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8 LELAND STANFORD JUNIOR UNIVERSITY  
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9  
10 **UNITED STATES DISTRICT COURT**  
11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 THERMOLIFE INTERNATIONAL,  
13 LLC

14 Plaintiff,

15 v.

16 MYOGENIX CORP., et al.

17 Defendants.

CASE NO.: 13-cv-651 JLS (MDD)  
(LEAD CASE)

**PLAINTIFFS THE BOARD OF  
TRUSTEES OF THE LELAND  
STANFORD JUNIOR UNIVERSITY  
AND THERMOLIFE  
INTERNATIONAL, LLC'S  
AMENDED MEMORANDUM IN  
SUPPORT OF THEIR MOTION FOR  
RECONSIDERATION OF THE  
COURT'S APRIL 4, 2017 ORDER (1)  
STRIKING PLAINTIFFS'  
DECLARATION, AND (2)  
GRANTING DEFENDANTS'  
MOTION FOR ATTORNEY FEES**

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24 AND RELATED CASES

Judge: Hon. Janis L. Sammartino  
Courtroom: 4A

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1 **I. INTRODUCTION**

2 Plaintiffs The Board of Trustees of the Leland Stanford Junior University  
3 (“Stanford”) and ThermoLife International, LLC (“ThermoLife”) (collectively,  
4 “Plaintiffs”) respectfully move the Court to reconsider its April 4, 2017 decision finding  
5 this case is exceptional pursuant to 35 U.S.C. § 285, which awarded Hi-Tech  
6 Pharmaceuticals, Inc. (“Hi-Tech”) and Vital Pharmaceuticals, Inc. (“VPX”)  
7 (collectively, “Defendants”) attorneys’ fees. *See* ECF No. 282. Plaintiffs do not seek  
8 reconsideration merely because they do not like the result. Reconsideration is necessary  
9 here because, although the Court sought to consider “the totality of the circumstances,”  
10 the majority of the “circumstances” cited by the Court to arrive at its decision are either  
11 not supported by the record or are contrary to the record before this Court.

12 For instance, the Court takes no notice of the patents in suit other than U.S.  
13 Patent No. 5,891,459 (the “459 Patent”) (Defendants raised no complaint about the  
14 pre-filing investigation as to those patents) and, even as to the ‘459 Patent, overlooks  
15 the pre-filing investigation into other products at issue, including Defendants’ own  
16 products. In the case of both Defendants, there is at least one product and at least one  
17 patent in suit against them which the Court’s pre-filing investigation determination does  
18 not cover, making this case perhaps the first case ever where a court has held that an  
19 inadequate pre-filing investigation on some products renders the case exceptional even  
20 when other products were adequately investigated.

21 The Court also struck Plaintiffs’ supplemental declaration which provided further  
22 details regarding Plaintiffs’ pre-filing investigation, because the affidavit had not been  
23 subject to discovery; yet the Court credited Defendants’ arguments and evidence that  
24 were (just like Plaintiffs’ stricken affidavit) never subject to discovery. In so doing, the  
25 Court improperly shifted the burden of persuasion on exceptionality from Defendants to  
26 Plaintiffs, and then rejected Plaintiffs’ evidence and made incorrect assumptions  
27 regarding Plaintiffs’ pre-filing investigation. This is clear error.

28 The Court’s ruling crediting one side’s evidence over the other is a direct result

1 of an even more fundamental error. At the Defendants’ request, the Court bifurcated  
2 trial between invalidity and infringement. For this reason, the record on infringement  
3 was never developed, yet the Court roots its exceptionality finding on a supposed lack  
4 of infringement. Even then, the Court overlooked the only infringement issue that *was*  
5 litigated: its claim construction ruling, which the Court passes over in its exceptionality  
6 decision. It is well-settled that attorneys’ fee applications should not result in mini-  
7 trials, but that is exactly what the Court did here, holding a mini-infringement trial on  
8 the papers. The Court cannot base its exceptionality finding on issues that were not  
9 actually litigated between the parties, particularly where unsupported accusations would  
10 have been disproven by discovery taken in the second phase of case, and especially  
11 when these two Defendants never claimed a Rule 11 violation arguing the infringement  
12 case was frivolous and never moved for summary judgment of non-infringement,  
13 instead insisting that the case be bifurcated and waiting to ambush Plaintiffs with their  
14 “evidence” after the case was closed.

15 To find a wrongful motivation by Plaintiffs, the Court again improperly credited  
16 Defendants’ unsupported accusations. The record is clear that Plaintiffs practiced the  
17 invention; that ThermoLife’s license from Stanford would protect its own customers  
18 from infringement claims; and that ThermoLife sells and markets arginine nitrate to  
19 some of the largest dietary supplement companies in the sports nutrition industry and its  
20 raw materials are used (with implicit licenses to the patents at issue here) in many very  
21 successful products that discovery would have shown account for well over one million  
22 units of finished products sold. Contrary to the Court’s implicit conclusion, Plaintiffs  
23 are *not* “trolls,” and there is no support for the Court’s manifestly unjust finding that  
24 Plaintiffs filed lawsuits to obtain nuisance settlements. If this were true, Plaintiffs could  
25 have covenanted not to sue each of the defendants that elected not to resolve these  
26 claims prior to trial, rather than proceeding to trial. The mere filing of numerous  
27 lawsuits asserting, in part, infringement of a now-expired patent does not make this case  
28 exceptional.

1 In short, the “totality of the circumstances” test does not allow the Court to  
 2 simply discount evidence that weighs against a finding of exceptionality and render  
 3 findings wholly unsupported by the facts. As explained in this Memorandum, the  
 4 Court’s decision is not supported by the record viewed in its entirety, and should be  
 5 reconsidered. *Large Audience Display Systems, LLC v. Tennman Productions, LLC*,  
 6 660 Fed. Appx. 966, 972 (Fed. Cir. 2016) (“the circumstances upon which a district  
 7 court relies must actually exist, and findings that such circumstances do exist must be  
 8 justified by the record. Here, many of the “circumstances” deemed dispositive by the  
 9 district court . . . either did not occur or were given undue weight. Thus, we must vacate  
 10 the trial court's finding of exceptionality and award of fees and costs under § 285”);  
 11 *Kimberly-Clark Worldwide Inc. v. First Quality Baby Products LLC*, 2017 WL  
 12 1382546, 3 (E.D. Wis. April 18, 2017) (“totality of the circumstances further weigh  
 13 against an award of fees when considering the case *in its entirety*”) (emphasis added).

## 14 **II. LEGAL ARGUMENT**

15 Under Rule 59(e) of the Federal Rules of Civil Procedure, a party may move “to  
 16 alter or amend a judgment...no later than 28 days after the entry of the judgment.”<sup>1</sup>  
 17 Such reconsideration of a prior order is “appropriate if the district court (1) is presented  
 18 with newly discovered evidence, (2) committed clear error or the initial decision was  
 19 manifestly unjust, or (3) if there is an intervening change in controlling law.” *Sch. Dist.*  
 20 *No. 1J, Multnomah Cnty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). In  
 21 addition, in the Southern District of California, a party may apply for reconsideration

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22 <sup>1</sup> Prior to this 28-day period expiring, Defendants filed their applications allegedly supporting their fees and  
 23 expenses – VPX in the amount of \$382,641.99 (ECF No. 285) and Hi-Tech for nearly three times that amount,  
 24 \$991,744.52 (ECF No. 284). Plaintiffs will file their oppositions to both on or before June 1, 2017, but note at  
 25 this time that Defendants have failed to attempt to delineate which legal costs they allegedly expended were  
 26 related to defending against infringement of the ‘459 Patent as opposed to the other patents-in-suit. *Cf. Kilopass*  
 27 *Technology, Inc. v. Sidense Corporation*, 82 F. Supp. 3d 1154, 1166 (N.D. Cal. 2015) (“As the defendant in this  
 28 case, Sidense would not have incurred *any legal costs* were it not for Kilopass’ claims of infringement”) (emphasis added). Because Defendants would have defended this action regardless of the outcome of Plaintiffs’ pre-filing investigation as to the ‘459 Patent, and neither of them have attempted to show what fees stemmed from the allegedly lack of pre-filing investigation (instead, taking a kitchen-sink approach of claiming all alleged fees and expenses), the fee award should be zero, even if this case is exceptional, which it is not.



1 “[w]henever any motion or any application or petition for any order or other relief has  
2 been made to any judge and has been refused or in whole or in part...” Civ. L.R.  
3 7.1(i)(1). This motion is brought under both Rule 59(e) and Civ. L.R. 7.1(i)(1).<sup>2</sup>

4 Plaintiffs acknowledge that district courts have discretion to determine whether a  
5 patent case is “exceptional” under 35 U.S.C. § 285 considering “the totality of the  
6 circumstances.” *Octane Fitness*, 134 S.Ct. at 1756. However, “the circumstances upon  
7 which a district court relies **must actually exist**, and findings that such circumstances do  
8 exist **must be justified by the record.**” *Large Audience Display Systems, LLC v.*  
9 *Tennman Productions, LLC*, 660 Fed. Appx. 966, 972 (Fed. Cir. 2016) (emphasis  
10 added). Where the “‘circumstances’ deemed dispositive by the district court...either  
11 **did not occur** or **were given undue weight**,” the Federal Circuit will vacate the trial  
12 court’s finding of exceptionality. *Id.* (emphasis added). For the Federal Circuit to  
13 uphold a finding of exceptionality, “the district court must assure both that the  
14 circumstances on which it relies are **accurate** and that the court affords only the  
15 **appropriate measure of weight to each.**” *Id.* (emphasis added).

16 Here, the Court concluded, “under the totality of the circumstances Defendants  
17 have shown that this case is exceptional such that an award of attorney fees is justified.”  
18 ECF No. 282 at 16. The Court points to three justifications for its conclusion:

- 19 (a) “Plaintiffs’ pre-filing investigation was severely lacking”;  
20 (b) “Plaintiffs’ motivation was seemingly to extract nuisance-  
21 value settlements from a large number of defendants”; and  
22 (c) “awarding fees here will advance compensation- and  
23 deterrence-oriented goals.”

24  
25  
26 <sup>2</sup> Reconsideration is an “extraordinary remedy, to be used sparingly in the interests of finality and  
27 conservation of judicial resources.” *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).  
28 Ultimately, whether to grant or deny a motion for reconsideration is in the “sound discretion” of the district  
court. *Navajo Nation v. Norris*, 331 F.3d 1041, 1046 (9th Cir. 2003) (citing *Kona Enters.*, 229 F.3d at 883).

1 *Id.* But none of these justifications are supported by the record and, instead, the Court’s  
 2 ruling disregards salient facts and evidence that contradict the Court’s ruling. Without  
 3 discovery or undisputed evidence, the Court simply accepts Defendants’ narrative -  
 4 while excluding Plaintiffs’ countervailing evidence due to lack of the same discovery.

5 For the reasons explained herein, Plaintiffs urge the Court to reconsider its  
 6 decision and find that, once the entire totality of the circumstances is considered, this  
 7 case does not “stand out” from other cases in any respect. *University of Utah v. Max-*  
 8 *Planck-Gesellschaft Zur Foerderung Der Wissenschaften E.V.*, 851 F.3d 1317, 1323  
 9 (Fed. Cir. 2017) (affirming denial of exceptional case finding, noting that an  
 10 exceptional case is one that “stands out from others with respect to the substantive  
 11 strength of a party’s litigating position” and “*Octane Fitness* does not require anything  
 12 more”) (quoting *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S.Ct. 1749,  
 13 1756 (2014)).

14 **A. The Record Does Not Support the Court’s Decision Regarding Plaintiffs’**  
 15 **Pre-Filing Investigation**

16 In its Order, the Court held that “Plaintiffs’ pre-filing investigation was severely  
 17 lacking” (ECF No. 282 at 16). In order to reach this conclusion, the Court did not  
 18 review the “totality of the circumstances.” Instead, the Court credited the Defendants’  
 19 arguments while wholly turning aside evidence undermining the Defendants’  
 20 accusations. Below, Plaintiffs cite to specific evidence in the record supporting  
 21 reconsideration and provide context to each of the Court’s three bases for finding the  
 22 pre-filing investigation lacking. The entire totality of the record demonstrates that the  
 23 Court should overturn its previous decision, which is based on a variety of clear errors  
 24 and manifestly unjust.

25 ///

26 ///

27 ///

28 ///

1                   **1. The Court Disregarded Substantial Evidence Related to**  
 2                   **Plaintiffs’ Pre-Filing Investigation**

3           The Court’s Order provides a limited view of the record, addressing only one  
 4 patent in suit and neglecting to mention other infringing products. Specifically, the  
 5 Court’s Order does not give any weight to the following:

- 6           - out of the “81” defendants sued for infringement in Defendants’  
 7 estimation (VPX’s Moving Br. at 2), *none* of them – other than  
 8 Hi-Tech and VPX – complained about the reasonableness of  
 9 Plaintiffs’ pre-filing investigations, from which it must be inferred,  
 10 when viewing the totality of the circumstances that the  
 investigations *were* reasonable;
- 11           - even as to these two Defendants, the only patent of which they  
 12 complain is the ‘459 Patent, and not the other three patents in suit  
 13 (*see* ECF No. 267 at 10 (indicating Hi-Tech was sued for  
 14 infringing four patents) and *id.* at 9 (indicating VPX was sued for  
 infringing three patents)); and
- 15           - even as to the ‘459 Patent itself, Hi-Tech does not complain about  
 16 the pre-filing investigation for all of its products, completely  
 17 avoiding the Anavar product which was also accused of infringing  
 the ‘459 Patent (*id.* at 10).

18 These issues were all addressed in Plaintiffs’ opposition and are part of the entire  
 19 totality of the circumstances, yet completely missing from the Court’s analysis.

20           Of course, the Court also struck the supplemental declaration that further  
 21 demonstrated the sufficiency of the pre-filing investigation. ECF No. 279 ¶¶ 16-23.  
 22 The Court held the declaration unfairly prejudicial because, *inter alia*, “Defendants  
 23 have had no discovery regarding these recently added statements and arguments, some  
 24 of which appear to directly conflict with the evidence previously before the Court.”  
 25 ECF No. 282 at 6. But strangely, the Court did not hold Defendants to this same  
 26 standard, relying on post-trial statements by Defendants that their products do not  
 27 infringe. If the concern is a lack of discovery on statements submitted after this case  
 28 was closed, then the Court should have also struck Defendants’ statements on an issue

1 never litigated that are unquestionably “unfairly prejudicial” to Plaintiffs. Indeed,  
2 Plaintiffs made this point several times in their opposition brief. *See, e.g.*, ECF No. 267  
3 at 5, 6 (“Defendants’ assertions of non-infringement have not been tested...or subject to  
4 full discovery”), and 13 (“nothing Mr. Wheat swears to with respect to his products  
5 could be taken as credible without the benefit of rigorous cross-examination”).

6 While Plaintiffs’ counsel’s declaration was not necessary in affirming the  
7 reasonableness of Plaintiffs’ pre-filing investigation, it is certainly a part of the “totality  
8 of circumstances” that the Court should have taken into consideration, particularly as  
9 there was never any infringement discovery in this case. Striking it on the grounds of  
10 prejudice, while crediting Defendant’s claims of a lack of infringement, was manifestly  
11 unjust.

12 Furthermore, the Court overlooked that the Defendants urged for bifurcation of  
13 this case, with validity (not infringement) litigated first. Defendants never moved for  
14 summary judgment on non-infringement. On this basis alone, the Court should be able  
15 to base its exceptionality finding on a lack of infringement. As the Court in *Stragent,*  
16 *LLC v. Intel Corporation*, 2014 WL 6756304 (E.D. Tx. Aug. 6, 2014) explained:

17 Stragent’s argument was certainly a weak one, but despite the  
18 alleged implausibility of Stragent’s position, Intel never sought  
19 summary judgment of non-infringement on the basis of the  
20 limitation at issue. This suggests that Intel did not always view  
21 Stragent’s infringement position as frivolous. There is little  
22 injustice in forcing Intel to bear its own attorney’s fees for  
23 defending a claim it did not challenge on summary judgment.  
24 Disposing of a frivolous claim on summary judgment would avoid  
25 a trial and have the effect of saving both parties a substantial  
26 portion of their litigation costs.

25 *Stragent*, 2014 WL 6756304 at \*5. Like the defendants in *Stragent*, Defendants’ failure  
26 to move for summary judgment on infringement (which they could have done at any  
27 time), “suggests that [Defendants] did not always view [Plaintiffs’] infringement  
28

1 position as frivolous.” The Court was required to consider this fact as part of the  
2 exceptionality analysis.

3  
4 **2. There is No Support in the Record for the Conclusion that**  
5 **Plaintiffs Relied Only on Advertising for their Pre-Filing**  
6 **Investigation**

7 The Court erroneously determined that in their pre-filing investigation Plaintiffs  
8 reviewed only “advertising,” and not “labels.” *See* ECF No. 282 at 11-12.<sup>3</sup> While the  
9 Court draws a distinction between “labels” and “advertising,” the record shows that the  
10 advertising claims Plaintiffs examined pre-suit are, for the most part, actually *on the*  
11 *products’ labels*. Thus, because the Court’s decision presumes that Plaintiffs should  
12 have examined “labels” but only looked at “advertising,” this assumption of the Court is  
13 contrary to the record; the Court’s decision is incorrect.

14 As one of numerous examples, the advertising for Hi-Tech’s NO Overload claims  
15 that the product contains a “high dosage of arginine....resulting in a significant increase  
16 in the availability of arginine for NO production.” *See* ECF No. 267 at 11.<sup>4</sup> This claim  
17 is stated on the *label of the product*. *See* Declaration of Tyler J. Woods in Support of  
18 Motion for Reconsideration, dated May 2, 2017 (“Woods Decl.”) at ¶ 3, Ex. B. In other  
19 words, the *label* that says the product provides a “high dosage of arginine” – enough to  
20 increase “NO production” – cannot be said to “disclose far less than the amount of l-

21  
22 <sup>3</sup> For example, the Court found that “if Defendants are correct that the relevant product labels disclose  
23 necessarily non-infringing amounts of ingredients, then this weighs strongly in favor of this case being  
24 exceptional”; “many of the product labels disclose far less than the amount of l-arginine required to infringe”;  
“Plaintiffs in the present case nowhere indicate that they relied on anything other than advertisements before  
bringing suit”; and “it would have been extremely easy for Plaintiffs to examine their labels.” ECF No. 282 at  
10-12.

25 <sup>4</sup> Of course, this claim is nearly identical to the language as to Hi-Tech’s Anavar, and Hi-Tech does not take  
26 issue with the pre-filing investigation as to Anavar. *See* ECF No. 267 at 10 (quoting statements pertaining to  
27 Anavar regarding the “high dosage of L-arginine” to “create a wealth of NO”); *see also* Declaration of Tyler J.  
28 Woods in Support of Motion for Reconsideration, dated May 2, 2017 at ¶ 2, Ex. A (Anavar label discussing  
“enhanced levels of nitric oxide” from “L-Arginine”). The Court never addresses in its decision how relying on  
nearly the same inducement language can lead to a finding of satisfactory pre-filing investigation as to one  
product but not as to another.

1 arginine required to infringe.” ECF No. 282 at 12. If anything, the label says the  
2 opposite.

3 Similarly, while the Court gives short shrift to Plaintiffs’ pre-filing investigation  
4 as to VPX’s products and the importance of the “marketing claims” analyzed as  
5 relevant to ingredient-list ordering, ECF No. 282 at 13, once again, the “marketing  
6 claims” in question are not merely found in advertising, but also on the products’ *labels*.  
7 *See, e.g.*, Woods Decl. 4, Ex. C (label for NO Shotgun, including that product increases  
8 “blood flow & nitric oxide [N.O.] levels”); *see also* ECF No. 267 at 15-17 (Plaintiffs’  
9 opposition brief discussing details of analysis, including labeling, ingredient ordering,  
10 label/advertising claims, and references to VPX’s product-specific study);  
11 compare *Antonious v. Spalding & Evenflo Companies, Inc.*, 275 F.3d 1066, 1075 (Fed.  
12 Cir. 2002) (“evidence uncovered by the patent holder’s investigation must be sufficient  
13 to permit a *reasonable inference* that all the accused products infringe”) (emphasis  
14 added) and ECF No. 282 at 13 (rejecting Plaintiffs’ “inferential reasoning” based on  
15 VPX’s labels).

16 Related, the Court’s reference for the apparent need for Plaintiffs to have proven  
17 in response to VPX’s motion that VPX’s products “contain amounts of L-  
18 arginine *sufficient to make them infringing*” purports to hold Plaintiffs to the incorrect  
19 legal standard with respect to the exceptional case determination. *See* ECF No. 282 at  
20 13 (emphasis in original). Plaintiffs’ pre-filing investigation did not require Plaintiffs to  
21 prove infringement; rather, a pre-filing investigation is sufficient if plaintiffs  
22 “evaluated the patent portfolio, analyzed the patent’s validity, determined the scope of  
23 the patent’s claims, and performed an infringement analysis.” *Intamin Ltd. v.*  
24 *Magnetar Technologies, Corp.*, 483 F.3d 1328, 1338 (Fed. Cir. 2007) (quoting *Q-*  
25 *Pharma, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1302 (Fed. Cir. 2004)); *see also*  
26 *Mad Dogg Athletics, Inc. v. Fitness Master, Inc.*, Case No. 2:15-cv-02616, 2015 WL  
27 12552047, \*3 (C.D. Cal. Sep. 28, 2015) (sufficiency of pre-filing investigation is  
28 context-specific inquiry, requiring district court to examine all circumstances

1 surrounding the submission) (citing *Bradgate Assoc., Inc. v. Fellows, Read & Assoc.,*  
2 *Inc.*, 999 F.2d 745, 752 (3d Cir. 1993)). Even if, *arguendo*, Plaintiffs’ pre-filing  
3 analysis turned out to be incorrect, that would not be relevant to an exceptional case  
4 determination. *Otsuka Pharmaceutical Co., Ltd. v. Sandoz, Inc.*, Civil Action No. 07-  
5 1000, 2015 WL 5921035, \*6 (D.N.J. Oct. 9, 2015) (“this case is most analogous to  
6 those post-*Octane* cases in which the losing party could not meet the burden of the  
7 arguments, but the arguments did not ‘descend to the level of frivolous argument or  
8 objective unreasonableness’ pursuant to § 285” (quoting *Gametek LLC v. Zynga, Inc.*,  
9 No. 132546, 2014 WL 4351414, at \*3 (N.D. Cal. Sept. 2, 2014) (denying motion for  
10 attorney fees because losing party's conduct fell short of “conduct that has been found  
11 to justify fee-shifting even post-*Octane*”)).

12 It is simply not true that there was no pre-filing infringement analysis or review  
13 of the labels. Plaintiffs’ opposition is replete with references to this analysis, as Mr.  
14 Kramer testified (during validity discovery):

15 Q Do you have any recollection of how it was determined  
16 that somebody was an infringer?

17 \* \* \*

18 THE WITNESS: Yes....Check existing products for their  
19 marketing claims and ingredients.

20 Q And what marketing claims would indicate they were an  
21 infringer?

22 A If they said arginine was going to increase nitric oxide or  
23 if the *label* had a certain *dose of arginine* in the product.

24 \*\*\*\*\*

25 .....In some products only a very small amount would be an  
26 infringement on some patents, and in some patents another dose  
27 would be an infringement.  
28

1 Q So under some of the patents a small amount would  
2 infringe; is that what you're saying?

3 A Yes.....

4 Q And in some of them it would require a larger amount?

5 A A minimum dose, yes.

6 *See* ECF No. 246-6 (Exhibit D to Declaration of Francis DiGiovanni, dated October 12,  
7 2016) at 133:4 – 134:6. Indeed, the *label* on NO Overload, just as an example, provides  
8 the *minimum dose* of L-arginine in the product required to infringe the '459 Patent –  
9 that is, a “high dosage” sufficient to provide for “NO [nitric oxide] production.” The  
10 above excerpts from Mr. Kramer’s testimony were also part of the trial record in this  
11 case (as Defendants’ Trial Exhibit No. 15A), and clearly a part of the totality of the  
12 circumstances, but this was all bypassed in the Court’s ruling, which was clear error.

13 With this context clarified, it is clear that Plaintiffs’ pre-filing investigation was  
14 more than adequate based solely on the testimony of Mr. Kramer (and even without  
15 considering the stricken affidavit), taken during the validity phase of the case, before  
16 infringement discovery could commence. No other conclusion is possible when the  
17 entire totality of the circumstances are considered, except that Plaintiffs *did* do a proper  
18 pre-filing investigation before filing their cases against these two Defendants, just as  
19 with the others.

20 **3. The Court Erroneously Determined that Certain Product**  
21 **Labels Disclosed an Additional Ingredient Rendering them**  
22 **Incapable of Infringement**

23 The Court also erred in finding that “Plaintiffs should have discovered by  
24 viewing the products’ labels that those products contained an additional ingredient  
25 rendering the product incapable of infringement.” ECF No. 282 at 10 (citing to n. 4).  
26 First, this determination essentially rules on infringement—a phase of the trial that  
27 never happened and on which no discovery was taken. More fundamentally, however,  
28



1 the Court’s ruling is inconsistent with its earlier ruling on claim construction. As  
2 Plaintiffs previously pointed out in their opposition brief:

3 In a material omission, Defendants leave out the fact that while the  
4 Court construed the ‘459 Patent as requiring that “arginine and  
5 lysine cannot be active ingredients,” *id.* at 13, the proper context  
6 for the question of what “active ingredients” are was also  
7 construed: “The Court finds, as it did in its discussion of the ‘872  
8 patent [U.S. Patent No. 6,117,872], that applicants did not disclaim  
9 the inclusion of all other amino acids, but just the inclusion of  
10 active ingredient amino acids for the purpose of bringing about the  
11 patent’s intended benefit.” See ECF No. 109 (Claim Construction  
12 Order) at 16 (emphasis added). Because the intended benefit of the  
13 ‘459 Patent’s asserted claim 1 is “improving vascular NO activity  
14 of the vascular system of a human host by enhancing endothelial  
15 NO,” ‘459 Patent at 26:39-40, Defendants’ non-infringement  
16 position by virtue of the inclusion of other amino acids can only be  
17 successful if they can show that the presence of these other amino  
18 acids could even possibly achieve the patent’s intended benefit.  
19 Defendants have not even tried to do so – instead, they take the  
20 strategy of not providing the full context of the Court’s  
21 construction of the ‘459 Patent.).

22 ECF No. 267 at 8-9. Under the Court’s claim construction ruling, the inclusion of an  
23 additional ingredient *does not* render the product incapable of infringement. Rather, the  
24 ingredient needs to be one that brings about the ‘459 Patent’s benefit—and there is no  
25 evidence in the record of any such benefit by any ingredient. Ruling otherwise was  
26 clear error.

27 The impact of the Court’s claim construction on this case was, indeed, a pivotal  
28 moment with respect to Plaintiffs’ reasonable infringement analysis that the Court  
disregards in its Order, even though it is clearly a part of the totality of the  
circumstances that deserves substantial weight. Just three days after the claim  
construction order was issued, Plaintiffs amended their infringement contentions to  
remove Hi-Tech’s Mesomorph product, which was initially alleged to have infringed  
U.S. Patent No. 6,646,006. ECF No. 267 at 11 (n. 6). Plaintiffs were certainly entitled

1 to rely on the Court’s claim construction ruling when conducting their infringement  
 2 analysis; it is clear legal error to find this case exceptional because the Defendants’  
 3 products included ingredients that they claim mitigated against infringement. For this  
 4 reason alone, reconsideration of the Order is necessary.<sup>5</sup>

5 **4. The Court Relies on a Statement Regarding the State of the Art**  
 6 **in 1993 That is Wholly Unsupported by the Record**

7 The Court held that “the claim explicitly requires administration of L-arginine in  
 8 an amount sufficient to enhance nitric oxide production, and that – at least as early as  
 9 1993 – studies showed that one gram was insufficient to enhance such production.”  
 10 ECF No. 282 at 11-12. In support, the Court cited the trial transcript at 460:11-461:7.  
 11 But the trial transcript does not support this statement – there is no discussion by Dr.  
 12 Boger of what was known *in 1993*.

13 If any ambiguity existed as to what amount of arginine was required to enhance  
 14 nitric oxide production, Defendants’ labels put that question to rest. A holistic review  
 15 of their labels and advertising showed that Plaintiffs had a reasonable basis to conclude  
 16 that the products had sufficient arginine to enhance nitric oxide production, even if it  
 17 was less than a gram. *See Rohm & Haas Co. v. Brotech Corp.*, 127 F.3d 1089, 1093  
 18 (Fed. Cir. 1997) (quoted in ECF No. 282 at 12) (denying Rule 11 motion as  
 19 reasonableness is judged “in light of the available information at the time of filing”).

20 But crucially, the actual amount of arginine was never relevant to Plaintiffs’ pre-  
 21 filing investigation as to the ‘459 Patent, because *the ‘459 Patent is a method patent*.  
 22 Thus, pre-filing investigation necessarily focused on whether the advertising and labels  
 23 were sufficient to support a claim of contributory infringement, *i.e.*, whether they  
 24

25 <sup>5</sup> Although the Court’s order finding this case exceptional does not refer to its prior ruling that certain claims  
 26 were barred by laches, to the extent this prior ruling played any role in the Court’s decision, the Supreme Court  
 27 recently held in that laches is *not* a defense to a patent infringement claim. *SCA Hygiene Products Aktiebolag v.*  
 28 *First Quality Baby Products, LLC*, 137 S.Ct. 954 (Mar. 21, 2017). Before this Court ruled that GNC was  
 entitled to the laches defense, Plaintiffs urged the Court to delay decision on GNC’s motion pending the  
 outcome of *SCA Hygiene*. See ECF No. 213 at 15. The Court declined to do so, holding that the laches defense  
 applied to all four of the patents-in-suit. *Id.* at 17.

1 disclosed to the user the method of “improving vascular NO activity of the vascular  
 2 system of a human host by enhancing endothelial NO,” as interpreted by the Northern  
 3 District of California (and as this Court would, in its own claim construction, interpret  
 4 the claim). *See* ECF No. 109 at 13-14; *see also id.* at 14-15 (rejecting defendants’  
 5 proposed construction that “prophylactic dose” means “dosage required to improve  
 6 preexisting vascular degenerative disease or prevent vascular degenerative disease in a  
 7 human host at risk”). Other information, such as product testing, would not have been  
 8 of assistance in finding such disclosure, particularly at the pre-filing investigation stage.  
 9 *See, e.g., Q-Pharma Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1301-02 (Fed. Cir.  
 10 2004) (“[g]iven Q-Pharma’s nonfrivolous interpretation of claim 1 as requiring no  
 11 specified minimum amount of CoQ10 and Jergens’ forthright assertions regarding the  
 12 therapeutic effects of CoQ10 in the accused product, we conclude that it was reasonable  
 13 for Q-Pharma to believe that the accused product contained a ‘therapeutically effective  
 14 amount’ of CoQ10 as the ‘principal active ingredient’”).

15 In short, the Court’s reliance on the amount of arginine or what was known in  
 16 1993 was clear error, because it is not supported by the record and cannot form the basis  
 17 for a finding of exceptionality.

18 **B. The Court’s Decision On Plaintiffs’ “Motivation” Is Also Not Supported by**  
 19 **the Record**

20 Apparently adopting Defendants’ narrative whole cloth, the Court found that  
 21 “Plaintiffs’ motivation was seemingly to extract nuisance-value settlements from a large  
 22 number of defendants.” *See* ECF No. 282 at 16. In order to reach this ruling, the Court  
 23 cited five pieces of “evidence”:

- 24 (1) Plaintiffs “only list one marketed product, sales of which  
 25 never amounted to more than 300 units” (*id.* at 14);  
 26 (2) Plaintiffs “brought suit under three patents that expired  
 27 several months after ThermoLife agreed to purchase the  
 28 licenses” (*id.*);

1 (3) Plaintiffs “settled early with many of the defendants in this  
2 lawsuit for seemingly small dollar amounts” (*id.*);

3 (4) Plaintiffs “have filed numerous infringement suits” (*id.*);  
4 and

5 (5) “Plaintiffs brought suit against many defendants without  
6 carefully reviewing their claims as a calculated risk that might  
7 yield nuisance-value settlements” (*id.* at 15).

8 These five assessments of Plaintiffs’ “motivations” are not supported by the record.  
9 Indeed, in assessing Plaintiffs’ motivations, the Court cites two decisions that  
10 underscore how this case does *not* “stand out” from others as required by *Octane*  
11 *Fitness*. In *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314 (Fed. Cir. 2011), a pre-  
12 *Octane Fitness* decision, the patentee and one of the inventors engaged in a myriad of  
13 litigation abuses such as destroying relevant documents, failing to engage in claim  
14 construction in good faith, displaying a “lack of regard for the judicial system,” and had  
15 a “cavalier attitude” toward the litigation process. *Id.* at 1327. In *Lumen View*  
16 *Technology, LLC v. Findthebest.com Inc.*, 24 F. Supp. 3d 329 (S.D.N.Y. 2014), the  
17 Court found the case to be exceptional because, among other things, the patentee  
18 engaged in “predatory” behavior and the entire lawsuit in question was “obviously  
19 baseless” and “no reasonable litigant could reasonably expect success on the merits.”  
20 *Id.* at 336 (quoting *Dominant Semiconductors Sdn. Bhd. v. OSRAM GmbH*, 524 F.3d  
21 1254, 1260 (Fed. Cir. 2008)). In fact, “[m]ost courts awarding attorneys’ fees post-  
22 *Octane* ‘have generally cited egregious behavior.’” *Finjan, Inc. v. Sophos, Inc.*, 2017  
23 WL 976673, \*1 (N.D. Cal. Mar. 14, 2017) (quoting *Aylus Networks, Inc. v. Apple, Inc.*,  
24 No. 13-cv-4700-EMC, 2016 WL 1243454, at \*7 (N.D. Cal. Mar. 30, 2016)). As  
25 demonstrated below, no such egregious conduct exists here, and the Court’s holding to  
26 the contrary is manifestly unjust and clear error.

27 ///

28 ///

1                   **1. The Court’s Reference to Plaintiffs’ “one” Marketed Product of**  
2                   **“300 units” Overlooks the Record**

3           The Court finds that Plaintiffs “only list one marketed product, sales of which  
4 never amounted to more than 300 units.” ECF No. 282 at 14. But the Court’s citations  
5 to the record point to Mr. Kramer’s deposition from over two years ago taken on  
6 invalidity issues only. *Id.* (citing Kramer Dep. excerpts, viewable at ECF No. 246-6  
7 and No. 253-11). Because the deposition is over two years old and not even in the  
8 damages phase of the case, the record is incomplete in regards to how many “marketed  
9 product” units ThermoLife sold and there is no support in the record regarding the  
10 “amount[]” of sales. This fact is not surprising considering damages discovery never  
11 commenced. Moreover, the Court does not explain how the volume or extent of  
12 ThermoLife’s sales impacts a finding of “motivation.”

13           Crucially, however, the Court overlooks that ThermoLife also sold the ingredient  
14 arginine nitrate to other supplement companies, an ingredient which practices the ‘872  
15 Patent and does not expire until 2018:

16           Q     Okay. What ThermoLife products do you think could have  
17           infringed these patents?

18           \* \* \*

19           THE WITNESS: Raw materials we were selling at the time and  
20           products that we had scheduled for development and release.

21           BY MS. VINSON BENTZ:

22           Q     All right. What raw materials were you selling?  
23

24           A     Arginine nitrate.  
25

26           Q     And why did you think that arginine nitrate might infringe  
27           the Stanford patents?

28           \* \* \*

1 THE WITNESS: If you were to read these patents and see what  
2 the invention is, the use of arginine nitrates would likely practice  
3 the inventions in these patents.

4 \* \* \*

5 Q Does ThermoLife sell arginine nitrate as a raw ingredient?

6 A Yes.

7  
8 *See Kramer Dep. Tr. at 28:9 – 29:2; 37:5-7 (ECF No. 253-11 [for pages 29 and 37 of*  
9 *transcript] and Woods Decl. ¶ 5 at Ex. D [for page 28 of transcript]).*<sup>6</sup>

10 This testimony, to which the Court gave no weight, demonstrates that  
11 ThermoLife not only sold finished products incorporating the ‘872 Patent’s invention,  
12 but ThermoLife also sold arginine nitrate as an ingredient to customers practicing the  
13 ‘872 Patent’s invention. That ThermoLife sold arginine nitrate as an ingredient is not  
14 surprising. ThermoLife owns, and Mr. Kramer is the inventor of, no less than fourteen  
15 issued U.S. Patents containing well over 350 claims pertaining to amino acids (such as  
16 arginine) and nitrate salt technology (including compound, composition and method  
17 claims). And arginine nitrate is a focus of ThermoLife’s business.<sup>7</sup> ThermoLife’s  
18 license from Stanford allowed ThermoLife to not only sell finished products, but also  
19 continue selling its patented arginine nitrate ingredient without exposing itself or its  
20 customers to potential infringement claims by other potential licensees of Stanford.

21 Had this case progressed to the discovery on damages, the evidence would have  
22 underscored the massive success of formulas sold by ThermoLife’s customers, which  
23 are approved by ThermoLife, utilizing arginine nitrate or combining arginine with other  
24 nitrate ingredients (such as creatine nitrate), most of which were already on the market

25 <sup>6</sup> Page 28 of Mr. Kramer’s transcript was a part of Trial Exhibit 15A.

26 <sup>7</sup> *See U.S. Patent Nos. 8,466,187; 8,952,046; 8,183,288; 8,178,572; 8,455,531; 8,034,836; 8,569,368;*  
27 *8,952,047; 8,952,045; 7,777,074; 8,957,100; 8,957,101; 8,048,921; and 8,569,369. ThermoLife uses the term*  
28 *“NO3-T” to market these patents, and, in turn, the “NO3-T” markings (or its predecessor terms, “NitraTech” or*  
*“ArgNitrate”) appear on ThermoLife’s customers’ products. See Woods Decl. ¶ 16, Ex. O (printout of*  
*www.no3-t.com/patents page, last accessed on April 27, 2017).*

1 when ThermoLife first approached Stanford to obtain the license. *See, e.g.*, Woods  
2 Decl. ¶ 6, Ex. E (label for USP Labs’ Jack3d, containing arginine nitrate purchased  
3 from ThermoLife); *id.* ¶ 7, Ex. F (label for USP Labs’ Jack3d Micro, containing  
4 arginine nitrate purchased from ThermoLife); *id.* ¶ 8, Ex. G (label for Arnold  
5 Schwarzenegger’s Iron Pump, containing arginine nitrate purchased from ThermoLife);  
6 *id.* ¶ 9, Ex. H (label for Schwarzenegger’s Iron Test, containing arginine nitrate  
7 purchased from ThermoLife); *id.* ¶ 10, Ex. I (label for Cellucor’s NO3, containing  
8 arginine nitrate purchased from ThermoLife); *id.* ¶ 11, Ex. J (label for USP’s MaxReps,  
9 containing arginine nitrate purchased from ThermoLife); *id.* ¶ 12, Ex. K (label for  
10 Cellucor’s C4, containing creatine nitrate purchased from ThermoLife, in combination  
11 with arginine); *id.* ¶ 13, Ex. L (label for USP’s Yok3, containing arginine nitrate  
12 purchased from ThermoLife); and *id.* ¶ 14, Ex. M (label for MusclePharm’s Assault,  
13 containing arginine nitrate purchased from ThermoLife). Discovery would have further  
14 shown that some of these brand names are widely known as some of the supplement  
15 industry’s best-selling and most popular pre-workout products, even stemming back to  
16 2013, when ThermoLife licensed the Stanford patents. *Id.* ¶ 15, Ex. N (listing  
17 Cellucor’s C4, USP’s Jack3d, and MusclePharm’s Assault-branded products among  
18 2013’s “top pre-workout supplements”).

19 Therefore, by no means is the universe of ThermoLife’s product offering merely  
20 “300” units of “one” product. Discovery, if it would have occurred, would actually  
21 reveal that the number of products sold or sourced by ThermoLife is in the *millions* of  
22 units across a broad range of products. Plaintiffs are *not* non-practicing entities; they  
23 practiced the invention, perhaps even to an extent higher than Defendants. For the  
24 Court to accept Defendants’ unsupported theory that both Plaintiffs are “patent trolls”  
25 (ECF No. 282 at 14) is contrary to the totality of the circumstances, and was clear error  
26 in addition to being manifestly unjust.

27 ///

28 ///

## 2. Whether a Patent has Expired is Irrelevant to Exceptionality

1 While the Court noted that “Plaintiffs...brought suit under three patents that  
2 expired several months after ThermoLife agreed to purchase the licenses” (ECF No.  
3 282 at 14), the Court did not indicate anywhere in its decision how this fact, even if  
4 accurate, supports a finding of bad faith or exceptionality. It does not. Parties can sue  
5 for past damages on an expired patent. *See, e.g., In re Morgan*, 990 F.2d 1230, 1232  
6 (Fed. Cir. 1992); *Wanlass v. Fedders Corp.*, 145 F.3d 1461, 1462 (Fed. Cir. 1998).  
7 Even if the three patents had expired *before* ThermoLife obtained the license, the “basic  
8 premise that the right to sue for past infringement cannot be assigned after a patent has  
9 expired *contradicts over a century of established patent law.*” *Valmet Paper Mach.,*  
10 *Inc. v. Beloit Corp.*, 868 F. Supp. 1085, 1087 (W.D. Wis. 1994) (emphasis added).

11 The reference to just “three patents” being in suit, which all expired soon after the  
12 case began, necessarily neglects the reality that Plaintiffs alleged that both Defendants  
13 infringed a fourth patent – the ‘872 Patent – which expires in 2018. See ECF No. 267 at  
14 10, 14. Neither Defendants, nor the Court, takes issue with Plaintiffs’ pre-filing  
15 investigation with respect to the ‘872 Patent. Yet the Court never mentions the ‘872  
16 Patent except to indicate that some of its claims were invalidated (ECF No. 282 at 2),  
17 giving the impression that only the “three patents” (and not the ‘872 Patent) were  
18 asserted against these two Defendants and this case was only about expired patents.  
19 The Court thus overlooks the totality of the circumstances that Plaintiffs brought suit on  
20 a still-in-effect patent.  
21

## 3. The Court’s Finding Regarding the Amount and Timing of Previous Settlements has No Support in the Record

22 The Court found that “Plaintiffs...settled early with many of the defendants in  
23 this lawsuit for seemingly small dollar amounts.” ECF No. 282 at 14. This statement  
24 has no support in the record, and even by Defendants’ own admission, because  
25 discovery on infringement and damages never occurred, and there was only limited  
26 discovery on sublicenses. *See, e.g.,* ECF No. 257 (VPX’s Moving Brief, filed under  
27  
28



1 seal) at n. 7 (indicating there was no discovery on 2015 and 2016 settlements, “of which  
2 there were many”). The record does not support the Court’s conjecture referring to  
3 “early” and “seemingly small” settlements, many of which included parties never sued  
4 by Plaintiffs. Nor does the Court tie any of these settlement figures into its finding that  
5 they were “nuisance-value settlements,” because the Court has no evidence (again, this  
6 discovery did not take place) regarding damages. *SFA Systems, LLC v. Newegg Inc.*,  
7 793 F.3d 1344, 1351 (Fed. Cir. 2015) (affirming denial of exceptional case finding  
8 where “the district court’s unwillingness to read bad faith motivations into SFA’s  
9 settlement amounts, without more evidence about what prompted those settlements, was  
10 neither clearly erroneous nor an abuse of discretion”); *Pragmatus Telecom LLC v.*  
11 *Newegg Inc.*, Civil Action No. 12-1533-RGA, 2016 WL 675529, \*4 (D. Del. Feb. 18,  
12 2016) (rejecting defendant’s argument that plaintiff settled for “nuisance amounts”  
13 because there was nothing in record concerning the “relative value” of the settlements).

14 While the Court’s decision refers to Plaintiffs’ supposed “file-and-settle” strategy  
15 (ECF No. 282 at 14), there is no evidence that Plaintiffs pursued a “file-and-settle”  
16 approach as to these (or any other) Defendants. Usually in such cases, a defendant can  
17 point to a low, often unsolicited offer from a plaintiff – for instance, one made right  
18 before a critical hearing – and tries to argue that the plaintiff wanted a quick pay off  
19 because it knew the case was a losing one. There is no evidence of the sort in the  
20 record. The point is not simply that Plaintiffs “proceeded all the way to trial” on the  
21 merits (ECF No. 282 at 15, n. 6) – rather, it is that Plaintiffs simply did not pursue a  
22 “file-and-settle strategy” with the moving Defendants (or any defendant). If the Court  
23 is implying Plaintiffs took a “file-and-settle strategy” with respect to *other* defendants,  
24 this is not supported by the record, but even if it was, it is not a strategy that these  
25 Defendants can claim made the exceptional case as to *them*.

26 If the Court was inclined to rule that the limited snapshot of settlements  
27 established that Plaintiffs sought “nuisance” settlements, without any evidence  
28 regarding the settling Defendants’ sales figures or consideration of any other factors,

1 then it should have conducted further discovery on this issue to allow Defendants to try  
 2 to present such evidence. Without any such evidence, however, the Court has no  
 3 factual basis to find that any of the settlements were “nuisance” or part of a “predatory  
 4 strategy.” ECF No. 282 at 15. There record is woefully incomplete as to what  
 5 happened in any of these other settlements, and none of the other defendants ever  
 6 moved for sanctions or argued exceptionality.

7 **4. The Court’s Statement that Plaintiffs “have filed numerous**  
 8 **infringement suits” Is Irrelevant and Not Supported by the**  
 9 **Record, But if it Is Relevant, it Serves Against Exceptionality**

10 In support of its finding of bad faith motivation, the Court noted that Plaintiffs  
 11 “have filed numerous infringement suits,” citing to a “2013 Patent Litigation Year in  
 12 Review” published by *Lex Machina*.<sup>8</sup> ECF No. 282 at 14-15. Without exploring the  
 13 legitimacy of the published claim or the legitimacy of the referenced lawsuits, the Court  
 14 makes a logical leap based on unsupported assumptions to reach the conclusion that  
 15 these other cases demonstrate bad faith. The Court never addresses the patents at issue  
 16 in these “numerous infringement suits”, what “numerous” means, or how many cases  
 17 are needed to make the amount relevant.<sup>9</sup>

18 Essentially, the Court adopted Defendants’ unfounded demonization of Plaintiffs  
 19 and used it as a short cut to find this case exceptional. Had the Court explored the  
 20 “numerous” other cases, it would have discovered the other courts have deemed those  
 21 cases unexceptional as well. *See, e.g.*, Case No. 2:12-cv-09229-GAF-FFM, ECF No.  
 22 246 (applying pre-*Octane Fitness* standard) and No. 278 (applying post-*Octane Fitness*  
 23

24 <sup>8</sup> The Lex Machina report is false and unreliable, in that its authors suggest that all plaintiffs listed in their  
 25 Figure 19 are “patent monetization entities,” which in the case of ThermoLife is, of course, completely  
 inaccurate. *Compare* ECF No. 246-7 at 6 with *supra* Point II.B.1. ThermoLife is a practicing entity.

26 <sup>9</sup> If the Court is suggesting, in referencing the word “numerous,” that Plaintiffs’ lawsuits were filed “within a  
 27 short time frame” (ECF No. 282 at 15), this is also not supported by the record. As of the end of August 2013 -  
 28 a half year after becoming the exclusive licensee - ThermoLife had filed only 24 cases involving Stanford’s  
 patents, with 20 cases active. *See* ECF No. 22 Order Consolidating Cases for Pretrial Purposes Up To and  
 Including Claim Construction (dated Aug. 30, 2013) at 3.

1 standard). There is no evidence that any defendant in any of these “numerous” cases  
2 successfully moved for sanctions or argued exceptionality.

3 Of course, the actual totality of circumstances renders incorrect the Court’s ruling  
4 that “the pattern of action here is indeed one that strongly suggests Plaintiffs brought  
5 suit against many defendants without carefully reviewing their claims...” ECF No. 282  
6 at 15. None of these “many” (or “numerous”) defendants ever asserted in litigation that  
7 Plaintiffs did not carefully review their claims before suing them, other than Hi-Tech  
8 and VPX, who only did so after the validity trial was completed. Therefore, the number  
9 of suits actually bolsters the reasonableness of Plaintiffs’ conduct.

### 10 **C. The Court’s Order Does Not Advance Compensation- and Deterrence-** 11 **Oriented Goals**

12 Without further explanation, the Court concludes that “awarding fees here will  
13 advance compensation- and deterrence-oriented goals.” ECF No. 282 at 16. “The  
14 purpose of section 285, unlike that of Rule 11, is not to control the local bar’s litigation  
15 practices....but is remedial and for the purpose of compensating the prevailing party for  
16 the costs it incurred in the prosecution or defense of a case *where it would be grossly*  
17 *unjust*, based on the baselessness of the suit or because of litigation or Patent Office  
18 misconduct, *to require it to bear its own costs.*” *Highmark, Inc. v. Allcare Health*  
19 *Mgmt. Sys., Inc.*, 687 F.3d 1300, 1310, n.1 (Fed. Cir. 2012), vacated and remanded, 134  
20 S.Ct. 1744 (2014) (emphasis added); *see Octane Fitness*, 134 S.Ct. at 1757  
21 (“sanctionable conduct is not the appropriate benchmark”). “Although *Octane* eased  
22 the standard for fee shifting, and clearly reduced the prevailing party’s burden from  
23 clear and convincing to a preponderance of the evidence, post-*Octane* decisions  
24 awarding fees have concerned egregious behavior.” *Gametek LLC v. Zynga, Inc.*, 2014  
25 WL 4351414, at \*3 (N.D. Cal. Sep. 2, 2014) (citing *Intellect Wireless, Inc. v. Sharp*  
26 *Corp.*, No. 10–6763, 2014 WL 2443871, at \*6 (N.D. Ill. May 30, 2014) (awarding fees  
27 based on false declarations before the PTO, without which, the court concluded, the  
28 plaintiff would not have obtained the patents at issue); *Cognex Corp. v. Microscan Sys.*,

1 *Inc.*, No. 13–2027, 2014 WL 2989975, at \*4 (S.D.N.Y. June 30, 2014) (criticizing  
2 plaintiff for post-trial motions that simply sought to re-litigate issues decided during  
3 trial and awarding fees at least as to those motions); *Precision Links Inc. v. USA*  
4 *Products Group, Inc.*, No. 08–576, 2014 WL 2861759, at \*3 (W.D.N.C. June 24, 2014)  
5 (criticizing plaintiff for seeking a preliminary injunction based in large part on a  
6 previously-rejected theory of liability and filing frivolous post-dismissal motions); *cf.*  
7 *Homeland Housewares, LLC v. Hastie2Market, LLC*, 581 Fed. Appx. 877, 878 (Fed.  
8 Cir. 2014) (upholding fee award where the party filed unsolicited briefs and multiple  
9 meritless reconsideration motions and failed to introduce admissible evidence to support  
10 its claim)).

11 Defendants are not entitled to any compensation in light of the totality of  
12 circumstances, as they cannot show they spent any legal fees they should not have, even  
13 if Plaintiffs’ pre-filing investigation was inadequate. *Supra* at 1, n.1. Indeed, the first  
14 time Defendants decided in the course of this multi-year litigation to present to the  
15 Court (or even to Plaintiffs) evidence of alleged non-infringement or to assert an  
16 inadequate pre-filing investigation was after the case was closed, following the validity  
17 trial. Defendants should not be compensated for fees, even in an exceptional case, if  
18 they cannot show they should not have spent the fees. *Cf. Magnetar Technologies*  
19 *Corp. v. Six Flags Theme Parks, Inc.*, Case No. 07-127-LPS-MPT, 2017 WL 962670, at  
20 \*14 (D. Del. Mar. 13, 2017) (“the court finds attorneys’ fees are also warranted to  
21 compensate the defendants in this case for the expenses in defending claims that should  
22 not have been maintained”). Without such a showing, there is no compensation-  
23 oriented goal that awarding fees would advance, and the Court has not indicated one  
24 exists in its ruling.

25 Similarly, the Court’s decision does not refer to any deterrence-oriented goals  
26 that would be advanced by an award of fees. The need for a deterrent impact of a fee  
27 award generally applies to circumstances where the plaintiff has engaged in “extortive  
28 litigation” or is a “patent troll.” *See, e.g., Tyco Healthcare Group LP v. Mutual*

1 *Pharmaceutical Company, Inc.*, Civil Action No. 07-cv-1299, 2016 WL 3965201, \*5  
2 (D.N.J. July 22, 2016); *Small v. Implant Direct Mfg. LLC*, Case No. 06 Civ. 683, 2014  
3 WL 5463621, at \*4 (S.D.N.Y. Oct. 23, 2014). Any theory as to “extortive litigation” or  
4 “patent trolling” with respect to either Plaintiff is put to rest with a view of the totality  
5 of the circumstances. *Supra* Point II.B.

6 **III. CONCLUSION**

7 For the reasons set forth above, Plaintiffs respectfully request that the Court grant  
8 Plaintiffs’ motion for reconsideration, and enter an Order denying Defendants’ motions  
9 for attorneys’ fees.

10 Respectfully submitted,

11 Dated: May 2, 2017

PACIFIC TRIAL ATTORNEYS

12  
13 By: /s/ Tyler J. Woods  
14 Tyler J. Woods  
*Attorneys for Plaintiffs*

15 *The Board of Trustees of the Leland*  
16 *Stanford Junior University*  
17 - and -  
*ThermoLife International, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 2, 2017, I electronically filed the foregoing **PLAINTIFFS' AMENDED MEMORANDUM IN SUPPORT OF IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION OF THE COURT'S APRIL 4, 2017 ORDER (1) STRIKING PALINTIFFS' DECLARATION, AND (2) GRANTING DEFENDANTS' MOTION FOR ATTORNEY FEES** with the Clerk of the Court using the CM/ECF system which will send notification of such filing via electronic mail to all counsel of record.

/s/Tyler J. Woods  
Tyler J. Woods