IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

REALTIME ADAPTIVE STREAMING, LLC Plaintiff, v. SLING TV L.L.C., et al. Defendants.	CIVIL ACTION NO. 1:17-CV-02097 PATENT CASE

DEFENDANTS' MOTION TO FIND THIS CASE EXCEPTIONAL UNDER 35 U.S.C. § 285 AND FOR FEE SHIFTING OF ATTORNEYS' FEES

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 54(d)(2) and 35 U.S.C. § 285, Defendants—the prevailing parties—respectfully request this Court: (1) find this case to be exceptional; and (2) award Defendants their attorney fees incurred litigating this case after the stay was lifted, in the amount of $5,075,519.[1]

Throughout this case, Defendants steadfastly maintained that the asserted claims of the '610 patent are invalid for claiming ineligible subject matter. Realtime's refusal to re-evaluate its claims when Realtime knew or should have known of the eligibility problem with the '610 patent significantly increased Defendants' costs. Thus, this Court should find this case exceptional and order fee shifting, just like the Central District of California did in Realtime's case against Netflix.

II. FACTS AND TIMELINE

On December 6, 2017, Defendants moved to dismiss the amended complaint, Dkt. No. 32, for claims covering patent-ineligible subject matter. Dkt. 47 at 1. Specifically, Defendants argued, "Realtime's asserted patents claim the well-known and abstract concept of selecting a compression scheme based on characteristics of the data being compressed." *Id*. at 2. During the hearing, the

[1] Defendants provide a "fair estimate" of the amount sought. Rule 54(d)(2)(B)(iii). This motion is supported with affidavits (Exs. 1, 2), "a summary of relevant qualifications and experience" for each person for whom fees are claimed, "a detailed description of the services rendered, the amount of time spent, the hourly rate charged, and the total amount claimed." D.C.COLO.LCivR 54.3.

Court expressed doubts about the eligibility of the '610 patent:

> Maybe this is just an abstract concept. This doesn't sound like something you would patent. It doesn't sound like its technology. It just sounds like an idea.

Mar. 7, 2018 Hrg. Tr. at 9:9-14. At Realtime's urging, the Court chose to perform claim construction before deciding eligibility. *Id*. at 14:14-15 ("[W]e need to get these terms defined and then see where we are.") The Court construed claim terms, including the term "throughput of a communication channel," on January 11, 2019, Dkt. 151, and stayed the case shortly thereafter for *inter partes* review (which cannot decide § 101 issues). Dkts. 162, 167.

Concurrently, two other district courts held that Realtime's nearly identical claims from the '535 patent were unpatentable under § 101. *Realtime Adaptive Streaming, LLC* ("*RAS*") *v. Google, LLC*, No. 2:18-cv-03629, Dkt. 36 (C.D. Cal. Oct. 25, 2018); *RAS v. Netflix, Inc.*, No. 17-1692, Dkt. 48 (D. Del. Dec. 12, 2018) ("*Netflix*") (report & recommendation). In addition, the Federal Circuit also held that selecting a compression technique and converting data between formats are patent-ineligible abstract ideas. *Adaptive Streaming Inc. v. Netflix, Inc.*, 836 F. App'x 900, 901 (Fed. Cir. 2020).

At Realtime's urging, the Court lifted the stay on January 15, 2021. Dkt. 179. Shortly thereafter, Defendants wrote to Realtime's counsel to "place Realtime and its counsel on notice regarding the significant financial liability that Realtime and its counsel face [including under] 35 U.S.C. § 285, if Realtime continues to pursue this meritless litigation." Ex. 3 at 1. In the letter, Defendants highlighted the baselessness of asserting the '610 patent. *Id.* Defendants explained that in "both the District of Delaware and the Central District of California, numerous claims of the '535 patent—the parent patent to the '610 patent—were held patent ineligible under 35 U.S.C. § 101" and that "[e]ven a casual comparison of the '610 patent asserted claims to the now invalid

claims of the '535 patent reveals that the '610 asserted claims are likely to suffer the same ineligibility finding." *Id.* at 4. Defendants also explained that the Federal Circuit's *Adaptive Streaming* opinion showed "there can be no objective basis for continuing to litigate [the '610 patent] against Defendants . . . ." *Id.*

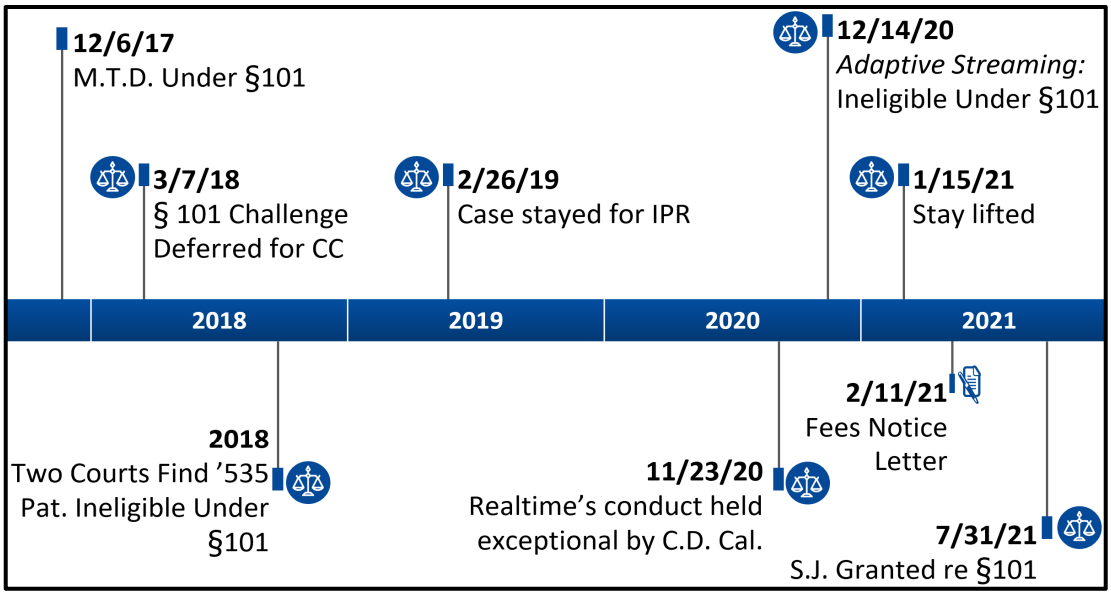
Realtime brushed off Defendants' letter, seeking to justify its claims by mischaracterizing the record and case law. Ex. 4. Realtime stated that "DISH moved to dismiss under § 101 and the Court denied that motion. Thus, you are threatening fees on an issue DISH lost on." *Id.* at 1. In fact, as discussed above, the Court merely accepted Realtime's request to decide the issue after claim construction. Realtime also claimed that "contrary to your false assertion—the Central District of California issued an order upholding the patent-eligibility of the related '535, '046, and '477 patents [which] strongly supports the validity of the '610 patent." *Id.* at 5. But as Defendants wrote to Realtime, *see id.* at 4, and as the Court later agreed in its order granting summary judgment, Dkt. 305 at 11–12, Realtime's position was unsupported.

Realtime's response also dodged Defendants' warnings about the *Netflix* and *Adaptive Streaming* opinions, asserting that Defendants "resort to misdirection by pointing to wholly unrelated cases not involving patents/claims conceived by the Realtime inventors." Ex. 4 at 6. However, these cases strongly evidenced that the '610 patent was ineligible. *See* Dkt. 305 at 4.

Realtime's blind pursuit of its claims—despite all indications they were baseless—forced Defendants to expend millions of dollars defending themselves from a case Realtime should have dropped before asking to lift the stay. Following discovery, Defendants filed for summary judgment that the '610 patent was ineligible, relying on the same arguments Defendants informed Realtime about months earlier. Dkt. 234. The Court granted Defendants' motion, finding that "as

in the *Adaptive Streaming*, *Google*, and *Netflix* cases, . . . the plaintiff has not come forward with evidence that shows a genuine dispute about a fact that is material to the resolution of the case." Dkt. 305 at 14. The Court explained that "Realtime focuses primarily on the term 'throughput of a communication channel' but that "[t]he absence of implementation details is evident on the face of the patent" and that Realtime did "not come forward with any evidence that raises a genuine dispute of material fact about whether consideration of the number of pending transmission requests was a new or inventive concept." *Id*. at 10, 14. The Court further recognized that several of Realtime's arguments were "conclusory" or "missing [] an explanation." *Id*. at 12.

A timeline of events relevant to this motion is illustrated below:



III. LEGAL STANDARD

35 U.S.C. § 285 instructs that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." Courts determine if a case is exceptional on a case-by-case basis considering the totality of the circumstances. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014). There is "no precise rule or formula for" determining whether a case is exceptional. *Biax Corp. v. Nvidia Corp.*, 626 Fed. App'x 968, 970-71 (Fed. Cir.

2015) (citing *Octane Fitness*, 572 U.S. at 554). Instead, an exceptional case is one that "stands out from others with respect to the substantive strength of a party's litigating position . . . or the unreasonable manner in which the case was litigated." *Id.* Post-*Octane Fitness*, courts routinely award attorneys' fees where the asserted patent clearly lacked subject matter eligibility. *See Inventor Holdings, LLC v. Bed Bath & Beyond, Inc.*, 876 F.3d 1372, 1379 (Fed. Cir. 2017) (affirming fees where there was "no uncertainty or difficulty in applying the principles set out in *Alice* to reach the conclusion that the [] patent's claims are ineligible").

IV. ARGUMENT

Realtime's unreasonable litigation strategy, coupled with its exceptionally weak merits positions, make this case exceptional. While Realtime's claims were always flawed, its claims became untenable before Realtime requested the stay be lifted. Further, Realtime's litigation conduct needlessly prolonged and multiplied the proceedings at great expense to Defendants. Defendants are the prevailing party, Dkt. 305 ("[a]s the prevailing party defendant is awarded . . . costs"), and Realtime's conduct leaves no doubt this case is exceptional.

A. Realtime's Claims Were Exceptionally Weak

1. Realtime's Arguments Were Untenable In Light of the Cases Holding the Related '535 Patent Claims Ineligible

Realtime's claims have always been exceptionally weak, but the weakness of its claims became abundantly clear before Realtime demanded that the Court lift the stay, in spite of the pending reexamination and substantial new question of patentability declared by the Patent Office. The law requires that a plaintiff ***reevaluate its case at all stages*** to avoid needless waste of resources. *See Highmark*, 572 U.S. at 561; *see also Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, No. 4:03-CV-1384, 2015 WL 6777377, at *2 (N.D. Tex. June 23, 2015) (reaffirming on

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