

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CORUS REALTY HOLDINGS,
INC.,

Plaintiff,

v.

ZILLOW GROUP, INC., et al,

Defendants.

CASE NO. C18-0847JLR

ORDER DENYING
DEFENDANTS' MOTION FOR
ATTORNEYS' FEES

I. INTRODUCTION

Before the court is Defendants Zillow Group, Inc., Zillow, Inc., and Trulia, LLC's (collectively, "Defendants" or "Zillow") motion for attorneys' fees pursuant to 35 U.S.C. § 285, 28 U.S.C. § 1927, and/or the court's inherent authority. (Mot. (Dkt. # 145).) Plaintiff Corus Realty Holdings, Inc. ("Corus") opposes the motion. (Resp. (Dkt. # 150).) The court has considered the motion, the parties' submissions in support of and

//

1 in opposition to the motion, the relevant portions of the record, and the applicable law.

2 Being fully advised,¹ the court DENIES Zillow's motion.

3 II. BACKGROUND

4 A. Factual Background

5 The facts of this case have been set forth in prior orders (*see, e.g.*, MSJ Order
6 (Dkt. # 138)), so the court here provides only a limited summary of the facts relevant to
7 this motion. This is a trademark infringement case in which Corus sued Zillow for
8 infringing on its U.S. Patent No. 6,636,803 (“the ’803 Patent”), entitled “Real-Estate
9 Information Search and Retrieval System.” (*See* Compl. (Dkt. # 1) ¶ 1; *see also id.* ¶ 16,
10 Ex. A.) The Patent covers systems and methods that use digital technology to locate
11 property and provide information in connection with a real-estate transaction (“the
12 Invention”). (*See, e.g.*, ’803 Patent at B1 4:4-6.) Corus alleged that Zillow infringed on
13 the ’803 Patent through developing, advertising, and making available the Zillow Real
14 Estate mobile application, the Trulia Real Estate mobile application, the Zillow Rentals
15 mobile application, the Trulia Rentals mobile application, and the HotPads mobile

16
17 ¹ Zillow does not request oral argument (*see* Mot. at 1), but Corus does (*see* Resp. at 1).
18 Oral argument is not necessary where the non-moving party suffers no prejudice. *See Houston v.*
19 *Bryan*, 725 F.2d 516, 517-18 (9th Cir. 1984); *Mahon v. Credit Bureau of Placer Cty. Inc.*, 171
20 F.3d 1197, 1200 (9th Cir. 1999) (holding that no oral argument was warranted where “[b]oth
21 parties provided the district court with complete memoranda of the law and evidence in support
22 of their respective positions,” and “[t]he only prejudice [the defendants] contend they suffered
was the district court’s adverse ruling on the motion.”). “When a party has an adequate
opportunity to provide the trial court with evidence and a memorandum of law, there is no
prejudice [in refusing to grant oral argument].” *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir.
1998) (quoting *Lake at Las Vegas Inv’rs Grp., Inc. v. Pac. Malibu Dev. Corp.*, 933 F.2d 724, 729
(9th Cir. 1991)) (alterations in *Partridge*). Here, the issues have been thoroughly briefed by the
parties, and oral argument would not be of assistance to the court. *See* Local Rules W.D. Wash.
LCR 7(b)(4). Accordingly, the court DENIES Corus’s request for oral argument.

1 application (collectively, “the Zillow Apps”). (*See* Stark Decl. (Dkt. # 59) ¶ 6, Ex. 4
2 (“Corus Infringement Contentions”) at 3.) Zillow denied Corus’s infringement
3 allegations and counterclaimed for declaratory judgments of noninfringement and
4 invalidity. (*See generally* Answer (Dkt. # 18).)

5 **B. Procedural Background**

6 The Court issued its claim construction order on July 2, 2019. (*See* CC Order (Dkt.
7 # 51).) During claim construction the parties agreed that “database” should be construed
8 as “a collection of data arranged for search and retrieval.” (*See* Joint Claim Chart (Dkt.
9 # 35) at 5.) The court construed the term “cellular-based location data” as “location data
10 from a cellular-based positioning system capable of tracking the position of a device in an
11 area of interest.” (CC Order at 49-50.)

12 On October 30, 2019, Zillow moved to exclude several of Corus’s infringement
13 theories and portions of Dr. Martin’s expert report that were untimely disclosed. (*See*
14 Mot. to Exclude Infring. Theories (Dkt. # 58) at 1.) The court granted the motion on
15 January 30, 2020. (*See* 1/30/2020 Order (Dkt. # 114) at 24.) Accordingly, the court did
16 not consider the untimely infringement theories or the excluded portions of Dr. Martin’s
17 report in deciding the parties’ summary judgment motions. (*See* Mot. to Exclude Infring.
18 Theories at 19-20.)

19 The court granted summary judgment in favor of Zillow on Corus’s infringement
20 claims (*see* MSJ Order at 41-42) and dismissed without prejudice Zillow’s counterclaim
21 for declaratory judgments of noninfringement and invalidity (*id.* at 44-45). With respect
22 to the “database” limitations, the court concluded (1) that Corus’s infringement

1 contentions stated that the Zillow Apps “store a database relating to the property
2 information” but failed to describe the structure or functionality of the alleged databases
3 on the Zillow Apps. (*Id.* at 18-19 (citing Stark Decl. (Dkt. # 59) ¶ 6, Ex. 4 (“Corus
4 Infringement Contentions”) at 16.) The court further held that even if Corus’s
5 infringement contentions explained Corus’s database theories in detail, Corus presented
6 insufficient evidence to establish a genuine dispute of material fact that the Zillow Apps
7 utilize a local “database” as defined by the ’803 Patent’s claims. (*Id.* at 20-22.)

8 With respect to the “cellular-based location data” limitation, the court held that the
9 ’803 Patent’s specification and the reexamination history showed that the cellular-based
10 location data limitations in the ’803 Patent’s independent claims disclaimed the use of
11 non-cellular sources of location data. (*Id.* at 33.) The court then held that Corus
12 presented evidence only that the Zillow Apps used “fused” or “crowd-sourced” forms of
13 location data but did not submit evidence that the Zillow Apps obtained location data
14 from a cellular-based positioning system. (*Id.* at 33-31.)

15 The court entered judgment on March 31, 2020 (Judgment (Dkt. # 144)), and
16 Zillow timely filed its motion for fees on April 14, 2020 (*see* Mot. at 15).

17 III. ANALYSIS

18 Zillow seeks attorneys’ fees under three sources of authority: (1) 35 U.S.C. § 285,
19 (2) 28 U.S.C. § 1927, and (3) the court’s inherent authority. (*See* Mot. at 1.) The court
20 sets forth the relevant legal standards for awarding attorneys’ fees before addressing
21 Zillow’s motion on the merits.

22 //

1 **A. Legal Standards**

2 Under 35 U.S.C. § 285, the court “in exceptional cases may award reasonable
3 attorney fees to the prevailing party” in a patent infringement suit. *See* 35 U.S.C. § 285.
4 “[A]n ‘exceptional’ case is simply one that stands out from others with respect to the
5 substantive strength of a party’s litigating position (considering both the governing law
6 and the facts of the case) or the unreasonable manner in which the case was litigated.”
7 *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014). “District
8 courts may determine whether a case is ‘exceptional’ in the case-by-case exercise of their
9 discretion, considering the totality of the circumstances.” *Id.* The United States Supreme
10 Court has suggested that district courts may consider a nonexclusive list of factors that
11 include “frivolousness, motivation, objective unreasonableness (both in the factual and
12 legal components of the case) and the need in particular circumstances to advance
13 considerations of compensation and deterrence.” *Id.* at 554 n.6 (quoting *Fogerty v.*
14 *Fantasy, Inc.*, 510 U.S. 517, 524 n.19 (1994)). The Supreme Court has rejected as
15 “overly rigid” a formula under which a case is exceptional “only if a district court either
16 finds litigation-related misconduct of an independently sanctionable magnitude or
17 determines that the litigation was both ‘brought in subjective bad faith’ and ‘objectively
18 baseless.’” *Id.* at 554. However, improper motivations and frivolity remain factors the
19 court may consider in assessing a motion for fees. *See id.* at 554 n.6.

20 Additionally, the court may award fees under 28 U.S.C. § 1927 or under its
21 inherent authority. Under 28 U.S.C. § 1927, the court may only award fees if Corus
22 acted in subjective bad faith, which is present if Corus “knowingly or recklessly raise[d]

1 a frivolous argument, or argue[d] a meritorious claim for the purpose of harassing an
2 opponent.” *In re Keegan Mgmt. Co. Sec. Litig.*, 78 F.3d 431, 436 (9th Cir. 1996). This
3 standard is similar to the standard the Ninth Circuit applies to requests for fees under the
4 court’s inherent authority. *See B.K.B. v. Maui Police Dep’t*, 276 F.3d 1091, 1108 (9th
5 Cir. 2002).

6 Finally, district courts may award sanctions in the form of attorney’s fees under
7 their inherent equitable powers if the court finds bad faith or “conduct tantamount to bad
8 faith.” *Id.* (quoting *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001)) (internal quotation
9 marks omitted). “Sanctions are available for a variety of types of willful actions,
10 including recklessness when combined with an additional factor such as frivolousness,
11 harassment, or an improper purpose.” *Id.* (quoting *Fink*, 239 F.3d at 994) (internal
12 quotation marks omitted). The decision to impose sanctions rests in the sound discretion
13 of the district court. *See Air Separation v. Underwriters at Lloyd’s of London*, 45 F.3d
14 288, 291 (9th Cir. 1994).

15 Inherent powers must be used only with restraint and discretion. *Leon v. IDX Sys.*
16 *Corp.*, No. C03-1158 P, 2004 WL 5571412, at *3 (W.D. Wash. Sept. 30, 2004), *aff’d*,
17 464 F.3d 951 (9th Cir. 2006) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991)).
18 If conduct can be sanctioned adequately under existing rules, a court ordinarily should
19 rely on the rules rather than on its inherent power to impose sanctions. *Herrera v. Singh*,
20 103 F. Supp. 2d 1244, 1256 (E.D. Wash. 2000) (citing *Chambers*, 501 U.S. at 50).

21 However, “if in the informed discretion of the court, neither the statute nor the rules are

22 //

1 up to the task, the court may safely rely on its inherent power.” *Chambers*, 501 U.S. at
2 50.

3 The court’s inherent power to sanction bad-faith conduct is based “not on which
4 party wins the lawsuit, but on how the parties conduct themselves during the litigation.”
5 *See id.* at 53. “Sanctions are available for a variety of types of willful actions, including
6 recklessness when combined with an additional factor such as frivolousness, harassment,
7 or an improper purpose.” *B.K.B.*, 276 F.3d at 1108 (quoting *Fink*, 239 F.3d at 994)
8 (internal quotation marks omitted).

9 **B. Zillow’s Motion**

10 Zillow contends that it is entitled to attorneys’ fees and costs because
11 Corus’s case “should never have been filed or, at the least, should not have been pursued
12 after the [c]ourt’s claim construction order and/or its order excluding Corus’s untimely
13 infringement theories.” (Mot. at 4.) Zillow argues that “Corus and its counsel knew, or
14 should have known, when they filed this lawsuit that there was no merit to the
15 infringement claim.” (*Id.* at 11.) Corus rests its assertions on three grounds: (1) that
16 Corus’s counsel knew when it filed this lawsuit “that its claims did not encompass
17 devices that rely on real-time access to a remote database of property information”; (2)
18 that Corus’s counsel knew “that Zillow maintained its database of property information
19 on remote servers, and its apps cannot work without real-time access to the remote
20 database”; and (3) that Corus’s counsel knew or should have known that the positions
21 between its infringement expert and its invalidity expert were irreconcilable. (*Id.*)

22 //

1 In response, Corus contends that its “infringement claims were reasonable and
2 consistent.” (Resp. at 8.) Corus points to the expense it incurred to engage in
3 reexamination of the ’803 Patent before filing suit. (*Id.*) Corus further contends it was
4 reasonable to interpret the court’s claim construction order to agree with Corus that
5 “infringement could occur even if remote data were downloaded to the local database.”
6 (*Id.* at 9.) Corus further argues that its experts’ positions were not inconsistent, but even
7 if they were, such inconsistency does not justify a fee award—particularly when one of
8 their experts “had little time” to review reams of source code and to rebut Zillow’s 900
9 pages of invalidity contentions and 640 pages of expert reports. (*Id.* at 12.)

10 1. 35 U.S.C. § 285

11 Zillow points to three primary cases it contends are analogous to the present case
12 and under which Zillow is entitled to fees under 35 U.S.C. § 285. (*See* Mot. at 12-14
13 (citing *AdjustaCam, LLC v. Newegg, Inc.*, 861 F.3d 1353, 1360-61 (Fed. Cir. 2017),
14 *Taurus IP, LLC v. DaimlerChrysler Corp.*, 726 F.3d 1306, 1327-28 (Fed. Cir. 2013), and
15 *IPS Grp., Inc. v. Duncan Solutions, Inc.*, No. 15-CV-1526-CAB (MDD), 2018 WL
16 2215418, at *2 (S. D. Cal. May 14, 2018).) In *AdjustaCam*, the Federal Circuit Court of
17 Appeals held that the district court’s finding that a patent licensee’s litigation position
18 was not exceptional was clearly erroneous. *See AdjustaCam*, 861 F.3d at 1360-61. The
19 court held that the plaintiff had filed a “weak” infringement lawsuit, but that the lawsuit
20 became “baseless” after the district court’s claim construction order. *Id.* at 1360.
21 Specifically, the plaintiff’s patent for a computer camera clip specified that it rotated over
22 a single axis, whereas there was no dispute that the defendant’s accused product rotated

1 “about at least two axes.” *Id.* at 1361. In addition, the court determined that the plaintiff
2 had litigated the case in an unreasonable manner, repeatedly using “after-the-fact”
3 declarations, serving a new expert report on the date of that expert’s deposition, and filing
4 supplemental declarations making new infringement arguments for the first time to the
5 Federal Circuit on appeal. *Id.* Finally, the court reviewed the plaintiff’s approach to
6 damages, which included “assert[ing] nuisance-value damages against many defendants,
7 settl[ing] with them for widely varied royalty rates, and continu[ing] to press baseless
8 infringement contentions well past an adverse *Markman* order and expert discovery.” *Id.*
9 The court made clear that it based its clearly erroneous finding on “the totality of these
10 case-specific circumstances.” *Id.* at 1362.

11 In *Taurus IP*, the Federal Circuit affirmed an award of fees under 35 U.S.C. § 285
12 where the written description of a claim limitation “provide[d] no support for [the
13 plaintiff’s] unreasonably broad construction.” *Taurus IP*, 726 F.3d at 1327 (“When
14 patentees have sought unreasonable claim constructions divorced from the written
15 description, this court has found infringement claims objectively baseless.”). The court
16 further reinforced the rule that “a party cannot assert baseless infringement claims and
17 must continually assess the soundness of pending infringement claims, especially after an
18 adverse claim construction.” *Id.* at 1328.

19 Finally, in *IPS Group*, the Southern District of California awarded fees under 35
20 U.S.C. § 285 where the plaintiff all but ignored a dispositive claim limitation. *IPS*
21 *Group*, 2018 WL 2215418, at *2. Specifically, the patent at issue had an independent
22 claim limitation that required that the surface of a cover panel to a parking meter have a

1 “plurality of buttons that operate the parking meter upon manipulation by a user,” but the
2 allegedly infringing meter “quite obviously does not have any buttons on its cover panel.”
3 *Id.* (“Indeed, this obvious deficiency with [the plaintiff’s] infringement claim was
4 apparent in IPS’s infringement contentions that completely failed to identify this claim
5 limitation on the accused device.”).

6 This case is distinguishable from the above cases. Although Zillow ultimately
7 prevailed on summary judgment, this was not a case, like *IPS Group*, in which Corus
8 completely ignored a claim limitation or pressed its infringement claim with no support
9 in the specification. Here, the court does not find evidence of frivolousness or
10 baselessness. The definition for one of the claim limitations at issue, the “database”
11 limitation, was agreed by the parties during the claim construction process, and a dispute
12 about the scope of that agreed construction arose only just before and during the
13 summary judgment stage. (*See* MSJ Order at 21-22 (indicating that further construction
14 was necessary to resolve the parties’ dispute about the difference between “search” and
15 “retrieval”).) True, Corus’s infringement contentions failed to identify the specific
16 “database” allegedly at issue in the accused Zillow apps, but that is a far cry from, for
17 example, simply ignoring the claim limitation as the plaintiffs did in *AdjustaCam* and *IPS*
18 *Group*. *See See AdjustaCam*, 861 F.3d at 1360-61; *IPS Group*, 2018 WL 2215418, at *2.
19 Corus addressed the “database” limitations in its contentions, and its failure to
20 specifically identify the structure and function of the alleged databases is better evidence
21 of an oversight than of pursuing a baseless claim. In sum, although Corus’s position

22 //

1 ultimately did not prevail on the “database” limitations, it was not frivolous or objectively
2 baseless.

3 The story is the same with respect to the “cellular-based location data” limitation.
4 Although the court’s construction, based on the specification and reexamination history,
5 construed the limitation to disclaim non-cellular sources of location data, Corus’s
6 ultimately unsuccessful position that the capability to use “fused” or “crowd-sourced”
7 data that interacted with cellular data in some way was not frivolous or baseless.

8 Zillow argues that at the latest, Corus should have abandoned its infringement
9 claim after the court struck portions of Dr. Martin’s report that addressed untimely
10 theories with respect to the “database” limitations. (*See* Mot. at 11.) However, the court
11 struck those theories on January 30, 2020, after the parties filed their summary judgment
12 motions and less than three weeks before the court granted summary judgment in favor of
13 Zillow on February 18, 2020. (*See* 1/30/2020 Order; MSJ Order.) Even if the court
14 considered Corus’s position baseless as of January 30, 2020, the fact that it failed to
15 withdraw its claims between that date and the court’s February 18, 2020, summary
16 judgment order, is a far cry from the conduct of the plaintiffs in the cases upon which
17 Zillow relies. For example, in *AdjustaCam*, the court determined that the plaintiff’s claim
18 became baseless after the court’s claim construction order, yet the plaintiffs continued to
19 litigate that case for months. *See* 861 F.3d at 1360.

20 Nor does the court find evidence of the kind of improper motivation that exists in
21 the cases upon which Zillow relies. Zillow’s evidence of improper motivation is that
22 Corus apparently used a litigation financier to finance its litigation costs. (Mot. at 1.)

1 However, Zillow submits no evidence of improper conduct on behalf of Corus vis-à-vis
2 the litigation financier. (*See generally id.*) That a separate entity may have paid some or
3 all of Corus’s litigation expenses, without more, is insufficient to find bad faith.

4 In sum, the court concludes that the factors of frivolity, motivation, baselessness,
5 and the need for deterrence or compensation all weigh against an award of fees under 35
6 U.S.C. § 285. Therefore, under the totality of the circumstances, the court declines to
7 award fees.

8 2. 28 U.S.C. § 1927 and Inherent Authority

9 The standards to award fees under Section 1927 and under the court’s inherent
10 authority are more stringent than the standards under 35 U.S.C. § 285. *See Octane*
11 *Fitness*, 572 U.S. at 557. In rejecting a more demanding standard for 35 U.S.C. § 285,
12 the Supreme Court has determined that such a standard would render 35 U.S.C. § 285
13 “largely superfluous” given the court’s authority under Section 1927 and the court’s
14 inherent authority to award fees under more stringent standards. *See Octane Fitness*, 572
15 U.S. at 557. As the court has not found frivolity, baseless claims, or improper
16 motivation, the court also concludes that it does not find evidence of recklessness
17 “combined with an additional factor such as frivolousness, harassment, or an improper
18 purpose.” *See B.K.B.*, 276 F.3d at 1108 (quoting *Fink*, 239 F.3d 989 at 994). Therefore,
19 the court declines to award fees under 28 U.S.C. § 1927 and the court’s inherent
20 authority.

21 //

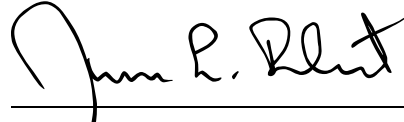
22 //

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

IV. CONCLUSION

For the foregoing reasons, the court DENIES Zillow's motion for attorneys' fees (Dkt. # 145).

Dated this 17th day of July, 2020.



JAMES L. ROBART
United States District Judge