

Judge Denise J. Casper: ELECTRONIC ORDER entered. re (291 (D. 295 Under seal) in 1:13-cv-12856-DJC and (230 (234 under seal) in CA 14-13628) MOTION for Attorney Fees filed by Sophos Inc. After this Court's grant of Sophos' motion for summary judgment as to the validity of the one remaining patent at issue in this case ('628 Patent), D. 282, Sophos moved for an award of attorneys' fees, D. 291, under 35 U.S.C. § 285. D. 291. Under that statute, the court "in exceptional cases may award reasonable attorney fees to the prevailing party." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1753 (2014) (quoting 35 U.S.C. § 285). 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." *Id.* at 1756. As to the latter consideration, "sanctionable conduct is not the appropriate benchmark" for determining whether an award of attorney's fees under the statute is justified since "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.* Sophos seeks attorneys' fees not for the years-long litigation, but only for the period between August 1, 2017 and December 8, 2017. D. 296 at 5. With respect to the substantive strength of RPost's position, Sophos points to the fact that one of RPost's experts, Dr. Rajeev Surati, altered his position on several issues such that his opinion no longer supported the positions taken by RPost in its motion for summary judgment regarding infringement, D. 296 at 11; that RPost claimed an earlier priority date in its summary judgment briefing than it had previously ever claimed, without any record support for doing so, D. 296 at 15; that RPost failed to challenge Sophos' invalidity contention in any meaningful way, D. 296 at 16, and that RPost, at no point in this litigation, provided factual support for its \$138 million damages claim, D. 296 at 17. Sophos also points to RPost's manner of litigating, including failures to respond to discovery requests, failure to prepare a Rule 30(b)(6) witness adequately for deposition, and failure to engage experts in a timely manner. D. 296 at 18-20. RPost responds that the change in Surati's expert opinion was a modification rather than a withdrawal of same, D. 304 at 10; that RPost was not required to submit any record support for its earlier priority date, D. 304 at 13; that Surati did meaningfully challenge Sophos' invalidity case; and that the Court never adjudicated the question of whether there was any record support for the damages claim, D. 304 at 14. RPost characterizes the litigation conduct identified by Sophos as "minor irritations" but does not dispute the substance of Sophos' claims in this regard. D. 304 at 6. After consideration of the motion and opposition, and reflection upon the course of litigation, the Court finds that this case is an "exceptional case" that justifies the award of reasonable attorneys' fees under 35 U.S.C. § 285 and thus ALLOWS Sophos' motion for fees, D. 291. Even putting aside Sophos' contention that RPost has engaged in baseless litigation against other entities in similar cases, D. 296 at 6-7, the litigation conduct identified by Sophos rises well beyond "minor irritations" (as RPost labels them) as RPost failed to engage in discovery at several critical junctures. D. 311 at 11-12. Additionally, RPost failed to provide any support in the record for a number of positions it took at summary judgment, including the specific contours of its infringement case, any of the required factual support for its earlier claimed priority date, D. 282 at 11-12, any expert opinion meaningfully to rebut Sophos' invalidity case, D. 282 at 13, and, although the Court did not need to reach the issue of damages at the summary judgment, any factual support during the course of

litigation that it was entitled to the lost profits that it sought. See D. 282 (noting that the "Defendants have not identified a single customer or sale that RPost has lost to Sophos"). While perhaps none of these alone would constitute an "exceptional case," the cumulative effect of them here do. Having found that an award of attorneys' fees under 35 U.S.C. § 285 is justified, the Court reserves upon whether the \$1.52 million in fees sought by Sophos for August to December 2017 is reasonable. To make such determination, the Court directs Sophos to submit additional supporting documentation in support of their claim for attorneys' fees by February 16, 2018. RPost will then have until March 2, 2018 to respond. Associated Cases: 1:13-cv-12856-DJC, 1:14-cv-13628-DJC(Hourihan, Lisa) (Entered: 02/02/2018)
As of February 5, 2018, PACER did not contain a publicly available document associated with this docket entry. The text of the docket entry is shown above.

Sophos Incorporated v. RPost Holdings, Inc. et al
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