IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: REMBRANDT TECHNOLOGIES, LP PATENT LITIGATION	MDL Docket No. 07-md-1848 (GMS)

ORDER

At Wilmington, this 2nd day of August, 2016, having reviewed the parties' contentions, the standard of review, and the applicable law;

IT IS HEREBY ORDERED that Rembrandt Technologies, LP's Motion for Reargument (D.I. 964) is DENIED.[1]

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[1] Following dismissal of all claims, (D.I. 880), the court entered an Order ("the Order"), (D.I. 951), requiring attorneys' fees to be paid by Rembrandt Technologies, LP ("Rembrandt") to All Other Parties ("AOPs".) (*See* D.I. 26 at 1) (at the outset of litigation, the parties submitted a Joint Status Report establishing that "all parties adverse to Rembrandt, whether they are defendants or declaratory relief claimants," would be referred to as "All Other Parties"). The court held that the case was exceptional for the purpose of awarding attorneys' fees because of (1) inequitable conduct on the part of the prior patent owner; (2) spoliation based on general disposal of documents by another prior patent owner; and (3) wrongful inducement by Rembrandt for witness compensation. (D.I. 951 at n.4.) On September 30, 2015, Rembrandt filed its motion for reargument and supporting brief, challenging the court's decision that Rembrandt's case was "exceptional" under 35 U.S.C. § 285. (D.I. 964, 966.)

The purpose of a motion for reargument is to "correct manifest errors of law or fact or to present newly discovered evidence." *Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999) (quoting *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d. Cir. 1085)). Accordingly, a court may alter or amend its judgment if the movant demonstrates at least one of the following: (1) a change in the controlling law; (2) availability of new evidence not available when the decision was issued; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice. *See id.*

Rembrandt's argument rests on the alleged violation of two factors under the *Max's Seafood* standard. According to Rembrandt, due to the passage of time, the Fee Motions required supplemental briefing to account for material changes in the controlling law. (D.I. 966 at 1.) Rembrandt asserts that the inequitable conduct and spoliation rulings are now contrary to current Federal Circuit law. (*Id.*) Rembrandt also contends that the wrongful inducement ruling was an error of law. (*Id.*) Rembrandt argues that under the § 285 standard in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, there was insufficient evidence to conclude that the case was exceptional. 134 S. Ct. 1749 (2014) (the governing standard under 35 U.S.C. § 285 for an "exceptional" determination is "clear and convincing" evidence).

Rembrandt points out that to support an inequitable conduct claim, a party must prove by clear and convincing evidence that (1) there was a misrepresentation or omission of information; and (2) that it was done with specific intent to mislead or deceive. *In re Rosuvastatin Calcium Patent Litig.*, 703 F.3d 511, 519 (Fed. Cir. 2012); (D.I. 966 at 6). Rembrandt relies on *Network Signatures, Inc. v. State Farm Mutual Auto Ins. Co.*, to argue that under new controlling law, there is no inequitable conduct if the former patent owner claims that a nonpayment of maintenance fees was unintentional. 731 F.3d 1239, 1240–41 (Fed. Cir. 2013) (holding that non-payment of fees in a revival petition alone not enough for inequitable conduct). AOPs dispute that *Network Signature* represents a change in law warranting reconsideration of whether Rembrandt inequitably revived patents because it applied the same standard as previous cases. (D.I. 990 at 7–8.) The AOPs also point out that Rembrandt never cited the cases it

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now relies on for a change in law, despite the fact that they occurred prior to the court's Order. (*Id.* at 3.) Nor did Rembrandt file a notice of supplemental authority to make the court aware of the change. (*Id.*)

The court must agree with the AOPs that Rembrandt's support from *Network Signatures* does not change the legal standard. While *Network Signatures* applied to a circumstance where intent to deceive was not the most reasonable inference in reviving the patent, 731 F.3d at 1242–1243, the court has determined that deception was the most reasonable inference in this matter because Rembrandt intentionally revived the abandoned patents in a matter that was not routine. The court has been furnished with sufficient evidence to conclude that revival of the patents in this case fit into a pattern of misconduct, and therefore deception was the most reasonable inference.

Next, Rembrandt argues that under Third Circuit law, there is now a finding of bad faith required to support a conclusion of spoliation. *See Bull v. United Parcel Service*, 665 F.3d 68, 79 (3d. Cir. 2012) (holding that spoliation requires a finding that the accused acted in "bad faith"). Without proof of bad faith, misplacing documents as a result of negligence or mistake will not constitute spoliation. (*See* D.I. 966 at 7.) The AOPs contend that there was bad faith because Rembrandt knew of the destruction and had intent to destroy the documents. (*Id.* at 8.) Moreover, the AOPs contend that the briefing addressed Rembrandt's intent in destroying documents. (*Id.*)

The court may not have explicitly stated that Rembrandt acted in bad faith, but the court found that spoliation occurred, under facts that support bad faith. The *Bull* decision itself quoted case law which articulated a connection between spoliation and bad faith. *Bull*, 665 F.3d at 79. There is sufficient evidence to support bad faith spoliation in the existing record, and there has been no error or change in law to require the court's reconsideration.

Rembrandt next insists that the wrongful inducement finding was an error of law. (D.I. 966 at 8.) The court concluded that Rembrandt had violated ethical rules by improperly compensating fact witnesses, but Rembrandt asserts that the Order was misapprehended because it is not improper to have an agreement that provides payment contingent on cooperation and the outcome of litigation, made in connection with an assignment or license of patent rights. *Ethicon, Inc. v. United States Surgical Corp.*, 135 F.3d 1456, 1465 (Fed.Cir.1998); *ESN, LLC v. Cisco Sys., Inc.*, 685 F. Supp. 2d 631, 637 (E.D. Tex. 2009). AOPs argue that the cases cited by Rembrandt are distinguishable because they did not specifically link payments to testimony. (D.I. 990 at 9–10.) For example, in *ESN*, the payment was upfront, with additional fixed sum payments conditioned on the outcome of litigation, and did not connect payments to witness testimony. 685 F. Supp. 2d at 646–47. In the current case, the AOPs assert that Rembrandt promised fact witnesses a percentage of recovery, directly linking payment to testimony. As the court's Order concluded, Rembrandt's witness compensation plan was legally unethical. Therefore, the court agrees with the AOPs that the wrongful inducement finding is unworthy of reargument.

Finally, Rembrandt alleges that the court erred procedurally in deciding the fee motion on the paper record after briefing was stale and without an opportunity for the parties to supplement the record. (D.I. 966 at 2.) In addition, Rembrandt contends that exceptionality must be assessed separately for each case in multi-district litigation. (*Id.* at 10.) The AOPs respond that courts routinely make exceptional-case findings without holding an evidentiary hearing and there is no rule that courts must evaluate the exceptionality of each case in an MDL proceeding individually. (D.I. 990 at 1.) Moreover, Rembrandt did not raise any objection when the court issued an order that the motions were ripe and that no additional briefing was required. (*Id.* at 4.) The court must agree with AOPs that there is no rule requiring an evidentiary hearing or a separate determination for each case under the circumstances.

The court can find no misunderstanding or errors in law or fact that would cause the court to reverse the exercise of its discretion in granting AOPs' motion for attorneys' fees. (D.I. 951.) Ultimately, the award of attorneys' fees is entirely within the discretion of the court. *See John T. ex rel. Paul T. v. Del. Cnty. Intermediate Unit*, 318 F.3d 545, 558 (3d Cir. 2003). As the District of Delaware Local Rules specify, "[m]otions for reargument shall be sparingly granted," D. Del. LR 7.1.5, in cases where (1) the court has patently misunderstood a party; (2) made a decision outside the adversarial issues presented by the parties; or (3) made an error not of reasoning but of apprehension. *Shelbyzyme, LLC v. Genzyme Corp.*, No. 09-768-GMS, 2013 WL 3229964, at *2 (D. Del. June 25, 2013). The court has found no error or change in law or fact and therefore the motion for reargument on this matter will not be granted.