THE CONSIDERATION OF SETTLEMENT OFFERS IS ONLY PROPER WITH A SHAM LITIGATION FINDING

The recent tendency in patent cases to treat "nuisance value" settlement offers as evidence of abuse—and even as an independent basis for fee-shifting under 35 U.S.C. § 285—is doctrinally unsound. Properly understood, there is no legally meaningful category of "nuisance value settlement offer" separate from sham litigation. Once a patent claim clears the sham-litigation threshold—that is, once it is not both objectively and subjectively baseless—any settlement offer, including one pegged to the defendant's cost of defense, is ordinary, protected bargaining. It is not "exceptional" conduct and cannot, standing alone, justify fee-shifting.

This article explains why. First, the *Noerr-Pennington*/*Globetrotter* framework protects patent enforcement and settlement communications unless the suit is a sham. Second, *Octane Fitness* did not displace that sham-litigation floor when a party seeks to penalize settlement conduct under § 285. Third, *Blake v. Robertson* confirms that even small or nominal patent claims are entirely legitimate, so settlement amounts keyed to limited economics are not suspect. Finally, the modern development of "nuisance value" in patent practice shows it is simply standard litigation economics, not a distinct species of legal wrong.

Together, these points support a clear rule: absent sham litigation, there is no such thing as a "nuisance value settlement offer" in any doctrinally relevant sense.

I. Noerr-Pennington, Professional Real Estate, and Globetrotter: Settlement Conduct Is Protected Unless the Suit Is a Sham

The starting point is the well-established *Noerr-Pennington* doctrine, as applied in *Professional Real Estate Investors v. Columbia Pictures* and imported into patent law in *Globetrotter Software v. Elan Computer Group*.

Professional Real Estate held that litigation is immune from antitrust liability unless it is "sham" petitioning. A suit is a sham only if:

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

2. It is subjectively baseless—brought "with the intent to use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon."

Globetrotter takes that standard and applies it directly to patent enforcement communications. A patentee's infringement assertions, pre-suit threat letters, and efforts to settle are treated as petitioning activity, immunized unless the patent claim itself is a sham. The Federal Circuit emphasized that warnings about litigation and efforts "to compromise the dispute" are "acts reasonably and normally attendant upon effective litigation," protected so long as the underlying claim is not sham.

This article's core move is to link this settled immunity framework to § 285 fee-shifting. If patent enforcement and settlement communications are constitutionally protected petitioning unless the underlying claim is a sham, it follows that:

- Only sham-level cases justify penalizing enforcement communications as such—whether under state tort law (as *in Globetrotter*) or via fee-shifting under § 285.

In other words, "nuisance value" labels cannot create a new, lesser category of punishable conduct. Either the case is a sham—objectively and subjectively baseless—in which event settlement behavior may illustrate bad faith; or it is not, in which event that settlement behavior is immune from being treated as an independent wrong. Once this is appreciated, the supposed category of "nuisance value settlement offers" evaporates as a matter of law. What remains are ordinary, protected settlement proposals made in the shadow of non-frivolous litigation.

II. *Octane Fitness* Does Not Eliminate the Sham-Litigation Floor for Penalizing Settlement Conduct Under § 285

Proponents of using "nuisance value" offers to support fee awards often lean on *Octane Fitness*, which reoriented § 285 around a flexible, totality-of-the-circumstances inquiry. *Octane* held that an "exceptional case" is one that:

1. "stands out from others" with respect to the substantive strength of a party's litigating position, or

2. the unreasonable manner in which the case was litigated.

From this, some courts have inferred that any settlement demand perceived as "less than cost of defense" or "harassing" may be used as evidence of "exceptionality." That conclusion is a misreading of *Octane* and a direct affront to the *Noerr-Pennington/Globetrotter* framework.

Octane did not purport to alter constitutional or pre-existing immunity doctrines. It spoke only to how courts distinguish ordinary from exceptional cases for fee-shifting purposes. When the conduct alleged to be abusive consists of petitioning activity, even if below the cost of defense—asserting patent claims and negotiating settlement—*Octane* must be read in harmony with *Professional Real Estate* and *Globetrotter*. That means:

- The dispositive predicate question remains whether the underlying patent claim is sham, i.e., both objectively and subjectively baseless.

- Only after that threshold is satisfied may a court legitimately treat settlement conduct as probative of exceptionality.

Professional Real Estate itself frames the key inquiry as whether "an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome," not whether the plaintiff's proposed settlement number seems too low, too high, or keyed to defense costs. And

Globetrotter explicitly protects "warnings about potential litigation" and attempts at compromise as activities "normally attendant upon effective litigation."

To use settlement demands—without a finding of objective and subjective baselessness—as proof that a case "stands out" for purposes of § 285 would do precisely what *Noerr-Pennington* and *Globetrotter* forbid: penalize protected petitioning conduct. Thus, *Octane* cannot be read to authorize a freestanding "nuisance value settlement offer" category that justifies fees. It may permit courts to look at settlement conduct as part of the overall picture, but only once the sham-litigation floor has been crossed. Absent that, settlement communications remain immune and legally irrelevant to exceptionality.

III. Blake v. Robertson: Small or Nominal Patent Claims Are Legitimate, So Low Settlements Are Not Inherently Abusive

Blake v. Robertson, a 19th-century Supreme Court decision, powerfully undercuts the notion that a patent action becomes abusive—or "nuisance-level"—because it can yield only small or nominal monetary relief. In *Blake*, the Court found the patent valid and infringed. Yet because the patentee could not adequately segregate the profits attributable to the patented invention, the Court held he was "entitled only to nominal damages." That outcome did not prompt any suggestion that the suit was improper, vexatious, or abusive. To the contrary, the enforcement action was treated as entirely legitimate; the patentee's right to sue did not turn on whether a large damages award was available.

This lesson matters for contemporary debates over "nuisance value" settlements:

- If a patent suit that can yield only nominal damages is nonetheless a proper vehicle to vindicate patent rights, then the small economic size of a claim does not render it illegitimate.

- By extension, a patentee's willingness to settle for an amount below the defendant's anticipated litigation costs—or for what a defendant derides as "nuisance value"—does not, without more, imply bad faith or abuse. It may simply reflect limited provable damages, litigation risk, or proof problems of the sort present in *Blake*.

Blake therefore confirms that the economic scale of a patent dispute is a poor proxy for legitimacy. A case is not abusive merely because the rational settlement range is relatively low. Using settlement dollars alone as evidence of exceptionality not only ignores *Blake's* teaching—it effectively creates a de facto minimum economic threshold for legitimate patent enforcement that the Supreme Court has never imposed.

IV. The Reality of "Nuisance Value" in Modern Patent Practice: Standard Litigation Economics, Not a Separate Wrong

The term "nuisance value" has gained purchase in the modern patent landscape, particularly in discussions of non-practicing entities and high-volume assertion campaigns. In this environment, it is common to see plaintiffs offer to settle for amounts framed around a defendant's

projected defense costs: "pay X now, or spend 5X litigating." Defendants routinely characterize such proposals as "nuisance suits," and some courts have been tempted to treat them as indicative of bad faith, especially where the offers are repeated across many targets. But this rhetoric obscures a simple reality:

- Cost-of-defense settlement dynamics pervade all litigation, not just abusive cases.

In any lawsuit, rational actors compare:

- expected damages discounted by likelihood of success;

- litigation costs saved by settling; and

- opportunity costs, reputational issues, and risk tolerance.

Out of this calculation comes a negotiation range that often—quite sensibly—has little to do with the theoretical "full trial value" of the claim. Settlement offers below, at, or even above expected trial value are standard features of bargaining, driven by uncertainty and the desire to avoid further expense. None of that turns on whether the underlying claim is meritorious or sham.

Labeling an offer "nuisance value" because it approximates or undercuts defense costs is therefore economically descriptive but legally empty. Absent objective baselessness and bad faith, it tells us nothing about the legitimacy of the underlying claim. To transform such offers into evidence of "exceptional" misconduct risks:

- Chilling early settlement, because any discounted proposal might later be brandished as proof of supposed abuse; and

- Collapsing the distinction between hard bargaining and bad faith, effectively punishing parties for engaging in precisely the kind of cost-sensitive negotiation our system is designed to encourage.

Globetrotter's protection for pre-suit warnings and "possible effort[s] to compromise the dispute" recognizes that settlement outreach—often aggressive, sometimes anchored to cost of defense—is "normally attendant upon effective litigation." That protection cannot be squared with a doctrine that treats ordinary cost-of-defense offers as suspect simply because the defendant finds the economics unattractive.

V. A Coherent Framework: Why "Nuisance Value" Collapses into Sham Litigation

This article's proposed three-step framework makes explicit why "nuisance value settlement offers" have no independent doctrinal status once sham litigation is properly accounted for.

1. Step 1 – Objective merit:

Determine whether the patentee's claim is objectively baseless.

- If a reasonable litigant could expect success on validity and infringement, the claim is not objectively baseless.

- If no reasonable litigant could expect success, objective baselessness is present.

2. Step 2 – Subjective intent:

Determine whether the patentee knew or should have known the claim was baseless.

- If the patentee pursued the case in good faith to obtain relief—even if mistaken—there is no subjective baselessness.

- If the patentee used the process itself as a weapon, indifferent to the merits, subjective bad faith exists.

3. Step 3 – Only if both baselessness and bad faith are shown:

In that narrow class of truly sham cases, settlement conduct (including cost-of-defense or very low settlement demands) may be relevant to confirm improper purpose or the unreasonableness of tactics and thus support a § 285 fee award. Under this framework, "nuisance value" is not a category of wrongful settlement behavior that can be used if other categories are present. It functions, at most, as evidence within an already-sham case, but requires sham proof. Where Steps 1 and 2 are not satisfied—i.e., where the claim has at least colorable merit and was brought in good faith—any settlement offer, whether low, high, or pegged to defense costs, is irrelevant to exceptionality in a legal sense. It cannot bootstrap an ordinary patent dispute into a fee-shifting event.

Put simply:

- If the case is non-sham, "nuisance value settlement offer" is just pejorative rhetoric for what the law views as routine bargaining.

- If the case is sham, the wrong lies in the sham litigation itself; "nuisance" offers may illustrate that wrong but do not create a new one.

VII. Why the Ortiz Court's Reliance on "Nuisance Value" Is Not Supported by the Case Law

The Federal Circuit's nonprecedential decision in *Ortiz v. Vizio*[1] illustrates how the "nuisance value" label can be misused in a way that is inconsistent with the governing precedent it purports to apply. In Ortiz, the district court found the case exceptional under § 285 based on several factors: (1) the weakness of Ortiz's damages theory given the marking problem, (2) Ortiz's failure to meet discovery deadlines, (3) Ortiz's past pattern of filing and dismissing cases on the same patents, and (4) a settlement demand "below the cost of defense," which the court expressly

[1] *Ortiz & Assocs. Consulting, LLC v. Vizio, Inc.*, No. 2024-1783, 2025 WL 3653227, at *5–6 (Fed. Cir. Dec. 17, 2025).

characterized as "nuisance value." The Federal Circuit affirmed, approving the district court's consideration of the "nuisance value" demand as one factor in the totality-of-the-circumstances analysis. Ortiz thus treats a below-cost-of-defense settlement offer as probative of exceptionality, even though it never found Ortiz's claim objectively and subjectively baseless.

That use of "nuisance value" is not supported by the very cases *Ortiz* cites—*Eon-Net, Blackbird*, *Lumen View*, *SFA*, *Thermolife*, and *AdjustaCam*—or by *Globetrotter* and the *Noerr-Pennington* line. Properly read, those precedents do not recognize a free-standing "nuisance value settlement" category that, by itself, can move a non-sham patent suit into the "exceptional" bucket.

A. The key "nuisance" cases (Eon-Net, Blackbird, Lumen View) all involved sham-like, bad-faith conduct

Ortiz leans on three Federal Circuit cases where "nuisance value" language appears: *Eon-Net*, *Blackbird*, and *Lumen View*. But in each of those decisions, the "nuisance" settlement posture was *derivative evidence* of a much deeper problem: claims that were effectively sham—either objectively baseless, filed without factual investigation, or pursued with an express intent to exploit litigation costs rather than to vindicate rights.

1. *Eon-Net LP v. Flagstar Bancorp*[2]

The court affirmed fees where the patentee:

- sued on extraordinarily broad, implausible interpretations of its claims,

- destroyed or failed to preserve relevant documents, and

- "exploit[ed] the high cost to defend complex litigation to extract a nuisance value settlement."

In context, the "nuisance value" reference was not the basis for exceptionality; it was a symptom of a broader, abusive enforcement campaign that had no reasonable prospect of success on the merits. The litigation itself was paradigmatically sham-like, and the low settlement demands confirmed the improper intent. Notably, this was a pre-*Octant* case requiring clear and convincing evidence.

2. ***Blackbird Tech LLC v. Health In Motion LLC***[3]

Blackbird filed a weak case on a narrow patent, repeatedly shifted its theories, and pressed meritless positions in the face of clear invalidity/non-infringement evidence. The "nuisance value" language appears where the court notes:

[2] *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1323–28 (Fed. Cir. 2011).
[3] *Blackbird Tech LLC v. Health In Motion LLC*, 944 F.3d 910, 914–19 (Fed. Cir. 2019).

- Blackbird "made multiple settlement demands that were far less than the anticipated cost of defense," and

- that posture fit with its overall pattern of leveraging defense costs against a very poor claim.

Again, the fee award rested on the combination of substantively baseless positions and a predatory settlement strategy. The settlement posture was confirmatory—not independently dispositive.

3. *Lumen View Tech. LLC v. Findthebest.com, Inc.*[4]

Lumen View threatened and then filed suit on a patent theory the court later called "objectively baseless." The record showed:

- form-pleaded complaints,

- no meaningful investigation, and

- internal admissions that the goal was to extract quick, cheap settlements.

The panel summarized Lumen View's "predatory strategy" and found that its "motivation for filing suit was to extract a nuisance settlement." Once more, the gravamen of the problem was sham litigation—no reasonable basis for success, coupled with deliberate use of the process itself as a bludgeon. "Nuisance settlement" described the motive; it did not create a new legal category.

Taken together, *Eon-Net*, *Blackbird*, and *Lumen View* thus stand for a narrow proposition: in *already abusive* or sham-like cases, the fact that a patentee pursues cost-of-defense settlements can corroborate bad faith and justify deterrence. None of them hold that a below-cost-of-defense offer, standing alone, converts an otherwise colorable patent action into an "exceptional" case.

Yet Ortiz quotes these decisions as if they authorized treating any "nuisance value" offer as affirmative evidence of exceptionality, even where there has been no finding that the claim was objectively and subjectively baseless. That is an unwarranted extension.

B. *SFA*, *Thermolife*, and *AdjustaCam* expressly reject treating "many suits" or "low settlements" as inherently suspect

Ortiz also cites *SFA Systems*, *Thermolife*, and *AdjustaCam*, but those cases cut the other way: they caution against exactly the inference Ortiz draws.

1. ***SFA Systems, LLC v. Newegg Inc.*[5]**

The court emphasized:

[4] *Lumen View Tech. LLC v. Findthebest.com, Inc.*, 811 F.3d 479, 482–85 (Fed. Cir. 2016).
[5] *SFA Sys., LLC v. Newegg Inc.*, 793 F.3d 1344, 1349–52 (Fed. Cir. 2015).

- The mere existence of these other suits does not mandate negative inferences about the merits or purposes of this suit.

- A pattern of suing multiple defendants is relevant only where there is "a pattern of litigation abuses characterized by the repeated filing of patent infringement actions for the sole purpose of forcing settlements, with no intention of testing the merits." Thus, SFA requires more than volume and low settlements. It demands evidence of a sole settlement-extraction motive—i.e., essentially sham litigation. Ortiz nods to this language but does not show that Ortiz's case met that standard; nor does it find that Ortiz had no intention of testing the merits.

2. ***Thermolife Int'l LLC v. GNC Corp.***[6]

Thermolife explicitly warns:

- "filing a large number of suits does not, by itself, justify an inference of an improper motive."

Ortiz repeats that sentence but then allows a similar inference anyway by treating Ortiz's history of filings and dismissals, plus a below-defense-cost offer, as collectively probative of "nuisance value" abuse—again, without a finding that the claims were sham under *Globetrotter* / *Professional Real Estate* standards.

3. ***AdjustaCam, LLC v. Newegg, Inc.***[7]

AdjustaCam confronts the exact issue:

- "Asserting seemingly low damages against multiple defendants—or settling with defendants for less than the cost of litigation—does not necessarily make a case 'exceptional' under § 285."

- Low damages and cost-of-defense settlements can be "one factor," but do not themselves "make a case exceptional."

AdjustaCam thus confirms the article's point: "nuisance value" is, at most, background context that may be considered once the court has a foundation for concluding that the litigation was objectively weak and pursued in an unreasonable or bad-faith manner. It is not an independent trigger for exceptionality.

Yet in *Ortiz*, the Federal Circuit accepted the district court's framing of a below-cost-of-defense settlement as "nuisance value" and allowed it to weigh in the § 285 calculus without requiring any finding that the claim was sham or that Ortiz's pattern of suits met *SFA*'s "sole purpose of forcing settlements" standard. That is not what *AdjustaCam*, *SFA*, or *Thermolife* authorize.

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[6] *Thermolife Int'l LLC v. GNC Corp.*, 922 F.3d 1347, 1363–64 (Fed. Cir. 2019).
[7] *AdjustaCam, LLC v. Newegg, Inc.*, 861 F.3d 1353, 1361–62 (Fed. Cir. 2017).

C. The *Ortiz* panel disregarded the *Globetrotter* / *Noerr-Pennington* "sham litigation" floor for penalizing settlement conduct, protected speech

Most significantly, *Ortiz* never grapples with *Globetrotter* or the *Noerr-Pennington* / *Professional Real Estate* line, which establish a constitutional floor: petitioning activity—including pre-suit threats and settlement communications—is protected unless the litigation is a sham (objectively baseless and subjectively in bad faith). The "nuisance value" cases cited in Ortiz are all consistent with that floor when read carefully:

Under Globetrotter, this harmony makes sense: once a claim is found to have at least colorable merit and to be pursued in good faith, settlement discussions are protected "acts reasonably and normally attendant upon effective litigation." On that understanding, a cost-of-defense settlement is legally indistinguishable from any other bargaining move, unless and until the litigation is first shown to be sham.

Ortiz breaks that harmony. It allows a court to:

- label a below-cost-of-defense offer "nuisance value," and

- use that label as a meaningful factor in the § 285 analysis,

without first determining that the underlying suit was objectively and subjectively baseless.

That approach sub silentio retreats from the sham-litigation floor. It treats a patentee's economic bargaining choice—exactly the kind of petitioning-adjacent conduct *Globetrotter* protects—as probative of "exceptional" abuse, absent a prior finding of sham. Nothing in *Eon-Net*, *Blackbird*, *Lumen View*, *SFA*, *Thermolife*, or *AdjustaCam* supports that move.

D. Properly understood, *Ortiz's* "nuisance value" reasoning is an unsupported extension—and should not be followed

When the cited authorities are analyzed carefully, Ortiz's treatment of "nuisance value" cannot be reconciled with them:

- The "nuisance" label in *Eon-Net*, *Blackbird*, and *Lumen View* attaches only in the presence of sham-like conduct and predatory intent. It is descriptive, not doctrinal.

- *SFA*, *Thermolife*, and *AdjustaCam* explicitly refuse to draw negative inferences from multiple suits or low settlements in the absence of such abusive patterns.

- *Globetrotter* and *Professional Real Estate* require a showing of sham litigation before protected settlement communications can be penalized.

Ortiz, by contrast, allows a below-cost-of-defense settlement demand to help make a case "exceptional" without a finding of objective and subjective baselessness. That is a step beyond what any of these cases authorize. It converts an economically ordinary offer into legally meaningful "nuisance value" evidence, and in doing so, conflates hard bargaining with bad faith.

For that reason, Ortiz's use of "nuisance value" should be understood as a nonprecedential, fact-bound outlier—not as a sound restatement of the law. The better reading of the case law is that "nuisance value" has no independent doctrinal force: it is relevant, if at all, only once sham-level baselessness and improper purpose have already been established.

VI. Conclusion: No Legally Independent "Nuisance Value Settlement Offer" Category

When the relevant doctrines are viewed together—*Noerr-Pennington* and *Professional Real Estate*, *Globetrotter*, *Octane Fitness*, and *Blake v. Robertson*—the conclusion is straightforward:

1. Patent enforcement and related settlement communications are protected petitioning activity. They can be penalized only when the underlying litigation is a sham: both objectively and subjectively baseless.

2. *Octane's* "exceptional case" standard operates within that constitutional and doctrinal framework. It does not license courts to punish protected settlement conduct in the absence of sham-level baselessness.

3. *Blake* underscores that economic modesty—even to the point of nominal damages—does not make a patent suit improper. Settlement proposals that reflect modest claim value, litigation risk, or cost of proof are therefore not inherently suspect.

4. Modern "nuisance value" settlement practices in patent litigation are standard litigation economics, not a distinct wrong. They occur in meritorious and unmeritorious cases alike and cannot serve as a shortcut for proving abuse.

Accordingly, there is no such thing, in a legally operative sense, as a "nuisance value settlement offer" separate from sham litigation. Either the case satisfies the objective- and subjective-baselessness requirements of sham litigation, in which event settlement behavior may serve as corroborating evidence of bad faith; or it does not, in which event settlement proposals—however aggressively priced—remain protected, non-exceptional petitioning activity.

Courts that treat "nuisance value" settlement offers as an independent ground for § 285 fee-shifting risk undermining constitutional petitioning rights, chilling legitimate enforcement of even modest patents, and eroding the distinction between hard bargaining and bad faith. The better view, grounded in the doctrines canvassed above, is to insist on a threshold showing of sham litigation before settlement conduct can play any role in the exceptionality analysis. Absent that showing, "nuisance value" is merely a label—not a legal category.