UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-81677-CIV-MARRA

ELECTRONIC COMMUNICATION
TECHNOLOGIES, LLC

Plaintiff,

v.

SHOPPERSCHOICE.COM, LLC

Defendant.
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ORDER

This Cause is before the Court upon Defendant's Motion for Attorney's Fees ("Motion") (ECF No. 82). Plaintiff filed a response in opposition to the Motion (ECF No. 91), and Defendant filed a reply in further support of its Motion (ECF No. 93). The Court has considered the Motion and the arguments of counsel and is otherwise fully advised in the premises.

U.S. Patent No. 9,373,261, owned by Plaintiff Electronic Communication Technologies, LLC, claims methods and systems for automating notification of delivery or pickup of a good or service. In 2016, Plaintiff sued Defendant, alleging that Defendant's order and shipping confirmation systems infringe Claim 11 of the '261 patent. In response, Defendant filed a Motion to Dismiss the Amended Complaint, arguing that the asserted claim is invalid because it covers subject matter ineligible for patent protection under 35 U.S.C. § 101. Applying the approach to section 101 adopted by the Supreme Court in *Alice Corp. Pty. v. CLS Bank Int'l*, 573 U.S. 208, 216 (2014), this Court concluded, as a matter of law, that the asserted claim is invalid because it is directed to a well-known concept, that is, automated notification of travel status, using conventional

technology. Therefore, the Court granted Defendant's Motion and entered judgment in Defendant's favor.

Defendant now seeks an award of attorney's fees as the prevailing party. Under the Lanham Act, "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." 15 U.S.C. § 1117. To be considered an "exceptional case" under the Lanham Act, the case must "'stand[] out from others,' either based on the strength of the litigating positions or the manner in which the case was litigated." *Tobinick v. Novella*, 884 F.3d 1110, 1118 (11th Cir. 2018) (adopting and applying the standard set forth in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014) to Lanham Act cases). An "exceptional" case is "one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." *Octane Fitness*, 572 U.S. at 554. District courts may determine whether a case is "exceptional" in the case-by-case exercise of their discretion, considering the totality of the circumstances. *Id.*

Here, considering the totality of the circumstances, the Court finds that this case cannot be considered "exceptional" as that term has been interpreted in *Octane* and *Tobinick*. First, the substantive strength of the litigating positions in this case does not render the case "exceptional" so as to warrant an award of attorney fees under the Lanham Act. This is not a situation where Plaintiff's litigating position was so obviously weak to render the case "exceptional." Although Plaintiff was ultimately unsuccessful, the Court had to consider the case law and the arguments of the parties before coming to an informed determination. There were no binding cases on point that stated that automated delivery notification is an abstract idea. Instead, the Court analogized delivery notification to the kinds of conventional business practices that have been found to be abstract ideas.

Moreover, the Court had to consider the effect of certain features, such as the use of authentication information and the interactive option to communicate with the pickup or delivery representative, to determine whether the asserted claim was directed to a transformative application of an abstract idea.

Second, the Court cannot conclude that Plaintiff exhibited the kind of unreasonable behavior that would make this case stand apart from others. This is not "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." 572 U.S. at 555.

Therefore, looking at the totality of the circumstances, the Court concludes that this case does not warrant an award of fees and non-taxable costs because it does not "'stand[] out from others,' either based on the strength of the litigating positions or the manner in which the case was litigated." *Tobinick*, 884 F.3d at 1118 (quoting *Octane Fitness*, 572 U.S. at 554).

Accordingly, it is **ORDERED AND ADJUDGED** Defendant's Motion for Exceptional Case Attorney's Fees (ECF No. 82) is **DENIED**.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 31st day of May, 2019.

KENNETH A. MARRA
United States District Judge