

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**

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

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## I. INTRODUCTION

Microsoft's Opposition fails to demonstrate the adequacy of its Sherman Act claim, as the Complaint does not meet required pleading standards, and the claim is barred under governing case law. Microsoft argues, incorrectly, that "controlling Third Circuit precedent, *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297 (3d Cir. 2007), establishes the viability" of its Sherman Act claim. Opp. at 1. However, Microsoft's Complaint fails to include the most basic elements relied upon in *Broadcom*. Microsoft's Sherman Act claim also relies centrally on InterDigital's patent enforcement conduct, which is protected by the First Amendment and *Noerr-Pennington* immunity. Further, even if Microsoft could allege sham litigation pursuant to the applicable heightened pleading standards (which it cannot), it would still have to plausibly allege all of the other elements of a Sherman Act claim (which it cannot). In addition, *Hanover 3201 Realty* does not provide a basis to vitiate InterDigital's *Noerr-Pennington* immunity.

Microsoft wrongly frames the issues when it claims that "[a]ntitrust law does not compel Microsoft to make the Hobson's choice . . . between paying supra-competitive royalties and enduring the burdens and litigation expense associated with protracted infringement litigation." Opp. at 3. "Antitrust law" is not compelling Microsoft to do anything. Rather, Microsoft is the *plaintiff* in this case seeking to use antitrust law as a sword to enrich itself with a claim for treble damages and injunctive relief, at the expense of InterDigital's First Amendment rights to petition the government and to enforce duly-issued patents. As the Supreme Court has made clear, litigation expenses (which are incurred by *both* parties to a lawsuit) are a necessary byproduct of exercise of the First Amendment right of petitioning, and courts must scrupulously guard against improper claims for tort damages based on pursuit of litigation. As for the other prong of Microsoft's imaginary "Hobson's choice," nothing in Microsoft's Complaint sets forth any circumstance where Microsoft could ever pay "supra-competitive" royalties. Microsoft has not paid any royalties at all, and cannot be compelled to do so absent a judgment from a court, which could hardly result in "supra-competitive" payments. Microsoft cannot make out an antitrust claim where it has alleged no injury and no plausible prospect of injury.

## II. MICROSOFT FAILS TO ADEQUATELY ALLEGE MONOPOLY POWER AND EXCLUSIONARY MONOPOLIZATION CONDUCT

*a. Insufficient allegations of monopoly power.* Microsoft argues that it sufficiently alleged a Sherman Act claim because it purportedly made the same allegations as in the *Broadcom v. Qualcomm* case. Opp. at 7. That is wrong. As Microsoft admits, *Broadcom* required as an element of the claim an allegation that the defendant possesses standards-essential patents that the SSO *included in the standard* in reliance on a FRAND commitment. Opp. at 6 (quoting *Broadcom*'s formulation requiring the SSO's "reliance on that promise when including the technology in a standard"); *see also Broadcom*, 501 F.3d at 304 ("Qualcomm supplies some of the essential technology that the ETSI ultimately included in the UMTS standard, and holds intellectual property rights ('IPRs'), such as patents, in this technology."); *id.* ("Specifically, *Broadcom* alleged, the ETSI included Qualcomm's proprietary technology in the UMTS standard only after, and in reliance on, Qualcomm's commitment to license that technology on FRAND terms."). A "patent hold-up" theory could logically only apply to SEPs that, because they are included in the standard, must be infringed in order to make standards-compliant products. *Broadcom*, 501 F.3d at 314 ("Firms may become locked in to a standard requiring the use of a competitor's patented technology."). Patents that were not included in a standard cannot, of course, even theoretically have market power based on standardization.

In its Opposition, Microsoft does not point to anywhere in the Complaint where it alleged that InterDigital has an essential patent for any 3G or 4G technology that was included by ETSI in 3G or 4G standards, such that Microsoft must use that technology in order to comply with the standards. Instead, Microsoft points to the very different, and insufficient, allegation that 3G/ 4G standards "include technologies *over which IDC claims to have patents*" Opp. at 7 (emphasis added). Even if Microsoft had adequately alleged that InterDigital "claimed to have" standards-essential patents, this would not be sufficient to establish the element required by *Broadcom* of an allegation that InterDigital actually has essential patents that were included in a standard in reliance on a FRAND commitment. But in fact, Microsoft has not even adequately alleged that

InterDigital claimed to have essential patents. Microsoft relies on InterDigital's ETSI declaration forms attached as Exhibits 1-19 to the Complaint, but these include no representations that the disclosed patents are in fact essential. To the contrary, they state only a belief that the patents "may be" or "may become" essential. Where the Complaint's allegations are contradicted by documents attached to the Complaint, they need not be accepted as true for purposes of a motion to dismiss. *Anderson v. Local 435 Union*, 2014 WL 4955611 (D. Del. Sept. 30, 2014) ("Where there is a disparity between a written instrument annexed to a pleading and an allegation in the pleading based thereon, the written instrument will control.").

In defense of its deficient allegations, Microsoft wrongly asserts that Broadcom had only alleged that Qualcomm "claimed to have" essential patents, and therefore Microsoft's pleading to this effect should be deemed sufficient. Opp. at 7. Microsoft mischaracterizes Broadcom's complaint. In fact—as repeatedly stated in the Third Circuit's opinion—Broadcom *did* include the allegations Microsoft omitted. In addition to alleging that Qualcomm claimed to have essential patents, Broadcom also alleged that "Qualcomm has unlawfully monopolized the WCDMA technology markets by inducing the relevant SDOs to adopt 3G standards that incorporate Qualcomm's patents as an essential element...." Opp. Ex. A at ¶ 140. As Broadcom further stated in its appeal brief, "[i]n reliance on Qualcomm's promise, the SDOs chose Qualcomm's technology to perform certain functions in the UMTS standard. As a result, companies such as Broadcom that want to compete in making UMTS parts and equipment are left with no choice but to use Qualcomm's patented technology." See Ex. 1 at \*6-\*7. Contrary to Microsoft's assertions, *Broadcom* simply did not hold that a plaintiff can allege nothing more than false FRAND commitments and "subsequent abusive licensing practices" in the absence of allegations that the SSO relied on the allegedly false FRAND commitment by including the defendant's patents in a standard. This missing link is fatal to Microsoft's antitrust claim premised on *Broadcom*.<sup>1</sup>

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<sup>1</sup> In fact, Microsoft affirmatively argues in its Opposition that InterDigital does not have standards-essential patents, as Microsoft claims that InterDigital's patent enforcement efforts  
(continued...)

*b. Exclusionary conduct.* The Complaint fails to identify any alternative technologies that were not adopted by ETSI as a result of the alleged anticompetitive conduct. Microsoft argues that it need not do so, because courts that have required allegations of other excluded technologies were addressing claims of failure to disclose patents to SSOs, rather than claims of false FRAND commitments. Opp. at 8. That distinction, however, is immaterial to the analysis. The antitrust theory asserted by Microsoft requires InterDigital to have excluded competition to monopolize a market by wrongfully inducing the SSO to include InterDigital's patents in a standard at the expense of other technologies. Whether the alleged wrongful conduct consists of failing to disclose patents or of making false FRAND commitments, in the absence of any identification of other alternative technologies, there is no basis on which to infer that anticompetitive exclusion occurred.

Microsoft also argues that, in *Broadcom*, the plaintiff was not required to allege alternative technologies. Once again, however, the *Broadcom* court was addressing allegations unique to that case. *Broadcom* alleged that "even if Qualcomm's WCDMA technology was the only candidate for inclusion in the standard, it still would not have been selected by the relevant SDOs absent a FRAND commitment." *Broadcom*, 501 F.3d at 316. Here, however, Microsoft's Complaint cannot be interpreted to include such an allegation. Microsoft claims in the Complaint that when there is no FRAND commitment and no alternative technology, ETSI rules require that standards development "shall cease." Compl. ¶ 37. Microsoft's selective quotation

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have been "shams" because Microsoft purportedly does not infringe any valid InterDigital patents by making 3G/4G standards-compliant products. Opp. at 14-17. Indeed, in one of the ITC investigations described in its Complaint, Microsoft publicly stated that "InterDigital has asserted *no* patents that are actually essential to the relevant standard (*i.e.*, necessarily infringed by the standard and valid) and hence no claim to any royalties under any circumstances." Nokia Inc., ZTE Corp., ZTE USA, Inc., and Contingent Respondent Microsoft Mobile Oy's Petition for Review of the June 14, 2014 Initial Determination With Respect to FRAND Issues (Public Version), Inv. No. 337-TA-868 (ITC July 10, 2014) at 2.

omits the rest of the rule,<sup>2</sup> which goes on to outline a procedure for a discretionary decision by ETSI's General Assembly on whether to adopt a technology notwithstanding the absence of a FRAND commitment in a situation where no alternative technologies are known. ETSI IPR Policy § 8.1.3 ("Prior to any decision by the General Assembly, the COMMITTEE should . . . use their judgment as to whether or not the COMMITTEE should pursue development of the concerned parts of the STANDARD or a TECHNICAL SPECIFICATION based on the non-available technology and should look for alternative solutions."). Ex. 2. In this case, there can be no inference that if InterDigital's technology were the only candidate for inclusion, it would still not have been selected by the SSO absent a FRAND commitment. Accordingly, without allegations of specific technologies that were excluded from the standard based on the alleged deception, Microsoft has not adequately alleged anticompetitive exclusionary conduct.<sup>3</sup>

### **III. MICROSOFT DID NOT ALLEGE FRAUD WITH PARTICULARITY**

Microsoft's assertion that its pleading has the same level of specificity as the complaint in *Broadcom* is incorrect, as set forth above. *See supra* Section II. In addition, *Broadcom* did not hold that antitrust claims premised on standards fraud are not subject to Rule 9(b); rather, the Third Circuit noted that this is an "interesting question" that was "not developed by the parties."

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<sup>2</sup> The court may consider on a motion to dismiss any matters incorporated by reference or integral to the claim, such as the ETSI IPR Policy on which Microsoft relies in the Complaint. *See McGown v. Silverman & Borenstein, PLLC*, 2014 WL 545903, at \*2 (D. Del. Feb. 7, 2014).

<sup>3</sup> The *Broadcom* court's conclusion that a Sherman Act monopolization claim can be made out where the alleged exclusionary behavior had no effect on competitive structure has also been criticized as conflicting with the Supreme Court's *NYNEX* decision. In *Rambus*, the D.C. Circuit rejected the FTC's effort to rely on *Broadcom* as support for its antitrust claim based on standards fraud. *Rambus Inc. v. FTC*, 522 F.3d 456, 466 (D.C. Cir. 2008) ("to the extent that [*Broadcom*] may have rested on a supposition that there is a cognizable violation of the Sherman Act when a lawful monopolist's deceit has the effect of raising prices (without an effect on competitive structure), it conflicts with *NYNEX*"); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998) (fraud that raised prices cannot be Sherman Act violation in absence of effect on competition). In *Rambus*, the D.C. Circuit reversed the FTC's decision finding Rambus liable for Sherman Act § 2 violations – a decision on which the *Broadcom* court had heavily relied in developing its "patent hold-up" theory. *Broadcom*, 501 F.3d at 311-14. Accordingly, *Broadcom* rests on a questionable foundation, as its analysis was based on an FTC decision that the *Broadcom* court thought was a "landmark" decision—but was actually later reversed on appeal.

*Broadcom*, 501 F.3d at 315 n.9. However, the Third Circuit has otherwise held that antitrust claims premised on fraud are subject to Rule 9(b). *Lum v. Bank of Am.*, 361 F.3d 217, 220, 228 (3d Cir. 2004). Microsoft also cites *Seville Industrial*, but that decision held that plaintiffs must “plead with particularity the ‘circumstances’ of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior,” and further that plaintiffs must inject “precision and some measure of substantiation into their allegations of fraud.” *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984) (Rule 9(b) met where plaintiff included “a list identifying with great specificity the pieces of machinery that were the subject of the alleged fraud”). Microsoft has failed to meet this standard, as it never specifies which patents were allegedly subject to “false” declarations.

Microsoft also did not specifically plead that InterDigital made any statements that were false when made. The extreme vagueness of Microsoft’s pleading concerning the patents that were allegedly subject to a “false FRAND commitment” is especially problematic where the FRAND licensing commitment at issue was subject to an express condition precedent. The ETSI licensing declaration states that the patent owner’s undertaking to be prepared to grant licenses on FRAND terms and conditions is made only “*to the extent* the IPRs disclosed . . . are or become, and remain ESSENTIAL....” See, e.g., Compl. Ex. 10 at 3 (emphasis added). Patents that are not included in a standard, and therefore do not become essential, are not even subject to the FRAND commitment. Microsoft’s allegations fall short of specific pleading of how InterDigital’s statements were supposedly false when made.

#### **IV. THE SHERMAN ACT CLAIM IS BARRED BY THE *NOERR-PENNINGTON* DOCTRINE**

##### **A. Microsoft’s Claim is Premised on Patent Enforcement Activity**

Although Microsoft admits that its Complaint relies on InterDigital’s litigation activities (Opp. at 11), it claims that the “core allegations” of the Complaint are not premised on litigation. However, most of the remaining conduct alleged by Microsoft is patent enforcement activity that

is related to litigation and therefore protected. The vast majority of circuits to consider the issue have held that *Noerr-Pennington* immunity extends beyond litigation to encompass “acts reasonably and normally attendant upon effective litigation.” *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983); *see also* Mot. at 10 (citing cases). Here, for example, Microsoft points to its allegation that InterDigital was “demanding excessive and discriminatory royalties.” Opp. at 10. But demands for royalties by patent owners are well within the category of protected litigation-related behavior. *In re Innovatio IP Ventures, LLC Patent Litig.*, 921 F. Supp. 2d 903, 911-12 (N.D. Ill. 2013); *Globetrotter Software, Inc. v. Elan Comput. Grp., Inc.*, 362 F.3d 1367, 1370 (Fed. Cir. 2004) (finding demand letters to be protected under preemption analysis using identical “sham” standard as *Noerr-Pennington*).

Thus, in *Innovatio*, applying Federal Circuit law,<sup>4</sup> the court dismissed tort claims premised on royalty demands alleged to be in violation of a RAND commitment as barred by *Noerr-Pennington*. *Innovatio*, 921 F. Supp. at 913 (*Globetrotter* “requires the application of *Noerr-Pennington* to shield pre-suit communications” from both state and federal tort claims). In general, the Federal Circuit has made clear that patent owners have a right to engage in communications to enforce their patents, including via licensing demands and threats of litigation, based on both the First Amendment and the patent laws. *See Globetrotter*, 362 F.3d at

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<sup>4</sup> Microsoft incorrectly argues that Federal Circuit law should not apply to the question of whether *Noerr-Pennington* applies here. As made clear in *Nobelpharma*, “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.” *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1068 (Fed. Cir. 1998). The fact that this case asserts an antitrust claim rather than a patent claim is not dispositive as to whether an appeal will lie with a regional circuit or the Federal Circuit, as there are numerous factors that affect the analysis. For example, the *Christianson* standard for Federal Circuit jurisdiction turns on whether the complaint requires the determination of a substantial question of federal patent law, not on the type of claim alleged. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988). Moreover, if InterDigital should assert a compulsory counterclaim over which the Federal Circuit has jurisdiction, an appeal will lie with the Federal Circuit. 28 U.S.C. § 1295(a)(1); *Vermont v. MPHJ Tech. Invs., LLC*, 803 F.3d 635 (Fed. Cir. 2015) (patent owner’s counterclaim seeking declaratory judgment of right to send demand letters under preemption theory conferred Federal Circuit jurisdiction). Even in an appeal before a regional circuit, due consideration should be accorded to Federal Circuit law in light of its mandate to “create a uniform body of federal law” on patent issues. *Cf. Nobelpharma*, 141 F.3d at 1068.

1370; *Va. Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 869 (Fed. Cir. 1997) (“A patentee that has a good faith belief that its patents are being infringed violates no protected right when it so notifies infringers.”); *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1353 (Fed. Cir. 1999); *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1336 (Fed. Cir. 1998)); *Concrete Unlimited Inc. v. Cementcraft, Inc.*, 776 F.2d 1537, 1539 (Fed. Cir. 1985); *see also Virtue v. Creamery Pkg. Mfg. Co.*, 227 U.S. 8, 37-38 (1913).

In addition, an “injury-based” analysis that examines what conduct actually is alleged to have injured the plaintiff is central to the application of the *Noerr-Pennington* doctrine in practice. Under the Supreme Court’s holding in *PRE*, even where the plaintiff alleges several types of purportedly anticompetitive acts, conduct that did not cause plaintiff’s alleged antitrust injury is not pertinent to the analysis:

The Court of Appeals held that Columbia’s alleged refusal to grant copyright licenses was not “separate and distinct” from the prosecution of its infringement suit. 944 F.2d, at 1528. The court also held that PRE had failed to establish how it could have suffered antitrust injury from Columbia’s other allegedly anticompetitive acts. *Id.* at 1529. Thus, whatever antitrust injury Columbia inflicted must have stemmed from the attempted enforcement of copyrights, and we do not consider whether Columbia could have made a valid claim of immunity for anticompetitive conduct independent of petitioning activity.

*Prof’l Real Estate Inv’rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 53 n.2 (1993) (*PRE*); *cf. Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013). Thus, the *Noerr-Pennington* doctrine barred the antitrust claims in *PRE* even though the plaintiff had alleged additional conduct beyond the copyright litigation, such as entering into restrictive distribution agreements. *Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 944 F.2d 1525, 1528-29 (9th Cir. 1991), *aff’d*, 508 U.S. 49 (1993) (*PRE I*). Both the Ninth Circuit and the Supreme Court concluded that the other conduct was not the source of the plaintiff’s antitrust injury, and consequently was properly disregarded in applying the *Noerr-Pennington* doctrine. *PRE I*, 944 F.2d at 1529; *PRE*, 508 U.S. at 54 n.2.

Here, if the alleged “false FRAND promise” to the SSO was part of a scheme to allow InterDigital to enforce its patents at “supra-competitive” rates, then it is not “separate and

distinct” from the patent enforcement conduct, and therefore is subject to *Noerr-Pennington*. *PRE*, 508 U.S. at 54 n.2. Alternatively, if the allegedly fraudulent activity toward the SSO is considered on its own, with no linkage to patent enforcement activity, Microsoft has shown no harm from it. Giving effect to *Noerr-Pennington* requires that antitrust liability cannot be premised on protected petitioning activity, regardless of whether Microsoft characterizes it as part of a larger “course of conduct.” 1 H. Hovenkamp et al., *IP and Antitrust* § 11.4f (2nd ed. Supp. 2011) (this analysis allows courts to “avoid the risk of such mixed allegations being used as a subterfuge to avoid the stringent requirements of *Walker Process* or *Noerr* immunity.”). In attempting to plead a “patent hold-up” theory, Microsoft repeatedly alleges that InterDigital tried to require it to pay “supra-competitive” royalties through litigation and litigation-related royalty demands. *E.g.*, Compl. ¶¶ 45, 57-61, 66-67, 84-86. This patent enforcement conduct is protected by *Noerr-Pennington* and cannot form the basis of an antitrust claim.

**B. FRAND Commitments Do Not Vitiating *Noerr-Pennington* Immunity**

Microsoft argues that it alleged that InterDigital’s commitments to ETSI mean that InterDigital “surrendered the right to exclude standard implementers who are able to license on FRAND terms,” and that the FRAND commitments at issue “guarantee that IDC would not attempt to prevent implementers from using its patented technology by seeking injunctions.” Opp. at 11-12 (citing Compl. ¶¶ 56, 72). Microsoft is both factually and legally wrong. Once again, the documents Microsoft attached to the Complaint belie its allegations: the FRAND commitments provided by InterDigital to ETSI do not mention injunctions, much less express any intention whatsoever to forego the right to sue for injunctive relief. Compl. Exs. 1-19. As a legal matter, courts have thoroughly rejected the proposition that the ETSI FRAND commitment entails a prohibition on suing for injunctive relief. *Apple Inc. v. Motorola Inc.*, 757 F.3d 1286, 1331 (Fed. Cir. 2014) (“To the extent that the district court applied a *per se* rule that injunctions are unavailable for SEPs, it erred.”). Indeed, where an SEP owner has agreed to ETSI’s FRAND undertaking, an “injunction may be justified where an infringer unilaterally refuses a FRAND royalty or unreasonably delays negotiations to the same effect.” *Id.* at 1332; *see also Certain 3G*

*Mobile Handsets and Components Thereof*, Inv. No. 337-TA-613, Initial Determination on Remand, 2015 WL 6561709 (Apr. 27, 2015).<sup>5</sup> The ITC likewise rejected Microsoft’s arguments that InterDigital could not maintain complaints at the ITC seeking exclusionary relief due to the existence of FRAND commitments. *See, e.g., Certain Wireless Devices With 3G Capabilities and Components Thereof*, Inv. No. 337-TA-800, Order No. 29 (June 20, 2012) (denying motion to terminate based on existence of FRAND commitments) & Initial Determination, 2013 WL 3961230, at \*235 (June 28, 2013). Precisely because of the danger of implementers like Microsoft refusing in bad faith to license SEPs, patent holders who make commitments to ETSI to be prepared to grant licenses on FRAND terms certainly do not forego all rights to sue for injunctive relief.

Microsoft also takes out of context and misapprehends the Ninth Circuit’s analysis in *Microsoft v. Motorola*, which was directed to whether *Noerr-Pennington* immunity can be applied to bar a **breach of contract claim**. 795 F. 3d 1024, 1047-48 (9th Cir. 2015). As the *Noerr-Pennington* doctrine has been exclusively applied to tort claims in Supreme Court jurisprudence, the Ninth Circuit rejected Motorola’s argument for extending *Noerr-Pennington* immunity to cover breach of contract claims. *Id.* *Motorola* was a breach of contract case, so it is wholly inapposite here, where the only claim at issue is a Sherman Act antitrust claim. As Microsoft acknowledges, the *Apple v. Motorola* court reached the same conclusion, finding that Apple’s Sherman Act claim was barred by *Noerr-Pennington* immunity, but that *Noerr-Pennington* did not apply to the breach of contract claim. *Opp.* at 13-14; *see also Apple, Inc. v.*

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<sup>5</sup> Microsoft also erroneously seeks to rely on materials relating to a different RAND commitment under the policy of the IEEE, a separate SSO with no connection to this case. *See Microsoft*, 795 F. 3d 1024 (addressing IEEE RAND commitment). The “business review letter” cited by Microsoft that the USDOJ provided to the IEEE regarding its new patent policy is not a legal precedent, and applies only to the specific facts presented by the IEEE for review. *Opp.* at 12. As the letter itself cautioned, “It is not the Department’s role to assess whether IEEE’s policy choices are right for IEEE as a standards-setting organization (“SSO”). SSOs develop and adjust patent policies to best meet their particular needs. It is unlikely that there is a one-size-fits-all approach for all SSOs, and, indeed, variation among SSOs’ patent policies could be beneficial to the overall standards-setting process. **Other SSOs, therefore, may decide to implement patent policies that differ from the [IEEE’s].**” (emphasis added).

*Motorola Mobility, Inc.*, 886 F. Supp. 2d 1061, 1076 (W.D. Wis. 2012) (antitrust claim barred by *Noerr-Pennington* immunity).

Here, there is already a lawsuit pending before this Court (No. 13-0010-RGA) in which Microsoft has asserted breach of contract counterclaims premised on InterDigital's alleged "breach of FRAND promises." InterDigital did not seek to dismiss those breach of contract claims based on *Noerr-Pennington* immunity, and Microsoft can make breach of contract arguments in that case (although of course InterDigital denies any such breach). Microsoft's argument that there is no basis for a distinction between breach of contract and tort claims for purposes of *Noerr-Pennington* is without merit. Controlling Supreme Court precedent applies the *Noerr-Pennington* doctrine to tort claims (and in particular antitrust claims). This antitrust action seeking treble damages and sweeping injunctive relief is exactly the type of case for which the Supreme Court established *Noerr-Pennington* immunity, in order to safeguard that "most precious of liberties" to petition the government bestowed by the First Amendment. See *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002). There is a strong presumption against finding waiver of Constitutional rights, and Microsoft has cited no authority holding that tort claims are not subject to *Noerr-Pennington* immunity in these circumstances.

### **C. Microsoft Failed to Allege "Sham Litigation"**

Citing a newly issued Third Circuit case, Microsoft argues that the *PRE* standard for evaluating sham litigation claims is not applicable here. *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162 (3d Cir. Nov. 12, 2015) ("*Hanover*"). In *Hanover*, the Third Circuit adopted a test for evaluating allegations of multiple sham petitions based on *California Motor Transport* that differs in minor ways from the *PRE* test. However, Microsoft's "sham litigation" allegations remain deficient under either analysis.

First, Federal Circuit law should be applied to the question of whether conduct in enforcing a patent can strip the patent owner of *Noerr-Pennington* immunity. See *supra* note 4. The Federal Circuit has not adopted a different test for allegations involving multiple petitions. In fact, Federal Circuit jurisprudence strongly suggests that, due to the unique nature of patents,

it would apply *PRE* rather than adopt a separate test based on *California Motor Transport*. “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.” *C.R. Bard, Inc. v. M3 Sys.*, 157 F.3d 1340, 1369 (Fed. Cir. 1998). Further, when the Federal Circuit was asked directly to consider adopting a separate test for multiple petitions, its analysis demonstrated that it would not do so in a case such as this one. *ERBE Elektromedizin GmbH v. Canady Tech. LLC*, 629 F.3d 1278, 1292 (Fed. Cir. 2010). The Federal Circuit found in *ERBE* that the three lawsuits at issue were not “not ‘simultaneous and voluminous’ and do not implicate a test for ‘a whole series of legal proceedings.’” *Id.* Accordingly, the Federal Circuit would apply *PRE* to the three ITC actions Microsoft has alleged here.<sup>6</sup>

Even applying the analysis of *Hanover*, Microsoft fails to allege sham litigation. The facts relied on by the Third Circuit to find sham petitioning were markedly different than here. In *Hanover* (as in the other Circuit cases that have developed a separate test based on *California Motor Transport*), the “serial” petitioning activity included multiple administrative challenges to zoning and other regulatory matters where courts could make inferences about baselessness with relative ease – unlike a patent infringement case which involves many complex substantive determinations, including claim construction, infringement, validity, and enforceability.<sup>7</sup> Thus, in *Hanover*, the Third Circuit found that “[d]efendants’ challenge to the Flood Permit was

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<sup>6</sup> The Complaint relies on three ITC actions, rather than the parallel district court actions. However, in light of defendants’ unilateral right to stay parallel district court actions (28 U.S.C. § 1659), these would not represent “simultaneous and voluminous” proceedings.

<sup>7</sup> Microsoft is also incorrect when it argues that InterDigital should not have pursued the 613 Investigation following a Federal Circuit claim construction decision in the 800 Investigation. *Opp.* at 17. Pursuant to the Remand Order in the 613 Investigation, the parties and ALJ were instructed to apply the Commission’s prior construction—which mirrored the legally correct claim construction adopted by this Court on the same patents in the ZTE case. The ALJ found in InterDigital’s favor applying that claim construction, and the Commission did not choose to adopt a different construction until its order on a petition for review at the very end of the case.

objectively baseless” and that the “New Jersey state court easily found that ShopRite was not an interested party.” *Hanover*, 806 F.3d at 181. Here, the ITC actions alleged by Microsoft were lengthy proceedings involving trials and appeals (including intermediate trial and appeal victories by InterDigital); there were no summary rejections of InterDigital’s claims. Further, Microsoft never even sought, much less obtained, any of the sanctions (including attorneys’ fees) available in the ITC for assertion of frivolous claims. The *Hanover* court also based its ruling on the fact that, “in addition to the lack of objective merit,” the plaintiff had also alleged bad faith litigation conduct. *Id.* Here, Microsoft has not alleged any litigation misconduct by InterDigital. Microsoft also did not allege the third factor that was critical in *Hanover*: “collateral harm imposed on plaintiffs by defendants’ petitioning activity,” such as “interference with [Microsoft’s] access to governmental agencies.” *Id.*

In any event, the *Hanover* test differs only in minor respects from *PRE*. Both tests are aimed at determining whether the petitioning activity constitutes “sham litigation.” Under either analysis, “sham litigation” must be filed for the purpose of harassing a competitor. *Id.* at 179, 181. Microsoft is not InterDigital’s competitor, and Microsoft did not identify a competitor whom InterDigital intended to harm through its actions (unlike in *Hanover*, where the court specifically found that the defendant’s actions were aimed at harming its competitor, Wegmans). *Id.* at 174. “Sham litigation” alone does not constitute an antitrust violation; Microsoft must also plausibly allege all of the other elements of a Sherman Act claim, which it has failed to do here.

#### **V. MICROSOFT FAILED TO ALLEGE INJURY-IN-FACT**

InterDigital’s Motion demonstrated both that Microsoft has alleged no past injury supporting damages (other than litigation expenses in connection with InterDigital’s non-sham litigation, which is not actionable), and also that Microsoft has alleged no plausible threat of any future injury that could support injunctive relief. Microsoft’s Opposition claims that it faces “threatened loss or injury in the form of supra-competitive licensing fees” (Opp. at 19) – but offers no explanation whatsoever for how this supposed “threat” could conceivably be realized. Microsoft and its predecessor Nokia have spent nearly a decade refusing to pay any royalties at

all to InterDigital for 3G/4G products, and continue to so refuse. Nothing in Microsoft's Opposition serves to dispel the mystery as to how "supra-competitive" royalty payments might be paid by Microsoft in the future. Thus, Microsoft's litany of speculative injuries that it *might* suffer *if* it ever paid "supra-competitive" royalties is entirely illusory. *Id.* at 19. Microsoft cannot be compelled to pay any royalties to InterDigital except pursuant to a court judgment, and no court will require payment of "supra-competitive" royalties. Microsoft's allegations in this regard do not remotely meet the requirement of plausibility under *Twombly*.

Microsoft's reliance on other district court cases is unavailing. RIM alleged that if it did not "acquiesce to Motorola's non-FRAND terms," then "its products (such as the Blackberry®) will no longer meet the SDOs' standards and RIM will be at a major competitive disadvantage." *Research in Motion Ltd. v. Motorola, Inc.*, 644 F. Supp. 2d 788 (N.D. Tex. 2008). Here, Microsoft did not allege that its refusal to acquiesce to purported "non-FRAND terms" would require Microsoft to change its products to be non-conforming to standards. Instead, Microsoft is continuing to sell standards-compliant products. In *Apple v. Motorola*, the court initially allowed Apple's Sherman Act claim to survive a motion to dismiss, but ultimately entered summary judgment finding no injury because Apple had paid no royalties to Motorola, and its only asserted "injury in fact" was payment of litigation expenses, which could not form the basis of a claim due to *Noerr-Pennington* immunity. *Apple*, 886 F. Supp. 2d at 1076. In *Apple v. Samsung*—a case where the plaintiff and defendant were fierce product competitors—Apple also relied on litigation expenses as its injury-in-fact,<sup>8</sup> but as Samsung did not assert *Noerr-Pennington* immunity, the court had no occasion to consider this argument. No. 11-CV-01846-LHK, 2011 WL 4948567 (N.D. Cal. Oct. 18, 2011).

## **VI. PRAYERS FOR RELIEF C, D, AND F SHOULD BE STRICKEN**

The overbroad prayers for relief set forth in Paragraphs C, D, and F of the Complaint highlight the overreaching nature of Microsoft's claims, and demonstrate that Microsoft is

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<sup>8</sup> See Counterclaims ¶ 88, *Apple v. Samsung*, No. 11-1846 (N.D. Cal. Jul. 21, 2011), ECF # 124.

actually seeking to use this lawsuit as a means to attack InterDigital's business, while seeking to seize for itself unfair and anticompetitive advantages over its rivals in the handset device market. *First*, Microsoft's citation of the *Qualcomm v. Broadcom* case only serves to demonstrate why Paragraph C seeking a declaration of unenforceability of thousands of InterDigital patents is improper. *Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004 (Fed. Cir. 2008). That case did not involve unenforceability as a remedy for an antitrust claim, but rather found that two patents could be held unenforceable on a waiver theory when the patent owner had failed to disclose those specific patents to an SSO. *Id.* at 1026. Here, Microsoft alleges that all of the patents at issue *were* disclosed to an SSO, and seeks a blanket finding that these thousands of patents should be found unenforceable pursuant to an ill-defined antitrust theory without any allegations supporting such a finding as to each patent. *Second*, Microsoft argues that InterDigital "overstates" the relief requested in Paragraph D seeking to void an untold number of unspecified contracts that InterDigital has with third parties. *Opp.* at 23 n.9. Yet the very vagueness and unlimited nature of this request for relief renders it improper. InterDigital does not know which third parties are implicated by this request, and it is not adequately supported by the allegations of the Complaint. *Third*, Paragraph F seeks an injunction requiring InterDigital to "make available" to Microsoft a FRAND license on terms to be determined by the Court, and further to disclose to Microsoft all of InterDigital's confidential licenses with Microsoft's competitors. In seeking to defend this request for relief, Microsoft fails to distinguish it from the declaratory judgment counterclaim seeking a declaration of FRAND terms that the Court has already dismissed. *Opp.* at 24.

## **VII. THE STATUTE OF LIMITATIONS BARS PRE-AUGUST 20, 2011 INJURIES**

Microsoft concedes that it may recover damages only for "the injuries it sustained in the four-year period prior to the filing of its complaint." *Opp.* at 21. Thus, the Court should dismiss any damages claims arising from alleged injuries prior to August 20, 2011.

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