

**ALERT**

## Federal Circuit Patent Bulletin: *Oplus Techs., Ltd. v. Vizio, Inc.*

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April 10, 2015

*"Although the award of fees is clearly within the discretion of the district court, when, as here, a court finds litigation misconduct and that a case is exceptional, the court must articulate the reasons for its fee decision."*

On April 10, 2015, in *Oplus Techs., Ltd. v. Vizio, Inc.*, the U.S. Court of Appeals for the Federal Circuit (Prost, Moore,\* O'Malley) vacated and remanded the district court's refusal to award Vizio attorneys' and expert witness fees under 35 U.S.C. § 285, 28 U.S.C. § 1927, and the court's inherent power, following the district court's summary judgment that Vizio did not infringe U.S. Patents No. 6,239,842 and No. 7,271,840, which related to digital video signal technology. The Federal Circuit stated:

Section 285 provides: "The court in exceptional cases may award reasonable attorney fees to the prevailing party." When the district court issued its opinion, we had required that patent litigants establish entitlement to fees under § 285 by clear and convincing evidence. Since the district court issued its opinion, the Supreme Court rejected this requirement, holding that "nothing in § 285 justifies such a high standard of proof." This change in the law lowers considerably the standard for awarding fees. In light of this change in the law, we believe it appropriate to vacate and remand this case in order for the district court to reconsider the propriety of awarding fees.

The district court opinion details an egregious pattern of misconduct. Even Oplus's counsel "agree[s] that [the misconduct was] quite severe." Although an award of fees is within the discretion of the district court, nothing in the opinion or in the record substantiates the court's decision not to award fees. The court's opinion details Oplus's misconduct. Given that the district court found counsel's behavior "inappropriate," "unprofessional," "vexatious," and "harassing," it is difficult to imagine how Vizio had not incurred additional expenses defending against such filings. The district court explained that Oplus's litigation positions, expert positions, and infringement contentions were a constantly moving target, "a frustrating game of Whac-A-Mole throughout the litigation." Defending against a constantly moving target would logically have increased the expense of litigation for Vizio. The court also detailed Oplus's "abusive discovery strategy," explaining that "Oplus misused

the discovery process to harass Vizio by ignoring necessary discovery, flouting its own obligations, and repeatedly attempting to obtain damages information to which it was not entitled." Again, it seems that this sort of discovery abuse would increase litigation costs for Vizio. The court gave several examples, including Oplus's filing of motions to compel, which were "seriously contradictory and unreasonable" and sought to compel discovery that it was not entitled to and had never even requested. Here too it seems likely that additional litigation expenses would have been incurred.

After detailing the serious misconduct and concluding that the case was exceptional, the explanation the court gave for denying fees was that the "case has been fraught with delays and avoidance tactics to some degree on both sides." The court did not specify the delays or tactics and, at oral argument, counsel for Oplus was unable to articulate delays that were substantiated in the record, let alone actions that would warrant the court's denial. On appeal, "Oplus has not challenged any finding by the district court" or "any single thing that [the district court judge] said."

We have reviewed the record and cannot find a basis to support the court's refusal to award fees. Oplus argues fees are not warranted because Vizio did not promptly move for summary judgment. We see no unusual delay in this record. That Vizio did not move for summary judgment at the outset of litigation does not absolve counsel's uncontested litigation misconduct nor could it justify refusal to award fees after summary judgment was filed. In fact, Oplus admitted, it failed to address multiple noninfringement contentions in its summary judgment opposition. Rather than stipulating to noninfringement, counsel forced the court to consider its opposition, which was predicated on the presentation of contradictory expert testimony. This conduct caused additional process and wasted party and judicial resources.

Oplus argues that fees are not warranted because the court noted that motion practice followed normal litigation practice. Whether or not this was similar to a normal case in that there was discovery and dispositive motion practice does not mean that Vizio did not incur additional fees on account of counsel's misconduct. The discovery abuses, unprofessionalism, and changing litigation positions described by the court had to have increased expense and frustration for all concerned.

Oplus argues that fees are not warranted because the court found that Oplus's allegations against Vizio were not objectively baseless at filing. Oplus's reliance on this section of the court's decision is misplaced. The court was deciding whether it would "alternatively award attorney fees" because Vizio alleged that the case was brought in subjective bad faith and was objectively baseless, not whether the lack of objective baselessness weighed against awarding fees for litigation misconduct.

Finally, Oplus argues that the court's decision to deny fees was not due to the court's professed aversion to awarding fees. In light of the detailed findings of misconduct in this case, the lack of basis for denying fees and the recent change in the law related to fees by the Supreme Court (which lowered the standard for assessing entitlement to fees), we vacate and remand for reconsideration.

Although the award of fees is clearly within the discretion of the district court, when, as here, a court finds litigation misconduct and that a case is exceptional, the court must articulate the reasons for its fee decision. In light of the court's fact findings regarding the extent of harassing, unprofessional, and vexatious litigation, the change in legal standard by the Supreme Court, and the lack of sufficient basis to deny fees under § 285, we vacate and remand for the district court to consider whether and the extent to which fees are warranted. Because the court premised its decision regarding fees under § 1927 and its inherent power at least in part on its decision to deny fees under § 285, we vacate those rulings and remand for further proceedings.