

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----x
LOTES CO., LTD.,

12-cv-7465 (SAS)

Plaintiff,

ECF CASE

v.

HON HAI PRECISION INDUSTRY CO., LTD. et al.,

Defendants.
-----x

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED COMPLAINT

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I. INTRODUCTION

Defendants seek to dismiss all seven counts of the First Amended Complaint (“FAC”) under Fed. R. Civ. P. 12(b)(6). Defendants take the position in their motion to dismiss (“Motion”) that all claims against the Defendants are not properly pled and thus fail as a matter of law. (Motion at 1) (Dkt. No. 29). Defendants’ burden under Rule 12 is high, and Defendants fail to meet it.

Defendants mischaracterize this case as an attempt to interfere with an ongoing Chinese patent infringement case. That is simply wrong. Although events overseas triggered this litigation, this case is about a world-wide patent license covering a technical standard. Lotes is asking this Court to enforce contracts breached by the Defendants, with New York forum-selection clauses, concerning a specification for computer connectors largely developed in the United States, and relating to products that incorporate those connectors and that are overwhelmingly shipped into the United States. These contractual breaches are part of a concerted effort by Defendants to dominate the relevant U.S. computer connector markets in violation of antitrust laws. The computer connectors at issue are known as Universal Serial Bus (“USB”) 3.0, the latest generation of computer connectors, which allow computers to connect to practically every device that needs to exchange data with a computer, including cell phones, memory sticks, and digital cameras, to name but a few. As alleged in the FAC and discussed below, Defendants want to dominate this market through an anticompetitive scheme known as patent hold-up.

II. LEGAL STANDARD

Plaintiff Lotes' FAC meets the pleading requirements of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, S.Ct. 1937 (2009). Specifically, Lotes has pled sufficient facts to allege breach of contract, promissory estoppel, declaration of waiver, declaratory judgment (that Lotes is licensed to Necessary Claims as defined in the contracts), and violations of Sherman Act Sections 1 & 2. FAC. (Dkt. No. 23).

A Rule 12(b)(6) motion to dismiss for failure to state a claim requires a showing by the moving party that the nonmovant has not met the pleading requirements under Rule 8. *Iqbal*, 556 U.S. 662, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 555). Under Rule 8, a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The pleading standard of Rule 8 requires a complaint to contain notice of the claim being made, with sufficient "[f]actual allegations . . . to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Rule 8 does not require "detailed factual allegations" of the pleadings. *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949.

If a plaintiff's pleadings contain sufficient factual matter, which when accepted as true state a claim for relief that is plausible on its face, then the complaint will survive a Rule 12(b)(6) motion. *Id.* (citing *Johnson v. Rowley*, 569 F.3d 40, 43 (2d Cir. 2009)). However, the plausibility standard is not akin to a "probability requirement," but instead is simply a requirement that the complaint has claims with "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence [to support the claim]." *Twombly*, 550 U.S. at 555.

Properly applied to Lotes' pleading, the *Twombly/Iqbal* standard calls for denial of Defendants' Motion. Lotes has alleged sufficient facts to support all seven counts against the Defendants.

III. ARGUMENT

A. Defendants Do Not Have Noerr-Pennington Immunity.

Defendants spend most of their Motion trying to persuade this Court to dismiss the antitrust claims (Sixth and Seventh Counts), beginning with an attempt to assert Noerr-Pennington immunity. This immunity claim ignores both the basic facts of this suit and the constitutional purpose behind the Noerr-Pennington doctrine.

The First Amendment constrains the Sherman Act. Noerr-Pennington exists to preserve a U.S. citizen's First Amendment right to petition his government for redress of grievances. The "Sherman Act does not prohibit . . . persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993) (quoting *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136, 81 S.Ct. 523, 529, 5 L.Ed.2d 464 (1961); accord, *Mine Workers v. Pennington*, 381 U.S. 657, 669, 85 S.Ct. 1585, 1593, 14 L.Ed.2d 626 (1965)). The First Amendment rationale of Noerr-Pennington protection was clearly set forth in *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972):

The same philosophy [that the right to petition is one of the fundamental freedoms protected by the First Amendment] governs the approach of *citizens or groups of them* to administrative agencies . . . and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right to petition.

Id. at 510 (emphasis added).

Although a constitutional right to petition exists to foster political discourse in the United States, the right does not apply where a foreign entity is petitioning in a foreign land. *See* Douglas Michael Ely, *The Noerr-Pennington Doctrine and the Petitioning of Foreign Governments*, 84 Colum. L. Rev. 1343, 1353-55 (1984). As alleged in the FAC, Foxconn

Kunshan is a Chinese company asserting its patents against Lotes in China. FAC at 3, ¶ 6; 23-24, ¶¶ 53-55. Foxconn Kunshan has not yet appeared in this litigation. Defendants provide no authority to support the contention that a *foreign entity* that is enforcing a patent in a *foreign country* is entitled to Noerr-Pennington immunity. More importantly, because Foxconn Kunshan has not appeared, this issue is not ripe for consideration, and Defendants have not explained how Foxconn Kunshan has standing to bring a motion to dismiss the antitrust claims against the defendants who have appeared and who are not asserting any patent rights.

It is well settled that aliens acting outside the territory of the United States cannot claim constitutional rights absent the activity of an agent of the U.S. government. *See, e.g., Johnson v. Eisentrager*, 339 U.S. 763, 781-85 (1950) (alien not entitled to Fifth Amendment protections abroad). Foxconn Kunshan, the alien entity asserting the patents in China, is thus not entitled to Noerr-Pennington immunity. The Defendants have not articulated any theory supporting an assertion of Noerr-Pennington immunity on these facts.

Finally, assuming *arguendo* that Defendants do have Noerr-Pennington immunity, the sham exception test of *Professional Real Estate Investors* applies. The Defendants asserted the Chinese patents in contravention of their obligations to license under the Contributors Agreement, the Adopters Agreement and correspondence with the USB-IF. FAC at 17-24, ¶¶ 38-41, 46, 55. The assertion of the Chinese patents, therefore, was objectively meritless given Defendants' promises to license all Necessary and non-Necessary patent claims. The patent assertions also conceal a malicious attempt to interfere with the business operation of Lotes and to shut down its USB 3.0 connector production lines. FAC at 24-27, ¶¶ 56-61.

For the foregoing reasons, Defendants' motion to dismiss the antitrust and tortious interference counts, ostensibly because of Noerr-Pennington immunity, should be denied.

B. The Sherman Act Counts are Not Barred by FTAIA.

Defendants next assert that the Foreign Trade Antitrust Improvement Act of 1982 (FTAIA) shields them from antitrust liability. The FTAIA sets forth the general rule that the Sherman Act “shall not apply to conduct involving trade or commerce . . . with foreign nations.” 96 Stat. 1246, 15 U.S.C. § 6a. Sherman Act claims do apply when “such conduct has a direct, substantial, and reasonably foreseeable effect” on U.S. “import trade or import commerce with foreign nations.” *Id.* at § 6a (1) & (2). This actionable conduct falls under the “domestic-injury exception” to the general rule. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 159 (2004). In other words, the FTAIA does not apply if the commercial activities abroad “adversely affect . . . imports to the United States.” *Empagran*, 542 U.S. at 161.

1. FTAIA is not a Jurisdictional Limit on the Sherman Act

The FTAIA thus imposes an additional element of a Sherman Act claim, properly resolved under a motion for summary judgment: namely, the factual question of whether the foreign commerce impacts imports into the United States. Although the Second Circuit has not addressed the question, two sister circuits have recently applied *Empagran* in the context of motions to dismiss. *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012) and *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3rd Cir. 2011). Both courts held that “the FTAIA sets forth an element of an antitrust claim, not a jurisdictional limit on the power of the federal courts.” *Minn-Chem*, 683 F.3d at 852; *Animal Science*, 654 F.3d at 467-68.

Ignoring this recent case law, Defendants rely heavily on a 2006 Delaware district court case between Intel and AMD on a facial challenge to the court’s subject matter jurisdiction. Motion at 19 (*In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F.Supp. 2d 555 (D. Del. 2006)). The Delaware court interpreted the FTAIA to impose a jurisdictional bar and the court’s

review was “not confined to the allegations of the complaint, and the presumption of truthfulness does not attach” to the plaintiff’s allegations. *Id.* at 558. The standard applied in this seven year-old case conflicts with the current trend in FTAIA jurisprudence. Furthermore, *In re Intel Corp.* was also considered—but not followed—in *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d 953 (N.D. Cal. 2011), a matter whose facts are closer to those before this Court.

Although *In re TFT-LCD* was a price-fixing case (like *In re Intel Corp.*), the flat panel displays at issue there were made and sold to ODMs (original design manufacturers) in Asia for import by OEMs (original equipment manufacturers) and sold to retailers in the United States, similar to the way USB connectors are imported into the U.S. *In re TFT-LCD*, 822 F.Supp.2d at 961, 962; FAC at ¶¶ 19-22, 33-34, 68. The court in *In re TFT-LCD* held that “the legislature must ‘clearly state’ that a statute is jurisdictional in character” and concluded that “[t]his Court agrees with the Third Circuit that application of this ‘clearly states’ test necessitates the finding that the FTAIA does not affect subject matter jurisdiction.” *In re TFT-LCD*, 822 F.Supp.2d at 959 (citing *Animal Science*).

Therefore, because the FTAIA does not impose a jurisdictional bar, Lotes does not have the burden of establishing jurisdiction. Defendants bear the burden of showing the claims are insufficient on their face, taking all allegations in the FAC as true and drawing all reasonable inferences in Lotes’ favor. *Ruotolo v. City of N.Y.*, 514 F.3d 184, 188 (2d Cir. 2008).

2. Defendants’ Conduct Has a Direct, Substantial and Foreseeable Effect on U.S. Commerce.

The allegations in the FAC fall squarely within the domestic injury exception to the FTAIA as discussed below. Conduct that has a “direct, substantial and foreseeable effect” on domestic or interstate commerce is an exception to the FTAIA. *Minn-Chem*, 683 F.3d at 856 (quoting *Empagran*). As discussed below, Lotes adequately alleges such conduct.

a. Conduct is Directly Targeted at the U.S. Market.

The Seventh Circuit has adopted the Justice Department’s position that the standard for “direct” conduct is “a reasonably proximate causal nexus” between the conduct and the claim that “addresses the classic concern about remoteness.” *Minn-Chem* at 856-57; Brief for Appellant at 35-42, *United States v. LSL Biotechnologies, Inc.*, 379 F.3d 672 (9th Cir. 2004) (No. 02-16472). In contrast, the *In re Intel Corp.* defendants, as here, used a strained narrow interpretation which argued that the FTAIA exception is limited to first sales, and if these first sales happened overseas, there is no exception under the FTAIA. Motion at 9. *In re TFT-LCD* expressly chose not to follow the interpretation of “direct effect” used by *In re Intel Corp.*, disagreeing with this narrow view and correctly holding that “[p]lacing such a limit the FTAIA’s domestic injury exception would all but eviscerate the distinction between the ‘domestic injury’ exception and ‘import commerce,’ which is not subject to FTAIA.” *In re TFT-LCD*, 822 F.Supp.2d at 963 (citing *Minn-Chem*). Defendants’ interpretation “would exclude from the Sherman Act’s reach a significant amount of anticompetitive conduct that has real consequences for American consumers” because in today’s world “modern manufacturing takes place on a global scale.” *Id.* at 964.

Numerous allegations in the FAC show that the conduct is directed to U.S. domestic and interstate commerce. Firstly, the injurious acts of the Defendants stem from their breach of the Contributors and Adopters Agreements. These agreements were part of an organized effort to standardize USB 3.0 connectors on the part of promoters (*e.g.*, Intel Corp.) and many manufacturers, who desired to sell into the U.S. to OEMs like Hewlett-Packard and Dell and who contract overseas with ODMs to manufacture their products. FAC at ¶¶ 19-23, 36-41, 61; Exhs. A, A-1. Secondly, in violation of their agreements, Defendants’ patent hold-up efforts—

breaching their license agreements and industry promises by filing patent suits to shut down Lotes' factories to monopolize and/or conspire to stifle competition—directly raise prices for USB 3.0 connectors and, consequently, the computers bought by U.S. consumers. FAC at ¶¶ 38-46, 53-60. Thirdly, the parties' business model is directed at the U.S. by putting their USB 3.0 connectors into notebooks and motherboards for desktops and servers, which are sold to ODMs as components for computers under contract with U.S. OEMs for importation for importation into the United States. FAC at ¶¶ 22, 63, 68. Fourthly, Defendants have availed themselves of the U.S. market in the manufacture and sale of USB 3.0 components. In *Animal Science Products*, the appellate court held that “functioning as a physical importer may satisfy the import trade or commerce exception, but it is not a necessary prerequisite” because “the relevant inquiry is whether the defendants' alleged anticompetitive behavior ‘was directed at an import market.’” *Animal Products* at 470 (citations omitted). “Foreigners who want to earn money from the sale of goods or services in American markets should expect to have to comply with U.S. law.” *Minn-Chem* at 854. Defendants are physical importers of either USB 3.0 connectors and/or products containing these components. Specifically, Hon Hai “operates a factory in Houston, Texas” and “operates one or more factories in Mexico that build server and/or desktop computers for Dell's sale in the United States market.” FAC at ¶ 23. The named California defendants import products into the United States, which include USB 3.0 connectors, to be distributed or assembled into computers. FAC at ¶¶ 4, 5.

b. The Alleged Conduct Has Substantial Effects on U.S. Commerce.

Defendants, the world's largest supplier of motherboards, supply 50% of all notebooks sold worldwide—including the United States. FAC at ¶ 21. Defendants manufacture a substantial percentage of USB 3.0 connector sales to ODMs, including as high as 65% to Quanta

for notebooks and 80% to Pegatron for motherboards for desktops and servers. FAC at ¶ 22.

Because of the sheer market power of Defendants, raising the price and/or degrading the quality of USB 3.0 connectors—because of the elimination of Lotes as a competitor and the in terrorem effect upon other competitors and ODMs in the market—provides a substantial effect. As shown in Table 1 of the FAC, the penetration of the Defendants into the U.S. consumer market for electronics is substantial for the relevant market of USB 3.0 connectors. FAC at ¶ 22.

c. It is Objectively Foreseeable that an International Cartel with a Grip on 50% of the World's Supply of Notebooks and Motherboards for Desktops and Servers will Impact U.S. Commerce.

Higher prices resulting from patent hold-up is objectively foreseeable. Defendants are an international cartel with a grip on 50% of the world's supply of notebooks and motherboards for desktops and servers, products that incorporate USB 3.0 connectors. FAC at ¶ 21. Price increases will result when the supply of USB 3.0 connectors is constricted, and ODMs are intimidated into buying USB 3.0 connectors only from Defendants. FAC at ¶ 69, 71. The conduct alleged in the FAC thus has a direct, substantial, and foreseeable effect on domestic and interstate commerce. For the foregoing reasons, Defendants' motion to dismiss the antitrust counts, ostensibly because they are barred by FTAIA, should be denied.

C. Lotes has Adequately Pled Antitrust Injury and a Dangerous Probability that Defendants will Acquire Monopoly Power.

Defendants' assertion that the FAC fails to adequately plead antitrust injury and dangerous probability that Defendants will acquire monopoly power has no merit. The FAC states, "Defendants are wrongfully using their foreign patents to raise prices and exclude competition in the USB 3.0 connector market in the United States. Defendants acquired this power as a result of misrepresentations to the USB-IF during the standards-setting process and/or

a refusal to adhere to the obligations that they undertook to the USB-IF and its adopters (including Lotes).” (FAC at ¶65). The specific injurious *effects* that Lotes points to arise precisely because Defendants are imperiling the competitive nature of the market.

1. The Defendants are Engaged in an Anticompetitive Patent Hold-Up.

Defendants are engaging in “patent hold-up,” an anticompetitive scheme that “use[s] the threat of a [patent] injunction as ‘a bargaining tool to charge exorbitant fees.’” *Hynix Semiconductor Inc. v. Rambus Inc.*, 609 F.Supp.2d 951, 966-68 (N.D. Cal., 2009). While neither the Supreme Court nor the Second Circuit has addressed patent hold-ups, the Ninth Circuit has explained that:

[S]tandards threaten to endow holders of standard-essential patents with disproportionate market power. In theory, once a standard has gained such widespread acceptance that compliance is effectively required to compete in a particular market, anyone holding a standard-essential patent could extract unreasonably high royalties from suppliers of standard-compliant products and services.

Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 876 (9th Cir. 2012).

The Third Circuit has noted “a growing awareness of the risks associated with deceptive conduct in the private standard-setting process.” *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 312 (3rd Cir., 2007). It reached that observation while rejecting a motion to dismiss a claim almost indistinguishable from the one here:

We hold that (1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on [RAND] terms, (3) coupled with an S[S]O's reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct.

Id. at 314. The *Broadcom* court's reasoning is persuasive.

Defendants concede that they have already extracted license fees from “many other USB 3.0 connector manufacturers” (Motion at 1, 5), notwithstanding their obligation to offer RAND-Zero licenses. (*Id.* at 5, 21). Curiously, Defendants present these licenses as if they imply an

absence of anticompetitive intent, rather than being evidence of a scheme that has already begun to raise prices and place a cloud over all unlicensed products. (FAC at ¶¶52, 71, 111, 118).

Defendants have even boasted to the press of their anticompetitive scheme. (FAC at ¶52; Exhs. D, D-1).

Patent hold-up is an illegitimate exercise of patent rights—Defendants’ attempt to secure an illicit *second* license fee for patents that they already licensed via the USB-IF. Defendants’ assertion that “Lotes’ purported ‘injuries’ flow from the exercise of Foxconn (Kunshan)’s patent rights,” (Motion at 10), rests upon their overbroad and unsubstantiated legal claim that “any exclusion resulting from the exercise of patent rights is legally protected exclusion” (*Id.* at 13). In fact, only exclusions resulting from the *legitimate* exercise of patent rights are legally protected. This patent hold-up scheme is the gravamen of Lotes’ antitrust claims, underpinning Lotes’ antitrust injury and Lotes’ demonstration of a dangerous probability of success.

2. Lotes has Suffered Antitrust Injury.

“The parameters of an antitrust injury analysis are limited to examining whether a plaintiff’s loss is ‘of the type the antitrust laws were intended to prevent and that flows from that which makes [a defendant’s] act unlawful.’” *Triple M Roofing Corp. v. Tremco, Inc.*, 753 F.2d 242, 247 (2d Cir. 1985). The analysis thus requires understanding the violation, its anticompetitive effects, and the losses flowing from those effects. Given the nature of patent hold up, that path is not hard to trace:

[T]he patentholder is in a position to ‘hold up’ industry participants from implementing the standard. Industry participants who have invested significant resources developing products and technologies that conform to the standard will find it prohibitively expensive to abandon their investment and switch to another standard. They will have become ‘locked in’ to the standard. In this unique position of bargaining power, the patent holder may be able to extract supracompetitive royalties from the industry participants.

Broadcom, 501 F.3d 297, 310 (3rd Cir. 2007).

Patent hold-up forces all of the patentee’s competitors to make one of three choices: cease production and exit the market; take a license and absorb higher costs; or litigate. The first two choices are among the most common categories of antitrust injury.

The core element of a monopolization claim is market power, which is defined as the ability to raise price by restricting output....[A] company that can exclude competition can sustain its ability to control prices and thereby maintain its market power. The pertinent inquiry in a monopolization claim, then, is whether the defendant has engaged in improper conduct that has or is likely to have the effect of controlling prices or excluding competition, thus creating or maintaining market power. *Pepsico, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 107-08 (2nd Cir., 2002).

Courts have also recognized litigation costs as antitrust damages. *Handgards v. Ethicon*, 601 F.2d 986, 997 (9th Cir. 1979). All manufacturers of USB 3.0 connectors will sustain one or more of these antitrust injuries. As a direct victim of Defendants’ attempted monopolization scheme, Lotes possesses antitrust standing to bring this claim. *See e.g., Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 118 (2nd Cir., 2010).

3. There is a Dangerous Probability that the Defendants will Succeed.

Defendants’ behavior is a textbook example of anticompetitive patent hold-up. The duplicative license fees they have already extracted (Motion at 1) describes the glide path from competition to monopolization. Lotes has asserted (FAC at ¶117) that there is a dangerous probability that Defendants’ scheme, if allowed to succeed, will enable the exercise of monopolistic market power—the Second Circuit’s standard attempted monopolization claims. *See, e.g., Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 570 (2nd Cir. 1990). “Market power,” in turn, “has been defined by the Supreme Court to mean the ‘power to control prices or exclude competition.’” *U.S. v. Visa U.S.A., Inc.*, 344 F.3d 229, 239 (2nd Cir. 2003). Defendants’ significant and undisputed share of the global upstream market (FAC at ¶22), which mirrors the U.S. market, is only one factor relevant to determining the presence of

market power—or the prospects for attaining it. “Market share is the primary indicator of the existence of a dangerous probability of success, but not the sole one.” *See, e.g., Twin Laboratories*, 900 F.2d at 570.

Defendants assert that Lotes “failed to allege market shares of the relevant product in the relevant geographic market alleged in the FAC,” (Motion at 19), which they themselves note is “the market for USB 3.0 connectors sold in the United States.” *Id.* Yet the FAC explicitly states that on information and belief: “Foxconn is the world’s largest supplier of motherboards and alone supplies the USB components for roughly 50% of all notebooks sold worldwide – including the United States” (FAC at ¶21); that “[a]doption rates of USB 3.0 connectors is forecast to reach 100% by 2013” (FAC at ¶20); that “roughly 94% of global notebook computers were assembled by a small number of Taiwanese vendors” (FAC at ¶20); and that “[a]lmost all notebooks contain several USB connectors (FAC at ¶20). The FAC then provides a tabular breakdown of USB 3.0 sales to major ODMs (FAC at ¶22). The FAC thus describes a global manufacturing market with little if any geographical variation, in which the United States is (by far) the single largest distribution destination—and provides market share data for that market.

Patent hold-ups, which entail a duplicitous elimination of competing technologies before licensing technologies, exceed the permissible bounds of patent law. *See e.g., Broadcom*, 501 F.3d at 312. The very nature of Defendants’ scheme, coupled with evidence of Defendants efforts at licensing, litigating, and/or otherwise enforcing patents that it convinced the SSO to incorporate into the standard, demonstrate a dangerous probability of monopolization. “Once a patent becomes essential to a standard, the patentee's bargaining power surges because a prospective licensee has no alternative to licensing the patent; he is at the patentee's mercy.”

Apple, Inc. v. Motorola, Inc., 869 F.Supp.2d 901, 913 (N.D. Ill., 2012). Lotes has properly pled an anticompetitive scheme with a dangerous probability of success.

4. Precedent Argues for Allowing Lotes' Antitrust Claims to Proceed

While, as noted above, neither Supreme Court nor Second Circuit precedent governs this case, the closest non-binding precedent, the Third Circuit's ruling in *Broadcom*, works in Lotes' favor. Defendants nevertheless ignore *Broadcom* entirely and devote considerable time and effort to the D.C. Circuit's ruling in *Rambus, Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008). (Motion at 13-14). There, the FTC accused Rambus of deceiving an SSO to create an anticompetitive patent hold-up. *See id.* at 459. On review, the D.C. Circuit "express[ed] serious concern about the sufficiency of the evidence on two particular points," and "set aside the Commission's orders," *id.* at 469. Defendants emphasize that facial similarity and favorable outcome in urging this Court to adopt *Rambus*.

But Defendants' reliance on *Rambus* is flawed in several significant ways. First, the D.C. Circuit's ruling concerned the sufficiency of the FTC's evidence, *see Rambus*, 522 F.3d at 459, and was thus a question of *proof*, not a question of *pleading*. Nothing in the D.C. Circuit's opinion suggests that the FTC's antitrust complaint was not well pled, in any way deficient, or grounds for dismissal; the Court simply determined that the FTC's evidence was insufficient to sustain its theories. *See id.* at 459. *Broadcom*, unlike *Rambus*, concerned a motion to dismiss an antitrust complaint alleging patent hold-up. In the Third Circuit's own words, it "present[ed] important questions regarding whether a patent holder's deceptive conduct before a private standards-determining organization may be condemned under antitrust laws and, if so, what facts must be pled to survive a motion to dismiss." *Id.* at 304.

In reaching its determination that Broadcom's claims were sufficient to defeat Qualcomm's motion to dismiss, the Third Circuit cited favorably, and in great detail, the FTC's complaint against Rambus—the very complaint that the D.C. Circuit later struck. *Id.* at 311-312. While this difference of opinion may not constitute a formal circuit split, it is more than sufficient to dispel any notion that the D.C. Circuit's *Rambus* ruling is accepted law. Furthermore, the Third Circuit's actual holding in *Broadcom* is *directly* on point here. Its factual predicate, describing a company committing to license on RAND terms and then renegeing on its promises to file infringement suits instead, differs from the instant facts only in that the USB-IF Contributor's Agreement required RAND-Zero terms rather than RAND terms. *See Broadcom*, 501 F.3d at 314.

Second, Defendants misstate the *Rambus* court's holding. (Motion at 14). The central quote upon which Defendants rely as a description of what “the D.C. Circuit held at a minimum” reads: “[A]n antitrust plaintiff must establish that the standard-setting organization would not have adopted the standard in question but for the misrepresentation or omission.” (Motion at 14). But this quote *is not* the Court's holding. In fact, it is not even the Court's language. It is a quote from an antitrust treatise that the *Rambus* Court incorporated in a parenthetical. The actual holding in *Rambus* was simply that “the Commission failed to demonstrate that Rambus's conduct was exclusionary,” *Rambus*, 522 F.3d at 465, a failure of proof that says nothing at all about pleading. Thus, the “holding” that Defendants urge this Court to adopt is not even a holding.

Third, despite conceding explicitly that “the facts of *Rambus* did not require the D.C. Circuit to address the issue,” Defendants ask this Court to adopt the broad and sweeping rule that “no antitrust claim will lie unless, absent the alleged ‘deception,’ the SSO would have adopted a

standard that incorporated *no patented technology*.” (Motion at 14, emphasis in original).

Defendants are thus asking this Court to create a brand new safe harbor insulating all participants in SSOs from any and all claims of patent hold-up as long as the adopted standard incorporates at least one patent. Such a sweeping safe harbor would be unprecedented and is indefensible, particularly since it is premised on a misreading of a non-binding case.

Defendants’ reliance on *Rambus* is thus an invitation to this Court to transform the D.C. Circuit’s controversial, non-binding, narrowly fact-specific ruling about the sufficiency of evidence into a broad safe harbor rule applicable at the pleading stage. Lotes respectfully urges this Court to decline this invitation, and to follow instead the lead that the Third Circuit set in *Broadcom*.

D. Defendants Cannot Show That They Are Legally Incapable of Conspiring.

Taking specific aim at Plaintiff’s Section 1 Sherman Act count (Sixth Count), Defendants contend that they cannot conspire as a matter of law because they are purportedly "affiliated companies." (Motion at 2, 15-18). Defendants' argument cannot prevail on this record and in the context of their Motion to Dismiss. Defendants concede that the five defendants are separate corporations, and not trade names or d/b/a's of other companies, (*see id.*), making it more—not less—likely that they can conspire. Defendants nonetheless argue that they are "closely related affiliates" and therefore cannot conspire to violate the antitrust laws. (*Id.*).

This Motion was filed by the Defendants because their previous motion to dismiss (Dkt. No. 25) was denied by the Court without prejudice because of the insertion of unauthenticated exhibits; Defendants were admonished by the Court for doing so. Transcript of Feb. 5, 2013 Conference (Dkt. No. 31). Defendants now defy the Court and introduce an unauthenticated 420 page “2011 Annual Report of Hon Hai,” in Chinese, admittedly extracted from a website,

ostensibly as a candidate for “judicial notice.” Motion at 18. The Defendants have misled the Court and Lotes about this document in order to get it into the Motion. The limited facts which a court may take judicial notice of are circumscribed by Federal Rules of Evidence. To be subject to judicial notice, a fact must “not be subject to reasonable dispute” because it “is generally known” or because it “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201 (28 U.S.C.A. (2012)). The 2011 Hon Hai Annual Report clearly does not fall into either category.

Defendants have attached selected pages of an alleged 2011 Taiwanese Annual Report for Hon Hai as Exhibit C to the Declaration of Thomas Lang. (Lang Decl., Dkt. No. 30-3). The Exhibit purports to show organization charts for Hon Hai. Setting aside for a moment numerous concerns about the report’s accuracy, Mr. Lang’s declaration does not state that he has personal knowledge about the 2011 Annual Report. Moreover, the Defendants do not allege that this 2011 report shows the proper corporate relationships on the date of the Complaint, as opposed to 2010 or 2011. Furthermore, the report was not submitted to the U.S. SEC, the relevant agency in all the case law Defendants cite.¹ Defendants do not provide any supporting case law for lifting a foreign annual report from a website and laundering it by judicial notice.

Finally, Exhibit C to the Motion appears to contradict the Defendants’ own admissions as to the ownership of Foxconn Electronics. According to the Defendants’ Rule 7.1 Disclosure Statement (Dkt. No. 15), “Foxconn Electronics has no parent corporation (only non-publicly traded minority shareholders).” However, according to the Defendants, Exhibit C purports to

¹ Under the Sarbanes-Oxley Act, financial statements, like annual reports submitted to the SEC, are certified by company officers who are subject to large fines and severe criminal penalties for misstatements. *See* 18 U.S.C. § 1350. Defendants have provided no information that annual reports in Taiwan are similarly certified. *See Kramer*, 937 F.2d 774 (emphasizing the specific qualities of documents filed with the SEC, such as their being required, by law, filed under oath, and not reasonably subject to dispute as to authenticity).

show that Foxconn Electronics is “56.65% owned by Hon Hai.” Motion at 17. Thus, there is a glaring factual discrepancy that casts doubt on the entire 2011 Annual Report. Even if one Defendant is not owned and controlled by Hon Hai, then all the other Defendants are capable of conspiring with that entity, and Lotes’ Section 1 count must survive.

Notwithstanding the foregoing problems, assuming *arguendo* that this Court took judicial notice of the 2011 Annual Report, the Court could not use the organization charts for the truth of the matter asserted in public documents of which they take judicial notice. *Roth v. Jennings*, 489 F.3d 499, 509, 512-13 (2d Cir. 2007) (vacating portion of district court decision that accepted statements in SEC filings as substantive evidence for the truth of the matter asserted); *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773-74 (2d Cir. 1991) (affirming district court taking judicial notice of SEC filing, not for truth of the matter asserted, but to confirm presence of information). Based on the charts in Exh. C to the Lang Decl., Defendants lure this Court into committing error by accepting their assertion that the Defendants are “not legally capable of conspiring with Hon Hai or with one another to commit an antitrust violation under Section 1 of the Sherman Act.” Motion at 18. This the Court cannot do.

For the foregoing reasons, Lotes objects to the 2011 Annual Report, and the Court should not take judicial notice the 2011 Annual Report (including Exh. C to the Lang Decl.). In addition, Lotes moves the Court to strike Exh. C to the Lang Decl. under Fed. R. Civ. P. 12(f) as inadmissible and prejudicial, including all references to Exh. C in the Motion.

E. Lotes Pleads Enough Facts to Show Breach of Contract.

Lotes has alleged more than enough facts to put Defendants on notice that they are being sued for breach of contract. Defendants assert that Lotes does not allege which claims of Defendants’ patents are being asserted. However, the relevant allegations are readily found in

FAC Exhibits G-1 and H-1 for the two asserted patents.² In any case, it is disingenuous for the Defendants to be complaining about any lack of information in the FAC about which claims are being asserted since Defendants are the ones who are asserting the patents.

Defendants have been put on notice that Lotes is alleging breach for failure to license the patent claims asserted by Defendants, the “Necessary Claims” within the meaning of the Contributors Agreement and the Adopters Agreement. FAC at ¶¶ 53-55, 62-63. The interpretation of “Necessary Claim” and its application to the patent claims being asserted by Defendants will be decided by the Court based on information that will be provided in discovery.

Lotes has alleged that “the asserted claims of the ‘608.0 patent and the ‘623.1 patent are ‘Necessary Claims’ and ‘Contributions’ as defined by the Contributors Agreement,” and Lotes also alleges that the asserted claims are necessary for implementing the USB 3.0 technical specification. FAC at ¶¶ 53-56, ¶ 62. Discovery, contract interpretation, and patent claim construction will resolve factual disputes between the parties on these issues.

It is premature and not required for Lotes to provide Defendants with detailed charts prior to contract interpretation, patent claim construction, and before discovery has commenced. There is a dispute on the meaning of “Necessary Claim” and no discovery has commenced. The specific patent claims that Lotes alleges are licensed under RAND-Z terms and whose assertion by Defendants breach the Contributors and Adopters Agreements are identified in Exhibits G, G-1, H and H-1 of the FAC.

² “Recently, the Requestor learned that the structure of USB 3.0 computer connector-related products . . . that the Requestee is manufacturing and selling *falls within the protective scope of claims 1 through 6 of the Requestor patent in question. These acts thus constitute infringement of the Requestor’s invention patent.*” Exh. H-1 at 3 for Chinese Patent 200810128623.1 (emphasis added).

Finally, Defendants make much of the fact that Foxconn Kunshan has alleged infringement of two USB 3.0 product lines, instead of all thirteen types of USB 3.0 connectors made by Lotes for export to the United States. (FAC at ¶ 61 and Motion at 21). Why Foxconn Kunshan has decided to sue on two products is, frankly, unknown to Lotes. Lotes' position is that all thirteen product lines are similarly at risk because the Defendants have not provided a license to Lotes. (FAC at ¶ 61). Lotes remains under a cloud of litigation on the yet-to-be-accused eleven product lines and could be sued for patent infringement on the other products at any time. In fact, Defendants have never even met with Lotes to begin discussing a patent license, notwithstanding the willingness of Lotes' to sit down and talk, a willingness communicated many times by Lotes to the Defendants, over the past two years. (FAC ¶¶ 42-44 and Exh. A; Gikkas Decl., Exh. A (Letter to Messrs. Herman & Lang)).

F. Lotes' Promissory Estoppel Count is Properly Pled

In stretching to cover every count of the FAC, Defendants also attack Lotes' promissory estoppel count (Second Count) as being improperly pled. (Motion at 21-22). Lotes is expressly permitted to plead in the alternative under Fed. R. Civ. P. 8(d). A plaintiff is allowed to plead a single count or claim alternatively, and it is allowed to plead alternative counts or theories concerning the same facts, *even if the alternative theories are inconsistent. Id.* Otherwise, a plaintiff could have its promissory estoppel claim dismissed at an early stage only to learn that the defendant disputes the contract's validity, thus potentially ending up with *no theory* to proceed upon. That is emphatically not the intent of New York law.

Defendants' main argument is that relief under a promissory estoppel theory is not available if there is an enforceable contract. (Motion at 22). However, those facts have not yet been established in this case. The Court has not yet found—and Defendants have not

conceded—that the express contracts at issue are valid, enforceable, and cover the promises that Lotes seeks to enforce. Furthermore, although Lotes has alleged that all the Defendants are bound by the license agreements, it is possible that *some* Defendants could be bound by express contract, while others are bound by promissory estoppel. (FAC ¶¶ 12, 38, 39, 41, 46; Exhs. A, A-1, C).

Furthermore, Lotes' promissory estoppel count explicitly extends to promises that fall outside the express terms of the Contributors and Adopters Agreements, thereby covering promises that *are not subject to those express agreements*. To give one important example, the Agreements require Defendants to license to Lotes, on RAND-zero terms, all so-called "Necessary [patent] Claims." (*See, e.g.*, FAC at ¶¶ 76-78 and Exhibit A at ¶ 3.4) (requiring license of "Necessary Claims . . . reading on contributions . . ."). However, Defendants separately and independently promised to license non-Necessary patent claims to all adopters as well on RAND terms. (FAC at ¶ 46 and Exhibit C) (citing a letter from Hon Hai promising to license all non-Necessary claims on RAND terms). In pleading its promissory estoppel count, Lotes telegraphed that it was pleading in the alternative and was also intending to cover promises that were not subject to the written agreements at issue in this case. FAC at ¶ 89. Accordingly, promissory estoppel is a viable, valid theory at this time.

G. The FAC Properly Pleads Tortious Interference With Business Relations

Defendants' assertion that Lotes' tortious interference claim (Fourth Count) must be dismissed has no basis. The FAC specifically alleges that Lotes had business relationships with various third-party customers, the Defendants interfered with those relationships by suing Lotes for patent infringement in China (and otherwise), the Defendants acted wrongfully because the China suit violated their obligations under the Adopters and Contributors agreement, and that the

Defendants' acts injured Lotes' relationships. *Scutti Enterprises, LLC. v. Park Place Entertainment Corp.*, 322 F.3d 211 (2d. Cir. 2003); Dkt. No. 23 at ¶¶95-98. This conduct has a sufficient nexus to New York because the Defendants expressly agreed to have all disputes arising out of their conduct resolved in New York courts. *Id.* at ¶¶ 9, 10, 12, 13. *See, e.g., Id.* at ¶10 (“The parties agree that all disputes arising in any way out of this Agreement shall be heard exclusively in, and all parties irrevocably consent to jurisdiction and venue in, the state and Federal courts of New York.”). Lotes has also pled significant injury in New York. *Id.* at ¶¶ 11, 13. The FAC asserts that defendants derive substantial revenue from sales in the SDNY and that the USB connectors manufactured by Defendants are directed primarily towards the U.S. market, thereby injuring plaintiff. *Id.* at ¶¶ 13, 68. These allegations bely Defendants' assertion that Lotes has not pled “any direct effects in the United States.” Motion at 11.

Defendants' reliance on *AllGood Entm't, Inc. v. AllGood Concerts*, 726 F.Supp. 2d 307 (S.D.N.Y. 2010) is misplaced. Motion at 11. The plaintiff in *AllGood* did not allege any harm in New York and instead merely claimed “generally alleged phone calls, meetings, and other negotiation-related activities in New York . . . with no explanation as to how these actions are related to the alleged tortious conduct of the AEG Defendants.” *Id.* at 316. By contrast, Lotes has pled conduct by defendants that resulted directly in competition-related harm to Lotes in New York. Although the *AllGood* plaintiff alleged the existence of a New York choice of law provision, that agreement was merely an NDA governing the exchange of confidential information, and not governing the actual conduct of the parties at issue. *Id.* at 318. Here, the forum selection clause, not a choice of law provision, of the Adopters and Contributors Agreements specifically governs the conduct of the parties. Moreover, Defendants' argument

that the Court cannot apply New York tortious interference law to conduct outside New York undermines the express intent of the parties and must be rejected.

H. The FAC Properly Seeks A Declaration of Waiver.

Lotes declaration of waiver claim (Third Count) should not be dismissed because the Court may enter a declaratory relief. 28 U.S.C. §2201. As noted in *Ixe Banco, S.A. v. MBNA Am. Bank, N.A.*, which is cited by Defendants, a waiver is a means by which a party to a contract voluntarily abandons or relinquishes a known right. *Ixe Banco, S.A. v. MBNA Am. Bank, N.A.*, 2008 U.S. Dist. LEXIS 19806, at * 27 n.5 (S.D.N.Y. Mar. 7, 2008). Defendants' reliance on this case and other authority, which they cited in their original motion to dismiss, is misplaced because Defendants treat Lotes' count as merely a cause of action of waiver. Lotes, however, has properly recast the count as a declaration of waiver. Indeed, Defendants waived their rights to other than a zero royalty on the necessary claims by executing the Contributors Agreement. Motion at ¶¶91-92. The Court may "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. §2201(a). The Chinese patent enforcement action has created an actual controversy regarding the rights of the parties under the Adopters and Contributors agreement, which must be heard exclusively in this Court. As such, Lotes' count for declaration of waiver is proper.

I. This Court May Adjudicate The Patent License Dispute.

Defendants are asking this Court to dismiss the declaratory judgment claim (Fifth Count) and have the license dispute decided in a Chinese patent court because of the pending patent infringement action initiated there by the Defendants. Motion at 24. Defendants do not cite to any authority that excuses them from performing their contractual obligations of granting to Lotes a "world-wide" patent license to their standard-essential claims, necessary to practice the

USB 3.0 technical specification (the “Necessary Claims”). FAC at ¶¶ 38, 39, 41; Exhs. A, A-1. Further, Defendants do not cite to any authority that relieves them of following the forum-selection clauses in their contracts that require them to bring disputes to the courts sitting in the State of New York. FAC at ¶¶ 10, 12. Finally, Defendants do not cite to any authority that Lotes cannot enforce its rights as a third-party beneficiary to the Defendants’ contractual commitments. FAC at ¶ 14.

Lotes is asking this Court for a declaration that it is licensed under the Necessary Claims per the contracts signed by Defendants. FAC at ¶¶ 99-102; FAC Prayer at L & M. Defendants agreed to bring their disputes to the Courts of New York and “[t]here are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect.” *M/S Brennan v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13 (1972). Defendants are asking this Court to ignore the forum-selection clause in the contracts they signed because they prefer to litigate in China. However, “whenever a party agrees to a forum-selection clause, it relinquishes any benefits that it might receive from statutory rights or favorable canons of contractual interpretation only available in other forums.” *Microsoft*, 696 F.3d at 884.

In *Microsoft*, the Ninth Circuit held that contract claims litigated in U.S. courts could resolve the issues in the foreign patent action when the foreign patents at issue were part of a world-wide license for standard-essential patents. *Id.* at 883. As in *Microsoft*, Lotes seeks to resolve the dispute, not based on patent invalidity or non-infringement, but on the basis of contract interpretation by a U.S. court. *See, also, Medtronic, Inc. v. Catalyst Research Corp.*, 518 F.Supp. 946 (D.Minn. 1981), *aff’d* 664 F.2d 660 (8th Cir. 1981) (court enjoined a party from enforcing injunctive relief in foreign patent action when none of the foreign fora had yet issued

an injunction). The cases cited by Defendants are inapposite because none provides guidance on the relief sought in the Fifth Count, namely a declaration that enforces a license agreement whose subject matter is a world-wide patent grant on standards-related patents. *See* Motion at 24.

That Defendants have filed suit in China does not excuse them from performing under their contracts. Lotes is not asking the Court to enforce Chinese patent law or to decide foreign patents under supplemental jurisdiction. Lotes is asking the Court to provide a declaration that will enforce the private contracts that bind the Defendants because “[a]lthough patents themselves are not extraterritorial, there is no reason a party may not freely agree to reservations or limitations on rights that it would have under foreign patent law (or any other rights it may have under foreign law) in a contract enforceable in U.S. courts.” *Microsoft*, 696 F.3d at 884. This Court should enforce the forum-selection clause of the Defendants’ contracts and adjudicate the matter of the declaration that Lotes is licensed to Defendants’ Necessary Claims, as defined in the agreements signed by the Defendants.

IV. CONCLUSION

For the foregoing reasons, Lotes respectfully requests this Court to deny Defendants’ Motion to Dismiss in its entirety.

Respectfully Submitted,

Dated: February 25, 2013



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