IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

PARALLEL NETWORKS, LLC,	§	
	§	
	§	
Plaintiff,	§	
	§	**CASE NO. 6:10-CV-111**
vs.	§	
	§	
ABERCROMBIE & FITCH CO., ET AL.,	§	
	§	
	§	
Defendants.		

MEMORANDUM OPINION AND ORDER

Before the Court are the following motions:

- Defendants Kayak, Orbitz, Shoebuy, and Wolverine's SEALED Motion for Attorneys' and Experts' Fees (Docket No. 918); and

- Plaintiff Parallel Networks, LLC's Motion to Strike Defendants' Motion for Attorneys' and Experts' Fees and Order Defendants to Cease Using Statements from the Hearing on March 1, 2011, and the Fruits Thereof (Docket No. 930).

Having considered the relevant briefing and for the reasons stated below, Defendants' Motion for Fees (Docket No 918) and Parallel Networks' Motion to Strike (Docket No. 930) are **DENIED**.

BACKGROUND

In 2010, Parallel Networks filed complaints against over 100 defendants in four separate actions. *See* Case No. 6:10-cv-111, Docket No. 1; Case No. 6:10-cv-112, Docket No. 1; Case No. 6:10-cv-275, Docket No. 1; and Case No. 6:10-cv-491, Docket No. 1.[1] On September 15, 2011, Parallel Networks filed a complaint against 18 additional defendants in Delaware. *See*

[1] Unless otherwise noted, all citations to docket numbers in this Order will refer to Case Number 6:10-cv-111.

Case No. 6:12-cv-374, Docket No. 1. That case was subsequently transferred to the Eastern District of Texas on June 18, 2012 after Judicial Panel on Multidistrict Litigation proceedings. *See* Case No. 6:12-cv-374, Docket No. 167. In each action, Parallel Networks alleged infringement of U.S. Patent Number 6,446,111 (" '111 Patent"). Currently, Defendants Kayak Software Corporation ("Kayak"), Orbitz LLC, Orbitz Worldwide Inc., Orbitz Worldwide LLC, and Orbitz Away LLC (collectively, "Orbitz"), Shoebuy.com, Inc. ("Shoebuy"), and Wolverine World Wide, Inc. ("Wolverine") (collectively, "Defendants") remain. *See* Docket No. 907.

LEGAL STANDARD

"The court in exceptional cases may award reasonable attorney fees to the prevailing party." 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.*, 134 S. Ct. 1749, 1756 (2014).

"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; *see also Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014) ("[T]he determination of whether a case is 'exceptional' under § 285 is a matter of discretion."); *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1324 (Fed. Cir. 2011) ("[W]e are mindful that the district court has lived with the case and the lawyers for an extended period."). "After determining that a case is exceptional, the district court must determine whether attorney fees are appropriate," which is within the Court's discretion. *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1460 (Fed. Cir. 1998) (citations omitted). Ultimately, a party must prove

entitlement to attorney fees only by a preponderance of the evidence. *Octane Fitness*, 134 S. Ct. at 1758.

Significantly, sanctionable conduct is not the standard for awarding fees under § 285. *Id.* at 1756. "[A] district 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." *Id.* at 1757.

ANALYSIS

Defendants assert that this case is exceptional under 35 U.S.C. § 285 because Parallel Networks' infringement positions were meritless and it continued to litigate this case in an unreasonable manner. Docket No. 918 at 8–9. Defendants seek recovery of their attorneys' and experts' fees. *Id.* at 15. Parallel Networks responds that its infringement positions were objectively reasonable and supported by expert opinion. Docket No. 931 at 9. Parallel Networks separately moves to strike Defendants' motion for fees because Defendants relied on statements made at a "special status conference," which was set in order to have a "frank discussion" regarding case management strategies for this case due to the large volume of defendants. Docket No. 930 at 1–2, 5.

Parallel Networks' Infringement Positions Were Not Objectively Unreasonable

Defendants state the previous summary judgment proceedings clarified that the "asserted patent claims require an 'executable applet' that is capable of being sent from a server computer to a user's computer ***in a single transmission***." Docket No. 918 at 8 (emphasis in original). Defendants assert that the accused websites function in "precisely the opposite manner" and "[t]he non-infringing nature of Defendants' systems was not hidden behind confidential source code." *Id.* Defendants further assert that both the former presiding judge and the Federal Circuit

"agreed that [Parallel Networks'] infringement theory was ***contrary to the patent itself***." *Id.* at 8–9 (emphasis in original). Thus, Defendants claim this case should never have been filed because it was clear from the beginning that the accused websites function beyond the scope of the claims. *Id.* at 9.

Parallel Networks responds that its infringement positions were objectively reasonable from the beginning because they were based on an investigation of the accused websites, which indicated the accused websites functioned in a manner consistent with the scope of the asserted claims. Docket No. 931 at 3. Parallel Networks contends that its infringement contentions remained objectively reasonable throughout the litigation because its claim construction positions and summary judgment oppositions were supported by extensive analysis and expert opinion. *Id.* at 9. Parallel Networks contends its expert opined in detail that source code for the accused websites indicated the applets functioned without interruption or error, consistent with the scope of the asserted claims. *Id.* at 10–11.

The fact that a party makes a losing argument is not relevant to whether attorneys' or experts' fees should be awarded. *See Octane*, 134 S. Ct. at 1753 (fees are not "a penalty for failure to win a patent infringement suit," but are appropriate only "in extraordinary circumstances"). Here, Defendants support their argument that Parallel Networks' infringement positions were objectively meritless from the time suit was filed based on rulings from the Court and affirmance from the Federal Circuit. Defendants do not dispute that Parallel Networks' infringement contentions were supported by extensive analysis and expert opinion, just that Parallel Networks was unsuccessful. Isolated statements from court rulings do not necessarily serve as a basis for whether a party made unreasonable arguments. The substantive strength of Parallel Networks' infringement positions was amply supported and not objectively

unreasonable. *See e.g.*, Docket No. 824 (Granting summary judgment to some defendants but denying it as to others based on a detailed infringement analysis supported with expert testimony).

Parallel Networks Did Not Litigate This Case Unreasonably

Defendants state that Parallel Networks was unreasonable in how it litigated this case. Docket No. 918 at 9. Defendants argue that Parallel Networks' strategy of pursuing "cost of defense settlements" is contrary to a typical plaintiff's strategy. Docket No. 918 at 10. Defendants contend it was unreasonable for Parallel Networks to "set a settlement floor that was based on potential litigation costs and set just low enough to make settlement the more attractive option." *Id.* Parallel Networks responds by moving to strike Defendants' motion for fees because Defendants relied on statements made at a special status conference on March 1, 2011 that were not meant to be used against a party later in the litigation. Docket No. 930 at 4. Parallel Networks contends it acted reasonably and in good faith under the circumstances by participating in discussions about how to manage the case efficiently and in a cost-effective manner for both the Court and Defendants. Docket No. 931 at 11–13. Defendants contend that statements made at the status hearing were not meant to be used "at trial to prove or disprove liability for infringement or invalidity…, but could be used for other purposes." Docket No. 935 at 5–6 (citing Docket No. 339 at 22:11–24:10 ("Hearing Tr.")).

Here, Defendants support their arguments with statements made by Parallel Networks' counsel at the status hearing. Other than relying on those statements and arguing that Parallel Networks litigated this case based on meritless infringement positions, Defendants do not identify any other conduct that they consider exceptional. As previously stated, Parallel Networks' infringement positions were not meritless. Parallel Networks' statements at the status

hearing were in response to inquiries from the former presiding judge. There, the goal was "to have a really frank discussion" about effectively managing this case. Docket No. 339 at 21:5–8 ("Hearing Tr."). Even though the hearing was held on the record, the former presiding judge was clear that statements made at the hearing (particularly those about settlement strategy) were not to be used against a party later in the litigation. *Id.* at 20:21–21:8.

Moreover, Parallel Networks' candid statements regarding its settlement position provided immediate benefit to Defendants. As a result of the special status conference, the Court set early claim construction and summary judgment proceedings that resulted in many defendants being found not to infringe. The Court encouraged such novel approaches to reduce litigation costs and resolve cases on the merits, but that can only happen when parties engage in a frank discussion. Here, Parallel Networks disclosed aspects of their litigation strategy, and the Court fashioned an appropriate remedy to the benefit of many defendants. There is nothing unreasonable with the way Parallel Networks conducted itself at the hearings.

CONCLUSION

Considering the totality of the circumstances, the Court does not believe this is an exceptional case. It does not stand out from others with respect to the strength of Parallel Networks' infringement position. While the size of this case required creative case management strategies, that—in and of itself—is not enough to warrant awarding fees. Accordingly, Defendants' Motion (Docket No. 918) and Parallel Networks' Motion (Docket No. 930) are **DENIED**.

So ORDERED and SIGNED this 31st day of March, 2016.

Robert W Schroeder III

ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE