

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

SHUFFLE TECH INTERNATIONAL, LLC,
ACES UP GAMING, INC., and
POYDRAS-TALRICK HOLDINGS LLC,

Plaintiffs,

v.

SCIENTIFIC GAMES CORPORATION,
BALLY TECHNOLOGIES, INC., AND
BALLY GAMING, INC.,

Defendants.

Civil Action No. 1:15-cv-03702

The Honorable Matthew F. Kennelly

**DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

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I. INTRODUCTION

Plaintiffs allege that Defendants fraudulently obtained two patents by withholding information from the U.S. Patent Office (PTO), filed one “sham litigation” asserting those two patents knowing that they were invalid (and four others asserting other patents), and used their alleged monopoly power to improperly control the market for automatic shuffling machines. Each of the Counts in the Complaint must be dismissed, on a number of grounds.

The Plaintiffs in this action do not have standing to bring it. *None* of the proceedings identified in the Complaint involved *any* of the Plaintiffs. Because Defendants never sued—or threatened to sue—Plaintiffs for infringing the patents at issue, there is no “case or controversy” to support Plaintiffs’ declaratory relief claim (Count I). Because Plaintiffs are neither customers nor competitors of Defendants and claim to have suffered only an indirect injury (a loss of royalty payments due under a license agreement), they have not suffered any antitrust injury, and certainly not any of the type necessary to support Counts II and III. They are therefore not proper plaintiffs to this action. Further, Plaintiffs’ Clayton Act claim (Count III) is long time-barred because the last pleaded acquisition was in 2009, well beyond the four-year statute of limitations. And their federal and state unfair competition claims (Counts IV-VI) fail because, as the Federal Circuit and this Court have repeatedly held, allegations of fraud on the PTO cannot support such claims.¹

In addition to their other legal infirmities, Plaintiffs’ monopolization allegations are also substantively meritless, as judicially noticeable facts show. *Avery Dennison Corp. v. Cont’l Datalabel, Inc.*, 2010 WL 4932666, at *1, 4 (N.D. Ill. Nov. 30, 2010) (Kennelly, J.) (dismissing

¹ This Court should dismiss Scientific Games Corporation (parent of the other two defendants) because there are no independent allegations supporting parental liability. It “is a general principle of corporate law ... that a parent corporation (so-called because of control through ownership of another corporation’s stock) is not liable for the acts of its subsidiaries.” *United States v. Bestfoods*, 524 U.S. 51, 61 (1998).

complaint alleging fraud on the PTO and sham litigation, and relying on information disclosure statements filed with the PTO). Defendants achieved their success in the marketplace legally, and long before the issuance of the patents at issue. Defendants did not fraudulently obtain the patents (the PTO having determined in the pending reexaminations that patentable subject matter exists), and filed well-founded cases for patent infringement where their rights were violated. Tellingly, none of the parties SHFL sued for infringement ever claimed fraud on the PTO or “sham litigation.”

These deficiencies are fundamental and cannot be cured. This Court should therefore dismiss with prejudice all counts of the Complaint as to all Defendants.

II. STATEMENT OF FACTS

A. SHFL Established And Leads The Alleged Relevant Market

Defendant SHFL, f/k/a Shuffle Master Inc., is a global gaming supplier and market leader in automatic card shufflers made for use in U.S. casinos, the product market alleged in this case. Compl. ¶¶10, 13, 17.² It was founded in 1983 and sold its first automatic shuffler in the early 1990s. *See* SHFL 2012 10-K³. As the innovator and market leader, SHFL has a strong intellectual property position—with over 2,500 worldwide patents, trademarks, and copyrights granted and pending. *Id.* Two of SHFL’s patents are at issue here: U.S. Patent 6,651,982 (the “’982 Patent”) and U.S. Patent 7,523,935 (the “’935 Patent”). Compl. ¶25; Dkt. 1-1; Dkt. 1-2. The PTO issued these patents on November 25, 2003 and April 28, 2009, respectively. Compl. ¶¶27, 30.

² SHFL was acquired by Bally Technologies Inc. (“Bally”) in 2013, which became a wholly-owned subsidiary of Scientific Games Corp. in November 2014. To be consistent with the Complaint, this Memorandum will refer to Bally, when it is doing business as SHFL or Shuffle Master, as SHFL.

³ SHFL’s 2012 10-K is incorporated by its reference in the Complaint (at ¶ 17) and this Court may properly consider it. *See ACLU of Ill. v. City of Chi.*, 2010 WL 3273279, at *9 n.7 (N.D. Ill. Aug. 13, 2010).

B. Plaintiffs Are Neither Customers Nor Competitors Of SHFL And Are Not Involved In Any Of The Proceedings Identified In The Complaint

Plaintiff Shuffle Tech primarily manufactures card shufflers for “private consumer use,” not for use by casinos. Compl. ¶¶19, 13. Shuffle Tech licenses its shuffler technology to other companies, including gaming equipment manufacturer DigiDeal Corporation (“DigiDeal”).⁴ Compl. ¶21. Using Shuffle Tech’s prototypes, DigiDeal developed its own automated shuffler (the “DigiShuffle”) and entered into a patent and technology license agreement with Shuffle Tech in September 2012. *Id.* ¶22. That agreement provides for royalty payments to Shuffle Tech and Plaintiff Poydras, an investor that finances the development of DigiShuffle products, over a 15-year period beginning in 2013. *Id.* ¶¶22-23. Plaintiff Aces Up was retained to assist in making, selling, and distributing the DigiShuffle. *Id.*

In October 2012, SHFL sued DigiDeal (the “Nevada Action”), alleging that DigiDeal infringed the ’982 and ’935 Patents by making, using, and offering to sell the DigiShuffle. Compl. ¶25; *see also SHFL Entm’t, Inc. v. DigiDeal Corp.* (“*DigiDeal*”); 2:12-cv-01782 (D. Nev.), Compl. ¶16 (Dkt. 1), and Am. Compl. ¶20 (Dkt. 67). DigiDeal, which is not a party in this case, is the only defendant in the Nevada Action. Shuffle Tech, Aces Up, and Poydras are not defendants in that case, and SHFL has never sued or threatened to sue any of them for infringement. Plaintiffs have never sought to intervene in or join the Nevada action.

Plaintiffs in this case allege that the Nevada Action is objectively baseless and part of an anticompetitive scheme. Compl. ¶26. DigiDeal makes no such allegations in the Nevada Action, and has not alleged that SHFL committed inequitable conduct, engaged in sham litigation, or defrauded the PTO. *See DigiDeal*, Answer (Dkt. 68). The Nevada Action is stayed pending the *ex parte* reexamination of the ’982 and ’935 Patents that DigiDeal initiated in

⁴ Plaintiffs’ Complaint refers to this company as “Digideal,” but the company is actually “DigiDeal.” *See* <http://www.digideal.com/about/index.php>.

January 2014. *DigiDeal*, Stay Order (Dkt. 101). Plaintiffs are neither parties in those reexamination proceedings, nor have they been identified as parties in interest. The Complaint selectively relies on the PTO's initial decisions (Compl. ¶¶29, 31), but recent PTO actions on the merits confirm the patentability of disclosed inventions. *E.g.*, Request for Judicial Notice (“RJN”) Ex. 1, PTO Notice of Intent to Issue *Ex Parte* Reexamination Certificate (May 4, 2015).

Plaintiffs were not a party to any of the four other alleged “sham” infringement actions— (1) a 2003 suit brought by Casino Austria Research and Development (“CARD”) in which SHFL counterclaimed for infringement of various patents (the “CARD Litigation”) (Compl. ¶¶65-73); (2) a 2004 suit against VendingData (*id.* ¶¶74-83); (3) a 2009 suit against Taiwan Fulgent Enterprise Co. (*id.* ¶84); and (4) a 2012 suit against TCS John Huxley (*id.* ¶85). None of the parties in the prior litigations asserted fraud on the PTO or sham litigation claims, and none of those cases even involved the '982 or '935 Patents at issue here.

III. ARGUMENT

A. Count I Must Be Dismissed Because This Court Lacks Subject Matter Jurisdiction To Issue A Declaratory Judgment

Defendants have never sued or threatened to sue Plaintiffs on the '982 and '935 patents; as a result, there is no “case or controversy” within the meaning of 28 U.S.C. § 2201, and Plaintiffs do not have Article III standing to bring a declaratory judgment claim.

The Declaratory Judgment Act is limited to cases in which there is an “actual controversy.” *Micron Tech., Inc. v. Mosaid Techs., Inc.*, 518 F.3d 897, 901 (Fed. Cir. 2008). Subject matter jurisdiction can only exist where “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.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007).

There is no such controversy here. Plaintiffs do *not* allege an underlying cause of action that Defendants could have brought or threatened to bring against them. Shuffle Tech implies that it jointly manufactured and marketed the DigiShuffle product at issue in the Nevada Action. *See, e.g.*, Compl. ¶¶24, 25. The Complaint makes clear that Shuffle Tech merely licensed its technology to DigiDeal, *id.* ¶22, and this license agreement does not create an adverse legal interest between Shuffle Tech and SHFL.

Plaintiffs complain that the DigiDeal litigation has cost them royalties from DigiDeal's sales of its accused card shuffler. *Id.* ¶23. Even if true, this economic loss cannot establish an actual controversy sufficient to support this Court's exercise of declaratory judgment jurisdiction. *See Microchip Tech. Inc. v. Chamberlain Grp., Inc.*, 441 F.3d 936, 943 (Fed. Cir. 2006) (Microchip's "economic interest in clarifying its customers' rights under Chamberlain's patents ... cannot form the basis of an 'actual controversy' under the Declaratory Judgment Act.").

B. Counts II and III Must Be Dismissed Because Plaintiffs Have Not Suffered Antitrust Injury And Do Not Have Standing

Plaintiffs are neither consumers nor competitors of Defendants. And, the only injuries Plaintiffs allege are those they incurred in their capacity as licensors, investors, and distributors. Plaintiffs' Sherman and Clayton Act claims therefore fail because Plaintiffs do not have antitrust standing and have not suffered antitrust injury.

To establish antitrust standing, Plaintiffs must show that they are the "proper part[ies] to bring a private antitrust action." *Associated Gen. Contractors of Cal., Inc. v. Cal. St. Council of Carpenters*, 459 U.S. 519, 536 n.31 (1983). They are not. Plaintiffs are "neither [] consumer[s] nor [] competitor[s] in the market in which trade was restrained," which counsels strongly against antitrust standing. *Id.* at 539. Shuffle Tech, by its own admission, makes "card shufflers

primarily *for private consumer use*,” not for use in casinos. Compl. ¶19 (emphasis added). Its connection to the alleged “market” (*id.* ¶13) is only via its relationship with third party DigiDeal, to which Shuffle Tech licensed its technology in exchange for “patent and technology royalties” (*id.* ¶21). Poydras and Aces Up are even farther removed; Poydras is an outside investor that provided financing for the development of the DigiShuffle, and Aces Up assists in sales and distribution. *Id.* ¶22. The only harm Plaintiffs collectively allege is their downstream loss of \$120 million in (speculative) future royalty payments pursuant to a license agreement with DigiDeal. *Id.* ¶¶22-23. These “injuries” are not legally cognizable antitrust injuries, and Plaintiffs are not the “proper parties” to bring them. *Local Beauty Supply, Inc. v. Lamaur, Inc.*, 787 F.2d 1197, 1201 (7th Cir. 1986) (plaintiff’s ability to bring treble damages antitrust action hinges first on “whether the plaintiff has suffered an antitrust injury and second whether the plaintiff is the proper party to bring the action”) (citing *In re Indus. Gas Litig.*, 681 F.2d 514, 515 (7th Cir. 1982)). If any party can “most efficiently vindicate the purposes of the antitrust laws” (*In re Indus. Gas*, 681 F.2d at 516), it is DigiDeal, and it has (tellingly) *not* brought any such claims. *See Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 395 (7th Cir. 1993) (antitrust standing “examines the connection between the asserted wrongdoing and the claimed injury to limit the class of potential plaintiffs to those who are in the best position to vindicate the antitrust infraction.”) (citing *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 111 n.6 (1986)).

Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 473 (7th Cir. 1982) is instructive. In that case, the Seventh Circuit held that “a patentee who licenses the manufacture of the patented product and whose royalties are keyed to his licensee’s sales or profits cannot obtain damages caused by an anticompetitive scheme that is directed at the licensee, injures the

licensee's business, and by so doing reduces the licensor's royalties." That is precisely the situation here. Shuffle Tech's (as well as Podyras's and Aces Up's) royalties are keyed to DigiDeal's sales, and the alleged anticompetitive scheme is directed at DigiDeal, the licensee. Compl. ¶¶22-23. Defendants have never accused Plaintiffs of infringement and Plaintiffs' only "injury" is a downstream reduction of royalties from its licensee.⁵ The antitrust laws were not designed to protect such attenuated financial interest; the leading antitrust treatise explains that the "licensor is denied standing even though its patent, trademark, or copyright royalty is a percentage of the revenues of a licensee whose product-market revenues were reduced by the defendant's antitrust violation." 2 P. Areeda & H. Hovenkamp, *Antitrust Law* ("Areeda"), ¶351a (3d ed. 2007); *see also Eisai, Inc. v. Sanofi-Aventis U.S., LLC*, 2010 WL 3172187, at *8 (D.N.J. Aug. 10, 2010) (plaintiff with only a royalty interest suffered no antitrust injury because "fewer or non-existent royalties under the profit-sharing arrangement ... is not an injury of the type intended to be redressed by the antitrust laws . . .").

Because Plaintiffs are neither Defendants' customers nor their competitors, have never been accused of infringement by Defendants, and have only a tangential interest in royalties under a third-party agreement, they cannot have suffered antitrust injury. Because they lack antitrust standing, Counts II and III of the Complaint must be dismissed.

C. Count II Must Be Dismissed For The Further Reason That Plaintiffs Do Not Plausibly Allege Antitrust Violations

Even if Plaintiffs had antitrust standing, their claims of fraud on the PTO (known as *Walker Process* claims) and of sham litigation fail as a matter of law.

⁵ The Court found standing in *Grip-Pak*, but on very different facts. There, the defendant had previously sued the plaintiff for infringement, which made the plaintiff a direct target of the alleged anticompetitive conduct. 694 F.2d at 474.

1. Plaintiffs Fail To State A Claim For Walker Process Fraud

Antitrust liability may arise in rare circumstances where a patentee with market power procures a patent by knowing and willful fraud on the PTO and uses that patent to restrain competition. *See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 174 (1965); *Avery*, 2010 WL 4932666, at *4. To state a claim for *Walker Process* fraud, a complaint must allege, in addition to the elements necessary to prove Section 2 liability: “(1) a false representation or deliberate omission of a fact material to patentability, (2) made with the intent to deceive the patent examiner, (3) on which the examiner justifiably relied in granting the patent, and (4) but for which misrepresentation or deliberate omission the patent would not have been granted.” *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1364 (Fed. Cir. 1998).

Plaintiffs’ speculative *Walker Process* allegations are devoid of any facts that could support a plausible inference that SHFL deliberately withheld material information or did so with the intent to deceive the PTO. Plaintiffs’ own admissions belie their allegations that SHFL failed to disclose multiple prior art references as part of a “deliberately planned and carefully executed scheme to defraud the USPTO and gain allowance of claims that would not have otherwise been allowed.” Compl. ¶32. And recent facts—all the proper subject of judicial notice—refute their allegations.⁶ None of the three allegedly “undisclosed prior art references” (Compl. ¶33) meet the exceedingly high threshold for successfully pleading fraud on the PTO.

First, it is at least misleading for Plaintiffs to allege that SHFL failed to disclose a Casino Concepts sales brochure describing the Roblejo prototypes during prosecution and reexamination of both the ’982 and the ’935 Patents (Compl. ¶¶32-33, 38-39). The ’982 and ’935 Patents

⁶ *See Grant Imp. & Distrib. Co. v. Amtec Int’l of N.Y. Corp.*, 2010 WL 706042, at *6 (N.D. Ill. Feb. 24, 2010) (“the court may take judicial notice of matters of public record, such as public court documents, and may consider such documents without converting the 12(b) motion to dismiss into a ... motion for summary judgment”) (citation omitted). *See also Avery*, 2010 WL 4932666, at *1, 2 (referring to Information Disclosure Statements filed with the PTO and attached to motion to dismiss).

(attached to the Complaint) explicitly reference the Roblejo '122 Patent, which describes the very prototypes Plaintiffs allege were omitted. *See* Dkt. 1-1; Dkt. 1-2. As a publicly filed document in the *CARD* Litigation referenced in the Complaint makes clear, “the [Casino Concepts] shuffler was the subject of U.S. Patent No. 5,989,122” and the “[t]he listed inventor on that patent is Conrad Roblejo.” RJN Ex. 2, Solberg Dec. ¶4. At best then, the brochure was cumulative (*see* 37 C.F.R § 1.56) to the Roblejo patent that SHFL *did* disclose. It is well settled that “[w]hen a reference was before the examiner, whether through the examiner’s search or the applicant’s disclosure, it cannot be deemed to have been withheld from the examiner.” *Molins PLC v. Textron, Inc.*, 48 F.3d 1172, 1185 (1985) (citations omitted). Accordingly, the alleged omission of the Roblejo sales brochure cannot constitute fraud on the PTO as a matter of law.⁷

Next, Plaintiffs complain that SHFL failed to properly disclose the Block '044 patent, which Plaintiffs contend invalidates all claims of the '982 Patent, during its prosecution.⁸ Even accepting as true Plaintiffs’ allegations that the Block '044 patent was not disclosed, Plaintiffs cannot plausibly allege “but for” causation—*i.e.*, that, but for SHFL’s omission, the '982 patent would not have issued. *See Dippin’ Dots, Inc. v. Mosey*, 476 F.3d 1337, 1347 (Fed. Cir. 2007) (“The heightened standard of materiality in a *Walker Process* case requires that the patent would not have issued but for the patent examiner’s justifiable reliance on the patentee’s misrepresentation or omission.”). On May 4, 2015, the PTO issued a Notice of Intent to Issue *Ex Parte* Reexamination Certificate, finding that the prior art before the PTO—including the

⁷ The Federal Circuit has held that a patentee’s failure to disclose a patent application reporting the same work described in scientific publications considered by the examiner did not constitute inequitable conduct because the reference was cumulative. *Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1574-75 (Fed. Cir. 1997).

⁸ Plaintiffs admit that SHFL subsequently disclosed the Block '044 patent in an Information Disclosure Statement for continuing-in-part and divisionals of the '982 Patent. Compl. ¶ 46. And Plaintiffs do not allege that SHFL failed to disclose the Block '044 patent during reexamination of either the '982 Patent or '935 Patents.

Robledo and Block patents—“fails to disclose, teach, suggest or otherwise make obvious [the ’982 Patent].” RJN Ex. 1.

Plaintiffs admit that the Block ’044 patent was disclosed in the ’935 Patent application, but complain that SHFL “buried” it by including it with irrelevant prior art. Compl. ¶32. This Court has already rejected claims based on “burying.” *See Avery*, 2010 WL 4932666, at *2 (Avery sufficiently disclosed references to the PTO when it filed an Information Disclosure Statement citing the references and had “no [further] obligation to offer its view on [the references]”); *see also Fiskars, Inc. v. Hunt Mfg. Co.*, 221 F.3d 1318, 1327 (Fed. Cir. 2000) (It is axiomatic that “when a reference was cited to the [PTO], it can not be deemed to have been withheld.”).

Finally, Plaintiffs’ allegation that SHFL intentionally withheld the Luciano Automatic Card Shuffler (ACS) prototype from the PTO is unsupported by any plausible factual allegations. The Luciano Declaration in the *CARD* Litigation, on which Plaintiffs rely (Compl. ¶41), shows, at best, that SHFL’s predecessor-in-interest (Progressive Games Inc.) received an unsolicited letter marketing the Luciano ACS in the early 1990s, nearly a decade before SHFL submitted its applications for the ’982 and ’985 Patents. RJN Ex. 3, Luciano Dec. ¶¶14, 17. Neither the receipt of this unsolicited letter in 1994, nor the fact that the Luciano ACS was cited in the *CARD* Litigation and a separate 2005 lawsuit—both involving entirely different patents (Compl. ¶¶41-42)—suggests an intent to deceive the PTO in unrelated proceedings involving the ’982 and ’985 Patents at issue here. These far-fetched allegations do not plausibly suggest that SHFL acted with the requisite fraudulent intent. *See C.R. Bard*, 157 F.3d at 1364 (requiring a heightened showing of scienter and materiality to establish fraud on the PTO).

Moreover, the Federal Circuit has made clear that even when there are sufficient facts to allege that a material prior art reference was known by an applicant and not disclosed to the PTO, this does “not plausibly suggest any deliberate decision to withhold a known material reference,” and thus cannot alone state a claim for *Walker Process* fraud. *Exergen Corp., v. Walmart Stores, Inc.*, 575 F.3d 1312, 1331 (Fed. Cir. 2009) (internal quotation marks omitted); *see also Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1071 (Fed. Cir. 1998) (“[F]or an omission such as a failure to cite a piece of prior art to support a finding of *Walker Process* fraud, the withholding of the reference must show evidence of fraudulent intent. A mere failure to cite a reference to the PTO will not suffice”). Accordingly, even assuming SHFL knew of the Luciano ACS and failed to disclose it, Plaintiffs have not alleged facts sufficient to plead *Walker Process* fraud.

2. Plaintiffs Fail To Allege A Plausible Sham Litigation Claim

Plaintiffs allege that “SHFL has engaged in a series of sham patent infringement lawsuits against every potential competitor” in order to maintain a monopoly and market power in the relevant market in violation of § 2 of the Sherman Act. Compl. ¶57, *see id.* ¶¶107-108. This “sham litigation” claim fares no better than the *Walker Process* claim. Each case involved duly-issued patents, and Plaintiffs have alleged no facts to overcome the presumption in favor of patent validity or that otherwise suggest the lawsuits were baseless. Indeed, for a company with an extensive patent portfolio to litigate five infringement suits on varied patents over more than a ten-year period is hardly remarkable.

The Supreme Court has defined “sham litigation” as “litigation that (1) is ‘objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits’ (the objective element), and (2) is motivated by a desire ‘to interfere *directly* with the business relationships of a competitor’ (the subjective element).” *Tyco Healthcare Group LP v. Mutual*

Pharm. Co., Inc., 762 F.3d 1338, 1343 (Fed. Cir. 2014) (emphasis in original) (quoting *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993) (“*PREI*”). Unless the exacting standards of *PREI* are satisfied, a patentee “must have the right of enforcement of a duly granted patent” and is entitled to the protection of the *Noerr-Pennington* doctrine. *C.R. Bard*, 762 F.3d at 1368-69.

Plaintiffs recite five supposedly “sham” litigations. Compl. ¶¶25-26; 65-85. Only one of those suits—the Nevada Action against DigiDeal—alleged infringement of the ‘982 or ‘935 Patents. In the other four—against CARD, Vending Data, Taiwan Fulgent, and TCS Huxley—SHFL alleged infringement of various other patents not at issue in this case. *Id.* ¶¶65-85. Plaintiffs do not contend that any of the patents involved in those other cases were procured by fraud or plead any facts to plausibly suggest that SHFL’s claims for infringement of those patents were “so baseless” that SHFL could not “realistically expect to secure favorable relief.” *PREI*, 508 U.S. at 67. Nor were any of the patents SHFL asserted in those litigations found to be invalid or fraudulently obtained. And, as this Court and the Federal Circuit have held, even the “effort to enforce a patent that ultimately falls to invalidity” is insufficient, alone, to state a claim for sham litigation. *Avery*, 2010 WL 4932666, at *6 (quoting *C.R. Bard*, 157 F.3d at 1369) (“‘sham litigation requires more than a failed legal theory,’ and ‘[n]either the bringing of an unsuccessful suit to enforce patent rights, nor the effort to enforce a patent that falls to invalidity, subjects the suitor to antitrust liability.’”). Absent any colorable allegations of bad faith, Plaintiffs cannot state a claim sufficient to overcome the presumption of patent validity. *See C.R. Bard*, 157 F.3d at 1369 (the “presumption that the assertion of a duly granted patent is made in good faith” is “overcome only by affirmative evidence of bad faith.”).

With respect to the Nevada Action alleging infringement of the '982 and '935 Patents, Plaintiffs make two allegations: (1) SHFL knew of three prior art references that rendered the '982 and '935 Patents invalid or unenforceable (Compl. ¶¶51, 55-60) and (2) SHFL did not conduct a “reasonable pre-filing investigation” of the DigiShuffle prior to filing suit, which Plaintiffs claim would have revealed that the DigiShuffle is “fundamentally different” than the inventions claimed in the '982 and '935 Patents (*id.* ¶¶26, 52).

Setting aside the fact that the defendant in the Nevada litigation—DigiDeal—did not make any such contentions, neither of these theories can give rise to a sham litigation claim. The first is based entirely on a claim of fraud on the PTO, which fails for the reasons previously discussed. *See supra* Section II(c)(1). Plaintiffs’ second allegation—that SHFL’s lawsuit against DigiDeal is objectively baseless because SHFL failed to test the DigiShuffle for noninfringement prior to filing suit—even if true, is not a “sufficient factual basis for a sham litigation claim.” *Avery*, 2010 WL 4932666, at *6. This Court rejected precisely the same argument. *Id.* (“Avery’s failure to perform a particular test identified by Continental does ‘not permit the court to infer more than the mere possibility’ that Avery brought suit against Continental in bad faith.”) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). Plaintiffs have not come close to alleging the detailed facts necessary to plead a sham litigation claim.

D. Count III Must Be Dismissed Because It Is Time-Barred

The statute of limitations bars Plaintiffs’ Clayton Act Section 7 claim. Antitrust claims brought by private plaintiffs are “*forever barred* unless commenced within four years after the cause of action accrued.” 15 U.S.C. § 15b (emphasis added). Plaintiffs’ Clayton Act count is based on two allegedly anti-competitive acquisitions: SHFL’s acquisition of CARD in May 2004 (Compl. ¶¶72-73), and of VendingData in March 2009 (*id.* ¶¶80-81). The door to a claim based on those acquisitions closed in 2008 and 2013, respectively, years before Plaintiffs filed suit.

It is well established that an action challenging the acquisition of another company's stocks or assets accrues at the time of the merger or acquisition. *See Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 604 (6th Cir. 2014) (“[a]s with the Sherman Act, a Section 7 cause of action challenging an acquisition accrues at the time of the merger or acquisition, and there is a four-year statute of limitations”); *see also* Areeda, ¶320c5, at 304. Plaintiffs point to two mergers that occurred 6 and 11 years ago, with citation to contemporaneous SEC disclosures publicly documenting each acquisition. *See* Compl. ¶¶72 & 80 (citing SHFL's 8-K dated May 13, 2004 and Elixir's (formerly VendingData) 8-K dated March 20, 2009). Plaintiffs do not allege they were unaware of these acquisitions, nor could they credibly, given the SEC filings. Thus, Plaintiffs' claim challenging these two mergers has been time-barred since March 2013 at the latest, four years after the VendingData acquisition. This suit comes too late.

E. Counts IV Through VI Must Be Dismissed Because They Are Entirely Premised On Alleged Sham Litigations and Inequitable Conduct

Plaintiffs allege violations of Section 43(a) of the Lanham Act, the Illinois Unfair Competition Act, and the Illinois Deceptive Trade Practices Act. *See* Compl. ¶¶117-140. These claims are based entirely on the alleged “sham” litigations; Plaintiffs do not allege any false or deceptive statements made to competitors or customers outside the scope of these litigations. Plaintiffs' “sham” litigation allegations cannot support these causes of action as a matter of law.

Plaintiffs' Lanham Act Count is based on Defendants' allegedly “baseless infringement claims.” Compl. ¶124. The Federal Circuit has repeatedly held that such allegations cannot give rise to a Lanham Act claim. For instance, in *Pro-Mold and Tool Co. v. Great Lakes Plastics, Inc.*, 75 F.3d 1568, 1575 (Fed. Cir. 1996), the Federal Circuit concluded that “[o]btaining a patent through inequitable conduct does not violate this statute [the Lanham Act].” It further explained that, “there are adequate remedies to deal with inequitable conduct when it is found.

Resort to federal unfair competition law is not one of them.” *Id.*; *see also Concrete Unlimited Inc. v. Cementcraft, Inc.*, 776 F.2d 1537, 1539 (Fed. Cir. 1985); *Chromium Indus., Inc. v. Mirror Polishing & Plating Co., Inc.*, 448 F. Supp. 544, 557 (N.D. Ill. 1978), superseded by statute on other grounds (“false patent claims are not the kind of unfair competitive activity at which the Lanham Act is directed.”).

Plaintiffs’ state law claims of unfair competition and deceptive trade practices also are based solely on the alleged “sham” litigation. Compl. ¶¶129, 136. Like the Lanham Act claim, a plaintiff cannot maintain an action under Illinois’s unfair competition laws premised only on claims of improper litigation. *See PSN Ill., Inc. v. Ivoclar Vivadent, Inc.*, 2005 WL 2347209, at *5 (N.D. Ill. Sept. 21, 2005) (“Courts applying Illinois law have repeatedly dismissed unfair competition claims based on the allegedly improper use of litigation as a means of competition”).

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiffs’ Complaint in its entirety with prejudice.

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Respectfully submitted,

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