SETTLEMENT DEMANDS CANNOT ESTABLISH "EXCEPTIONALITY" UNDER § 285 ABSENT BOTH OBJECTIVE AND SUBJECTIVE BASELESSNESS OF THE PATENT CLAIM

Courts have recently found that a settlement demand less than a Defendant's cost of litigation is a nuisance value case which is used as a factor to make a case exceptional. *Ortiz & Assocs. Consulting, LLC v. Vizio, Inc.*[1] However, Section 285 does not permit using a party's settlement demands, standing alone, as proof that a case is "exceptional." Fee-shifting in the context of alleged abusive patent enforcement is appropriate only if the underlying claim is both objectively and subjectively baseless; absent that showing, settlement conduct is legally irrelevant to exceptionality.

1. *Globetrotter* and the sham-litigation standard limit when enforcement conduct can be penalized

Globetrotter[2] applies the *Noerr-Pennington* / *Professional Real Estate*[3] "sham litigation" framework to patent enforcement communications. Under that framework a patentee's assertion of infringement and related pre-suit or settlement communications are protected activity unless the claim is a 'sham', meaning:

a. objectively baseless—"no reasonable litigant could realistically expect success on the merits"; and

b. Subjectively baseless / bad faith—brought to use the process itself as a weapon rather than to obtain a favorable judgment. *See Globetrotter*, 362 F.3d at 1375–78 (*adopting Professional Real Estate's* two-part test).

That same objective/subjective framework sensibly dictates when a court may treat patent-enforcement conduct as sanctionable—whether via state-law tort theories (preempted in *Globetrotter*) or via fee-shifting under § 285.

2. Section 285 "exceptionality" cannot be inferred merely from how a party negotiated

After Octane Fitness, § 285 authorizes fee awards in "exceptional cases," focusing on:

a. the substantive strength of a party's litigating position, and

b. the manner in which the case was litigated.

But in the specific context where a defendant points to settlement demands as proof of abuse, the dispositive question is still whether the claim itself was a sham—i.e., both objectively and

[1] No. 2024-1783, 2025 WL 3653227, at *6 (Fed. Cir. Dec. 17, 2025).
[2] *Globetrotter Software, Inc. v. Elan Computer Grp., Inc.*, 362 F.3d 1367, 1374–76 (Fed. Cir. 2004).
[3] *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59–60, 113 S. Ct. 1920, 1928, 123 L. Ed. 2d 611 (1993).

subjectively baseless—not whether the plaintiff negotiated hard, proposed "cost-of-defense" resolutions, or misjudged case value.

Professional Real Estate makes clear that the key inquiry is whether "an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome,"[4] not whether the settlement numbers were agreeable or aggressive. *Globetrotter* likewise protects "warnings about potential litigation" and efforts "to compromise the dispute" as "acts reasonably and normally attendant upon effective litigation," so long as the underlying claim is not sham. 362 F.3d at 1376–77. If the patent position is not objectively baseless and not pursued in bad faith, using settlement communications as independent evidence of "exceptionality" under § 285 would impermissibly punish protected petitioning activity.

3. *Blake* underscores that even small or nominal claims are legitimate, so settlement posture proves little about exceptionality

Blake v. Robertson[5] shows that a patent suit can be entirely legitimate even when it will support only nominal damages: The Court found validity and infringement, but, because the patentee could not segregate profits attributable to the patent in suit, held he was "entitled only to nominal damages."[6] The lack of substantial, provable damages did not make the suit improper or abusive; it simply limited the remedy. Blake thus confirms that the economic size of the claim—even if modest or nominal—does not render a patent action illegitimate. By the same token, the fact that settlement demands may be low, high, or key off the anticipated cost of defense says nothing, by itself, about whether the action is a sham. Using those demands as a proxy for "exceptionality," without first establishing objective and subjective baselessness, would conflate hard bargaining with bad faith and contradict *Blake's* recognition that even small claims are proper vehicles for enforcing patent rights.

4. Only sham-level conduct justifies treating settlement demands as relevant to § 285

The correct rule is:

(1) Step 1 – Merits: Determine whether the patentee's claim is objectively baseless. If the claim is at least colorable—i.e., a reasonable litigant could expect success on validity/infringement—there is no objective baselessness.
(2) Step 2 – Intent: Determine whether the patentee knew or should have known that its claim was baseless. If the patentee pursued the claim in good faith to obtain relief (even if mistaken), there is no subjective baselessness.

[4] 508 U.S. at 60.
[5] 94 U.S. 728 (1876).
[6] *Id*. at 734.

(3) Step 3 – Only if Step 1 and Step 2 is satisfied: In that narrow set of truly sham cases, settlement conduct may illustrate the patentee's improper purpose or the unreasonableness of its litigation tactics, and thereby support an "exceptional" finding.

But without the predicate showing that the lawsuit itself is both objectively and subjectively baseless, settlement demands cannot bootstrap an ordinary, good-faith patent dispute into an exceptional case:

Parties routinely propose settlements below or above expected trial outcomes, or keyed to defense costs; that is standard litigation economics. Treating such routine conduct as evidence of "exceptionality" would chill early resolution and undermine Globetrotter's protection for pre-suit warnings and "possible effort[s] to compromise the dispute."

Absent that threshold showing, a patentee's pre-suit and settlement communications are protected petitioning activity. The mere fact that Plaintiff made aggressive or cost-of-defense settlement proposals does not transform a non-frivolous infringement suit into an "exceptional" case. *Blake v. Robertson* confirms that even suits yielding only nominal damages are legitimate patent actions, 94 U.S. at 734; it follows that settlement posture in such suits cannot, without proof of objective and subjective baselessness, justify fee-shifting under § 285. The Court should therefore decline to treat Plaintiff's settlement demands as evidence of exceptionality in the absence of a demonstrated sham claim.