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4 UNITED STATES DISTRICT COURT  
5 WESTERN DISTRICT OF WASHINGTON  
6 AT TACOMA

7 CONQUEST INNOVATIONS, LLC,

8 Plaintiff,

9 v.

10 THE SKYLIFE COMPANY, INC.,

11 Defendant.

CASE NO. C15-5697BHS

ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANT'S MOTION FOR  
ATTORNEY'S FEES AND  
COSTS

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13 This matter comes before the Court on Defendant The SkyLIFE Company, Inc.'s  
14 ("SkyLife") motion for attorney's fees and costs (Dkt. 41). The Court has considered the  
15 pleadings filed in support of and in opposition to the motion and the remainder of the file  
16 and hereby grants in part and denies in part the motion for the reasons stated herein.

17 **I. PROCEDURAL HISTORY**

18 On September 28, 2015, Plaintiff Conquest Innovations, LLC ("Conquest") filed a  
19 complaint against SkyLIFE asserting causes of action for infringement of U.S. Patent No.  
20 7,167,827 (the "827 Patent"), breach of mutual nondisclosure agreement, and unfair  
21 competition. Dkt. 1. On November 23, 2015, SkyLIFE filed a motion to dismiss. Dkt.  
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1 21. On January 26, 2016, the Court stayed the matter pending a reexamination of the  
2 ‘827 Patent. Dkt. 33.

3 On September 27, 2016, Conquest filed a notice informing the Court that all  
4 claims in the ‘827 Patent had been cancelled and that it was voluntarily dismissing its  
5 complaint. Dkt. 36. Although SkyLIFE opposed the voluntary dismissal, the Court  
6 granted the motion. Dkt. 40.

7 On November 9, 2016, SkyLIFE moved for attorney’s fees and costs. Dkt. 41.  
8 On November 21, 2016, Conquest responded. Dkt. 44. On November 25, 2016,  
9 SkyLIFE replied. Dkt. 47.

## 10 **II. FACTUAL BACKGROUND**

11 On January 23, 2007, the United States Patent and Trademark Office issued the  
12 ‘827 Patent identifying Terry Conrad (“Conrad”) as the inventor and American  
13 Technology Corporation as the assignee. Dkt. 1, Exh. A. The patent was subsequently  
14 assigned to Conrad and licensed to Conquest. *Id.*, ¶ 4. Conrad is a member and manager  
15 of Conquest. *Id.*

16 On January 27, 2012, Conrad and Jeffery Potter (“Potter”), President of SkyLIFE,  
17 entered into a non-disclosure agreement (“NDA”). *Id.*, Exh. D. Under the protections of  
18 the NDA, Conrad provided samples and technical information to SkyLIFE. Dkt. 26,  
19 Declaration of Terry Conrad (“Conrad Decl.”), ¶¶ 13, 16–19. In July 2015, Conrad  
20 noticed SkyLIFE’s products advertised on its website. *Id.*, ¶ 22. Conrad contacted Potter  
21 and informed him of possible infringement of the ‘827 Patent. *Id.*, ¶ 23. Potter did not  
22 respond. *Id.* Conrad then contacted his attorney Rex Stratton (“Stratton”). *Id.*, ¶ 24. In

1 August 2015, Stratton sent Potter two letters requesting information about SkyLIFE's  
2 products and relaying Conquest's interest in licensing its knowhow and patented  
3 technology. *Id.*, Exh. H. Potter did not respond. *Id.*, ¶ 24.

4 Then, Conrad and Stratton contacted Chris Svendsen ("Svendsen") "to determine  
5 if the claims of the '827 Patent 'read' on the Live Leaf product that SkyLIFE was  
6 marketing on its website." Dkt. 46, Declaration of Chris Svendsen ("Svendsen Decl."), ¶

7 5. Regarding this determination, Svendsen declares as follows:

8 I was able to download from the SkyLIFE website a detailed  
9 disclosure of the Live Leaf product. Copies of the materials that were  
10 downloaded are of record as an attachment to plaintiff's COMPLAINT  
11 FOR INFRINGEMENT OF U.S. PAT. NO. 7,167,827, UNFAIR  
12 COMPETITION, BREACH OF MUTUAL NONDISCLOSURE  
13 AGREEMENT [Dkt. No. 7.1], as Exhibit B and Exhibit C, attached thereto.  
14 I also had access to the written description Mr. Conrad provided to  
15 SkyLIFE under the Conquest/SkyLIFE Nondisclosure Agreement (NDA).  
16 This information was provided to SkyLIFE at its request and provided the  
17 necessary information to enable the manufacture of the Live Leaf device,  
18 including a bill of materials. This information is also in the record before  
19 the Court in plaintiff's AMENDED COMPLAINT [Dkt. No. 7.1], in  
20 paragraph 16 therein. After a diligent and careful examination of this  
21 information, I ascertained the Live Leaf product infringed one or more  
22 issued claims of the '827 Patent.

16 *Id.*, ¶ 6.

### 17 III. DISCUSSION

18 "The court in exceptional cases may award reasonable attorney fees to the  
19 prevailing party." 35 U.S.C. § 285. Conquest concedes that SkyLIFE was the prevailing  
20 party, Dkt. 44 at 4, and, therefore, the remaining issue is whether this case is exceptional.  
21 The Supreme Court has held that "an 'exceptional' case is simply one that stands out  
22 from others with respect to the substantive strength of a party's litigating position . . . or

1 the unreasonable manner in which the case was litigated.” *Octane Fitness, LLC v. ICON*  
2 *Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014).

3 In this case, SkyLIFE argues that this is an exceptional case due to Conquest’s  
4 bad-faith litigation and frivolous claims. Dkt. 41 at 4. The case law seems to support  
5 SkyLIFE’s position. First, Conquest’s pre-filing inquiry is suspect. In the context of a  
6 Rule 11 violation, the Federal Circuit stated that a law firm is required “to, at a bare  
7 minimum, apply the claims of each and every patent that is being brought into the lawsuit  
8 to an accused device and conclude that there is a reasonable basis for a finding of  
9 infringement of at least one claim of each patent so asserted.” *View Eng’g, Inc. v.*  
10 *Robotic Vision Sys., Inc.*, 208 F.3d 981, 986 (Fed. Cir. 2000); *Q-Pharma, Inc. v. Andrew*  
11 *Jergens Co.*, 360 F.3d 1295, 1301 (Fed. Cir. 2004).

12 In support of its pre-filing inquiry, Conquest submitted the Svendsen declaration.  
13 This declaration, however, is formulaic, conclusory, and inadequate. Although Svenson  
14 declares that he engaged in a “diligent and careful examination,” he fails to provide any  
15 facts to support these conclusions and leaves unanswered how his investigation was  
16 either diligent or careful. Svendsen Decl., ¶ 6. Then he states that he “ascertained the  
17 Live Leaf product infringed one or more issued claims of the ‘827 Patent.” *Id.* Without  
18 identifying one or more of the 24 possible claims, the conclusion is unsupported by any  
19 actual evidence. In contrast, the expert in *Q-Pharma* offered a declaration identifying  
20 how the accused product read onto elements of specific claims in the patent. 360 F.3d at  
21 1301. Svenson’s declaration falls well below this level of detail.

1 Furthermore, the material used to conduct the alleged inquiry is also suspect.  
2 Although Conquest contacted SkyLIFE to discuss infringement, there is no evidence  
3 Conquest attempted to obtain SkyLIFE’s allegedly infringing product. An uninvited  
4 letter to the CEO of the company is fundamentally different than a call to inquire about  
5 purchasing a product or obtaining a sample product. In fact, there was nothing  
6 preventing Conquest from including in its letter to the CEO a request for a product  
7 instead of reaching the conclusion that infringement should be discussed. In any event,  
8 basing infringement contentions on marketing material and information provided by the  
9 patentee alone is frivolous. *See, e.g., View Eng’g*, 208 F.3d at 986 (“apply the claims of  
10 each and every patent that is being brought into the lawsuit to an accused device . . .”).  
11 Based on this information, the complaint should have only alleged that SkyLIFE’s  
12 advertised product infringes the ‘827 Patent, which highlights the frivolousness of the  
13 infringement claims. *See, e.g., Ling-Temco-Vought, Inc. v. Kollsman Instrument Corp.*,  
14 372 F.2d 263, 270 (2d Cir. 1967) (“the mere advertising of a patented device is not itself  
15 an infringement.”)

16 Given the foregoing, the Court finds that any reasonable jurist would consider  
17 Conquest’s infringement allegations questionable. What turns “questionable” into  
18 “exceptional” is the presence of Conquest’s claim for breach of the NDA. As SkyLIFE  
19 identifies in its motion to dismiss, the facts alleged in the complaint are contradicted by  
20 the exhibits attached to the complaint. Dkt. 21 at 7–8. Conquest alleged that SkyLIFE  
21 “disclosed the proprietary information of Plaintiff to third-parties, including Potter  
22 Technologies LLC, in violation of the restrictions on disclosure under the NDA.” Dkt.

1 20, ¶ 29. The emails attached to the complaint, however, establish that Conrad provided  
2 the technical information to Potter employees, not SkyLIFE. *Id.*, Exh. E. Conquest’s  
3 response fails to address this contradiction and instead provides more evidence of  
4 information that Conrad provided to SkyLIFE. Dkt. 25; Dkt. 26-6. The entire point of a  
5 NDA is to provide information between the parties and, therefore, evidence that one party  
6 provided information to the other party does not establish that the other party breached  
7 the NDA. In sum, Conquest’s inadequate pre-filing inquiry negates the allegations  
8 supporting one prong of its breach of contract claim, Dkt. 10, ¶ 28, and it has provided no  
9 information to support its allegation that “upon information and belief” SkyLIFE  
10 breached the NDA by providing information to third parties, *id.* ¶ 29. Accordingly,  
11 Conquest has failed to show any rational basis to assert this claim.

12         Second, the Court is unable to conclude that Conquest engaged in bad-faith  
13 litigation. Early settlement discussions are encouraged in all civil actions, and the fact  
14 that Conquest pressed a license early is not uncommon. Moreover, Conquest did  
15 participate in the reexamination, which undermines SkyLIFE’s argument that Conquest  
16 failed to prosecute its patent during reexamination. *See* Svendsen Decl., Exh. B.  
17 Although the Court does not conclude that Conquest engaged in bad-faith litigation  
18 tactics, this does not undermine the conclusions regarding the extremely weak strength of  
19 Conquest’s claims.

20         Finally, Conquest objects to the amount of fees requested by SkyLIFE. Dkt. 44 at  
21 10. The Court agrees that Conquest has requested fees that are at least beyond the scope  
22 of this matter. For example, Conquest has requested fees for the reexamination

1 proceeding. The Court finds that the proceeding would most likely have occurred  
2 regardless of this lawsuit and has nothing to do with Conquest's failure to conduct a pre-  
3 filing inquiry. Thus, the Court declines to award fees incurred in conjunction with that  
4 proceeding. Otherwise, the Court will award all fees that were incurred in conjunction  
5 with defending Conquest's claims in this Court.

6 **IV. ORDER**

7 Therefore, it is hereby **ORDERED** that SkyLife's motion for attorney's fees and  
8 costs (Dkt. 41) is **GRANTED in part** and **DENIED in part** as stated herein. SkyLIFE  
9 shall file a revised petition for fees in accordance with this order and note it in accordance  
10 with Local Rules, W.D. Wash. LCR 7(d)(3). Conquest may respond to the requested fees  
11 in accordance with the local rules.

12 Dated this 23rd day of January, 2017.

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BENJAMIN H. SETTLE  
15 United States District Judge