith or exceptionally meritless claims may sufficiently set itself apart from mine-run cases to warrant a fee award.” *Id.*

The Supreme Court in *Octane Fitness* rejected the Federal Circuit’s requirement that proof of entitlement to fees under § 285 must be by clear and convincing evidence. *Id.* at 1758. Instead, the proper standard of proof for purposes of § 285 is the preponderance of the evidence standard applicable to other aspects of patent-infringement litigation. *See id.*

III. ANALYSIS

Churchill argues that this is an exceptional case under § 285 because (a) Plaintiffs should have known that Claim 13 was invalid as anticipated by U.S. Patent No. 6,923,255 (“the ’255 Patent” or “Prior Art”); (b) Plaintiffs’ claim construction and invalidity positions were objectively unreasonable; (c) the deposition testimony of Plaintiffs’ expert, Dr. Herbert Hofstatter, establishes that this is an exceptional case; (d) the lawsuit was filed and prosecuted in bad faith; and (e) there is a need for deterrence and compensation. As explained below, this Court finds that Churchill has

failed to demonstrate that these matters, separately or collectively, establish that this is an exceptional case warranting an award of fees and non-taxable costs under § 285.

A. Argument That Plaintiffs Should Have Known the '397 Patent Was Invalid as Anticipated by the '255 Patent

Churchill argues that Plaintiffs knew or should have known that the '397 Patent was invalid because it was anticipated by the Prior Art represented by the '255 Patent.

“Under the Patent Act, and the case law before its passage, a patent is ‘presumed valid.’” *Commil USA, LLC v. Cisco Sys., Inc.*, ___ U.S. ___, 135 S. Ct. 1920, 1929 (2015) (citing 35 U.S.C. § 282(a)). Based on that presumption, a patent holder plaintiff is not required to prove that his patent is valid in order to sue for infringement. *Commil*, 135 S. Ct. at 1929. Instead, an infringement defendant must prove invalidity by clear and convincing evidence. *See id.* (citing *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 95 (2011)); *see also Mass. Inst. of Tech. v. Shire Pharm., Inc.*, 839 F.3d 1111, 1124 (Fed. Cir. 2016).

In this case, it is undisputed that the '255 Patent was disclosed as prior art in the application for the '397 Patent. Having reviewed the application, including the '255 Patent prior art, the Patent and Trademark Office (“PTO”) issued the '397 Patent. Plaintiffs were entitled to rely on the presumption of validity. Plaintiffs’ refusal to accept Churchill’s argument that the patent was invalid, and instead to rely on the position of the PTO and the presumption of validity, does not render the case

exceptional. *See, e.g., Hockeyline, Inc. v. Stats LLC*, Civil Action No. 13-cv-1446 (S.D.N.Y. Apr. 27, 2017) [Doc. # 145-1] (noting that “a patent examiner who had access to all the prior art allowed this patent” and stating that it “takes a great deal more than bringing and maintaining a lawsuit alleging infringement of a duly issued patent to qualify as ‘misconduct’”).

B. Argument That Plaintiffs’ Claim Construction and Invalidity Positions were Objectively Unreasonable

Churchill argues that Plaintiffs’ claim construction and invalidity positions were objectively unreasonable. Where a party has presented good faith arguments in support of its position, it will generally not have asserted objectively unreasonable or exceptionally meritless claims. *See Small v. Implant Direct Mfg., LLC*, 2014 WL 5463621, *3 (S.D.N.Y. Oct. 23, 2014), *aff’d*, 609 F. App’x 650 (Fed. Cir. 2015).

With reference to the invalidity positions, Churchill argues that Plaintiffs offered varying proposals for construction of the claim term “deformable activator” that were intentionally designed to avoid invalidating prior art, and that Claim 13 was invalid under Plaintiffs’ proposed construction as anticipated by the ’255 Patent. As discussed above, the application for the ’397 Patent disclosed the ’255 Patent as existing prior art. Notwithstanding the existence of the ’255 Patent, the PTO issued the ’397 Patent. Plaintiffs were not unreasonable in asserting, and relying on the presumption of, the validity of an existing patent against a challenge based on a

disclosed prior art reference. Plaintiffs' invalidity position in this litigation was not unreasonable.

With reference to Plaintiffs' claim construction position, Churchill argues that Plaintiffs' claim construction position was objectively unreasonable in light of claim construction principles, patent specifications, testimony of the named inventor, and prior admissions in an application for a European patent. Churchill argues that Plaintiffs proposed "nebulous and ambiguous" claim constructions in an attempt to avoid the '255 Patent as prior art. Specifically, Churchill notes that in the Preliminary Claim Construction statement, Plaintiffs proposed construing the term "deformable activator" to include a limitation that it remain "one body after its deformation," yet in the Joint Claim Construction Statement, Plaintiff changed its proposed construction to modify the limitation to read "while remaining a unitary device." *See* Motion, pp. 10-11. The Court has reviewed the proposed claim constructions, as well as Plaintiffs' claim construction briefing. The Court finds that these modifications are not material and, as explained by Plaintiffs, were in part a response to Churchill's assertion during the claim construction process that Plaintiffs' original proposed claim construction was too complex to assist the jury. Moreover, it is not exceptional that the wording of a party's proposed claim constructions evolves during the claim construction process.

Churchill also argues that the case is exceptional because Plaintiffs' claim construction position was objectively unreasonable. The Court has reviewed the claim construction briefing in this case – Plaintiffs' Opening Claim Construction Brief [Doc. # 70], Defendants' Responsive Claim Construction Brief [Doc. # 72], and Plaintiffs' Reply Claim Construction Brief [Doc. # 75]. One of the primary disagreements between the parties was whether the claim term “deformable activator” as used in Claim 13 should be construed to include a deformable ball. Plaintiffs argued that the term “deformable activator” as used in Claim 13 of the '397 Patent did not include a ball, and Defendants asserted that it did. The '397 Patent clearly used the terms deformable activator and deformable “ball-like portion” differently, and there was intrinsic and extrinsic evidence that the claim term “deformable activator” did not include a deformable ball. The parties' experts appeared to agree that a “deformable activator” as used in Claim 13 did not include a ball. During his deposition, Churchill's expert agreed that the term “deformable activator” as used in Claim 13 did not include a ball *per se*, and that the specifications referencing a “deformable activator” were not referencing a ball. Contrary to Churchill's argument herein, it appears that Plaintiffs' European patent application made a similar distinction between a deformable activator and a deformable ball. Churchill has taken isolated statements by Paul Lee during his deposition to support its argument that Plaintiffs' claim

construction position was objectively unreasonable, but Lee’s testimony taken as a whole demonstrates that he understood that a deformable activator as used in Claim 13 of the ’397 Patent is separate and different from an activation ball.

Based on the full record, including evidence and briefing presented during the claim construction phase, the Court finds that Churchill has failed to demonstrate by a preponderance of the evidence that Plaintiffs’ position regarding the validity of the ’397 Patent and the proper construction of the claim term “deformable activator” were objectively unreasonable such that the case is exceptional for purposes of a § 285 award of fees and non-taxable costs.¹ “Merely asserting that a party’s arguments were without merit does not show that the case is exceptional.” *Western Falcon, Inc. v. Moore Rod & Pipe, LLC*, 2015 WL 3823629, *6 (S.D. Tex. June 18, 2015) (Rosenthal, J.). Whether or not the Court would ultimately have construed the claim term “deformable activator” as suggested by Plaintiffs, their position was not exceptionally meritless or objectively unreasonable. The “correctness or eventual

¹ Churchill relies heavily on the Eastern District of Texas decision in *Iris Connex, LLC v. Dell, Inc.*, 2017 WL 365634 (E.D. Tex. Jan. 25, 2017). In that case, however, the plaintiff proposed construction of the claim term “multi-position . . . reading head” to include fixed cameras. The district court held that “no reasonable juror could conclude that a fixed camera was ‘physically moveable’ or equivalent to a physically movable camera.” *See id.* at *1. The district court found the plaintiff’s proposed claim construction to be “not only implausible but nonsensical.” *See id.* at *14. The *Iris Connex* case is factually distinguishable from the case at bar and does not support a finding that Plaintiffs’ position in this case was objectively unreasonable.

success” of a party’s position in the lawsuit is not dispositive of the exceptional case analysis. *See SFA Sys., LLC v. Newegg Inc.*, 793 F.3d 1344, 1348 (Fed. Cir. 2015). Instead, the focus is whether the “party’s litigating position [was] so meritless as to ‘stand out’ from the norm and, thus, be exceptional.” *Id.* (citing *Octane Fitness*, 134 S. Ct. at 1756).

C. Argument That Dr. Hofstatter’s Testimony Establishes That This Is an Exceptional Case

Dr. Hofstatter provided a timely Expert Report on Claim Construction for Plaintiffs. Dr. Hofstatter has 25 years experience in the oil and gas industry, has a Ph.D. in Petroleum Engineering, and has been a professor for over five years at a university in Austria.

Churchill argues that Dr. Hofstatter provided deposition testimony that was “illogical and absurd,” “nonsensical,” incredible, and false, and that he did not understand some of the opinions in his written report because they were provided by counsel. As discussed above, Plaintiffs’ claim construction position – independent of Dr. Hofstatter’s expert report – was not objectively unreasonable. Dr. Hofstatter testified throughout his deposition that the term “deformable activator” *as used in the ’397 Patent* was distinguishable from, and did not include, a “deformable ball.” As explained above, neither this litigation position nor Dr. Hofstatter’s consistent testimony was objectively unreasonable.

Absent a showing that Dr. Hofstatter's report and testimony were objectively unreasonable, Churchill must demonstrate by a preponderance of the evidence that Dr. Hofstatter's expert opinions constituted misconduct sufficient to allow a finding that this is an exceptional case under § 285. The Court finds that Churchill has failed to satisfy this burden. In reaching this finding, the Court has considered not only the briefing and evidence submitted in connection with the Motion for Fees, but has also considered the briefing and other materials submitted in connection with the admissibility of Plaintiffs' expert's opinions, namely Dr. Hofstatter's Expert Report [Doc. # 70-2], Defendants' Motion to Strike Plaintiffs' Expert Report on Claim Construction [Doc. # 65], Plaintiffs' Response to the Motion to Strike [Doc. # 71], and Defendants' Reply [Doc. # 73].

Churchill argues that Dr. Hofstatter during his deposition took an "absurd semantic position." It is clear, however, that English is not Dr. Hofstatter's first language, and that he was trying to be cautious and precise with his word choice.

Churchill asserts that Dr. Hofstatter offered "false" testimony, but the record does not support that assertion. Dr. Hofstatter stated in his Expert Report that he had "considered the file history of the '397 patent and some extrinsic evidence." *See* Expert Report, p. 10. Churchill argues that this is false because, during his deposition, Dr. Hofstatter testified that he had not seen the '397 Patent's prosecution's history.

Churchill has failed to demonstrate that the statement regarding having “considered” the prosecution history was false and constituted exceptional misconduct by Plaintiffs. Plaintiffs explain that the ’255 Patent as prior art is identified on the first page of the ’397 Patent and, therefore, Dr. Hofstatter did not need to see the prosecution history to understand that the prior art had been disclosed. Additionally, Dr. Hofstatter was advised that the application for the ’397 Patent was granted as submitted, without any further statement by the patent applicant or the patent examiner. As a result, Dr. Hofstatter could believe that he had “considered” the relevant aspects of the prosecution history without having seen the actual file. This does not constitute exceptional misconduct sufficient to allow an award of fees under § 285.

Defendants complain also that Dr. Hofstatter’s Expert Report included statements that were not his opinions but were, instead, provided by Plaintiffs’ counsel. The 1993 Committee Note for Rule 26, regarding expert reports, provides that counsel are permitted to provide assistance to experts in preparing their reports. *See, e.g., Seitz v. Envirotech Sys. Worldwide Inc.*, 2008 WL 656513, *1 (S.D. Tex. Mar. 6, 2008) (Rosenthal, J.). This is particularly true where, as here, the expert provides technical opinions and the legal principles are supplied by the attorney. *See id.* Therefore, the fact that counsel provided the Expert Report’s explanation of the doctrine of claim differentiation is not misconduct, exceptional or otherwise.

Dr. Hofstatter, in the background section of the Expert Report, discussed certain prior art references. Churchill complains that during his deposition several weeks later, Dr. Hofstatter stated that he had not seen the documents. Dr. Hofstatter's inability to remember documents that he claims to have seen earlier and that were relevant only for purposes of technical background does not rise to the level of exceptional misconduct.

The Court finds that Churchill has failed to demonstrate by a preponderance of the evidence that Plaintiffs engaged in misconduct that would warrant a finding of exceptional case under § 285. This case does not stand out from other patent cases with respect to the manner in which it was litigated with respect to Dr. Hofstatter and his Expert Report. Dr. Hofstatter's conduct was not exceptional, and certainly nothing rises to the level of misconduct on the part of Plaintiffs or their counsel.

D. Argument that Plaintiffs Filed and Prosecuted this Lawsuit in Bad Faith

Churchill argues that Plaintiffs filed and pursued this lawsuit in bad faith and in an attempt to cripple Churchill's business.² There is a "presumption that the

² Churchill argues also that Plaintiffs' use of Dr. Hofstatter's Expert Report is evidence of bad faith. As explained in the prior section, Churchill has failed to show that use of Dr. Hofstatter's report constituted misconduct. For the same reasons, the use of his report fails to demonstrate bad faith.

assertion of infringement of a duly granted patent is made in good faith.”³ *Taurus IP, LLC v. DaimlerChrysler Corp.*, 726 F.3d 1306, 1326-27 (Fed. Cir. 2013). As discussed above, Plaintiffs had a presumptively valid patent and, therefore, were entitled to sue alleged infringers. Churchill has failed to demonstrate by a preponderance of the evidence that Plaintiffs sued it in bad faith and in an effort to cripple Churchill’s business.

The Court notes that at no point in this lawsuit did Plaintiffs engage in dilatory conduct designed to prolong the lawsuit or increase costs. The lawsuit was filed on April 3, 2013. Defendants requested and obtained an extension of time to July 21, 2013, to respond to the Complaint. On July 19, 2013, Defendants filed a Motion to Transfer Venue [Doc. # 22], seeking to transfer the case from the Galveston Division to the Houston Division, a distance of approximately 50 miles. The Motion to Transfer Venue was denied on October 8, 2013. Plaintiffs did nothing to delay the claim construction process, filing their opening and reply claim construction briefs by the original deadlines of April 11, 2014, and May 16, 2014. On May 26, 2014, Churchill filed its Notice of Filing of an Inter Partes Review [Doc. # 78]. When the IPR was instituted by the PTAB, the case was stayed and administratively closed.

³ The Supreme Court in *Octane Fitness* rejected the requirement that an exceptional case be established by clear and convincing evidence, but did not reject the underlying presumption of good faith. See *Octane Fitness*, 134 S. Ct. at 1758.

When the IPR process was completed, the case was reinstated and Plaintiffs promptly moved to dismiss their claims against Defendants. There is nothing to indicate that Plaintiffs were acting in bad faith and attempting to prolong the lawsuit or increase expenses for any party. Indeed, the Court views favorably Plaintiffs' willingness to dismiss their claims without further litigation.⁴ *Cf. Western Falcon*, 2015 WL 3823629 at *3 (the plaintiffs opposed summary judgment after PTAB invalidated patent).

E. Argument Regarding the Need for Deterrence and Compensation

Churchill argues that a finding that this is an exceptional case under § 285 is needed to deter future patent holders from filing infringement claims after being confronted with invalidating prior art. Generally, “the need for the deterrent impact of a fee award is greater where there is evidence that the plaintiff is a ‘patent troll’ or has engaged in extortive litigation.” *Small v. Implant Direct Mfg. LLC*, 2014 WL 5463621, *4 (S.D.N.Y. Oct. 23, 2014), *aff'd*, 609 F. App'x 650 (Fed. Cir. 2015) (citing *Lumen View Tech., LLC v. Findthebest.com, Inc.*, 2014 WL 2440867, *7 (S.D.N.Y.

⁴ Churchill complains that Plaintiffs appealed the PTAB's decision to the Federal Circuit. The availability of an appeal to the Federal Circuit is part of the IPR process, and Plaintiffs are entitled to avail themselves of the right to appeal. Plaintiffs enjoyed the presumption that Claim 13 of the '367 Patent was valid until the claim was cancelled, “and patent claims are not cancelled until a certificate issues after the inter partes review appeals are exhausted.” *See Western Falcon*, 2015 WL 3823629 at *8. Plaintiffs' decision to appeal the PTAB's ruling does not suggest that this is an exceptional case warranting an award of fees and costs pursuant to § 285.

May 30, 2014) (awarding fees where plaintiff filed several lawsuits in a short time frame); *Yufa v. TSI Inc.*, 2014 WL 4071902, *4 (N.D. Cal. Aug. 14, 2014) (fees awarded pursuant to § 285 where the plaintiff had a history of prosecuting patent infringement cases)).

In this case, unlike the situation in *Iris Connex*, 2017 WL 365634, there is no suggestion that Plaintiffs are a mere shell corporation created for the sole purpose of conducting patent infringement litigation. Indeed, it is undisputed that Plaintiffs are a viable business that generated significant revenue from the use of the technology covered by the '397 Patent. There is no evidence that Plaintiffs have a history of filing multiple patent infringement lawsuits. Churchill has failed to satisfy its burden to prove that there exists a need for deterrence that would justify an award of fees under § 285.

With reference to the compensation factor, Churchill argues that it should be awarded its attorneys' fees and non-taxable costs in this case because Plaintiffs refused to dismiss the lawsuit until Claim 13 was invalidated by the PTAB. This argument is unpersuasive. For the reasons discussed herein, Churchill has failed to demonstrate by a preponderance of the evidence that it is entitled to recover its attorneys' fees pursuant to § 285.

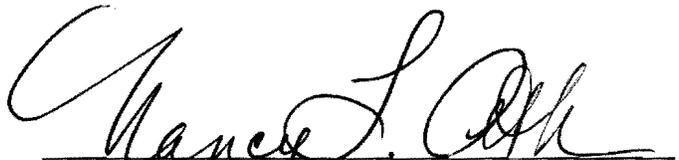
IV. CONCLUSION AND ORDER

Churchill has failed to satisfy its burden to demonstrate that this is an exceptional case under § 285. As a result, the Court exercises its discretion to deny an award of reasonable fees and expenses. It is hereby

ORDERED that Churchill's Motion for Fees [Doc. # 133] is **DENIED**.

Because this is the sole remaining issue in this case, the Court will issue a separate final order.

SIGNED at Houston, Texas, this **8th** day of **May, 2017**.



NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE