

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MICROSOFT MOBILE, INC. and MICROSOFT
MOBILE OY,

Plaintiffs,

v.

INTERDIGITAL, INC.; INTERDIGITAL
COMMUNICATIONS, INC.;
INTERDIGITAL TECHNOLOGY
CORPORATION; INTERDIGITAL PATENT
HOLDINGS, INC.; INTERDIGITAL
HOLDINGS, INC., and IPR LICENSING, INC.,

Defendants.

C.A. No.: 1:15-cv-723-RGA

JURY TRIAL DEMANDED

**OPENING BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND
MOTION TO STRIKE**

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I. INTRODUCTION

In the Complaint, Plaintiffs Microsoft Mobile Oy and Microsoft Mobile, Inc. (“Microsoft”) assert a claim under the Sherman Act based on InterDigital’s longstanding efforts to enforce its patent rights relating to 3G and 4G cellular wireless technologies, which are subject to industry standards determined by the 3GPP and ETSI standard-setting organizations. Most of Microsoft’s allegations relate to the lengthy history of litigation between InterDigital and Nokia that has been ongoing since 2005; Microsoft became the successor of Nokia when it acquired Nokia’s handset business in 2014. For the past decade, InterDigital has sought to enforce its patent rights and has made diligent, good faith efforts to negotiate a patent license with Nokia on FRAND terms and conditions in the face of Nokia’s steadfast refusal to license (which Microsoft continued after the acquisition). Following trials in three separate International Trade Commission (“ITC”) investigations, all of the Administrative Law Judges rejected Nokia’s and Microsoft’s assertions that InterDigital failed to comply with FRAND commitments, and, in the most recent ITC case, Microsoft was determined by the ALJ to be an unwilling licensee who refuses to take a license.

Notably, Microsoft’s Complaint, for all its obfuscating jargon about “supracompetitive” royalties and “patent hold-up,” nowhere pleads that Microsoft has ever paid a dime in royalties to InterDigital (“supracompetitive” or otherwise). Rather, Microsoft has simply ignored InterDigital’s license requests and has refused to pay any royalties. There is no “patent hold-up” where Microsoft has chosen to avail itself of the self-help remedy of infringing any applicable InterDigital patent rights and proceeding to use 3G and 4G cellular wireless standards to manufacture its cellular phones without obtaining a license. In fact, as determined by ALJ Essex in the ITC, Microsoft is engaging in improper *reverse* hold-up against InterDigital, which occurs when manufacturers of standardized products refuse to negotiate licenses for SEPs in an effort to “evade the putative licensee’s obligation to fairly compensate the patent holder.” *See* U.S. Department of Justice and U.S. Patent and Trademark Office Policy Statement on Remedies For Standards-Essential Patents Subject to Voluntary F/RAND Commitments at 7 (Jan. 8, 2013).

Notwithstanding the decade-long history of lawsuits among the parties involving numerous claims and counterclaims relating to FRAND and standards-setting activities for 3G/4G cellular wireless technologies, Nokia/Microsoft never asserted a purported Sherman Act claim until now. Perhaps not coincidentally, Microsoft filed this lawsuit on August 20, 2015 – just eight days before the August 28 target date in the ITC 613 Remand Investigation, when the Commission would issue its decision on whether to affirm the ALJ’s finding of a violation of Section 337 and recommendation to exclude Microsoft’s accused products. Accordingly, it appears that Microsoft’s belated Sherman Act claim was filed simply as a tactic to gain leverage in the event of an adverse ITC decision.

The Complaint should be dismissed because Microsoft’s allegations fail to state a Sherman Act claim. Microsoft does not adequately allege the essential elements of monopoly power and exclusionary conduct. Further, although Microsoft’s antitrust claims are based on allegations of fraud, the Complaint also failed to plead with Rule 9(b) specificity. Because Microsoft’s Sherman Act claim is predicated on InterDigital’s patent enforcement activity, including through filing legitimate lawsuits, it is also barred by the *Noerr-Pennington* doctrine, which immunizes defendants from antitrust liability for exercising their First Amendment right to petition the government. Microsoft has also failed to plead any cognizable antitrust injury, as it does not allege it has ever paid any royalties to InterDigital, and indeed its only allegation of injury relates to payment of litigation costs and fees – further confirming that Microsoft’s antitrust claim is based on InterDigital’s protected petitioning activity. The Court should also strike Microsoft’s improper prayers for relief, and its claims for any alleged damages arising prior to the applicable statute of limitations date.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Prior Actions Between the Parties

This action arises against a background of an unusually long and complicated procedural history. In 2005, Nokia filed a lawsuit against InterDigital in the District of Delaware claiming that InterDigital’s statements to ETSI concerning potentially standards-essential patents for 3G

cellular technology violated the Lanham Act, along with other related claims. *See* Case No. 05-0016-JJF. That case is currently stayed. In 2007, InterDigital filed a complaint in the ITC asserting infringement of certain patents (the 613 Investigation), along with a parallel action in the District of Delaware that has been stayed since the outset.¹ *See* Case No. 07-0489-SLR.

InterDigital later filed two more ITC investigations in 2011 and 2013 (the 800 and 868 Investigations), along with parallel actions in the District of Delaware that are assigned to this Court. The 800 Investigation parallel action (Case No. 11-0654-RGA) was stayed at the outset. The 868 Investigation parallel action (Case No. 13-0010-RGA) was not stayed upon filing, and litigation proceeded until recently, when the Court granted the parties' stipulation to stay the action pending appeal of the USPTO *inter partes* review decision on the '244 patent. Case No. 13-0010, D.I. 536. Nokia/Microsoft asserted numerous counterclaims in the 13-0010 action, which are based on the same facts as the Sherman Act claim raised by Microsoft in this action. The Court already dismissed several of the counterclaims in the 13-0010 case with prejudice: the California Unfair Competition Law counterclaim; the counterclaim seeking a declaratory judgment that InterDigital is promissory estopped from seeking exclusionary relief; the counterclaim seeking a declaration of implied license; and the counterclaim for equitable estoppel. *See id.* at D.I. 42 (order dismissing counterclaims). The Court also dismissed the declaratory judgment counterclaims seeking determination of a "FRAND rate" for U.S. essential patents on jurisdictional grounds, as Nokia/Microsoft did not agree to be bound by the "FRAND rate" and the requested declaratory judgment would serve no useful purpose. *InterDigital Commc'ns v. Nokia Corp.*, No. 1:13-cv-00010-RGA, 2014 U.S. Dist. LEXIS 72389 (D. Del. May 28, 2014). The counterclaims that remain in the 13-0010 case after the dismissal orders consist of: (i) counterclaims for breach of a contract between InterDigital and the ETSI standard-setting organization, and (ii) counterclaim for declaratory judgment of patent misuse.

¹ *See* 28 U.S.C. § 1659 (mandatory stay available when a parallel ITC action is pending if invoked by defendant).

B. The Results of the ITC Investigations

There have been three ITC Investigations initiated by InterDigital against Nokia/Microsoft regarding 3G/4G wireless patents, all of which resulted in trials before Administrative Law Judges. In the 800 Investigation, the 868 Investigation, and the 613 Remand Investigation, the ITC ultimately found no violation of Section 337 due to patent non-infringement and/or invalidity, and therefore entered no exclusion orders against Nokia/Microsoft. However, in those investigations, Nokia/Microsoft raised the same arguments as in this case concerning InterDigital's alleged breach of FRAND commitments, and those issues were tried in three separate trials. In each and every investigation, Nokia/Microsoft's FRAND arguments were rejected.² Following full trials that encompassed the live testimony of multiple fact and expert witnesses, thousands of documentary exhibits, and hundreds of pages of pre- and post-trial briefing, the ALJs determined that the respondents failed to establish any breach of FRAND commitments by InterDigital. *See In the Matter of Certain Wireless Devices With 3G Capabilities and Components Thereof*, Inv. No. 337-TA-800, Initial Determination, 2013 WL 3961230 (June 28, 2013); *In the Matter of Certain Wireless Devices With 3G and/or 4G Capabilities and Components Thereof*, Initial Determination, 2014 WL 2965327 (June 13, 2014); *In the Matter of Certain 3G Mobile Handsets and Components Thereof*, Inv. No. 337-TA-613, Initial Determination on Remand, 2015 WL 6561709 (Apr. 27, 2015).

Specifically, in the 800 Investigation, ALJ Shaw rejected respondents' argument that "InterDigital's entire licensing scheme is grounded in bad faith given that InterDigital in this and similar proceedings seeks injunctions based on essential patents while knowing full well that injunctive relief should be available only for non-essential patents." 2013 WL 3961230, at *233

² Even where the ALJs found patents not to be infringed, and therefore non-essential and not subject to FRAND obligations, ITC practice required them to make findings on respondents' FRAND defenses and public interest arguments, in the event that the patents were to be later found valid and infringed (for example, upon Commission review).

(citations, internal quotations omitted). The ALJ found that respondents failed to show any authority for the proposition that the ITC may not investigate Section 337 violations involving alleged standards-essential patents. *Id.* at *235. In addition, ALJ Shaw rejected respondents' claims that they had been "discriminated" against, holding that "[t]he FRAND nondiscrimination requirement prohibits 'unfair discrimination,' but it does not require uniform treatment across licensees, nor does it require the same terms for every manufacturer or competitor." *Id.* ALJ Shaw also expressly rejected Nokia's claim of an alleged breach of FRAND commitments based on InterDigital's offer of a worldwide rather than a single-country license. *Id.* Ultimately, the ALJ rejected all of respondents' assertions of FRAND violations by InterDigital. *Id.*

In the 868 Investigation, ALJ Essex likewise held that "[t]he evidence presented does not support the Respondents' position that InterDigital has violated a FRAND obligation by filing this complaint at the ITC." 2014 WL 2965327, at *81. Further, while respondents argued that "by having an exclusion order hanging over the negotiations, there is a risk of 'patent holdup': that is[,] the owner of the IPR may obtain remuneration beyond the value of the IP, because it is a standard," the ALJ found that "[t]here is no evidence that is the case here." *Id.* Instead, "[t]hese Respondents chose [to] take the actions that led to the allegation of infringement rather than follow ETSI policy for obtaining a license." *Id.* at *78. ALJ Essex noted that respondents seek to use FRAND as a "sword to strike down legal remedies and to hold their own duties at bay as long as possible." Finding that "[i]t is not in the public interest to support this," ALJ Essex found in favor of InterDigital on the FRAND issues. *Id.* at *112.

Most recently, in the 613 Remand Investigation, ALJ Essex found that "[t]here is no evidence in the case that IDC was not attempting to negotiate in good faith, nor any evidence that they were refusing to work towards a FRAND license." 2015 WL 6561709, at *23. In addition, the ALJ found "there is no evidence of holdup" and that "[t]he obligation that InterDigital has taken has been fulfilled." *Id.* The ALJ also reviewed the evidence that Microsoft refused to negotiate for a FRAND license with InterDigital, and found that "[i]n failing to negotiate in a meaningful way, and refusing to take a license, [Microsoft] is currently an unwilling licensee . . .

.” *Id.* at *26. “Where a respondent uses the technology covered by a patent, and refuses to take a license to the technology or refuses to negotiate in a meaningful way there is reverse holdup. . . . Throughout this case, and in its briefs the respondents have repeatedly made the claim that [InterDigital has] failed to make an offer on FRAND terms, and that their offers have been FRAND compliant. This is not supported by the evidence, and the statements cannot be made in good faith.” *Id.* at *25. “Other evidence that supports the finding of reverse holdup is the clear gain that occurs daily for [Microsoft] . . . Each day that the respondents use the patents without taking a license, [InterDigital] loses money that it will not be able to recover.” *Id.* at *26.

In short, Nokia and Microsoft have now failed three times to prove any breaches of FRAND obligations or any alleged “patent hold-up” by InterDigital.

III. MICROSOFT FAILED TO ALLEGE ESSENTIAL ELEMENTS OF ITS SHERMAN ACT CLAIM

a. Insufficient allegations of monopoly power. Microsoft’s sole claim in its Complaint is for monopolization under Sherman Act § 2. In asserting such a claim, one of the essential elements is “possession of monopoly power in the relevant market.” *Queen City Pizza, Inc. v. Domino’s Pizza, Inc.*, 124 F.3d 430, 437 (3d Cir. 1997); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1353 (Fed. Cir. 1999). Microsoft has alleged no market in which InterDigital has monopoly power, and Microsoft’s complaint should therefore be dismissed under Federal Rule of Civil Procedure 12(b)(6).

To be sure, Microsoft does use the phrase “relevant market.” It says: “[T]he relevant markets are the markets for technologies covered by the InterDigital patents . . . that are essential, or are alleged to be essential, to the 3G and 4G cellular standards . . . , together with all other alternative technologies” Compl. ¶ 38. Microsoft also uses the phrase “monopoly power.” It alleges that, “[o]nce ETSI adopts technology for a cellular standard, the owner of *each essential patent used in that standard* obtains monopoly power in a relevant technology market.” *Id.* ¶ 39 (emphasis added).

The fatal defect in these and Microsoft's other deficient allegations is that Microsoft nowhere asserts that InterDigital has an essential patent for any 3G or 4G technology. Absent allegations that InterDigital patents are in fact "essential," there is no basis for Microsoft's alleged relevant market. And absent allegations that ETSI has adopted a standard for which InterDigital holds an actually "essential patent used in that standard," there can be no monopoly power based on Microsoft's allegations.

The closest Microsoft comes to identifying essential patents is a table in Paragraph 44, with declarations attached as exhibits 1-19. But the declarations say only that InterDigital possesses intellectual property that "may be" essential. *E.g.*, Compl., Ex. 1. And Paragraph 44 itself states only that "InterDigital made submissions . . . declaring that certain of its patents or patent applications *may be or become essential*" *Id.* ¶ 44 (emphasis added).

The Complaint includes no allegations indicating whether or not any of the thousands of patents reflected in the 19 declarations is in fact "essential." Indeed, nowhere in the Complaint does Microsoft allege that any InterDigital patent is essential to any standard. And since actual essentiality is a necessary predicate to the possession of monopoly power under the Complaint's allegations, *id.* ¶ 39, Microsoft's Complaint is insufficiently pleaded. A defendant cannot defend a monopolization case without knowing what market it supposedly monopolized. *Cf. Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 321-22 (3d Cir. 2007) (affirming dismissal of antitrust claim as "too speculative" where it was based in part on the assumption "that SDOs will adopt B3G and 4G standards incorporating Qualcomm's IPR as essential elements").

Possession of monopoly power in a relevant market is the most basic requirement of any claim under Sherman Act § 2. Microsoft's failure to allege this essential element requires dismissal for failure to state a claim.

b. Exclusionary conduct. Compounding the monopoly power deficiency, Microsoft fails also to allege the essential element of anticompetitive exclusionary conduct. *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004). The "exclusion" alleged here is the purported exclusion of alternative technologies that, Microsoft claims, would have been

adopted by ETSI in the absence of InterDigital's conduct. But Microsoft refuses to identify any of the "other alternative technologies" that were not adopted by ETSI as a result of the alleged anticompetitive conduct, Compl. ¶¶ 38, 40, as the law requires. *Rambus Inc. v. FTC*, 522 F.3d 456, 463-67 (D.C. Cir. 2008). Thus, in *Apple Inc. v. Samsung Elecs. Co.*, the court dismissed Apple's Sherman Act § 2 claim because "Apple . . . has failed to allege sufficient facts to support a plausible inference that . . . a viable alternative technology performing the same functionality would have been incorporated into the UMTS standard." No. 11-CV-01846-LHK, 2011 WL 4948567, at *6 (N.D. Cal. Oct. 18, 2011). There, as here, "Apple's allegations are merely conclusory statements that '[h]ad Samsung properly disclosed the existence of its IPR, the relevant SSO would have selected a viable alternative technology.'" *Id.* That was insufficient: "Without more, for example, factual allegations that there were other technologies considered by the SSO at the time of standard setting, Apple has not met its burden under the pleading standards set forth in Fed. R. Civ. P. 8." *Id.*; see also *Apple Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 WL 1672493, at *5 (N.D. Cal. May 14, 2012) (after amendment, "for *each* of Samsung's technologies adopted as part of the UMTS standard, Apple alleges that pre-standardization there existed alternative substitutes for the technologies covered by Samsung's patents") (emphasis added); *ChriMar Sys. v. Cisco Sys.*, 72 F. Supp. 3d 1012, 1018 (N.D. Cal. 2014) (dismissing Sherman Act counterclaim based on alleged standards fraud that did not contain allegations about competing technologies).

Microsoft's failure to identify any relevant technology that would have been adopted as an alternative to each essential patent but for the claimed exclusionary conduct equally warrants dismissal under Rule 12(b)(6).

IV. MICROSOFT'S FAILURE TO STATE THE ALLEGED FRAUD WITH PARTICULARITY WARRANTS DISMISSAL

As Microsoft's claim for monopolization under Sherman Act § 2 is predicated on allegations of fraudulent behavior by InterDigital, it is required to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). Microsoft has not done so. The

complaint contains no specific allegations regarding the fraudulent conduct on which Microsoft's claim rests. Rather, the Complaint simply rests on broad, general statements without alleging any actual, particularized facts demonstrating fraud.

Although antitrust claims generally are not subject to the pleading requirement of Rule 9(b), the Third Circuit has found a heightened standard to be applicable to a complaint in which "the antitrust claim [was] based on fraud," noting that "fraud must be pled with particularity in *all* claims based on fraud." *Lum v. Bank of Am.*, 361 F.3d 217, 220, 228 (3d Cir. 2004) (emphasis in original).

Microsoft has not met this requirement. The failure to plead any alleged fraudulent acts concerning the specific relevant market in which InterDigital has monopoly power means that there is no way to tell whether there was any fraud resulting in monopolization of that market. Any analysis of Microsoft's claims, and InterDigital's ability to defend itself, requires Microsoft to identify the specific market and the corresponding fraud on which its claim is based. *See Apple v. Samsung*, 2011 WL 4948567, at *4. Although Microsoft alleges in a conclusory manner that InterDigital had a fraudulent intent because it knew at the time it made ETSI declarations that it had no intention of licensing on FRAND terms, it provides no facts demonstrating intent at the time the declarations were made. *See, e.g.*, Compl. ¶ 45 (alleging "InterDigital concealed its intent to engage in hold-up," with no factual support). Although "intent" may be alleged generally under Rule 9(b), there still must be "sufficient underlying facts from which a court may reasonably infer that a party acted with the requisite state of mind." *Exergen Corp. v. Wal-Mart Stores*, 575 F.3d 1312, 1327-29 (Fed. Cir. 2009).

There is nothing in Microsoft's complaint revealing which of the InterDigital declarations it has attached were fraudulent, how and why they were fraudulent, or how ETSI was deceived into adopting any particular standard incorporating any particular patent. Nothing in Microsoft's complaint alleges facts with particularity demonstrating that InterDigital's statements to ETSI were false when made. Microsoft's allegations that InterDigital obtained monopoly power

through fraudulent representations to ETSI are made in purely conclusory terms. Rule 9(b) requires more.

V. THE SHERMAN ACT CLAIM IS BARRED BY THE NOERR-PENNINGTON DOCTRINE

A. *Noerr-Pennington* Provides Immunity From Antitrust and Other Tort Claims For Actions Undertaken to Enforce Patents

The First Amendment guarantees the right to petition the government for redress of grievances. U.S. Const. amend. I. Indeed, the Supreme Court has emphasized that the right to petition is “one of the most precious of the liberties safeguarded by the Bill of Rights,” and that “the right is implied by the very idea of a government, republican in form.” *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (citations, internal quotations omitted). The *Noerr-Pennington* doctrine, based on First Amendment principles, provides immunity from antitrust and other tort claims for acts of petitioning, such as filing lawsuits. *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 56, 66 (1993) (“*PRE*”) (barring antitrust claim premised on assertion of copyright lawsuit). *Noerr-Pennington* immunity applies to filed litigation as well as “acts reasonably and normally attendant upon effective litigation” such as threats of litigation, pre-suit demand letters, and settlement offers. *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983); *see also Glass Equip. Dev., Inc. v. Besten, Inc.*, 174 F.3d 1337 (Fed. Cir. 1999);³ *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 935 (9th Cir. 2006); *Primetime 24 Joint Venture v. Nat'l Broad. Co.*, 219 F.3d 92, 100 (2d Cir. 2000); *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1560 (11th Cir.1992); *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 850-51 (1st Cir. 1985).

³ Federal Circuit law governs antitrust claims to the extent “premiered on the bringing of a patent infringement suit,” while regional circuit law governs other aspects of antitrust claims not unique to patent law. *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1068 (Fed. Cir. 1998).

Here, Microsoft predicates its antitrust claim on an allegation that InterDigital seeks to enforce its patents against Microsoft via lawsuits and “threats” of court or agency exclusion orders:

InterDigital supports its hold-up and discrimination against Standards implementers, like Microsoft, by threatening them with exclusion and other prohibitive orders that would prevent the importation into the United States of any products that include Standards-compliant technology. Since 2007, InterDigital has pursued a campaign of multiple, sequential infringement actions under 19 U.S.C. § 1337 at the International Trade Commission against the Nokia Devices and Services business, which is now owned by Microsoft. In these infringement actions, InterDigital uses patents that InterDigital declared as essential or potentially essential to the 3G and 4G Standards

Compl. ¶ 70. However, Microsoft’s allegations concerning pursuit of litigation or threats of litigation cannot form the basis of a Sherman Act claim. “Under the *Noerr-Pennington* doctrine, a patent owner who asserts its rights through a patent infringement action is generally immune from antitrust liability.” *Magnetar Techs. Corp. v. Six Flags Theme Parks, Inc.*, No. 07-127-LPS, 2011 WL 678707, at *2 (D. Del. Feb. 18, 2011) (holding proposed Sherman Act claim against patent holder to be barred by *Noerr-Pennington* immunity); *see also In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1327 (Fed. Cir. 2000). Accordingly, courts have found antitrust and other tort claims based on patent enforcement conduct to be barred by *Noerr-Pennington* immunity, including in the context of a patent owner’s assertion of allegedly standards-essential patents. *See In re Innovatio IP Ventures, LLC Patent Litig.*, 921 F. Supp. 2d 903, 909-922 (N.D. Ill. 2013) (dismissing RICO, unfair competition and other tort claims premised on assertion of standards-essential patents based on *Noerr-Pennington* immunity); *Apple, Inc. v. Motorola Mobility, Inc.*, 886 F. Supp. 2d 1061, 1076 (W.D. Wis. 2012) (holding on summary judgment that antitrust claim was barred by *Noerr-Pennington* immunity where “Apple contends that its claim under § 2 of the Sherman Act arises out of Motorola’s ‘abuse of the standard-setting process’ and ‘Motorola’s deceptive conduct and failure to offer a [fair, reasonable and nondiscriminatory] license.’”) (brackets in original, citation omitted).

Indeed, application of the *Noerr-Pennington* doctrine is particularly apt in the context of an antitrust action based on a claim that an alleged SEP-owner has attempted to monopolize a market by means of lawsuits seeking injunctions:

[T]he *Noerr-Pennington* doctrine most assuredly does protect a SEP holder that sues for an injunction or threatens to do so, for the fundamental reason that petitioning is protected by the First Amendment and the court (or the ITC) works as a gatekeeper against requests for injunctions that would harm the public, just as the legislature works as a gatekeeper balancing the interests affected by a petition for anticompetitive legislation. Asking for the relief alone does not monopolize the market because courts independently assess the proper outcome.

Douglas H. Ginsburg, Taylor M. Owings, & Joshua D. Wright, *Enjoining Injunctions: The Case Against Antitrust Liability for Standard Essential Patent Holders Who Seek Injunctions*, The Antitrust Source at 5-6 (Oct. 2014).

In light of the paramount importance of the First Amendment right to petition, the circumstances in which *Noerr-Pennington* immunity can be vitiated are extremely narrow. As the Supreme Court has explained, “[w]e crafted the *Noerr-Pennington* doctrine—and carved out only a narrow exception for ‘sham’ litigation—to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances.” *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1757 (2014); *see also Magnetar*, 2011 WL 678707, at *2-3 (Supreme Court has recognized only sham litigation and *Walker Process* fraud in procurement of a patent as exceptions to *Noerr-Pennington* immunity). A finding of sham litigation thus requires meeting the exceedingly high bar set forth by the Supreme Court’s two-part test announced in *PRE*: first that the lawsuit was both “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits,” and then, only if the first prong is established, that the lawsuit is subjectively baseless in that it “conceals an attempt to interfere directly with the business relationships of a competitor through the use [of] the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.” *Magnetar*, WL 678707, at *2 (citation, internal quotations omitted).

This extraordinarily difficult showing required for a finding of sham litigation is necessary to vindicate not only the First Amendment right to petition, but also the Constitution’s

provision to Congress of the power to secure for inventors exclusive rights in their discoveries, as implemented by the federal Patent Act. U.S. Const. art. I, § 8, cl. 8 (granting Congress power to secure for inventors “the exclusive Right to their . . . Discoveries”); 35 U.S.C. §§ 1-376. “Since a principal purpose of the patent system is to provide innovators with a property right upon which investment and other commercial commitments can be made, absent the *PRE* criteria the patentee must have the right of enforcement of a duly granted patent, unencumbered by punitive consequences should the patent’s validity or infringement not survive litigation. . . . The law recognizes a presumption that the assertion of a duly granted patent is made in good faith; this presumption is overcome only by affirmative evidence of bad faith.” *C.R. Bard, Inc. v. M3 Sys.*, 157 F.3d 1340, 1369 (Fed. Cir. 1998) (citation omitted); *see also Nobelpharma*, 141 F.3d at 1068 (whether conduct in procuring or enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws is to be decided as a question of Federal Circuit law).

B. The Complaint Does Not Plead An Exception to *Noerr-Pennington*

1. Microsoft Fails to Allege Sham Litigation

Microsoft failed to adequately plead that InterDigital’s patent enforcement activity alleged in the Complaint was a “sham” under the two-prong criteria of *PRE*. Microsoft’s allegations are not sufficient under the ordinary standards of *Twombly/Iqbal*,⁴ and certainly are not sufficient under the “heightened pleading standard” that courts have applied to plaintiffs seeking to allege an exception to *Noerr-Pennington* immunity. *Or. Nat. Res. Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991). “This heightened level of protection accorded petitioning activity is necessary to avoid ‘a chilling effect on the exercise of this fundamental First Amendment Right.’ Conclusory allegations are not sufficient to strip a defendant’s activities of *Noerr-Pennington* protection.” *Id.* (citation omitted).

⁴ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Here, Microsoft fails to adequately allege “objective” or “subjective” baselessness.⁵ The Complaint’s statement that “InterDigital also has had no objective basis . . . to expect that it will ultimately prevail on its requests for exclusionary relief” (Compl. ¶ 77) does not correctly state the Supreme Court’s criteria. The test is an objective one that refers not to an individual litigant’s beliefs, but rather to whether an “objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome.” *PRE*, 508 U.S. at 60. Further, “existence of probable cause to *institute* legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation”; there is no further inquiry into how later developments in the litigation may affect assessment of chances of success. *Id.* at 62 (emphasis added). The 613 Investigation referenced by Microsoft in the Complaint was instituted in 2007, yet Microsoft includes no allegations about any purported “objective baselessness” at that time. Compl. ¶ 77.

Objectively, there can be no question that InterDigital’s patent enforcement lawsuits have had at the very least a colorable basis. Indeed, this Court has presided over the related No. 13-1010 patent infringement case (and the similar No. 13-0009 *InterDigital v. ZTE* patent case in which InterDigital received favorable jury verdicts of infringement on three patents), and has had the opportunity to observe that these cases have asserted reasonable arguments presented by capable counsel. They can surely be said to have at least a colorable basis and are not “objectively baseless.” Similarly, all of InterDigital’s ITC actions referenced in the Complaint were litigated through trial. None was dismissed on an early motion to terminate or on summary determination (the ITC equivalents of motions to dismiss and summary judgment), and InterDigital in fact *prevailed* both in its 2012 Federal Circuit appeal and at the ALJ level on

⁵ Microsoft does not adequately allege objective baselessness, and accordingly the Court need not examine subjective baselessness. *PRE*, 508 U.S. at 60. However, even if the Court did examine this prong, Microsoft’s allegations do not demonstrate that InterDigital had a motivation to interfere with a competitor. Microsoft did not allege that Microsoft and InterDigital are competitors, and in fact, alleged that InterDigital did not want to “secure exclusion” against Microsoft. Compl. ¶ 75. Microsoft’s attempt to allege subjective motivation by noting that the Court dismissed its improper effort to obtain a declaratory judgment of “FRAND rates” also fails, as this allegation has no bearing on motivation to interfere with a competitor. Compl. ¶ 76.

remand in the 613 Investigation.⁶ In fact, the ALJ found *Microsoft's* positions in that case to be lacking in good faith, not InterDigital's. 613 Remand ID, 2015 WL 6561709, at *25, 35.⁷

Although the ITC actions did not ultimately result in findings of violation or exclusion orders in favor of InterDigital, a mere lack of success on the merits must not be confused with “objective baselessness.” As the Supreme Court has cautioned, “when the antitrust defendant has lost the underlying litigation, a court must resist the understandable temptation to engage in *post hoc* reasoning by concluding that an ultimately unsuccessful action must have been unreasonable or without foundation.” *PRE*, 508 U.S. at 60 n.5 (internal citation and quotation marks omitted). Even where lawsuits are unsuccessful, patent owners have a First Amendment right to file infringement lawsuits in a genuine effort to seek redress, and are immune from antitrust liability based on such lawsuits, “even though such a suit may have an anticompetitive effect”. *Indep. Serv. Orgs*, 203 F.3d at 1326.

Further, the idea that baseless lawsuits could “coerce” patent defendants into “capitulation to . . . abusive licensing demands” (Compl. ¶ 77) is not plausible, as there is no reason for a defendant to agree to an unfavorable settlement of a baseless lawsuit in which it is certain to prevail. While Microsoft asserts that the “expenses” of litigation threatened to “coerce” it into acceding to “abusive licensing demands” (*id.*), it never explains how, for a multibillion dollar company like Microsoft, the comparatively minor expenses of lawsuits could conceivably “coerce” such a result. Tellingly, Microsoft does not and cannot allege that it actually *did* take a license, belying its claims of purported “coercion.”

⁶ *InterDigital Commc'ns Inc. v. Int'l Trade Comm'n*, 690 F.3d 1318 (Fed. Cir. 2012); 613 Remand ID, 2015 WL 6561709, at *35-36 (finding in favor of InterDigital and recommending exclusion order).

⁷ While courts have found that preliminary successes in litigation are not necessarily determinative of non-sham status (*see FilmTec Corp. v. Hydranautics*, 67 F.3d 931, 938 (Fed. Cir. 1995)), this fact is nevertheless strongly persuasive in finding lawsuits not to be objectively baseless. *See id.* (finding FilmTec's suit not to be objectively baseless where trial court found in its favor); *see also Twin City Bakery Workers & Welfare Fund v. Astra Aktiebolag*, 207 F. Supp. 2d 221, 224 (S.D.N.Y. 2002); *Harris v. Custom Builders, Inc. v. Hoffmeyer*, 834 F. Supp. 256, 261-62 (N.D. Ill. 1993).

Any attempt to allege that InterDigital's litigation has been a sham would also be implausible because it is entirely inconsistent with the Complaint's theory of antitrust liability, pursuant to which Microsoft claims that it faces a threat of "exclusion from the marketplace" due to patent enforcement litigation filed by InterDigital. Compl. ¶ 84; *see also id.* ¶ 70. According to Microsoft's "patent hold-up" theory, InterDigital has market power because it can use its patents to prevent manufacturers from using industry standards and thereby "hold them up" for excessive royalties. *Id.* ¶¶ 28-30. Yet "sham litigation," which by definition cannot succeed, could never result in Microsoft being excluded from the market by any injunction or exclusion order. A risk of exclusion from the market due to a SEP could only arise where the patent owner can assert at least a colorable, non-baseless patent lawsuit.⁸ And that is precisely the situation in which *Noerr-Pennington* provides immunity.

2. Microsoft Fails to Allege A *Walker Process* Claim

Microsoft's Complaint includes brief, conclusory allegations about InterDigital's conduct in procuring a single patent, U.S. Patent No. 7,941,151 (the "'151 patent"). Compl. ¶ 47-50 (alleging that InterDigital "misappropriated" technology claimed in the '151 patent). Assuming this is an effort to allege the sort of *Walker Process*-type antitrust claim that could be exempt from *Noerr-Pennington* immunity due to fraudulent procurement of a patent at the PTO, it likewise fails. **First**, it lacks the specificity of pleading required of such claims. *See, e.g., Medimmune, Inc. v. Genentech, Inc.*, 427 F.3d 958, 967 (Fed. Cir. 2005), *rev'd on other grounds*, 546 U.S. 1169 (2007) (*Walker Process* fraud must be pleaded with Rule 9(b) specificity); *Dippin' Dots, Inc. v. Mosey*, 476 F. 3d 1337 (Fed. Cir. 2007) (*Walker Process* claim requires a more stringent showing of fraud in procurement of patent than mere inequitable conduct). **Second**, it suffers the same deficiency as a purported "sham litigation" claim: Microsoft's theory

⁸ Indeed, as set forth above, Microsoft's theory requires it to plead that InterDigital has essential patents that are required for use in an industry standard. *See supra* Section III. Enforcement of such patents, which by definition are infringed by use of an industry standard, certainly could not be considered a "sham."

depends on a claim that Microsoft can be excluded from the market by a standards-essential patent, which allegedly allows InterDigital to “hold up” Microsoft to obtain excessive royalties. But to the extent Microsoft could show that the ‘151 patent was fraudulently-obtained and unenforceable, as would be required for such a claim, it obviously could not result in an exclusion order or injunction. *Third*, under *Walker Process*, the assertion of a fraudulently obtained patent is not itself an antitrust violation; it is simply one element of a Sherman Act claim, and Microsoft has pleaded nothing that would establish the rest of the elements with respect to the ‘151 patent specifically. *Walker Process Equip., Inc. v. Food Machinery & Chem. Corp.*, 382 U.S. 172, 174 (1965) (enforcement of a patent procured by fraud on the Patent Office may violate § 2 of the Sherman Act “provided the other elements necessary to a § 2 case are present”). *See supra* Sections III-IV.

C. The Sherman Act Claim Should Be Dismissed Based on *Noerr-Pennington* Immunity

Microsoft’s Sherman Act claim, which seeks to impose treble-damages liability upon InterDigital for its good faith patent enforcement efforts, must not be allowed to proceed. Courts have recognized time and again the chilling effect that claims like this one impose upon Constitutional rights, and have conferred immunity under *Noerr-Pennington* for that very reason. If Microsoft’s claim is not barred, patent owners will suffer the *in terrorem* effect of the threat of claims for ruinous damages from corporate behemoths like Microsoft, and will thereby be deterred from pursuing meritorious actions to enforce their patents. As set forth above, Supreme Court precedent does not allow this result.

In this case in particular, Microsoft, along with its predecessor Nokia, rebuffed InterDigital’s licensing efforts for almost a decade, all the while generating profits from selling 3G/4G cellular wireless products complying with industry standards without paying a dime in royalties to InterDigital. Now, Microsoft is seeking to impose treble damages liability on InterDigital for nothing more than seeking to enforce duly granted patents and petitioning the courts for redress. Of course, Microsoft was afforded every opportunity to raise its assertions of

“patent hold-up” and “breach of FRAND obligations” in the ITC actions when it opposed exclusionary relief, and such issues were fully tried, briefed, and considered in those proceedings. Courts serve a gatekeeping function that ensures that no purported “patent hold-up” can occur in such circumstances, because any defenses to exclusionary relief based on FRAND obligations will be considered and adjudicated. Because the “threat of exclusion” due to SEPs cannot become a reality unless and until a court orders it, and good faith petitioning of courts is immune from antitrust liability, Microsoft cannot premise its antitrust claim on InterDigital’s patent enforcement efforts.

VI. MICROSOFT FAILS TO ALLEGE INJURY-IN-FACT

As an essential element of a Sherman Act Section 2 claim, Microsoft must allege causal antitrust injury: an injury-in-fact to Microsoft that also constitutes injury to competition caused by the defendant’s predatory or anticompetitive behavior:

“[A] plaintiff must prove a causal connection between [the antitrust violation] and actual damage suffered.” *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267, 1273 (3d Cir.1995); *see also Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 483 (3d Cir.1998) (“To recover damages, an antitrust plaintiff must prove causation, described in our jurisprudence as ‘fact of damage or injury.’” (citations omitted)); II Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 360c2, at 195 (“The plaintiff must show actual injury that was ‘caused’ by the violation.”).

Callahan v. A.E.V., Inc., 182 F.3d 237, 250 (3d Cir. 1999); *see also Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 92 (3d Cir. 2011) (“It is a basic tenet of antitrust law that a cause of action will not lie if the plaintiff has not been harmed.”). Here, Microsoft fails to allege an injury that it suffered caused by InterDigital’s alleged anticompetitive actions.

Section 4 of the Clayton Act allows private party antitrust actions to be initiated by any person “injured in his business or property” by reason of antitrust law violations. 15 U.S.C. § 15(a). The Complaint alleges no injury-in-fact to Microsoft from alleged actions of InterDigital. Although Microsoft alleges that the proposed royalty rates offered by InterDigital were unreasonably high and/or discriminatory (Compl. ¶¶ 56-61), Microsoft fails to allege that it has ever *paid* such royalties to InterDigital. InterDigital’s proposed royalties, therefore, cannot have caused any injury to Microsoft. *See Apple*, 886 F. Supp. 2d at 1076 (no evidence that Apple

“suffered any antitrust injury as a result of Motorola’s license demand” where “Apple refused to pay” the royalties sought by Motorola). Nor is Microsoft in any imminent danger of paying “unreasonably” high royalties. To the contrary, Microsoft has steadfastly refused to pay any royalties to InterDigital for 3G/4G products, and InterDigital cannot force Microsoft to pay royalties short of obtaining a judgment in litigation. Thus, Microsoft will never pay “unreasonable” royalties: to the extent InterDigital prevails in litigation that results in royalty payments, it will be pursuant to a court determination that has taken into account any applicable FRAND commitments. Indeed, not only has Microsoft not been injured by InterDigital’s conduct, as an active participant in the 3G/4G device market, Microsoft has presumably earned significant revenue from selling infringing devices without paying royalties (while many of its competitors have done so). Microsoft’s complaint describes the *opposite* of injury.

The Court should dismiss Microsoft’s Sherman Act claim as deficient, because it lacks any cognizable allegations of injury. Microsoft’s rote, conclusory allegation that it has suffered unspecified “irreparable injury to its business and property” (Compl. ¶ 90) is not sufficient to plead a “plausible” antitrust claim, as required by *Twombly*. The only allegation that even approaches a specific form of harm allegedly suffered by Microsoft is the assertion that its injury “includes the litigation fees and costs necessary to avoid the payment of supra-competitive licensing terms and exclusion from the marketplace for Standard-compliant products.” Compl. ¶ 84. Yet by characterizing its alleged antitrust injury as consisting of payment of “litigation fees and costs,” Microsoft confirms that its antitrust claim is based on InterDigital’s protected petitioning activity, which means that its antitrust claim is barred by the *Noerr-Pennington* doctrine. *See supra* Section V; *Apple*, 886 F. Supp. 2d at 1076 (rejecting antitrust claim where Apple “identifie[d] no other damages except litigation fees and expenses” its antitrust claim was therefore “premised on Motorola’s attempt to enforce its patents,” which was privileged conduct protected by First Amendment and *Noerr-Pennington* doctrine).

VII. PRAYERS FOR RELIEF C, D, AND F SHOULD BE STRICKEN

A. Microsoft's Prayers for Relief are Overreaching and Seek Remedies That Are Unavailable for Their Claim As Pleaded

Microsoft seeks unprecedented, overbroad remedies that have no bearing on its alleged antitrust claims or remedying harm allegedly suffered by Microsoft:

- “A declaration that each of InterDigital’s U.S. patents declared by it to be essential to the Standards (the “U.S. SEPs”) is unenforceable.” (Paragraph C)
- “A declaration that any and all contracts or agreements that InterDigital has entered into in furtherance of its unlawful conduct are void.” (Paragraph D)
- “Injunctive relief requiring that InterDigital: (1) make available to Microsoft a non-confidential license to its U.S. SEPs on FRAND terms as determined by a court; and (2) disclose to Microsoft the terms and conditions pursuant to which it has licensed or offered to license its SEPs.” (Paragraph F)

The Court may strike from a pleading any “immaterial” or “impertinent” matter. Fed. R. Civ. P. 12(f).

The function of a 12(f) motion to strike is to avoid expenditure of time and money that necessarily arises from litigating spurious issues by disposing of those issues prior to trial. *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir.), cert. denied, 509 U.S. 903, 113 S.Ct. 2992, 125 L.Ed.2d 687 (1993). “Immaterial matter is that which has no essential or important relationship to the claim for relief or the defenses being pleaded.” 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1382, at 706-07 (2d ed. 1990). “Impertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question.” *Id.* at 711

Delaware Health Care v. MCD Holding Co., 893 F. Supp. 1279, 1291-92 (D. Del. 1995). Pursuant to this authority, courts have stricken requests for relief that are immaterial and impertinent, including when there is no basis or authority for such relief. *Id.* at 1292 (striking prayer for relief where plaintiff proffered no authority for the basis or relevance of such a petition in the context of an antitrust suit). Here, there is no basis and no authority for granting the relief sought by Microsoft as a remedy in an antitrust case.

B. Paragraphs C and D of the Prayer for Relief Should Be Stricken Because Microsoft Lacks Standing to Assert These Remedies, and the Court Should Not Exercise Declaratory Judgment Jurisdiction Over These Claims

To have standing to assert a claim, Article III requires that a plaintiff satisfy three elements: 1) the plaintiff must have suffered an injury in fact that is a) concrete and particularized and b) actual or imminent; 2) there must be a causal connection between the injury and the conduct complained of; and 3) it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Microsoft has no standing under Article III to seek the declaration sought in Paragraph C that each of InterDigital’s U.S. patents declared by it to be essential to standards is unenforceable.⁹ This request apparently encompasses thousands of patents, yet Microsoft alleges nothing in the Complaint to support a claim of unenforceability as to each of them. Likewise, Microsoft has no standing to request the relief set forth in Paragraph D, seeking a declaration that any and all contracts or agreements InterDigital has entered into *with third parties* are void. *See, e.g., Rottlund Homes of New Jersey, Inc. v. Saul, Ewing, Remick & Saul, LLP*, 243 F. Supp. 2d 145, 153-54 (D. Del. 2003) (nonparties generally lack standing to sue on contracts). Microsoft has not alleged any injury as a result of contracts or agreements with entities other than Microsoft, and Microsoft has no standing to seek to invalidate contracts to which it is not a party. Such relief would significantly affect the legal rights of many companies who have not been joined in this lawsuit and who have had no notice of the requested judgment. The Court should strike Microsoft’s improper requests for relief.

Further, because Microsoft seeks declaratory judgments in its prayer for relief, it must comply with the Declaratory Judgment Act (as Microsoft acknowledges in Paragraph 21 of the Complaint where it invokes 28 U.S.C. §§ 2201-02 as a basis for jurisdiction). The Court should decline to exercise declaratory judgment jurisdiction over the requested declarations because the

⁹ As discussed previously, Microsoft also fails to plead that InterDigital declared any patents “to be essential,” as the declaration forms it attached to the complaint state only that the listed patents “may be” or “may become” essential. Compl., Exs. 1-19.

requirements of the Act are not met. These claims for relief fail under the Third Circuit’s test in *Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 411 (3d Cir. 1992), under which the court must examine the “‘adversity of interest’ between the parties, the ‘conclusivity’ that a declaratory judgment would have on the legal relationship between the parties, and the ‘practical help, or utility,’ of a declaratory judgment.” *Id.* Further, with respect to the requested declarations of patent unenforceability, Federal Circuit precedent holds that the “threshold question for declaratory judgment jurisdiction is ‘whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.’” *Microsoft Corp. v. DataTern, Inc.*, 755 F. 3d 899, 903 (Fed. Cir. 2014).

Here, Microsoft has not established a substantial controversy of sufficient immediacy to support the declarations it seeks. The Complaint fails to allege facts supporting a present controversy concerning unenforceability of *all* of InterDigital’s U.S. patents disclosed to standards-setting organizations, nor has it included allegations setting forth the basis of the alleged unenforceability under the patent laws. Microsoft also fails to allege a controversy between Microsoft and InterDigital that could lead to declarations concerning the enforceability of InterDigital’s agreements with third parties who are not involved in this litigation. In addition, the scope of the declaratory judgments sought by Microsoft is also highly impractical and unwieldy, relating to potentially thousands of patents and dozens or hundreds of various kinds of agreements. Microsoft’s requests for declaratory judgment thus fail under the factor for establishing declaratory judgment jurisdiction that assesses the “practical help, or utility” of the requested declarations. Finally, declaratory judgment jurisdiction is discretionary. 28 U.S.C. § 2201(a) (court “may declare” rights of parties); *Step-Saver Data Systems, Inc. v. Wyse Tech.*, 912 F.2d 643, 646-47 (3d Cir. 1990) (“Even when declaratory actions are ripe, the Act only gives a court the power to make a declaration . . . ; it does not *require* that the court exercise that power.”) (emphasis in original). The Court can and should decline to exercise jurisdiction over the requests for declaratory judgment in light of the impractical, overreaching, and irrelevant

nature of the claims for relief. *Cf. InterDigital Commc'ns v. Nokia Corp.*, No. 1:13-cv-00010-RGA, 2014 U.S. Dist. LEXIS 72389 (D. Del. May 28, 2014).

C. Paragraph F of the Prayer for Relief Should Be Stricken

Microsoft's request in Paragraph F for an injunction requiring InterDigital to "make available a non-confidential license to its U.S. SEPs on FRAND terms" and to disclose to Microsoft the terms of its confidential licenses with third parties, in violation of confidentiality agreements with the third parties, is not a proper request for relief. First, the Court has already dismissed Microsoft's claim seeking a declaration of FRAND terms for InterDigital's U.S. SEPs. *InterDigital Commc'ns*, 2014 U.S. Dist. LEXIS 72389. Microsoft's request for an order requiring InterDigital to "make available a non-confidential license to its U.S. SEPs on FRAND terms" is the same claim under another guise, and should be stricken. This prayer for relief would not serve to remediate the alleged antitrust violation, but rather would allow Microsoft to continue infringing if it chose to decline the license to be "made available." Second, Microsoft's unprecedented request to obtain access to the terms of InterDigital's confidential license agreements with third parties – many of whom are Microsoft's direct competitors – for disclosure to Microsoft's own in-house competitive decision-makers is not a remedy for an antitrust violation. Rather, it is an effort by Microsoft to gain an advantage over its competitors in the handset business by rifling through its competitors' confidential licensing information and using that information to its own advantage.¹⁰ Microsoft's highly improper and anticompetitive request for relief should be stricken.

¹⁰ Indeed, Microsoft itself routinely asserts in litigation that its licensing information is highly sensitive and cannot be disclosed to competitors. *See, e.g.*, Decl. of Tanya Moore in Support of Non-Party Microsoft Corp.'s Mot. to Seal Confidential License and Terms, *Apple Inc. v. Samsung Elecs. Ltd.*, No. 11-cv-1846-LHK (N.D. Cal. July 26, 2012), ECF No. 1395 (terms of Microsoft's license with Samsung including "amount of license payments and royalties" are "highly sensitive confidential information of Microsoft that, if revealed to the public and Microsoft's competitors . . . would substantially harm Microsoft").

VIII. MICROSOFT'S CLAIMS ARISING FROM ALLEGED INJURIES PRIOR TO AUGUST 20, 2011 SHOULD BE DISMISSED AS BARRED BY THE FOUR-YEAR STATUTE OF LIMITATIONS

The statute of limitations for a Sherman Act claim is four years. 15 U.S.C. § 15b. In the Complaint, Microsoft alleges conduct by InterDigital at least as far back as 2001, including participation in the ETSI standard-setting organization. Compl. ¶ 44. To the extent any of Microsoft's claims for relief allegedly accrued prior to August 20, 2011 (four years prior to filing the Complaint), they should be time-barred. *Pa. Dental Ass'n v. Medical Service Ass'n of Pa.*, 815 F. 2d 270 (3d Cir. 1987) (limiting relief to injury occurring within four-year statute of limitations). Thus, although Microsoft also alleges more recent conduct within the limitations period, its claims for damages cannot be based on any injury arising earlier than the limitations date. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 495-502 (1968). Accordingly, Microsoft's prayer seeking damages or other relief should be barred to the extent the alleged injury arose before August 20, 2011.

IX. CONCLUSION

For the reasons stated herein, InterDigital's motion to dismiss and motion to strike should be granted.

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