

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

KOR-CT, LLC,	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION NO.
	:	3:04cv789 (SRU)
	:	
SAVVIER, INC., ET AL.,	:	
Defendants.	:	

RULING ON MOTION FOR FEES

Kor-CT, LLC (“Kor-CT”) brought four claims against Savvier, Inc., Savvier LP, and William Suiter (collectively “Savvier”), all arising from Savvier’s marketing of an abdominal exerciser called “the 6 Second Abs.” The first claim sought a declaration that Savvier’s patent on the 6 Second Abs was invalid; the second claim alleged that the 6 Second Abs infringed one of Kor-CT’s patents; the third claim alleged improper marking of the 6 Second Abs; and the fourth claim alleged a violation of the Connecticut Unfair Trade Practices Act (“CUTPA”). I dismissed the first and fourth claims for failure to state a claim. I granted summary judgment to Savvier on the second and third claims. *Kor-CT, LLC v. Savvier, Inc.*, 344 F. Supp. 2d 847 (D. Conn. 2004). Savvier now seeks an award of fees under 35 U.S.C. § 285. I conclude that this is not an “exceptional” case warranting an award of fees.

I. Legal Standard

In patent cases, “[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party.” 35 U.S.C. § 285. In order to make such an award, the district court must first determine whether the case is exceptional, and, if so, the court must then determine whether fees should be awarded. *Union Pacific Resources Co. v. Chesapeake Energy Corp.*, 236 F.3d 684, 694 (Fed. Cir. 2001). The moving party must demonstrate the exceptional nature of the case

by clear and convincing evidence viewed in light of the totality of the circumstances. *Eltech Sys. Corp. v. PPG Indus., Inc.*, 903 F.2d 805, 811 (Fed. Cir. 1990). The award of fees under 35 U.S.C. § 285 is made at the court’s discretion. *Cambridge Products, Ltd. v. Penn Nutrients, Inc.*, 962 F.2d 1048, 1050 (Fed. Cir. 1992).

There are several types of conduct that can make a case “exceptional,” for example, fraud on the patent office, misconduct during the litigation, and vexatious or unjustified litigation. *See Brooks Furniture Manufacturing, Inc. v. Dutailier International, Inc.*, 393 F.3d 1378, 1381 (Fed. Cir. 2005). The Federal Circuit has explained, however, that “[a]bsent misconduct in conduct of the litigation or in securing the patent, sanctions may be imposed against the patentee only if both (1) the litigation is brought in subjective bad faith, and (2) the litigation is objectively baseless.” *Id.*

II. Application in This Case

Savvier contends that Kor-CT’s suit against it was vexatious and unjustified. According to Savvier, the manner in which Kor-CT litigated the case needlessly increased the cost to Savvier and the underlying claims brought by Kor-CT were frivolous enough to compel an inference of bad faith.

None of the actions that Savvier describes as vexatious – which consist principally of the filing of duplicative motions and late briefs, as well as the seeking of allegedly unnecessary discovery – rise to the level of “misconduct in the conduct of the litigation.” Accordingly, the question is whether Savvier has demonstrated, by clear and convincing evidence, that Kor-CT, acting in bad faith, brought an objectively baseless suit.

I start with the claim of bad faith. Savvier argues that Kor-CT’s bad faith is demonstrated

by (a) the weakness of its claims and (b) its conduct in pursuing those claims. I agree that Kor-CT's claims were weak; that is why I dismissed two of them, and granted summary judgment for the defendants on those that remained. I am not, however, able to conclude that the claims were so entirely without merit that bringing them was clear and convincing evidence of bad faith. Similarly, though some of Kor-CT's filings did appear redundant, and, at times, I would have preferred it had Kor-CT's submissions been more timely, its actions never struck me as the result of anything more sinister than oversight or disorganization. Throughout the course of this litigation, it was fairly clear to me that Kor-CT and its attorneys sincerely – though in my view incorrectly – believed a wrong had been committed and were simply trying to bring that perceived wrong to the attention of the court. Savvier's current filings do not convince me otherwise.¹

Because I find no bad faith in Kor-CT's conduct, I conclude that this case is not exceptional, and I do not reach the question whether any of the claims were objectively baseless. *See Brooks Furniture*, 393 F.3d at 1381 (“Since we conclude that the first requirement (subjective bad faith) is not satisfied here, we need not decide whether the second (objectively baseless) standard was met.”). Moreover, even could I be convinced that this case was nominally “exceptional,” my finding that Kor-CT was not improperly motivated would incline me against exercising my discretion to sanction it with an order to pay Savvier's fees.

¹ Kor-CT argued in opposition to Savvier's motion for fees that, in deciding to bring this action, it relied in good faith on the opinion of outside counsel. Savvier seeks discovery relating to that opinion. I do not rely on Kor-CT's statements regarding that opinion in reaching my conclusion concerning Kor-CT's subjective intentions, and, therefore, discovery on that subject is not necessary.

Savvier's motion for attorneys fees (doc. # 93) is DENIED.

It is so ordered.

Dated at Bridgeport, Connecticut, this 28th day of March 2005.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge