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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

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11 FLOWRIDER SURF, LTD., a Canadian
12 corporation; and SURF WAVES, LTD., a
13 company incorporated in the United
14 Kingdom,

14 Plaintiffs,

15 v.

16 PACIFIC SURF DESIGNS, INC., a
17 Delaware corporation,

18 Defendant.

Case No.: 3:15-cv-01879-BEN-BLM

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
RENEWED MOTION FOR
ATTORNEYS' FEES AND COSTS**

[Doc. 282]

19
20 Presently before the Court is Defendant Pacific Surf Designs, Inc.'s ("PSD" or
21 "Defendant") renewed motion for attorneys' fees pursuant to 35 U.S.C. § 285, 28 U.S.
22 1927, and the Court's inherent power. (Doc. No. 282.) Plaintiffs Flowrider Surf, Ltd. and
23 Surf Waves, Ltd. (collectively "Plaintiffs") oppose this request. (Doc. No. 285.)
24 Defendant filed a Reply to Plaintiffs' Opposition to which Plaintiffs filed an *ex parte* Sur-
25 Reply in Opposition. (Doc. Nos. 286 and 294.) The Court finds the matter suitable for
26 decision without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons
27 discussed below, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant's
28 Motion.

I. BACKGROUND

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2 Plaintiffs, wholly-owned subsidiaries of Whitewater West Industries, Ltd., are in the
3 water-park ride industry. FlowRider is the exclusive global licensee of U.S. Patent No.
4 6,491,589 (the “‘589 Patent”) entitled, “*Mobile Water Ride Having Sluice Slide-Over*
5 *Cover.*” (Doc. No. 1, Compl. ¶ 9.) Surf Waves owns U.S. Patent No. 8,088,016 (the “‘016
6 Patent”) entitled, (*Half-Pipe Water Ride.*) *Id.* ¶ 12. Defendant competes with the Plaintiffs
7 in the water-park ride industry.

8 On August 24, 2015, Plaintiffs commenced this patent infringement action alleging
9 Defendant willfully infringed the ‘589 and ‘016 Patents. *Id.* This Court dismissed the ‘589
10 Patent on May 25, 2017, for lack of subject matter jurisdiction. (Doc. No. 222.) On
11 January 17, 2018, after *inter partes* review of the ‘016 Patent, the Patent Trial and Appeal
12 Board (“PTAB”) issued its Final Written Decision pursuant to 35 U.S.C. § 318(a) and 38
13 C.F.R. § 42.73. (Doc. No. 230-1, Ex. A.) In the decision, the PTAB found all the
14 “asserted” claims (1-5 and 7-20) to be unpatentable.¹ As a result of the PTAB’s decision,
15 the ‘016 Patent is essentially unenforceable in this proceeding. *See Cuozzo Speed Techs.,*
16 *LLC v. Lee*, 136 S. Ct. 2131, 2143 (2016) (“[A] decision to cancel a patent [in an IPR]
17 normally has the same effect as a district court’s determination of a patent’s invalidity.)

18 On May 7, 2018, based on the decision of the PTAB finding the Plaintiffs’ patent
19 unenforceable, this Court enter judgment for the Defendant. Plaintiffs, on May 16, 2018,
20 filed a Notice of Appeal to the Federal Circuit.² (Doc. No. 241.)

21 On May 22, 2018, Defendant filed a Motion for attorney’s fees and expert expenses.
22 (See Doc. No. 246.) Plaintiffs filed their response on June 11, 2018, along with an *ex parte*
23 application for Order denying Defendant’s Motion for attorney’s fees and bill of costs
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26 ¹ Claim 6 of the ‘016 Patent was not sought as an *Asserted Claim*. (See Doc. No.
214-1 at 2-3.)

27 ² Plaintiffs seek appellate review of this Courts May 8, 2018 judgment and May 26,
28 2017 Order granting PSD’s Motion to Dismiss U.S. Patent 6,491,589. (Doc. Nos. 240,
222.)

1 without prejudice or alternatively, stay the proceedings pending the decision of Plaintiffs'
2 appeal to the Federal Circuit. (Doc. Nos. 255, 248.) Defendant filed its response on May
3 31, 2018, to which the Plaintiffs' replied in opposition to the Defendant's Bill of Costs on
4 June 7, 2018. (Doc. Nos. 249, 250.) The Court entered an Order on December 21, 2018,
5 denying both motions. Upon learning that the Federal Circuit summarily affirmed the
6 PTAB's decision in favor of the Defendants, Plaintiffs withdraw their appeal on July 1,
7 2019.

8 On July 15, 2019, the Defendant filed the instant motion, seeking attorney's fees
9 pursuant to 35 U.S.C. § 285, 28 U.S.C. § 1927, and the Court's inherent power. (Doc. No.
10 282.) The Plaintiffs filed their response in opposition to Defendant's motion for attorney's
11 fees, to which the Defendant replied. (Doc. Nos. 286, 294.)

12 II. LEGAL STANDARD

13 A. 35 U.S.C. § 285

14 The Patent Infringement Act provides that reasonable attorney's fees may be
15 awarded to the prevailing party in "exceptional cases." 35 U.S.C. § 285. A case is
16 "exceptional" if it stands out from others with respect to either: (1) the substantive
17 strength of a party's litigating position, or (2) the unreasonable manner in which the case
18 was litigated. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749,
19 1756 (2014). "District courts may determine whether a case is exceptional in the case-
20 by-case exercise of their discretion, considering the totality of the circumstances." *Id.* at
21 1767 (internal quotations omitted). The court may also consider a non-exclusive list of
22 factors to consider in deciding whether a case is exceptional: "frivolousness, motivation,
23 [and] objective unreasonableness" *Id.* at 1756, n.6 (citing *Fogerty v. Fantasy*, 510
24 U.S. 517, 534 n.19 (1994)). Either subjective bad faith or the pursuit of especially
25 meritless claims may be sufficient to set a case apart. *Id.* at 1757. A party must establish
26 its entitlement to attorney's fees by a preponderance of the evidence. *Id.* at 1758.

27 A finding that a case is exceptional does not end the inquiry. The decision to
28 award attorney's fees is discretionary and "permits the judge to weigh intangible as well

1 as tangible factors: the degree of culpability of the infringer, the closeness of the
2 question, litigation behavior, and any other factors whereby fee-shifting may serve as an
3 instrument of justice.” *Nat’l Presto Indus., Inc. v. W. Bend Co.*, 76 F.3d 1185, 1197 (Fed.
4 Cir. 1996).

5 **B. 28 U.S.C. § 1927**

6 Section 1927 provides that any attorney “who so multiplies the proceedings in any
7 case unreasonably and vexatiously may be required by the court to satisfy personally the
8 excess costs, expenses, and attorney’s fees reasonably incurred because of such conduct.”
9 28 U.S.C. § 1927. Section § 1927 sanctions may be upheld if an attorney’s conduct was
10 “reckless or in bad faith.” *Cunningham v. Cty. of Los Angeles*, 879 F.2d 481, 490 (9th
11 Cir. 1988); *see Lahiri v. Universal Music & Video Distribution Corp.*, 606 F.3d 1216,
12 1219 (9th Cir. 2010).

13 An attorney acts in bad faith when he or she “practices a fraud upon the court” or
14 “delays or disrupts the litigation.” *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 46
15 (1991). Bad faith may also consist of recklessly raising a frivolous argument. *See In re*
16 *Keegan Mgmt. Co. Secur. Litig.*, 78 F.3d 431, 436 (9th Cir. 1996). Put differently, “[f]or
17 sanctions to apply, if a filing is submitted recklessly, it must be frivolous, while if it is not
18 frivolous, it must be intended to harass.” *Id.* An attorney’s bad faith is assessed under a
19 subjective standard. *Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.2d
20 1112, 1118 (9th Cir. 2000). “Knowing or reckless conduct meets this standard.” *Id.*
21 (citing *MGIC Indem. Corp. v. Moore*, 952 F.2d 1120, 1121-22 (9th Cir. 1991)).

22 **C. The Court’s Inherent Power**

23 “[T]he district court has the inherent authority to impose sanctions for bad faith,
24 which includes a broad range of willful improper conduct.” *Fink v. Gomez*, 239 F.3d
25 989, 992 (9th Cir. 2001). “To impose sanctions under its inherent authority, the district
26 court must make an explicit finding ... that counsel’s conduct constituted or was
27 tantamount to bad faith.” *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1131 (9th Cir. 2002);
28 *see also B.K.B. v. Maui Police Dep’t*, 276 F.3d 1091, 1107-08 (9th Cir. 2002) (attorney’s

1 knowing and reckless introduction of inadmissible evidence was tantamount to bad faith
2 and warranted sanctions under § 1927 and the court’s inherent power.); *Fink v. Gomez*,
3 239 F.3d 989, 993-94 (9th Cir. 2001) (attorney’s reckless misstatements of law and fact,
4 combined with an improper purpose, are sanctionable under the court’s inherent power).

5 The Court “has the inherent authority to impose sanctions for bad faith, which
6 includes a broad range of willful improper conduct.” *Fink v. Gomez*, 239 F.3d 989, 992-
7 94 (9th Cir. 2001) (finding “mere recklessness, without more, does not justify sanctions
8 under a court’s inherent power” but that “[s]anctions are available for a variety of types
9 of willful actions, including recklessness when combined with an additional factor such
10 as frivolousness, harassment, or an improper purpose”).

11 III. DISCUSSION

12 Defendant contends it is entitled to its reasonable attorney’s fees expended
13 addressing the ‘016 Patent pursuant to 35 U.S.C. § 285, reasonable attorney’s fees
14 expended addressing the ‘589 Patent pursuant to 28 U.S.C. § 1927, and attorney’s fees,
15 expert fees, and non-taxable costs incurred pursuant to the Court’s inherent authority.
16 (Doc. No. 282 at 15.) The Court addresses each in turn.

17 A. 35 U.S.C. § 285

18 Under 35 U.S.C. § 285, “[t]he court in exceptional cases may award reasonable
19 attorney fees to the prevailing party.” Here, Defendant is the prevailing party with regard
20 to the ‘016 Patent.” (Doc. No. 282 at 13.) Upon determining that the ‘016 patent was
21 unenforceable, the Court entered judgment in favor of Defendant as to the entire action.³
22 *See Id.* Thus, the issue before the Court is whether this is an “exceptional case[]”
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25 ³ In some cases, “defendants need not prevail on the merits to be classified as a
26 ‘prevailing party.’” *Raniere v. Microsoft Corporation*, 887 F.3d 1298, 1306 (Fed. Cir.
27 2018) In *Raniere*, the court held that the district court’s dismissal of the action with
28 prejudice “gave Appellees the full relief to which they were legally entitled,” rendering
them “prevailing parties” because the parties’ relationship had materially changed. *Id.* at
1306, 1308.

1 justifying an award of attorney's fees. A case can be "exceptional" either "with respect
2 to the substantive strength of [Plaintiff's] litigating position ... or the unreasonable
3 manner in which the case was litigated." *Octane Fitness*, 134 S. Ct. at 1756. For the
4 reasons discussed below, the Court finds that, based on the totality of circumstances, this
5 case is "exceptional" on both grounds.

6 **i. Substantive Strength of Plaintiff's Litigating Position**

7 Defendant argues Plaintiffs' litigating position was exceptionally weak in light of
8 the fact that the '016 Patent was invalidated in view of Plaintiffs' own licensed patents
9 and related infringement theories.⁴ (Doc. No. 282 at 15.) Plaintiffs' respond their
10 litigating position was objectively reasonable since there was a reasonable basis for
11 presuming the '016 Patent was valid, including that: it was issued by the United States
12 Patent and Trademark Office ("PTO"), 35 U.S.C. 282(a); Plaintiffs conducted significant
13 pre-filing due diligence regarding the validity of the '016 Patent; and the PTAB's
14 decision that the Defendant demonstrated invalidity by a "*preponderance of the*
15 *evidence*" cannot justify a finding that Plaintiffs' infringement positions before *this Court*
16 were "exceptionally weak." (Doc. No. 285 at 9.)

17 The Court agrees with the Defendant and finds this case exceptional because
18 Plaintiffs knew or should have known that the '016 Patent was objectively unreasonable
19 and frivolous. This is especially true considering it was previously invalidated as
20 described *supra*. (Doc. No. 282 at 15.) Moreover, the Plaintiffs' awareness of the
21 invalidating prior art (*at least as to the '589 Patent*), raised overbroad infringement
22 theories, including that Plaintiffs' Supertube included "opposite" first and second curved
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25 ⁴ "Plaintiffs were aware of the '589 Patent from the outset of the case, and
26 undoubtedly were also aware of the other two patents used to invalidate the '016 Patent
27 given that they were purportedly licensed to Plaintiff FlowRider in the same agreement.
28 Ex. E, 214. *See Raymond v. Blair*, No. 09-5507, 2012 WL 1135911, at *4 (E.D. La. Apr.
4, 2012) (awarding fees where plaintiffs 'knew or should have known from the inception
of this litigation that the patent was invalid.')." (Doc. No. 282 at 15.)

1 sidewalls extending substantially upwardly from edges of a middle section.⁵ *Id.* at 15-16.
2 Furthermore, Plaintiffs endeavored to frustrate Defendant's attempt to mitigate costs by
3 refusing to drop their '016 Patent. This left Defendant little choice but to seek IPR
4 review to defend its product line. The PTAB agreed with Defendant, and found
5 Plaintiffs' '016 Patent unpatentable, thereby invalidating all of Plaintiffs' asserted claims.
6 *See Id.* In effect, the PTAB's Final Decision (*affirmed by the Federal Circuit*) confirmed
7 that the Plaintiffs' litigation positions regarding the '016 Patent were not only
8 exceptionally weak, but were also frivolous in view of the prior art. *Beckman*
9 *Instruments, Inc. v. LKB Produkter AB*, 892 F.2d 1547, 1551 (Fed. Cir. 1989) (holding
10 that an exceptional case finding can be based on a frivolous suit).

11 Plaintiffs' arguments to the contrary are not persuasive. First, Plaintiffs' claim
12 there was a reasonable basis for contending the '016 Patent was valid since it was issued
13 by the PTO. (Doc. No. 285 at 8.) The problem with this claim is that "Courts often find
14 that plaintiff patentees' cases are exceptionally weak when their issued patents have been
15 invalidated," much like the situation presented in this case. *See, e.g., Inventor Holdings,*
16 *LLC v. Bed Bath & Beyond, Inc.*, 876 F.3d 1372 (Fed. Cir. 2017.) (Doc. No. 286 at 2.)

17 Second, Plaintiffs claim that significant pre-filing due diligence regarding the '016
18 Patent was conducted prior to filing the Complaint. (Doc. No. 285 at 8.) However,
19 noticeably absent from its response is "what investigation" Plaintiffs performed to
20 support its contention there was "a reasonable belief that the '016 Patent was valid and
21 enforceable in view of PSD's February 2016 invalidity contentions and its IPR petition."
22 (See Doc. Nos. 286 at 3; 294-1 at 2.)

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26 ⁵ "Nothing better evidences Plaintiffs' own realization that their proposed claim
27 constructions were unreasonably broad than the fact that they offered narrower
28 constructions before the PTAB, which applied a 'broadest reasonable interpretation'
standard." (Doc. No. 282 at 16.)

1 Third, Plaintiffs' claim of maintaining a "consistent claim construction" position
2 throughout the litigation and IPR review is not supported by the evidence. (Doc. No. 285
3 at 8.) Defendant's Motion and Reply reference multiple instances where Plaintiffs' IPR
4 responses provided significantly narrower claim construction definitions than was
5 originally provided and ultimately adopted by this Court. (See Doc. Nos. 282 at 16, 286
6 at 3-4.)

7 Lastly, Plaintiffs' assertion the PTAB's final decision in favor of Defendant was
8 merely the result of a difference of opinion. (Doc. No. 285 at 8.) Plaintiffs have no basis
9 to assert knowledge of the PTAB examiners thought processes in reaching the decision it
10 did in this case.

11 At bottom, Plaintiffs relied on nothing more than their own speculative aspirations,
12 derived from weak circumstantial indicators—rather than clear language taken from
13 controlling legal documents to reach the conclusions asserted in response to the
14 Defendant's Motion. As such, Plaintiffs have no reasonable basis for arguing that its
15 claims are well grounded. Thus, this case stands out as "exceptional" with respect to the
16 substantive strength of Plaintiffs' litigating position. *Octane Fitness*, 134 S. Ct. at 1756.

17 **ii. Manner in Which the Case was Litigated**

18 Defendant contends the case is exceptional because Plaintiffs litigated it to: (1)
19 exert significant settlement pressure on Defendant; and (2) to force Defendant to turn
20 over its sensitive financial records. (Doc. No. 286 at 6.) Plaintiffs disagree on both
21 accounts, arguing Defendants' claims stem from the fact that Plaintiffs': (1) refused to
22 succumb to Defendant's pressure to dismiss the '016 Patent; and (2) instead chose to
23 aggressively exercise their legal right to pursue injunctive relief to stop Defendants
24 infringing activities. (Doc. No. 285 at 11.)

25 The Court notes that the interactions between the parties and counsel in this suit
26 have been contentious. Despite this, the Court still finds Plaintiffs' litigation conduct
27 taken, unreasonable. *See Lyda v. CBS Interactive, Inc.*, No. 16-cv-06592-JSW, Dkt. No.
28 35 at 7 (N.D. Cal. Jan. 24, 2018) (granting fees; because one factor under *Octane Fitness*

1 is “the need to advance considerations of compensation and deterrence, ... the Court also
2 takes into consideration the fact that Plaintiff has sued other entities on similar claims,
3 without success.”)

4 In this case, Plaintiff brought the lawsuit without conducting sufficient due
5 diligence to determine the validity of the ‘016 Patent. While it is not entirely clear what
6 pre-filing investigation Plaintiffs did or did not undertake, the record permits a few
7 observations: Cursory review of the record should have given Plaintiffs some idea that
8 the ‘016 Patent was invalid in view of its own licensed patents and related infringement
9 theories. (Doc. No. 282 at 15.) This means that either (1) Plaintiffs did not (*contrary to*
10 *its representations*) conduct a sufficient pre-trial investigation; (2) they did conduct a
11 sufficient pre-trial investigation, and while Plaintiffs were aware of the ‘589 Patent as
12 well as the other two patents used to invalidate the ’016 Patent, given that they were
13 purportedly licensed to Plaintiff FlowRider in the same agreement, decided to proceed
14 anyways; or (3) they did conduct a sufficient pre-trial investigation, came to the
15 objectively unreasonable conclusion that the ‘016 Patent was still valid, and proceeded on
16 that basis. Of these three scenarios, the last is the most innocuous. However, even if
17 only this scenario is true, Plaintiffs were no less than willfully blind in choosing to go
18 forward with the suit against the Defendant. Instead of making efforts to clarify the
19 validity of the ‘016 patent, Plaintiffs stuck their head in the sand and proceeded to file
20 this lawsuit. As such, Plaintiffs failed to undertake an adequate pre-suit filing
21 investigation before filing this suit, which was exceptionally unreasonable litigation
22 conduct.

23 Aside from the aforementioned, Plaintiffs also failed to notify the Defendant early
24 on that it would not be seeking any damages related to the ‘016 Patent, thereby forcing
25 Defendant to spend resources on meritless discovery and expert reports. (Doc. No. 286 at
26 6.) Moreover, Plaintiffs refused to discuss the merits of the case despite Defendant’s
27 numerous invitations to do so. *Id.* Lastly, Plaintiffs also misrepresented the record by
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1 alleging that “[b]oth the PTAB and this Court confirmed that PSD’s IPR (from which
2 PSD argues clearly presented the invalidity of the ‘016 Patent) lacked merit.”⁶ *Id.* at 6-7.

3 In sum, Plaintiffs initiated this suit without adequately investigating the validity of
4 the ‘016 Patent (*and despite warning signs to the contrary*), insisted on maintaining this
5 suit despite mounting evidence regarding the validity of the ‘016 Patent, and obfuscated
6 the fact that the ‘016 Patent had validity issues, the manner in which it litigated this case
7 also makes this case stand out as “exceptional.”

8 For the foregoing reasons, this case stands out both with respect to the substantive
9 strength of Plaintiff’s litigating position and the manner in which Plaintiffs litigated it.
10 Accordingly, the Court finds this is an “exceptional case[]” warranting attorneys’ fees.

11 **B. 28 U.S.C. § 1927 and Courts Inherent Power**

12 Defendant also moves the Court to impose sanctions against Plaintiffs and their
13 counsel pursuant to 28 U.S.C. § 1927 as well as the court’s inherent power. Defendant
14 argues that sanctions are warranted because Plaintiffs attempt to obfuscate the standing
15 issue followed by their frivolous standing arguments “multiplie[d] the proceedings ...
16 unreasonably and vexatiously.” (Doc. No. 282 at 14-15.) Moreover, Defendant
17 emphasizes that it warned Plaintiffs that it would seek fees if it chose to continue litigating
18 this matter, but Plaintiffs continued anyways. Plaintiffs’ dispute Defendant’s claims
19 countering that sanctions are not warranted because Defendant unreasonably delayed
20 seeking sanctions, making their request untimely. (Doc. No. 285 at 17.) Furthermore,
21 Defendant’s request is improper because Plaintiffs alleged conduct does not constitute
22 subjective bad faith or recklessness.⁷ (Doc. No. 285 at 17.)

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25 ⁶ The Court never took any position on the merits of the petition. Moreover,
26 Plaintiffs cite to the PTAB’s Institution decision in which it expanded the grounds of
invalidity, but still relied on only the prior art PSD raised. (Doc. No. 286 at 7.)

27 ⁷ Section 1927 requires that an attorney’s multiplication of proceedings be both
28 “unreasonable” and “vexations [],” the conduct of the attorney in question must have
been somehow wrongful. (Doc. No. 285 at 17.)

1 Although close, the Court finds that, on balance, sanctions under either § 1927 or
2 the Court's inherent power are not warranted. As discussed above, Plaintiff's conduct
3 during this litigation was exceptionally unreasonable: despite knowing facts that should
4 have put it on notice that it had standing problems, Plaintiffs' did not adequately
5 investigate its standing issues before filing this lawsuit, continued to pursue a
6 determination on the merits despite mounting evidence of standing issues, and obfuscated
7 the fact that it had standing issues.⁸ (Doc. No. 282 at 19.) Through this conduct,
8 Plaintiffs' were able to drag out this action and force Defendant to incur significant
9 additional expenses in numerous ways, including briefing on numerous motions,
10 depositions, and additional time and effort in terms of correspondence and meet and
11 confers to get to the bottom of Plaintiffs' falsehoods and misrepresentations regarding
12 their document production.⁹ *See Id.* at 22. However, the Court is not convinced that this
13 conduct rises to the level of misconduct required under § 1927 or the standards for
14 exercising the Court's inherent power.

15 First, with respect to § 1927, the Court does not find that Plaintiffs or its counsel
16 acted with "subjective bad faith." *Blixseth v. Yellowstone Mountain Club, LLC*, 796 F.3d
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19 ⁸ Plaintiffs' choice to produce the License Agreement showing FlowRider received
20 rights while at the same time withholding the Sublicense Agreement showing FlowRider
21 gave those rights away on the same day cannot reasonably be interpreted as anything but
22 a deliberate attempt to mislead PSD and the Court as to standing. (Doc. No. 282 at 19-
23 20.) Thereafter, Plaintiffs attempted to avoid producing any documents revealing
FlowRider's lack of patent rights by falsely telling the Court and PSD that all documents
had been produced when they had not. *Id.* at 21.

24 ⁹ "This is precisely the type of 'unreasonabl[e] and vexatious []' 'multipl[y]ing of
25 the proceedings' that § 1927 is intended to deter." *See also* 10 C. Wright et al., *Federal*
26 *Practice and Procedure*, § 2670 (3d ed. 2015) ("explaining the purpose of § 1927 is 'to
27 place directly on attorneys a sanction that should encourage them to refrain from the
28 frivolous, to weigh considerations of relevancy and privilege carefully when participating
in discovery proceedings, and to advise their clients in accordance with their best legal
judgment rather than in terms of securing tactical advantage through the manipulation of
the process.>"). (Doc. No. 282 at 22.)

1 1004, 1007 (9th Cir. 2015) (“Sanctions pursuant to section § 1927 must be supported by a
2 finding of subjective bad faith.”). Under Ninth Circuit law, “bad faith is present when an
3 attorney knowingly or recklessly raises a frivolous argument or argues a meritorious
4 claim for the purpose of harassing an opponent.” *Id.* As discussed above, Plaintiffs’
5 basis for asserting standing as to the ‘589 Patent was objectively unreasonable and
6 exceptionally weak. However, the Court does not find that this position was entirely
7 without support. As Plaintiffs point out, Defendant’s Motion for Sanctions was untimely
8 because Defendant waited until May 22, 2018, (*a full year after the time the Court*
9 *dismissed the ‘589 Patent*) to seek sanctions.¹⁰ (Doc. No. 285 at 14.) Moreover, the
10 filing of a complaint cannot be the basis for sanctions under 28 U.S.C. § 1927. *Moore v.*
11 *Keegan Mgmt. Co. (In re Keegan Mgmt. Co., Sec. Litig.)*, 78 F.3d 431, 435 (9th Cir.
12 1996). Lastly, in its reply, Defendant seeks sanctions based on the conduct of Plaintiffs,
13 rather than counsel, which is improper under 28 U.S.C. § 1927. Sanctions under 28
14 U.S.C. § 1927 may only be rendered based on the actions of attorneys in this action. *Pac.*
15 *Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1117 (9th Cir. 2000)
16 (“Section 1927 authorizes the imposition of sanctions against any lawyer who wrongfully
17 proliferates litigation proceedings once a case has commenced.”) (Doc. No. 294-1 at 3.)
18 In addition, there was at least some weak circumstantial evidence that supported
19 Plaintiffs’ assertions. Accordingly, the Court does not find that Plaintiffs or counsel
20 “knowingly or recklessly raise[d] a frivolous argument.” *Blixseth*, 796 F.3d at 1007.

21 The Court also does not find that Plaintiffs or counsel brought this case or continued
22 to litigate it for the purpose of harassing Defendant. Instead, the record suggests that
23 Plaintiffs’ purpose in litigating this matter was to protect its “valuable intellectual property
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26 ¹⁰ District courts are expected to sanction wrongful conduct as it occurs. *In re*
27 *Yagman*, 796 F.2d 1165, 1183 (9th Cir. 1986) (“prompt action helps enhance the
28 credibility of the rule and, by deterring further abuse, achieve its therapeutic purpose”
(citations omitted)). (Doc. No. 285 at 14.)

1 assets” from Defendant’s “knock offs” water ride attractions. (See Doc. No. 285 at 1.)
2 While its continued insistence that it possessed standing was disrespectful to the Court’s
3 resources and is not the type of behavior that should be encouraged in the legal profession,
4 the Court finds that it is better characterized as extremely zealous advocacy exercised with
5 poor judgement rather than harassment. Thus, it is also not the case that Plaintiff’s counsel
6 “argue[d] a meritorious claim for the purpose of harassing an opponent.” *Blixseth v.*
7 *Yellowstone Mountain Club, LLC*, 796 F.3d 1004, 1007 (9th Cir. 2015). Accordingly,
8 because the Court cannot conclude that Plaintiffs’ counsel acted with “subjective bad
9 faith,” sanctions under § 1927 are not warranted.

10 Second, with respect to the Court’s inherent power, the Court does not find that
11 Plaintiffs or counsel’s “conduct constituted or was tantamount to bad faith.” *Christian v.*
12 *Mattel, Inc.*, 286 F.3d 1118, 1131 (9th Cir. 2002). It is true that certain aspects of Plaintiffs’
13 behavior come close: its continued assertions of standing in its pleadings and
14 representations to the Court and Defendants were misleading and its continued insistence
15 on pursuing the merits of this case wasted resources. However, the Court is not convinced
16 that this crosses the line from extremely zealous advocacy to actual bad faith. Instead, it
17 seems more likely that Plaintiffs simply took an aggressive tack toward this case and
18 maintained hopeful aspirations that, somehow, it could eventually push its way through.
19 As such, sanctions pursuant to the Court’s inherent power are not warranted.

20 In sum, for the reasons discussed above, the Court finds that this case does not
21 warrant sanctions either under § 1927 or the Court’s inherent power.

22 IV. CONCLUSION

23 For the foregoing reasons, the Court **GRANTS** Defendant’s request for attorneys’
24 fees pursuant to 35 U.S.C. § 285, but **DENIES** Defendant’s motion for sanctions pursuant
25 to 28 U.S.C. § 1927 and the Court’s inherent power. Defendant is directed to submit a
26 complete justification for the fees it seeks, including justification for the rates charged and
27 the time spent, organized to facilitate the Court’s review and adjustment of the requested
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1 fees. Fees shall be presented organized both by date and by timekeeper. Defendant shall
2 provide the Court and Plaintiff with native Excel versions of the spreadsheets they submit.

3 Defendant shall file all they deem necessary to support their fees no later than March
4 30, 2020. Plaintiff shall file its objections to Defendant's accountings no later than April
5 14, 2020. Defendant shall file its response to the objection no later than April 22, 2020.
6 The Court will notify the parties if it requires a hearing on the amount of the fees.

7 **IT IS SO ORDERED.**

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9 Dated: February 24, 2020


10 **HON. ROGER T. BENITEZ**
11 United States District Judge
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