IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DUKE UNIVERSITY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	1:14-CV-1034
	)	
SANDOZ, INC., et al.,	)	
	)	
Defendants.	)	

ORDER

This matter is before the Court on motions for attorney's fees filed by several defendants. (Docs. 73, 84.) The plaintiffs to this action have filed several patent infringement lawsuits against various defendants who propose to manufacture and sell a generic version of the prescription drug Latisse. Defendants Sandoz, Inc., Akorn, Inc., and Hi-Tech Pharmacal Co., Inc., now seek attorney's fees from the plaintiff Allergan, Inc., ("Allergan") for defending this litigation related to U.S. Patent No. 8,926,953 ("the '953 patent"). They assert that because this Court and the Federal Circuit invalidated substantively identical claims in a previous lawsuit, Allergan had no objective basis to believe it could succeed with the '953 lawsuit. The defendants' requests for attorney's fees will be denied.

Federal patent law authorizes a court to award attorney's fees and other compensation to the prevailing party only "in exceptional cases." 35 U.S.C. § 285. "[A] central aim of § 285 . . . is to prevent an alleged infringer from suffering a 'gross injustice.'" *Kilopass Tech., Inc. v. Sidense Corp.*, 738 F.3d 1302, 1313 (Fed. Cir. 2013)

(citation omitted). The aim is not to punish a plaintiff for bringing claims, but to "compensate a defendant for attorneys' fees it should not have been forced to incur." *Id.*

An "exceptional case" for purposes of § 285 "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.*, 134 S. Ct. 1749, 1756 (2014). District courts decide whether a case was exceptional "in the case-by-case exercise of their discretion, considering the totality of the circumstances," 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.* at 1756 & n.6. Entitlement to attorney's fees must be established by a preponderance of the evidence. *Id.* at 1758.

The defendants each make essentially the same arguments for why Allergan's conduct was exceptional: that Allergan only sued over the '953 patent because the Federal Circuit invalidated its U.S. Patent No. 7,351,404 ("the '404 patent"); that the '953 patent claims involved the same subject matter as the previously litigated patents; and that Allergan's attempts to distinguish the '953 patent were objectively baseless and misleading. (Docs. 74 at 9-11; 85 at 6-9.)

The *Octane Fitness* guidance on what makes a case "exceptional" for purposes of § 285 is more liberal than the standard described in previous Federal Circuit precedent.[1] Nonetheless, a finding of exceptionality requires more than the mere fact that a party's arguments were unsuccessful; that this Court ruled against the plaintiffs on collateral estoppel grounds is not sufficient by itself to merit an award of attorney's fees. *See Gaymar Indus., Inc. v. Cincinnati Sub-Zero Prods., Inc.*, 790 F.3d 1369, 1373 (Fed Cir. 2015) ("[F]ees are not awarded solely because one party's position did not prevail."); *Raylon, LLC v. Complus Data Innovations, Inc.*, 700 F.3d 1361, 1368 (Fed. Cir. 2012) ("Reasonable minds can differ as to claim construction positions and losing constructions can nevertheless be nonfrivolous.").

Here, Allergan did not litigate the case in an unreasonable or vexatious manner. *See SFA Sys., LLC v. Newegg Inc.*, 793 F.3d 1344, 1349 (Fed. Cir. 2015) ("[U]nder *Octane Fitness*, the district court must consider whether the case was litigated in an unreasonable manner as part of its exceptional case determination, and . . . district courts can turn to our pre-*Octane Fitness* case law for guidance."). Nor did Allergan engage in misconduct or misrepresentations. *Cf. MarcTec, LLC v. Johnson & Johnson*, 664 F.3d 907, 919-20 (Fed. Cir. 2012) ("MarcTec engaged in litigation misconduct when it: (1) misrepresented both the law of claim construction and the constructions ultimately adopted by the court; and (2) introduced and relied on expert testimony that failed to meet even minimal standards of reliability, thereby prolonging the litigation and the

[1] *See Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc.*, 393 F.3d 1378 (Fed. Cir. 2005), *abrogated by Octane Fitness*, 134 S. Ct. 1749.

expenses attendant thereto."). Finally, Allergan's position in this lawsuit, while weak, was not frivolous. *See Octane Fitness*, 134 S. Ct. at 1756 n.6.

The totality of circumstances does not show that the defendants have suffered a "gross injustice." *Kilopass Tech.*, 738 F.3d at 1313. The Court is not satisfied by a preponderance of the evidence that Allergan's conduct was exceptional.

It is **ORDERED** that the motions for attorney fees, (Docs. 73, 84), are **DENIED**.

This the 10th day of February, 2016.

UNITED STATES DISTRICT JUDGE