

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
9

10 NUTRITION DISTRIBUTION
11 LLC, an Arizona Limited
12 Liability Company,

Plaintiff,

13 v.

14 PEP RESEARCH, LLC, a Texas
15 Limited Liability Company doing
16 business as International Peptide;
17 BRIAN REYNDERS, an
18 individual; FRED REYNDERS, an
19 individual; DOES 1 through 10,
inclusive,

Defendants.

Case No.: 16cv2328-WQH-BLM

ORDER

20
21 HAYES, Judge:

22 The matter before the Court is the motion for attorney fees and related expenses filed
23 by Defendants. (ECF No. 78).

24 **I. PROCEDURAL BACKGROUND**

25 On September 15, 2016, Plaintiff initiated this action by filing a complaint, alleging
26 violation of § 43(a)(1)(B) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), against
27 Defendants PEP Research LLC (PEP), Brian Reynders, and Fred Reynders. (ECF No. 1).
28 On December 30, 2016, Plaintiff filed an amended complaint, the operative Complaint in

1 this action, alleging the same claim.¹ Plaintiff alleged that Defendants’ supplement
2 company, a competitor of Plaintiff, engaged in false and misleading advertising of certain
3 prescription-only drugs and synthetic peptides (the Products). (ECF No. 9). The
4 Complaint stated that Defendants falsely represent the Products as “research peptides and
5 chemicals” that are “not for human consumption” and “intended for laboratory research
6 only” (the Representations). *Id.* ¶ 1. Plaintiff alleged the Representations are misleading
7 because Defendants market and advertise the Products for personal use and consumption.
8 *Id.* Plaintiff alleged the Representations are misleading because Defendants do not inform
9 consumers that the Products are banned from sporting events and pose health and safety
10 risks. *Id.*

11 On September 7, 2017, the Court denied Defendants’ motion to dismiss with respect
12 to Plaintiff’s Lanham Act claim and granted the motion to dismiss as to Plaintiff’s
13 Racketeer Influenced and Corrupt Organizations Act claim. (ECF No. 15).

14 On February 15, 2019, the Court granted summary judgment in favor of Defendants.
15 (ECF No. 75).

16 On March 4, 2019, Defendants filed a motion for attorney fees and related expenses.
17 (ECF No. 78).

18 On March 25, 2019, Plaintiff filed a response in opposition to the motion for attorney
19 fees. (ECF No. 81).

20 On April 1, 2019, Defendants filed a reply in support of the motion for attorney fees.
21 (ECF No. 83).

22 II. CONTENTIONS

23 Defendants contend that they are entitled to attorney fees pursuant to the Lanham
24 Act and Fed. R. Civ. P. 54(d)(2) because this case is exceptional within the meaning of the
25

26
27 ¹ Plaintiff’s claims against Defendants Mastercard International Incorporated, Authorize.net, and Amazon
28 Payments were dismissed for failure to serve. (ECF No. 21).

1 attorney fee statutory provision. Defendants assert that the Court informed Plaintiff of the
2 evidence necessary to avoid summary judgment in the September 7, 2017 order denying
3 Defendants’ motion to dismiss and that Plaintiff had no evidence supporting the Lanham
4 Act claim two years later at summary judgment. Defendants contend that it was frivolous
5 and unreasonable for Plaintiff to approach summary judgment without any evidence in
6 support of the Lanham Act claim. Defendants assert that Plaintiff knew no false advertising
7 had occurred or caused harm, and that Plaintiff pursued the litigation to drive up litigation
8 costs and obtain discovery sanctions or a settlement. Defendants contend that an award of
9 attorney fees would properly compensate Defendants and Defendants’ counsel and deter
10 Plaintiff and Plaintiff’s counsel from pursuing similar actions.

11 Plaintiff contends that Defendants have not met the burden to show this case is
12 exceptional based on the fact that Defendants prevailed on summary judgment. Plaintiff
13 contends that the claims in this case were not frivolous or unreasonable because the Court
14 denied Defendants’ motion to dismiss. Plaintiff contends that Defendants have not
15 demonstrated an improper motive by referencing Plaintiff’s other cases because Plaintiff
16 has prevailed in prior similar suits. Plaintiff contends that the Court should consider
17 Defendants’ efforts to thwart discovery and corresponding discovery sanctions in this case.
18 Plaintiff asserts that Plaintiff is not engaged in a scheme warranting deterrence; rather,
19 “retailers like Defendants are criminally convicted for their intentional schemes to defraud
20 and mislead.” (ECF No. 81 at 7).

21 **III. DISCUSSION**

22 The Lanham Act permits an award of reasonable attorneys’ fees to a prevailing party
23 in “exceptional cases.” 15 U.S.C. § 1117(a). The “exceptional” determination is within
24 the discretion of the trial court. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S.
25 559, 564 (2014). “[D]istrict courts analyzing a request for fees under the Lanham Act
26 should examine the ‘totality of the circumstances’ to determine if the case was exceptional,
27 exercising equitable discretion in light of the nonexclusive factors identified in *Octane*
28 *Fitness* and *Fogerty*, and using a preponderance of the evidence standard.” *SunEarth, Inc.*

1 *v. Sun Earth Solar Power Co.*, 839 F.3d 1179, 1181 (9th Cir. 2016) (first quoting and citing
2 *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014), then citing
3 *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994)) (internal citation omitted). “[A]n
4 ‘exceptional’ case is simply one that stands out from others with respect to the substantive
5 strength of a party’s litigating position (considering both the governing law and the facts
6 of the case) or the unreasonable manner in which the case was litigated.” *Id.* at 1180
7 (quoting *Octane Fitness*, 572 U.S. at 554). Courts determining if a case is “exceptional”
8 consider nonexclusive factors including: “frivolousness, motivation, objective
9 unreasonableness (both in the factual and legal components of the case) and the need in
10 particular circumstances to advance considerations of compensation and deterrence.” *Id.*
11 at 1181 (quoting *Octane Fitness*, 572 U.S. at 554 n.6). “[A] case presenting either
12 subjective bad faith or exceptionally meritless claims may sufficiently set itself apart from
13 mine-run cases to warrant a fee award.” *Octane Fitness*, 572 U.S. at 555.

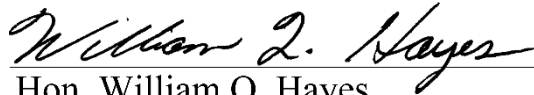
14 In this case, Plaintiff alleged that Defendants violated the Lanham Act by advertising
15 and selling products labeled “not for human consumption” when those products were
16 intended for human consumption. Defendants prevailed on summary judgment by
17 demonstrating a lack of evidence to support the Lanham Act claim, which shifted the
18 burden to Plaintiff to set forth evidence demonstrating a genuine issue of material fact—a
19 burden Plaintiff failed to carry. Defendants have not shown by a preponderance of the
20 evidence that this case “case present[s] either subjective bad faith or exceptionally
21 meritless claims,” based on Plaintiff’s failure to set forth the evidence needed to maintain
22 the Lanham Act claim. *See Octane Fitness*, 572 U.S. at 555. Defendants have not shown
23 by a preponderance that Plaintiff’s claims were frivolous or improperly motivated or
24 objectively unreasonable based on the facts and law of this case. Defendants have not
25 shown by a preponderance that compensation and deterrence considerations require an
26 award of fees in this case. *Compare Certified Nutraceuticals, Inc. v. Avicenna*
27 *Nutraceutical, LLC*, No. 316CV02810BENBGS, 2018 WL 5840042, at *3 (S.D. Cal. Nov.
28 7, 2018) (awarding fees based on clear and convincing evidence of “wrongfulness,

1 willfulness, and bad faith in engaging in inequitable conduct,” misleading representations
2 to the court, and a litigation history of disregarding court orders), *with Sophia & Chloe,*
3 *Inc. v. Brighton Collectibles, Inc.*, No. 12-CV-2472-AJB-KSC, 2019 WL 1429588, at *9
4 (S.D. Cal. Mar. 29, 2019) (determining that the plaintiff’s failure to provide evidence to
5 survive summary judgment did not render the case exceptional). The Court declines to
6 exercise its discretion to find this case “exceptional” within the meaning of 15 U.S.C. §
7 1117(a).

8 **IV. CONCLUSION**

9 IT IS HEREBY ORDERED that Defendants’ motion for attorney fees (ECF No. 78)
10 is DENIED.

11 Dated: May 8, 2019


12 Hon. William Q. Hayes
13 United States District Court
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28