



“District courts may determine whether a case is ‘exceptional’ in the case-by-case exercise of their discretion, considering the totality of the circumstances.” *Octane Fitness*, 134 S. Ct. at 1756; *see also Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014) (“[T]he determination of whether a case is ‘exceptional’ under § 285 is a matter of discretion.”); *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1324 (Fed. Cir. 2011) (“[W]e are mindful that the district court has lived with the case and the lawyers for an extended period.”). “After determining that a case is exceptional, the district court must determine whether attorney fees are appropriate,” which is within the Court’s discretion. *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1460 (Fed. Cir. 1998) (citations omitted). Ultimately, a party must prove entitlement to attorney fees only by a preponderance of the evidence. *Octane Fitness*, 134 S. Ct. at 1758.

Significantly, sanctionable conduct is not the standard for awarding fees under § 285. *Id.* at 1756. “[A] district court may award fees in the rare case in which a party’s unreasonable conduct—while not necessarily independently sanctionable—is nonetheless so ‘exceptional’ as to justify an award of fees.” *Id.* at 1757.

## **DISCUSSION**

NLV contends that this case is exceptional for two reasons: (1) the asserted patents are “plainly” invalid; and (2) Plaintiff engaged in “sue-and-settle behavior.” (Mot. at 4, 9.) Neither argument is persuasive in this case.

With regard to validity, the patents-in-suit withstood scrutiny on several different fronts. First, there was the covered business method petition filed against the patents-in-suit by NLV’s co-defendant, Tagged, in February 2015. The threshold arguments made in the petition were rejected by the PTAB, and the petition failed. Next, at claim construction, NLV moved to

invalidate the patents-in-suit on the basis that a dozen of the claim terms were indefinite. Those arguments were also rejected. Later at trial, the jury unanimously rejected NLV's claim that the patents-in-suit were anticipated or rendered obvious by the prior art. This track record (in addition to the statutory presumption of validity) belies NLV's contention that Plaintiff was "unreasonable" to think the patents-in-suit were valid. Indeed, throughout the course of this litigation several presumptively reasonable decision makers, including the Patent Trial and Appeal Board, the jury, and a sitting magistrate judge, rejected NLV's invalidity arguments. Though this Court ultimately found that both asserted patents were directed toward patent-ineligible subject matter, such a finding, without more, does not render this case exceptional.

Furthermore, this case was filed just months after the Supreme Court's decision in *Alice Corp. v. CLS Bank International*, 134 S. Ct. 2347 (2014). While instructing, *Alice* does not provide, in all instances, bright-line rules as to subject-matter eligibility. Indeed, this area of law continues to evolve, as subsequent decisions from the Federal Circuit shape the contours of the *Alice* framework. See, e.g., *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016); *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014). Here, NLV's motion suggests that Plaintiff should have known from the inception of this case that all asserted claims the patents-in-suit were "plainly" invalid. Decisions as to patent eligibility are often difficult. A finding of patent ineligibility does not in and of itself confer exceptional case status.

Finally, NLV paints Plaintiff as a litigant pursuing an intentional sue-and-settle strategy. This assertion is not supported in this case. The record demonstrates that Plaintiff was willing to litigate this case on the merits. In fact, until the case-dispositive order in favor of NLV, Plaintiff had prevailed on the merits at several junctures in the life of this case. Willingness to litigate on the merits is not indicative of a sue-and-settle litigant. Considering the totality of facts and

circumstances in this case, the Court concludes that the manner in which Plaintiff litigated this case does not give rise to a finding of exceptionality.

**CONCLUSION**

For the reasons set forth above, NLV's Motion for Attorneys' Fees (Dkt. No. 191) is **DENIED.**

**So ORDERED and SIGNED this 4th day of October, 2016.**

  
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RODNEY GILSTRAP  
UNITED STATES DISTRICT JUDGE