

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RECOGNICORP, LLC,

Plaintiff,

v.

NINTENDO CO. LTD., et al.,

Defendants.

CASE NO. C12-1873RAJ

ORDER DENYING NINTENDO'S
MOTION FOR RECOVERY OF
ATTORNEYS' FEES, COSTS, AND
EXPENSES

I. INTRODUCTION

This matter comes before the Court on Defendants, Nintendo Co. Ltd. and Nintendo of America, Inc.'s (collectively "Nintendo"), Motion for Recovery of Attorneys' Fees, Costs, and Expenses. Dkt. #133. Nintendo seeks to recover an award pursuant to section 285 of the Patent Act, 28 U.S.C. § 1927, and the Court's inherent power to grant attorneys' fees. *Id.* at 5-6. Plaintiff opposes Nintendo's motion by arguing that Nintendo has not demonstrated that this case is "exceptional," as is required for a recovery of fees under section 285 of the Patent Act, Nintendo has not demonstrated that Plaintiff acted in bad faith, as is required for an imposition

1 of sanctions under 28 U.S.C. § 1927, and Nintendo has not demonstrated that Plaintiff acted
2 vexatiously, in bad faith, wantonly, or oppressively, as is required for a recovery of fees
3 pursuant to the Court’s inherent powers to grant attorneys’ fees. For the reasons stated herein,
4 the Court agrees with Plaintiff; Nintendo’s motion is accordingly DENIED.

5 **II. BACKGROUND**

6 Background relevant to this matter was previously set forth in the Court’s Order
7 granting Nintendo’s Motion for Judgment on the Pleadings. *See* Dkt. #130 at 1-3. In summary,
8 Plaintiff brought this patent infringement suit against Nintendo. *See* Dkt. #1. On December
9 15, 2015, the Court granted Nintendo’s Motion for Judgment on the Pleadings. Dkt. #130.
10 Nintendo now seeks to recover approximately \$600,000 in attorneys’ fees, costs, and expenses
11 pursuant to section 285 of the Patent Act, 28 U.S.C. § 1927, and the Court’s inherent power to
12 award fees to a prevailing party. Dkt. #133 at 5-6. Nintendo argues that it incurred this amount
13 following Plaintiff’s continued litigation of this case after the Supreme Court issued its decision
14 in *Alice Corporation Pty. Ltd. v. CLS Bank International*, 134 S. Ct. 2347 (2014). *Id.* at 7-10.
15 The opinion in *Alice* was issued on June 19, 2014; Nintendo seeks to recover fees it incurred
16 between June 19, 2014, and December 15, 2015. *Id.* at 10.

17 **III. DISCUSSION**

18 Section 285 of the Patent Act allows courts to award reasonable attorney fees to
19 prevailing parties in “exceptional cases.” 35 U.S.C. § 285. A case is exceptional if it “stands out
20 from others with respect to the substantive strength of a party's litigating position (considering
21 both the governing law and the facts of the case) or the unreasonable manner in which the case
22 was litigated.” *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756
23 (2014). Courts must use their discretion to determine if a case, given the totality of the
24 circumstances, is exceptional. *Id.* Factors courts may consider in making this determination

1 include frivolousness, motivation, objective unreasonableness, and the need to compensate or
2 deter parties. *Id.* (citing *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534, n.19 (1994)). Because
3 section 285 does not impose an evidentiary burden, the party seeking fees need only demonstrate
4 that they are entitled to fees by a preponderance of the evidence. *See id.* at 1758. A finding of
5 exceptionality is “rare.” *Id.* at 1757.

6 Aside from the authority granted by statute, courts also possess the inherent power to
7 award attorneys’ fees when a losing party acts “in bad faith, vexatiously, wantonly, or for
8 oppressive reasons[.]”. *Aleyska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 258-59
9 (1975). A finding of bad faith is required for courts to impose sanctions pursuant to their
10 inherent powers. *Fink v. Gomez*, 239 F.3d 989, 993 (9th Cir. 2001).

11 An imposition of sanctions against counsel is also possible pursuant to 28 U.S.C. § 1927.
12 Section 1927 allows courts to assess the excess costs of a proceeding against an attorney, where
13 the attorney “so multiplies the proceedings in any case unreasonably and vexatiously.” 28
14 U.S.C. § 1927. “The key term in the statute is ‘vexatiously’; carelessly, negligently, or
15 unreasonably multiplying the proceedings is not enough.” *In re Girardi*, 611 F.3d 1027, 1061
16 (9th Cir. 2010). Unjustified proceedings that are intended to harass are considered “vexatious.”
17 *See Terrebonne, Ltd. of Cal. v. Murray*, 1 F. Supp. 2d 1050, 1055 (E.D. Cal. 1998) (“[T]he term
18 ‘vexatious’ has been defined as ‘lacking justification and intended to harass.’”).

19 The Court agrees that Nintendo’s recovery of attorneys’ fees, costs, and other expenses
20 pursuant to section 285 of the Patent Act is not warranted. First, Nintendo fails to demonstrate
21 that the substantive strength of Plaintiff’s litigation position was so meritless that it stands out
22 from other patent infringement actions. Nintendo sole argument to the contrary relies on the
23 Supreme Court’s opinion in *Alice Corporation Pty. Ltd. v. CLS Bank International*. Dkt. #133
24 at 7. In *Alice*, the Supreme Court held that the patent ineligible concept of intermediary

1 settlement could not be made patent eligible through generic computer implementation,
2 because the computer implementation did not transform the abstract idea of intermediary
3 settlement into a patent eligible concept. 134 S. Ct. at 2352. According to Nintendo, after
4 *Alice* Plaintiff should have known that its litigation position was weak and that continued
5 litigation was unreasonable because Plaintiff's patent, like the patents in *Alice*, relied on
6 generic computer implementation to make its ineligible concepts patent eligible. Dkt. #133 at
7 9-10, 13. In response, Plaintiff argues that its continued litigation of this suit was not
8 objectively unreasonable because Plaintiff presented reasonable arguments that explained why
9 its patent was indeed patent eligible under the two-prong test explained in *Alice*. Dkt. #137 at
10 9. The Court agrees with Plaintiff.

11 In response to Nintendo's motion for judgment on the pleadings, Plaintiff explained
12 why its patent was not directed to an abstract idea, as well as why its patent, even if it were
13 directed to an abstract idea, nonetheless contained an inventive concept. *Id.* at 14. Although
14 Plaintiff's arguments were ultimately rejected, the Court does not agree that this is sufficient
15 grounds for finding this case "exceptional." As explained by the Supreme Court in *Octane*
16 *Fitness, LLC. V. ICON Health & Fitness, Inc.*, it is the substantive strength, not the ultimate
17 success, of a party's litigation position that helps determine whether a case is "exceptional."
18 134 S. Ct. at 1756; also *SFA Sys., LLC v. Newegg Inc.*, 793 F.3d 1344, 1348 (Fed. Cir. 2015).
19 Here, Nintendo fails to convince the Court that Plaintiff's litigation position was so lacking in
20 merit that it warrants a finding of exceptionality. The Court also declines to find, as Nintendo
21 appears to advocate, that patent holders whose patents may be similar to the patent in *Alice*
22 should have to decide between voluntarily dismissing their suits or being assessed attorneys'
23 fees pursuant to section 285.

1 Nintendo also fails to demonstrate that Plaintiff litigated this suit in an unreasonable
2 manner. According to Nintendo, Plaintiff engaged in an “orchestrated attempt to corner
3 numerous companies,” so it could “threaten them with litigation, and extract quick settlements.”
4 Dkt. #133 at 13. In support of this position, Nintendo relies on *Edekka LLC v. 3balls.com, Inc.*;
5 Nintendo claims that Plaintiff’s litigation position is analogous to that of the plaintiff in *Edekka*
6 because Plaintiff’s litigation position was unreasonable and its litigation strategy was predatory.
7 Case Nos. 2:15-CV-541, 2:15-CV-585 JRG, 2015 WL 9225038 (E.D. Tex. Dec. 17, 2015); *see*
8 *id.* at 11-12. Nintendo argues that an award in its favor will deter Plaintiff’s “predatory
9 strategies.” *Id.* at 12. Plaintiff counters by arguing that Nintendo’s reliance on *Edekka* is
10 misplaced; *Edekka*, Plaintiff argues, is distinguishable because Plaintiff has not sued hundreds of
11 defendants, did not present untenable arguments, did not make low, expiring offers to settle, and
12 did not avoid defending its patents in court. Dkt. #137 at 12. The Court agrees with Plaintiff.

13 Nintendo fails to demonstrate that Plaintiff brought suit against it, and the defendants in
14 Plaintiff’s other suits, for the improper purpose of forcing settlements. In support of its position,
15 Nintendo points out that Plaintiff settled some of its suits within five months; this information
16 falls short of demonstrating that Plaintiff, like the *Edekka* patentee, brought suit as part of a
17 larger scheme to “‘exploit[] the high cost to defend complex litigation’ to extract ‘nuisance value
18 settlement[s]’ from defendants[.]” *Edekka*, 2015 WL 9225038 at *4 (internal citation omitted).
19 The Court also declines to find that the existence of other patent infringement suits brought by
20 Plaintiff necessarily indicates that Plaintiff brought the present suit as part of a larger
21 “orchestrated attempt” to extract multiple settlements. *See SFA Sys.*, 793 F.3d at 1351 (existence
22 of other lawsuits did not render a case exceptional where defendant did not demonstrate that suit
23 in question was brought for the purpose of forcing a settlement, or without the plaintiff’s
24 intention of testing the merits of its claims); Dkt. #133 at 13.

