No. 19-1899

United States Court of Appeals For The Federal Circuit

SOPHOS, INC.,

Plaintiff-Appellee,

v.

RPOST HOLIDNGS, INC.,
RPOST COMMUNICATIONS LTD.,

Defendants-Appellants.

Appeal from the United States District Court for the District of Massachusetts in Case No. 14-cv-13628, before the Honorable Denise J. Casper

PRINCIPAL BRIEF OF APPELLANTS RPOST HOLDINGS, INC. AND RPOST COMMUNICATIONS LTD.

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October 11, 2019

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CERTIFICATE OF INTEREST

Counsel for the Appellant Shure Incorporated certifies the following:

1. The full name of every party or amicus represented by me is:

   RPost Holdings, Inc.
   RPost Communications, Ltd.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

   None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

ADDYHART P.C.	–	Meredith M. Addy, Robert P. Hart, Helen Dutton, Craig McLaughlin
DOWNS MCMAHON LLP	–	Joseph M. Downs, III
BEN-ZVI & ASSOCIATES	–	Henry Ben-Zvi
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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. See Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

   Sophos Inc. v. RPost Holdings, Inc., RPost Communications Ltd., 2018-1392, 2018-1454 (decided March 14, 2019).

Dated: October 11, 2019

By: /s/ *Meredith M. Addy*
Meredith M. Addy

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5(a), there are no other appeals of this decision of the U.S. District Court for the District of Massachusetts. The Court previously determined an appeal from the same district court case on the validity of U.S. Patent No. 8,504,628, captioned: *Sophos Inc. v. RPost Holdings, Inc.*, No. 18-1392 (decided Mar. 14, 2019) (unpublished) (Dyk, Wallach, Hughes).

JURISDICTIONAL STATEMENT

This appeal arises from a decision of the U.S. District Court for the District of Massachusetts under 28 U.S.C. §§ 1331 and 1338(a). On February 2, 2018, the district court granted Sophos' motion for attorney fees under 35 U.S.C. § 285, and on April 18, 2019, the district court ruled on the amount of fees to be awarded. Defendants RPost Holdings, Inc. and RPost Communications Ltd. timely filed a notice of appeal, which the Court docketed on May 17, 2019. This Court has jurisdiction under 28 U.S.C. § 1295(a)(1).

STATEMENT OF THE ISSUES

1. Whether the district court legally erred in determining that the case was exceptional without performing its own analysis, or in the alternative, whether the district court clearly erred by relying on Sophos' allegations in its motion, which do not align with the record; and where either of these errors results in an abuse of discretion in determining an exceptional case, requiring reversal.

2. Whether the district court legally erred in determining that an award of over $1.4 million in attorney fees was reasonable for four months of legal work, where the district court failed to do its own analysis, and where the district court at least partially based its award on "what was at stake in the litigation," or alternatively, whether the district court committed clear error by relying on the statements made in Sophos' brief about the reasonableness of the fee amount without performing its own analysis; and where either of these errors results in an abuse of discretion in determining the amount of the fee award, requiring reversal.

INTRODUCTION

This case provides a prime example of winning by bombarding opposing counsel with more work than a lawyer can possibly do in any 24 hour period, and doing so for four months. The result, the party with the large legal team, Sophos, won the case, and did so handily on summary judgment, removing the need and the cost of a trial. All's fair in war. However, the legal system should not doubly reward the litigant both for its win and for its strategies in securing that win. And, in so doing, effectively penalize a patentee declaratory-judgment defendant. That is not the American system, nor is it the goal of 35 U.S.C. § 285. Sophos was entitled to hire a large law-firm engaging six lawyers and two paralegals full-time for four months to the tune of $1.56 million in legal fees. Also, in hindsight, to defend such an onslaught, RPost may have benefitted from its own army of multiple lawyers and paralegals, but that is not how this battle went down. In the end, Sophos won, and the case should be over. Instead, after Sophos filed for its attorney fees, the district court based its exceptional case determination on the same substantive facts that it found assisted Sophos preparing for and the court in ruling on summary judgment. And, in determining

reasonableness of the fee award, the district court then shouldered RPost with 90% of Sophos' legal fees, ignoring the context in which the hard-fought four months occurred, and providing an improper double reward for Sophos' aggressive legal strategy. Under any "objective" lens, such blitzkrieg litigation strategy can hardly form the basis for the definition of "reasonable" fees.

Reflecting this double reward, a case win and a judgment of attorney fees, the facts relied upon by the district court in finding exceptionality, have nothing to do with bad faith or vexatious litigation conduct. Nor did the court find such hallmarks of fee awards or that any of its findings "permeated" the four-month period-at-issue, warranting $1.4 million. Instead, the facts the district court relied upon are the same facts that it held caused RPost to lose the case, e.g., failure to support earlier priority date and failure to "meaningfully" defend validity. And these facts only arose after three years of difficult legal and technical issues, including the failure of Sophos' Rule 12(c) Motion to Dismiss on patent eligibility and a claim construction decision favorable to RPost. There was no bad faith, there was no vexatious litigation, instead,

RPost's counsel defended the blitzkrieg as best he could, and in the end RPost lost. This case is hardly exceptional.

Similarly, the court determined, without any analysis, that an award of over $1.4 million was a reasonable application of the lodestar approach. In doing so, the district court failed to address RPost's specific concerns about the six-lawyer, two-paralegal team's block and inefficient billing, and other defects, focusing erroneously on "what was at stake in the litigation" as the appropriate gauge. Precedent, however, is clear, that the court must explain its analysis in detail and must address the concerns raised by the non-movant. Basing a fee amount on "what was at stake" cannot be a substitute for proper analysis. For any one of these reasons, the case should be reversed.

STATEMENT OF THE CASE

I. The Underlying Merits Decision

This case involved a hotly contested patent litigation that has now lasted over six years. On November 12, 2013, Sophos filed this declaratory judgment action against RPost, alleging non-infringement

and invalidity of several patents.[1] Appx010. During the six-year pendency of this litigation, the parties tried multiple times to settle the case, to no avail. *See, e.g.,* Appx020; Appx023.

The case proceeded through preliminary motions, and in December 2015, Sophos filed a Federal Rule of Civil Procedure 12(c) Motion for Judgment on the Pleadings Based on 35 U.S.C. § 101. Appx017. Prior to a decision on the Rule 12(c) motion, the parties briefed claim construction, and in February 2016, the district court held a claim construction hearing. Appx019. In June 2016, the district court issued a Memorandum and Order on Claim Construction (adopting 8 out of 11 constructions proposed by RPost (2 out of 3 on the '628 Patent)) and Denied Sophos' Rule 12(c) Motion that the claims failed to satisfy 35 U.S.C. § 101. Appx020; Appx591. Thereafter, the case was assigned to mediation. In November 2016, the mediator reported that there had been "significant progress. The parties to exchange further information one count and contact the ADR provider's clerk for further mediation." Appx020; Appx586.

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[1] Of the asserted patents, only the '628 patent is relevant to this fee appeal.

In January 2017, the parties filed a Joint Stipulation of Dismissal of all asserted patents except the '628 Patent. Even though the Massachusetts district court denied Sophos' Rule 12(c) motion, in a parallel proceeding, a district court in Arizona found other asserted patents not patent eligible, and this appellate Court affirmed. Appx685. In February 2017, the district court held an Initial Pretrial Conference, setting dates through trial for the '628 Patent, the remaining patent-in-suit. Appx021.

In April 2017, the parties filed, and the district court granted, a Joint Motion to Stay and Administratively Close Cases. Appx023; Appx587. In the Joint Motion, the parties stated that "the parties are in discussions to reach a business resolution that would also resolve the litigations" by August 1, 2017. Appx587. The court, however, required that "[t]he 1/8/18 trial date remains in place if cases not resolved. The pretrial deadlines will be adjusted accordingly." Appx023 (Court Order Dated April Dated April 19, 2017 (Dkt. 160)). Between April 2017 and August 1, 2017, therefore, the case was administratively closed and the parties engaged in settlement negotiations. *Id.*

In July 2017, four attorneys from Goodwin Proctor appeared on behalf of plaintiff Sophos, and its prior counsel withdrew.[2] Appx023.

On August 8, the parties filed a status report indicating that settlement had not been reached, and both parties proposed new dates in preparation of the January 8, 2018 trial that the district court maintained despite the settlement negotiation stay. Appx023.

On August 9, defendant RPost's prior counsel withdrew, and RPost retained Henry Ben-Zvi, a sole practitioner. *Id.*

On August 21, plaintiff Sophos served Second Supplemental Noninfringement and Invalidity Contentions ("Sophos' Contentions") (Appx725), following defendant RPost's service of its Second Amended Infringement Disclosure ("Infringement Disclosure") in March 2017. August 21, 2017, was the first time Sophos asserted the two prior art references, Dickinson and Muldoon, that later became the subject of the successful summary judgment motion for invalidity. Appx735. In Sophos' Second Amended Invalidity Contentions, Sophos asserted 90

[2] At least six attorneys, three of which were partners, and two paralegals billed time according to Sophos' records. Appx368; Appx382-395

prior art references. These Contentions were 705 pages in length with 681 pages of single-spaced claim charts. Appx742 (start of Dickinson claim charts); Appx905 (start of Muldoon claim charts); Appx1429 (end of 681 pages of claim charts).[3] Notably, none of Sophos' prior invalidity contentions identified either Dickinson or Muldoon, among other references.

On September 1, 2017, the district court adopted Sophos' proposed schedule and entered dates as follows:

Activity	**Due Date**	**Days Between**
Final Non-infringement and Invalidity Contentions	2017-08-21	*nunc pro tunc*
Fact Discovery Completed	2017-09-15	14 (from order)
Opening Expert Reports	2017-09-22	7
Rebuttal Expert Reports	2017-10-13	21
Expert Discovery Completed	2017-10-21	8
Motions for Summary Judgment	2017-11-03	13
Oppositions to Summary Judgment	2017-11-27	24
Replies to Summary Judgment	2017-12-01	6
Motions in Limine	2017-12-01	6

[3] In stark comparison, Sophos' First Supplemental Noninfringement and Invalidity Contentions contained 19 prior references for the '628 Patent and far fewer total pages.

Activity	Due Date	Days Between
Hearing on Summary Judgment	2017-12-06	5
Oppositions to Motions In Limine	2017-12-08	2
Final Pretrial Conference	2017-12-21	13
Trial Begins	2018-01-08	17

Appx024. Fact discovery was completed just 25 days after Sophos served its 705-page Second Supplemental Contentions. *Id.* And RPost's technical expert served his Opening Expert Report on time, just one month later. *Id.*

With only one week from the completion of discovery to prepare and serve opening expert reports, Appx024, RPost was forced to file a Motion for Extension of Time for its damages expert report; Sophos opposed the motion. Appx024-025. In the motion, RPost explained that during the August 2017 change of litigation counsel, RPost's new counsel had understood all experts had been retained. Appx620. However, upon getting up to speed in the case, RPost's new counsel learned that no damages expert had been retained. Appx620. To add further pressure, once RPost retained a damages expert, the protective order prevented RPost's new counsel from showing the newly-retained damages expert Sophos' highly confidential material until Sophos' counsel consented.

Appx621. When RPost's counsel asked for Sophos' counsel's consent, Sophos' counsel indicated that it "would not be able to consider RPost's request to approve Mr. Leisner until some unspecified time." Appx622; Appx624. As of the filing of the Motion for Extension of time on September 22, 2017, Sophos' counsel had not approved RPost's counsel's request to show RPost's damages expert any Highly Confidential Sophos documents so he could prepare his damages opinion. Appx624. In addition, Sophos refused to stipulate to any extension of time for RPost's damages report and opposed RPost's motion. Appx024-025.

On September 26, 2017, the district court extended the deadline for RPost's damages report to September 28, 2017, a total of six days. RPost served its damages report of Christopher J. Leisner ("Leisner") on September 29, 2017 (per the parties' mutual agreement) and subsequently, on October 9, 2017, served a supplemental damages report. RPost's expert noted in its September 29 filing that it had not had time to review Sophos' Highly Confidential Information and would be submitting a supplemental report. Appx627. Sophos moved to strike the supplemental Leisner damages report, not for its substance, but rather for the later filing date. Appx0025; Appx633-634. In rendering its

decision granting Sophos' summary judgment motion of invalidity, the district court denied Sophos' motion as moot. *See* Appx028; Appx664.

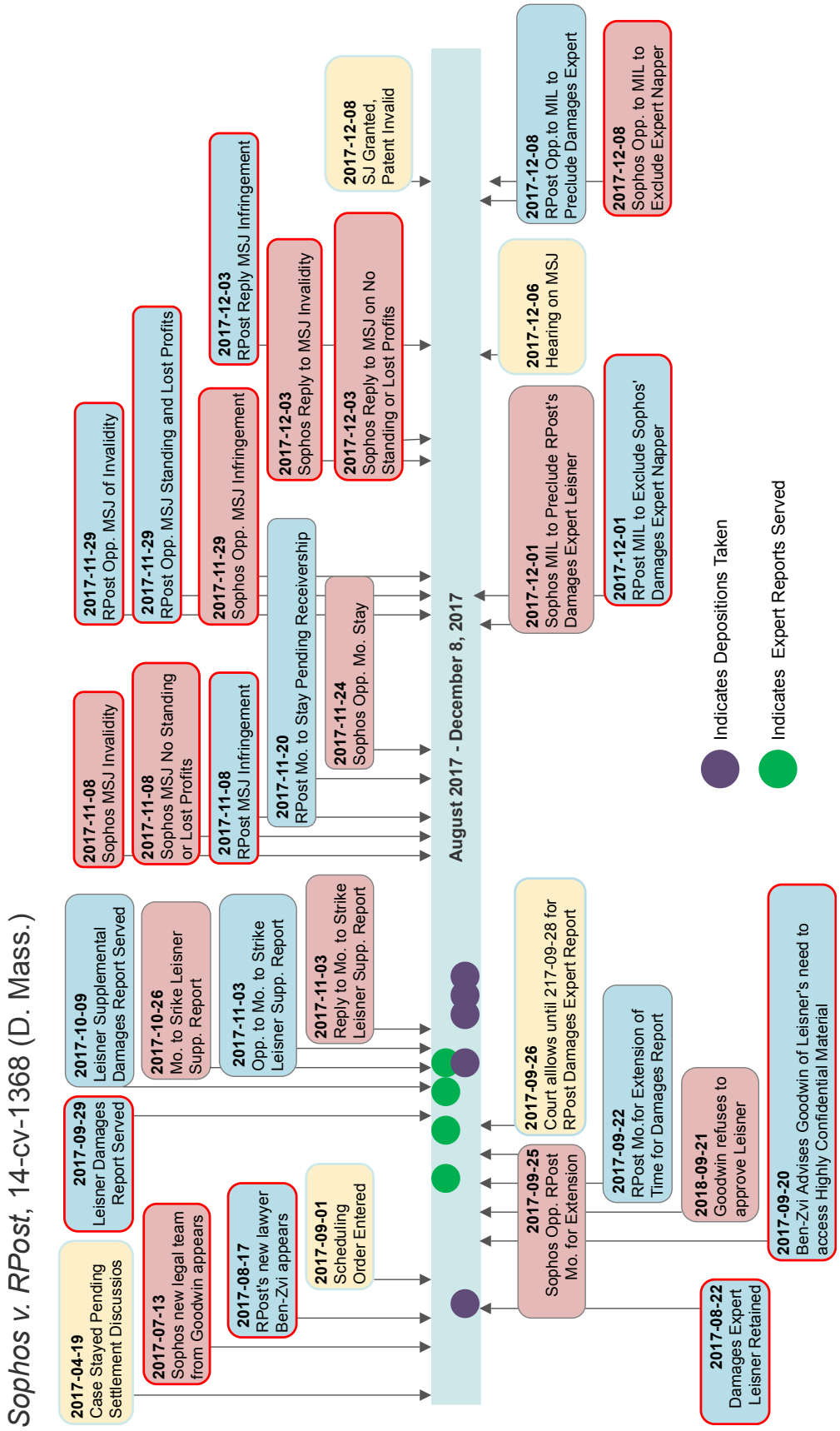
On November 8, 2017, Sophos filed two motions for summary judgment ("MSJ") on grounds of standing, lost profits, and invalidity. Appx027. The invalidity motion had been in the works since at least August 21, 2017, when Sophos served its Contentions. Appx379; Appx403. In its combined partial MSJ, Sophos sought a finding that RPost lacked standing to assert the '628 patent and further that it was not entitled to seek lost profits. Appx027. Further, in its invalidity motion, Sophos asserted that the '628 Patent was invalid as anticipated based on either of the two newly-cited prior art references, Dickinson and Muldoon. Appx735. Conversely, RPost filed a MSJ of Infringement of the '628 Patent, and Sophos not only opposed but countered with its own MSJ of noninfringement. Appx028; Appx029.[4]

[4] Just weeks before the summary judgment hearing, RPost moved for a stay pending resolution of a ruling in parallel proceedings, implicating the ownership of the '628 Patent. Appx028. Sophos opposed and the district court below denied RPost's motion. Appx029.

Two days after hearing argument on both parties' MSJs, the district court issued its order on December 8, 2017, granting Sophos' motion for summary judgment of invalidity, denying as moot Sophos' partial motion for summary judgment on standing and lost profits. Appx032; Appx649. Notably, the district court did not rule on RPost's MSJ of infringement or Sophos' MSJ of noninfringement:.

> For the following reasons, the Court DENIES Sophos' motion for summary judgment with respect to standing, D. 207, ALLOWS Sophos' motion for summary judgment on patent validity, D. 201, finding the '628 patent invalid, and DENIES as moot the remaining motions, D. 207 (as to lost profits), D. 221, D. 251.

Appx032. On appeal, this Court affirmed the district court's invalidity determination as to one of the two newly-cited Sophos references but remanded to clarify the scope of the invalidity determination as limited to only the asserted claims. Appx665. The timeline on the next page shows the barrage of activity that occurred during the last four months of 2017.


Sophos v. RPost, 14-cv-1368 (D. Mass.)
August 2017 - December 8, 2017
2017-04-19 Case Stayed Pending Settlement Discussios
2017-07-13 Sophos new legal team from Goodwin appears
2017-08-17 RPost's new lawyer Ben-Zvi appears
2017-09-01 Scheduling Order Entered
2017-09-29 Leisner Damages Report Served
2017-10-09 Leisner Supplemental Damages Report Served
2017-10-26 Mo. to Srike Leisner Supp. Report
2017-11-03 Opp. to Mo. to Strike Leisner Supp. Report
2017-11-03 Reply to Mo. to Strike Leisner Supp. Report
2017-11-08 Sophos MSJ Invalidity
2017-11-08 Sophos MSJ No Standing or Lost Profits
2017-11-08 RPost MSJ Infringement
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2017-11-29 Sophos Opp. MSJ Infringement
2017-12-03 Sophos Reply to MSJ Invalidity
2017-12-03 RPost Reply MSJ Infringement
2017-12-03 Sophos Reply to MSJ on No Standing or Lost Profits
2017-12-08 SJ Granted, Patent Invalid
2017-09-25 Sophos Opp. RPost Mo. for Extension
2017-09-26 Court allows until 217-09-28 for RPost Damages Expert Report
2017-09-22 RPost Mo.for Extension of Time for Damages Report
2018-09-21 Goodwin refuses to approve Leisner
2017-08-22 Damages Expert Leisner Retained
2017-09-20 Ben-Zvi Advises Goodwin of Leisner's need to access Highly Confidential Material
2017-12-01 Sophos MIL to Preclude RPost's Damages Expert Leisner
2017-12-01 RPost MIL to Exclude Sophos' Damages Expert Napper
2017-12-06 Hearing on MSJ
2017-12-08 RPost Opp.to MIL to Preclude Damages Expert
2017-12-08 Sophos Opp. to MIL to Exclude Expert Napper
Indicates Depositions Taken
Indicates Expert Reports Served

II. The District Court's Exceptional Case Determination and Award of Over $1.4 Million in Fees for Four Months' Legal Work

Shortly after the decision granting summary judgment of invalidity, Sophos filed a motion for attorney fees, which the parties briefed. Appx033-35; Appx039; Appx042; Appx171; Appx174; Appx324. Without benefit of a hearing, the district court issued a perfunctory three-paragraph electronic ruling in relevant part stating:

> 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.

Appx001-002; Appx034-035. The district court "reserved" a decision upon whether Sophos' $1.52 million in fees sought from August to December 2017 was reasonable and directed Sophos to submit additional supporting documentation, and for RPost to respond. Appx002; Appx035.

After briefing was completed, in a further cursory electronic order, the district court ruled in full:

> Having previously determined that this is an "exceptional case" in which the award of reasonable attorneys' fees is appropriate, D. 317, the Court has considered Sophos Inc.'s submission regarding the appropriate award of same, D. 320, 322-23 and 332, and RPost's response to its submission, D. 326-27, and rules as follows. Contrary to RPost's contentions, the Court concludes that Sophos has shown that the hours expended (sought only for 8/1/17 to 12/8/17 for litigation after the stay was lifted and 12/9/17 to 1/31/18 in connection with the attorneys' fee application) and hourly rates sought (median rates, not actual billable rates) are reasonable.
>
> As to the number of hours, Sophos has provided a detailed, contemporaneous accounting of the hours expended by the attorneys and paralegals (which were not excessively redacted as RPost suggests, D. 327 at 12), D. 323-2 and 323-3, as well as a monthly breakdown of the litigation tasks that the legal team was undertaking during the August 2017 to January 2018 timeframe. D. 323-1. Although RPost complains that many of the contemporaneous timekeeping records constitute "block billing" that warrants substantial discount, D. 327 at 9-11, this Court does not agree. The concern about block billing is that the aggregation of time spent on a case does not allow the Court to assess the reasonableness of the time spent on specific tasks. Id. at 9 (and cases cited). Such is largely not the case here. Even where a timekeeper billed

> most or many of the hours in the workday, the summary provided was most often descriptive of the particular tasks undertaken. See, e.g., Attorney Lu entries on 8/1/17, 8/8/17, D. 323-2 at 2-3. To the extent that some entries could have been more descriptive, some reduction is appropriate (here, 10%), but not the more substantial reduction urged by RPost. D. 327 at 11. Moreover, the cumulative hours spent for such tasks, given the pace and demands of the litigation at the time, were reasonable as were the assignment of the legal tasks among the various attorneys and non-legal work to the two paralegals. The overall lodestar (reduced by 10% as noted above) was reasonably calculated, particularly as Sophos used its actual (reasonable) hours expended for 8/1/17 to 1/31/18 and the AIPLA median billing rates for IP attorneys and the AmLaw50 median billing rates for paralegals. D. 322 at 10 (and exhibits cited).
>
> Finally, the Court does not find RPost's argument that the attorneys' fees sought by Sophos ($1.56 million) to be excessive given what was at stake in this litigation. D. 327 at 6-7. Whether Sophos believed that RPost's damages demand was viable, such demand, coupled with the requirements of fact discovery, expert discovery and motion practice, framed the potential stakes for the litigation and the demands for legal work. D. 322 at 7-8.
>
> For all of these reasons, the Court reduces Sophos' lodestar of $1,561,055 by 10% and awards attorneys' fees in the amount of **$1,404,949.50.**

Appx003; Appx037-038. RPost appealed.

SUMMARY OF THE ARGUMENT

Sophos achieved its goal of invalidating RPost's '628 Patent through four months of hard fought all-out patent litigation. In doing so, Sophos was entitled to employ a blitzkrieg strategy employing six attorneys and two paralegals for 3000 hours in four months, combatting RPost's one attorney. However, simply because Sophos won the case does not alone make its success in the underlying battles fodder for an exceptional case determination. No facts relied upon in the district court's decision increased Sophos' legal fees. To the contrary, accepting those facts would have resulted in an overall decrease in fees because they assisted in the summary judgment result, and in doing so prevented a much more expensive trial. Similarly, it is not reasonable to expect RPost, the losing party under the American legal system, to shoulder Sophos' $1.4 million in fees, which resulted from its blitzkrieg strategy decisions. Those strategy decisions achieved Sophos' desired result and ended the litigation. The district court did not find and Sophos has not pointed to activity on behalf of RPost that improperly or unfairly increased Sophos legal spend. For these reasons, this fee decision should be reversed.

STANDARD OF REVIEW

The Court reviews an exceptional case determination for abuse of discretion. *Lumen View Tech. LLC v. Findthebest.com, Inc.*, 811 F.3d 479, 482 (Fed. Cir. 2016) (citing *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559 (2014). "To meet the abuse of discretion standard, the moving party must show that the district court has made 'a clear error of judgment in weighing relevant factors or in basing its decision on an error of law or on clearly erroneous factual findings.'" *Bayer CropScience AG v. Dow AgroSciences LLC*, 851 F.3d 1302, 1306 (Fed. Cir. 2017) (quoting *Mentor Graphics Corp v. Quickturn Design Sys., Inc.,* 140 F.3d 1374, 1377 (Fed. Cir. 1998).

ARGUMENT

I. The District Court Legally Erred In Failing to Perform its Own Analysis of Exceptionality

In reviewing a motion to hold a case exceptional, the district court cannot simply look at the factors a movant alleges entitled it to fees. *See, e.g., Large Audience Display Sys., LLC. v. Tennman Productions, LLC*, No. 2015-2040, slip op. at 10 (Fed. Cir. Oct. 20, 2016) (nonprecedential) (hereinafter, "*LADS I*") (vacating and remanding the district court's award of attorney fees and costs based on both a misunderstanding of the

relevant factors to exceptionality and on an erroneous view of the evidence); *see also In re Rembrandt Techs. LP*, 899 F.3d 1254, 1280 (Fed. Cir. 2018). Instead, the court must put those in context with the entire case, including all of the proceedings occurring during the time period for which fees are requested. *LADS I*, slip op. at 10-11; *Rembrandt*, 899 at 1280.

Although nonprecedential, the facts of *LADS I* are informative here. In *LADS I*, the Court vacated a district court determination of exceptionality and of fees because the Court held that:

> the circumstances upon which a district court relies must actually exist, and findings that such circumstances do exist must be justified by the record. Here, many of the 'circumstances' deemed dispositive by the district court, including but not limited to those noted, supra, either did not occur or were given undue weight.

Id. at 10-11 (holding that the district court must assure both that the circumstances on which it relies are accurate and that the court affords only the appropriate measure of weight to each").

Here the district court committed three errors, any one of which require reversal. First, the district court failed to do its own analysis, which is required in determining exceptionality. *See LADS I*, slip op. at 10. Second, the court's reliance on Sophos' allegations of misconduct

caused the court to clearly err by accepting those allegations at face value and not reviewing them in context with the rest of the proceedings. *See, e.g., Rembrandt*, 899 F.3d at 1280. Third, an independent analysis would have foreclosed exceptionality because the alleged facts relied upon by the court did not increase the litigation burden Sophos faced. *See., e.g.*, *Rembrandt*, 899 F.3d at 1280 (holding for reasonableness that there must be "at least some 'causal connection' between the misconduct and the fee award," and awarding "all fees with no explanation whatsoever of such a causal connection—was not enough.") (citing district court decision).

Because the district court legally erred in failing to perform its own analysis and clearly erred by relying on Sophos' allegations in a vacuum without considering the "totality" of the circumstances, the court ignored the strength of RPost's positions. For example, the court's claim construction was favorable to RPost. *See* Appx591. The court denied Sophos' Section 101 motion. *Id.* And in addition, RPost survived an *inter-partes* review petition filed on the '628 Patent. Appx243. Any one of those events would bolster a patentee's faith in the validity of its patent. Unfortunately, however, the court focused "undue weight" to Sophos' arguments without record support, making the determination of

exceptionality is not justified and the case should be reversed. *LADS I,* slip op. at 11 ("[T]he district court must assure both that the circumstances on which it relies are accurate and that the court affords only the appropriate measure of weight to each").

A. The Court Must Perform Is Own Analysis in Determining an Exceptional Case

"[T]he circumstances upon which a district court relies must actually exist, and findings that such circumstances do exist must be justified by the record." *LADS I*, slip op. at 10. Here, the district court's decision on exceptionality relies on Sophos' memorandum in support of its motion without evaluating the "totality" of the record evidence. Appx001-002 (referring to "D. 291," Sophos Motion for Summary Judgment; "D. 296," Sophos Supporting Memorandum; and "D. 311," Sophos Reply Brief); Appx033-034. Yet, precedent requires the district court to do its own analysis. and to base such analysis on the record. Failure to do so results in reversible error. *LADS I*, at 11. Indeed, as set forth in Section I.C., *infra*, if it had done so here, the other factors at play during this intense four month period of the litigation would have prevented a finding of exceptional case. *Id.*

B. The Court Also Committed Clear Error by Relying on Sophos's Allegations of Misconduct

1. Sophos' Allegations of Misconduct Are Insufficient to Support Exceptionality

The district court relied on several of Sophos' assertions about RPosts' activity; however, consultation of the record reveals that Sophos' assertions are at best argumentative. First, citing Sophos' reply brief, the court improperly relied on RPost's alleged failure to engage in discovery. Appx002. However, Sophos never filed a motion to compel the discovery it later claimed was insufficient. In order to be entitled to fees for alleged discovery abuses, motions identifying such abuses must be filed. It is improper to sandbag the losing party at the end of the case with fees without first moving to compel production of the allegedly missing material or providing specific notice of its intent to file for attorney fees. *See, e.g.*, *Stone Basket Innovations, LLC v. Cook Med. LLC*, 892 F.3d 1175, 1181-82 (Fed. Cir. 2018) (holding that a 'party cannot simply hide under a rock, quietly documenting all the ways it's been wronged, so that it can march out its 'parade of horribles' after all is said and done," quoting *Aten Int'l Co. v. Uniclass Tech.* , No. 15-04424, slip op. at 5 (C.D. Cal. Mar. 30, 2018)).

In *Stone Basket*, defendant Cook waited nearly a year after service of its invalidity contentions, and nine months after the inventor's statements regarding the sheath's novelty, before informing Stone that, if Stone refused to drop the case, "Cook intend[ed] to file … a motion for attorneys' fees against [Stone], its principals and its attorneys." *Stone Basket*, 892 F.3d at 1181. Here, not only did Sophos fail to inform RPost of its fee motion prior to filing, Sophos failed to complain about the alleged discovery failure through a motion to compel during discovery.

Additionally, the district court contradicted itself by denying as moot both RPost's and Sophos' cross motions for infringement and noninfringement, respectively, and then summarily stating in its fee decision that "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*." Appx002 (emphasis added).

Next the court asserts that RPost's expert opinion did not "meaningfully" rebut Sophos' invalidity case. Appx002 (citing generally D.282, the decision holding the '628 Patent invalid, Appx648). Although RPost disagrees with this characterization and the facts show otherwise, the court entirely failed to consider the other factors at issue during the

same time period. Specifically, in just one month, from August 21 through September 22, RPost's technical expert had to review and process Sophos' new Contentions, which contained over 700 pages of materials and detailed-single spaced claim charts, and he had to incorporate responses to Sophos' new Contentions in his report. Appx725; Appx358-359.

Finally, the district court improperly relied on an alleged failure to provide factual support for RPost's lost profits theory. Appx002. However, the district court never ruled on, and in fact denied as moot, Sophos' Partial MSJ for no lost profits. Therefore, it is improper for the court to later base its exceptionality on characterizations of RPost's opposition to that motion. Appx002.

2. Sophos' 705 Page New Contentions Just One Month Prior to RPost's Expert's Report Contributed to RPost's Experts Alleged Inconsistencies

The record also reveals that, contrary to Sophos' assertion that RPost's invalidity case was somehow baseless, the two prior art references that resulted in the district court's invalidity determination, Dickinson and Muldoon, were not presented by Sophos until August 21, 2017. Four years after the case was filed (Appx004); after a denial to

institute *inter-partes* review (Appx243), and less than 3 months before summary judgment (Appx024). In addition, the two prior art references were presented as part of a 90-reference list that appeared in a 705-page Second Supplemental Noninfringement and Invalidity Contentions, including 681 pages of single-spaced claim charts. Appx725; Appx358-359 (Sophos admitting that the contentions "were over 700 pages and contained detailed claim charts on nearly thirty prior art references.").

To hold RPost liable for Sophos' entire $1.4 million in fees without even considering the hardship placed on RPost by Sophos' late addition of over 70 new pieces of prior art, less than three months before summary judgment and four months before scheduled trial, and during expert discovery, including reports and depositions, certainly creates reversible error in a determination of an exceptional case.

C. An Independent Analysis Forecloses Exceptionality Because None of the Facts Relied Upon by the Court Increased Sophos' Workload

In addition to the extremely short time period between Sophos' Second Supplemental Contentions and the due date for expert reports and summary judgment briefs, which was not considered by the district court, none of the conduct relied upon by the district court in awarding

the $1.4 million in fees was responsible for increasing Sophos' counsel's workload.

First, Sophos was planning on filing summary judgment motions regardless of whether RPost's experts' reports and depositions. Appx021 (Dkt. 147 Scheduling Order); Appx379; Appx403. Even prior to seeing RPost's expert reports, Sophos was preparing for summary judgment. *See, e.g.,* Appx403 (Lu 8/21 entry: "analyze potential claims for motion for summary judgment"; accord Lu entry 8/22); compare Appx024 (Opening Expert Reports filed on September 22, 2017; Summary Judgment Motions Filed November 27, 2017). Therefore, it is improper for the fee award to include the cost of Sophos' summary judgment motions when Sophos would have filed them regardless. *See Kilopass Tech., Inc. v. Sidense Corp.*, 738 F.3d 1302, 1313 (Fed. Cir. 2013) (fees should "compensate a defendant for attorneys' fees it should not have been forced to incur").

Additionally, even accepting Sophos' improper interpretation of RPosts' technical experts' report and testimony: "after RPost's technical expert received Sophos's invalidity expert report, he disavowed key opinions in his infringement report," Appx046, fails to logically result in

additional fees to Sophos. Hence, assuming arguendo that Sophos' interpretation was correct, RPosts' technical expert's alleged "disavowal" assisted Sophos in its invalidity assertions on summary judgment. Therefore, RPost's technical expert's alleged disavowal cannot be a proper source of an award of legal fees for Sophos. *Kilopass Tech., Inc.* 738 F.3d at 1313 (fees should "compensate a defendant for attorneys' fees it should not have been forced to incur"). Nor can Sophos' motions for summary judgment which would have been filed regardless. The timeline, *supra* on page 13, shows in red outline each of the activities that the parties would have incurred regardless of whether summary judgment had been successful. *See, e.g., Kilopass Tech., Inc.* 738 F.3d at 1313

Hence, none of the activity relied upon by the district court in awarding $1.4 million in legal fees is the type of activity that makes a case exceptional for purposes of awarding attorney fees. Accordingly, the case should be reversed.

II. The District Court Abused its Discretion in Holding $1.4 Million Reasonable for Four Months' of Legal Work

A. The District Court Legally Erred By Failing to Do Its Own Analysis

The Fitness v. ICON Health & Fitness, 134 S. Ct. 1749, 1756-57 (2014)determination of reasonable attorney fees is a "matter committed to the sound discretion" of the district court judge. *See Octane Fitness v. ICON Health & Fitness*, 134 S. Ct. 1749, 1756-57 (2014). However, failing to do any analysis is legal error, requiring reversal. *LADS I* (reversing and remanding both findings of exceptionality and fee award where "the district court accepted the amount proposed by Appellees as reasonable and awarded the full amount, *without performing a lodestar calculation*.") (emphasis added).

Moreover, the lodestar calculation, *i.e.*, the hours times rate calculation is only the starting point. The Court must then review the specific details of the work performed in order to determine the correct fee to award. "To determine the hours reasonably expended on . . . [the] case, the Court scrutinizes the contemporaneous billing records that . . . [the applicant] submitted to determine the hours actually spent and then deducts those hours that were insufficiently documented or 'duplicative, unproductive, excessive, or otherwise unnecessary.'" *E.E.O.C. v.*

Autozone, Inc., 934 F. Supp.2d 342, 348 (D. Mass. 2012) (quoting *Grendel's Den, Inc. v. Larkin*, 749 F. 2d 945, 950 (Cir. 1984)). Here, the court did not take on that analysis.

Similarly, reliance on unsupported conclusions that gloss over the inability to determine the reasonableness of the attorney fees, results in clear error further supporting reversal. *Id.* Here, the court relied entirely on Sophos' positions, without considering the record itself, much less the demonstrative aids presented by RPost, both showing the unreasonableness of the fees submitted. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (holding section 285 does not permit recovery of hours expended by counsel that were "excessive, redundant, or otherwise unnecessary.").

Here, the district court's entire analysis as to the "reasonableness" of its award of attorney fees stems from its unsupported conclusions:

1. Block billing is not a problem because the court can determine what tasks were performed by the description. Appx003.
2. The cumulative hours spent were reasonable because the "assignment of the legal tasks among the various attorneys and non-legal work to the two paralegals" was reasonable. Appx003.

3. Fees of $1.56 million for four months of legal work was reasonable because of what "was at stake in the litigation." Appx003.

RPost addresses each of these erroneous conclusions in turn.

1. The District Court Glosses Over RPost's Specific Concerns Regarding Sophos' Counsel's Billing Practices

a. The District Court Ignored the Need to Know How Much Time Was Spent on What Task

The district court recognized RPost's argument about Sophos' legal team's block billing practices, noting that "RPost complains that many of the contemporaneous timekeeping records constitutes 'block billing' that warrants substantial discount …." Appx003. The court noted, however, that it "did not agree," that such block billing equated with the need for a deep discount in fees. *Id.* Instead, recognizing at least some of the concerns of block billing, i.e., "that the aggregation of time spent on a case does not allow the Court to assess the reasonableness of the time spent on specific tasks," *id*., the court then ignored them concern completely, holding that:

> Even where a timekeeper billed most or many of the hours in the workday, the summary provided was most often

> descriptive of the particular tasks undertaken. See e.g., Attorney Lu entries on 8/1/17, 8/8/17.

Appx003 (record citations omitted). However, the court's one-sentence explanation of two of hundreds entries, fails to address RPost's stated concern and ignores the evidence put forward by RPost about the magnitude harm of the block billing. *See e.g.,* Appx497-498; Appx544-546 (listing all redactions); Appx547-559 (listing all conferences and meetings); Appx560-563 (listing instances of duplicative work performed by timekeepers); Appx564-569 (listing large billings related to three fact depositions).

First, the ability of the court to review the "summary" which was "descriptive of particular tasks" provides no information on how much time was spent on each task, which would be required to understand whether the entire time spent was "reasonable." *See, e.g.*, *U.S. v. NCH Corp.*, 2010 WL3703756, at *5 (D.N.J. Sept. 10, 2010) ("when there is confusion due to block billing, the blame lies on the party seeking fees . . . . [T]he significant amount of 'block-billing' employed by B&D, in this instance, thwarts the Court in the performance of its review obligations and does not reasonably merit Sun's obligation to provide 'some fairly definite information as to the hours devoted to various general activities'

and by whom") (quoting *Keenan v. City of Phila.*, 983 F. 2d 459, 473 (3rd Cir. 1992)).

Second, the two entries cited by the district court pale in reflection to the hundreds other entries identified by RPost as improper block billing. Appx484-494; Appx497-569. The value of the tasks conglomerated in these issues cannot be determined, much less whether the total value of such tasks is reasonable. *See U.S.*, 2010 WL3703756, at *5). Third, RPost also identified, but the court failed to address, the "contemporaneous timekeeping record" of multiple timekeepers, reflecting block billing, which makes identification impossible of whether the tasks identified in the block billing entries were performed efficiently or were performed inefficiently and/or by multiple billing entities. *Id*).

b. The Exemplary Time Entry Referenced by the District Court Represents a Pattern of Unrecoverable Billing

Every Sophos timekeeper engaged in block billing and in only a few instances a particular timekeeper only performed one task in a day. *See, e.g.*, Appx397-441; Appx443-446. The particular example identified by the court exemplifies the problems prevalent in the billing records:

			the TrendMicro/Symantec cases from the N.D. California
8/1/2017	Lu, Alexandra	9.1	Analyze document productions; analyze and evaluate prior art for invalidity contentions; call potential experts
8/1/2017	Leonard, Albert	2	Conference with Ms. [...]Zahedi and Ms. [...]Lu regarding Sophos litigation; download additional case files; organize

Appx397. Ms. Lu spent nine and one-tenth hours on three projects: "analyze document productions; analyze and evaluate prior art for invalidity contentions; call potential experts." *Id.* However, there is no indication as to how much time she spent on each project. Hence, there is no way to know if the time she spent, e.g., analyzing and evaluating the prior art for invalidity contentions, was reasonable. This is especially true when combined with hers and other billers' other time entries, which are block billed and may include some amount of time "analyzing and evaluating the prior art for invalidity contentions." *See, e.g.,* Appx397-399 (Lu entry at 8/2, 8/3 8/9 …..); *see also* Appx399 (Zahedi entry at 8/9 regarding invalidity contentions; 8/10 regarding invalidity contentions); *See also* Appx400 (Kline entry of 8/11 regarding invalidity analysis and deposition strategy); Appx401(Frederickson entry of 8/14 regarding team meeting, discovery plan, invalidity contentions, teleconference); Appx402 (Shiferman entry 8/16 regarding discovery issues; conference with Frederickson; invalidity contentions); accord Appx402-403(multiple

entries for Shiferman, Zahadi, Kline, Lu, Frederickson regarding invalidity contentions among other things)[5]

Therefore, Sophos failed to provide the court with any reasonable way to determine whether any of the entries reflects work that is "duplicative, unproductive, excessive, or otherwise unnecessary" and therefore not recoverable. *See e.g., U.S. v. NCH Corp.*, 2010 WL3703756, at *5 (D.N.J. Sept. 10, 2010). Courts have disallowed fees entirely where it confronts block billed time entries. *See, e.g., Walker v. Gruver*, 2013 WL 5947623, at *13 (M. D. Pa. Nov. 5, 2013) (excluding all block billed entries); *Estate of Schultz v. Potter*, 2010 WL 883710, at * 5 n. 9, *7 n. 14 (W. D. Pa. March 5, 2010) (disallowing "the entire amount billed for these block entries"); *M W Builders, Inc. v. Safeco Ins. Co. of Am.*, 2009 WL 116175, at *8 (D. Or. April 28, 2009) (excluding all block billed time); s*ee also Hills Canyon Preservation Council v. U.S. Forest Service*, 2004 WL 1853134 (D. Or. Aug. 18, 2004) at * 8 (excluding all block billed entries of at least three hours with four or more tasks).

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[5] These examples are just for "invalidity contentions," but the practice is prevalent and seen with respect to all the relevant issues to this fee appeal. Appx397-441; Appx443-446

In addition, while she does take a 10% lodestar reduction, such is not for block billing, rather she holds that the reduction is because "some time entries could have been more descriptive…." Appx003. Therefore, because the district court failed to do her own analysis; relied on a conclusory and inadequate explanation to substantiate Sophos' legal team's block billing, and ignored RPost's concerns entirely, her ruling that RPost must pay over $1.4 million in Sophos' legal fees is not be a reasonable application of section 285. Indeed, it more closely resembles a sanction. *See In re Rembrandt,* 899 F.3d at 1280 ("Attorney fees under § 285 are compensatory, not punitive.") (citation omitted) ("In such a "statutory sanction regime []," a "fee award may go no further than to redress the wronged party 'for losses sustained'; it may not impose an additional amount as punishment for the sanctioned party's misbehavior." (quoting *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 & n.5 (2017) (quotation omitted).

2. Reasonable "Assignment of Legal Tasks" Does Not Refute an Argument that the Total Amount of Hours Was Excessive

The district court's only explanation for its conclusion that the cumulative hours spent on legal and non-legal tasks, "given the pace and

demands of the litigation at the time" were reasonable is that the "assignment of the legal tasks among various attorneys and non-legal work to the paralegals" was reasonable." Appx0003. Yet, the court fails to show any analysis or even refer to any record entries to show why it believed these assignments were reasonable. Where the court is required to do her own analysis, such a "rubber stamp" of movant's assertions, renders the fee-award unreasonable. *LADS I*, slip op. at 10-11 In fact, a review of the timesheets shows lawyers performing non-legal work, duplicative and inefficient work. *See e.g.,* Appx486-489 (analyzing block billing); Appx490 (arguing inappropriateness of Sophos' redactions); Appx491-494 (identifying inefficient, duplicative and unsubstantiated billing); Appx497-498; Appx544-546 (listing all Sophos redacted billings); Appx547-559 (listing all Sophos conferences and meetings between attorneys); Appx560-563 (listing Sophos instances of duplicative work performed by timekeepers); Appx564-569 (listing large billings related to three fact depositions).

In conclusion, the court's refusal to do her own analysis does nothing to address RPost's argued concerns that the cumulative hours for four months' worth of work were not reasonable. Appx486

B. Basing "Reasonableness" On "What Was At Stake in the Litigation" Results in Legal Error

"It is axiomatic that attorneys almost inevitably consider the amount involved in a particular case when determining a reasonable number of hours to expend on any given issue or when allocating personnel resources based upon the expertise or experience required. Where only a small amount is at stake, it certainly would not be reasonable to expend countless hours on such a small claim or to commit the most experienced or valued attorney in the firm to work on the case. Thus where the amount involved is small, reductions in the reasonable number of hours expended or the reasonable hourly rate can easily be made to reflect this fact. It is for this reason that the Supreme Court has held that the "results obtained" factor is generally subsumed within the lodestar calculation and thus normally should not provide an independent basis for a departure from the lodestar figure." *Bywaters v. United States*, 670 F.3d 1221, 1231 (Fed. Cir. 2012) (citations omitted).

To hold RPost liable for Sophos' entire $1.4 million in fees without consideration to Sophos' case valuation at the beginning of the four-month timeframe is erroneous. *Bywaters*, 670 F.3d at 1231. Moreover,

failing to give consideration to the hardship placed on RPost by Sophos' late addition of over 70 pieces of prior art, less than three months before summary judgment and four months before scheduled trial, and during expert discovery, including reports and depositions, certainly is not reasonable.

CONCLUSION

RPost respectfully requests that the Court reverse the determination of exceptional case and the award of attorney fees, or in the alternative, that the Court vacate and remand both determinations with instructions to the district court to perform the appropriate analyses.

Dated: October 11, 2019

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APPENDIX

United States District Court
District of Massachusetts (Boston)
CIVIL DOCKET FOR CASE #: 1:13-cv-12856-DJC

* * *

02/21/2018	317	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 partys unreasonable conductwhile 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.

United States District Court
District of Massachusetts (Boston)
CIVIL DOCKET FOR CASE #: 1:13-cv-12856-DJC

		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)

United States District Court
District of Massachusetts (Boston)
CIVIL DOCKET FOR CASE #: 1:13-cv-12856-DJC

* * *

04/18/2018	344	Judge Denise J. Casper: ELECTRONIC ORDER entered. D. 320 : Having previously determined that this is an "exceptional case" in which the award of reasonable attorneys' fees is appropriate, D. 317, the Court has considered Sophos Inc.'s submission regarding the appropriate award of same, D. 320, 322-23 and 332, and RPost's response to its submission, D. 326-27, and rules as follows. Contrary to RPost's contentions, the Court concludes that Sophos has shown that the hours expended (sought only for 8/1/17 to 12/8/17 for litigation after the stay was lifted and 12/9/17 to 1/31/18 in connection with the attorneys' fee application) and hourly rates sought (median rates, not actual billable rates) are reasonable.

As to the number of hours, Sophos has provided a detailed, contemporaneous accounting of the hours expended by the attorneys and paralegals (which were not excessively redacted as RPost suggests, D. 327 at 12), D. 323-2 and 323-3, as well as a monthly breakdown of the litigation tasks that the legal team was undertaking during the August 2017 to January 2018 timeframe. D. 323-1. Although RPost complains that many of the contemporaneous timekeeping records constitute "block billing" that warrants substantial discount, D. 327 at 9-11, this Court does not agree. The concern about block billing is that the aggregation of time spent on a case does not allow the Court to assess the reasonableness of the time spent on specific tasks. Id. at 9 (and cases cited). Such is largely not the case here. Even where a timekeeper billed most or many of the hours in the workday, the summary provided was most often descriptive of the particular tasks undertaken. See, e.g., Attorney Lu entries on 8/1/17, 8/8/17, D. 323-2 at 2-3. To the extent that some entries could have been more descriptive, some reduction is appropriate (here, 10%), but not the more substantial reduction urged by RPost. D. 327 at 11. Moreover, the cumulative hours spent for such tasks, given the pace and demands of the litigation at the time, were reasonable as were the assignment of the legal tasks among the various attorneys and non-legal work to the two paralegals. The overall lodestar (reduced by 10% as noted above) was reasonably calculated, particularly as Sophos used its actual (reasonable) hours expended for 8/1/17 to 1/31/18 and the AIPLA median billing rates for IP attorneys and the AmLaw50 median billing rates for paralegals. D. 322 at 10 (and exhibits cited).

Finally, the Court does not find RPost's argument that the attorneys' fees sought by Sophos ($1.56 million) to be excessive given what was at stake in this litigation. D. 327 at 6-7. Whether Sophos believed that RPost's damages demand was viable, such demand, coupled with the requirements of fact discovery, expert discovery and motion practice, framed the potential stakes for the litigation and the demands for legal work. D. 322 at 7-8.

For all of these reasons, the Court reduces Sophos' lodestar of $1,561,055 by 10% and awards attorneys' fees in the amount of $1,404,949.50.

(McKillop, Matthew) (Entered: 04/18/2019)

CERTIFICATE OF SERVICE

I, Meredith M. Addy, a member of the Bar of this Court, hereby certify that on October 11, 2019, a copy of PRINCIPAL BRIEF OF APPELLANTS RPOST HOLDINGS, INC. and RPOST COMMUNICATIONS LTD. was filed with the Court and served by electronic via CM/ECF on counsel of record.

By /s/ *Meredith M. Addy*
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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief was printed using a 14 point Century Schoolbook and Times New Roman font.

This brief complies with the type-volume limitation of Federal Circuit Rule 32(a). This brief contains 7373 words, excluding the parts of the brief exempted under the Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b). This certificate was prepared in reliance on the word count of the word-processing system (Office 365 Microsoft® Word for Mac) used to prepare the brief.

Dated: October 11, 2019

By: /s/ *Meredith M. Addy*
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