

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

LOTES CO., LTD.)

Plaintiff,)

v.)

12-cv-7465 (SAS)

ECF Case

HON HAI PRECISION INDUSTRY CO. LTD.;)

FOXCONN INTERNATIONAL HOLDINGS, INC.;)

FOXCONN INTERNATIONAL, INC.; FOXCONN)

ELECTRONICS, INC.; and FOXCONN (KUNSHAN))

COMPUTER CONNECTOR CO., LTD.)

**ORAL ARGUMENT
REQUESTED**

Defendants.)
_____)

**DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED COMPLAINT**

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The served Defendants submit this reply memorandum of law in further support of their motion to dismiss Plaintiff’s First Amended Complaint (“FAC”).¹ This lawsuit remains the proverbial tail wagging the dog on a Chinese lawsuit, pending in a Chinese court, between Asian parties, concerning Chinese patents. The antitrust laws should not be used as a sword to collaterally attack such suits. Plaintiff’s other claims likewise fail for the myriad reasons set forth in the Defendants’ Opening Brief and below.

I. ARGUMENT

A. Plaintiff Fails to Cite Any Case Law Refuting the Applicability of the *Noerr Pennington* Doctrine.

The allegations in the FAC establish that this case is premised on Foxconn (Kunshan)’s assertion of patent rights in China. Such conduct is clearly immunized from both antitrust and tortious interference claims under the *Noerr Pennington* Doctrine. (Opening Br. at 7).

Plaintiff relies solely on a 29-year-old law review article to argue the contrary – that *Noerr Pennington* should not apply “where a foreign entity is petitioning in a foreign land.” (See Opp. at 3-4). However, there is no legal support for Plaintiff’s argument, and all courts since the 5th Circuit decision in *Coastal States* have concluded otherwise on this exact issue. See *Coastal States Mktg. Inc. v. Hunt*, 694 F.2d 1358, 1366-67 (5th Cir. 1983) (petitioning foreign governments is protected under *Noerr Pennington*).²

¹ The Memorandum of Law in Support of Defendants’ Motion to Dismiss Plaintiffs’ First Amended Complaint (“Defendants’ Opening Brief”) is cited as “Opening Br. at ____”. Plaintiff’s Opposition to Defendant’s Motion to Dismiss Plaintiff’s First Amended Complaint is cited as “Opp. at ____”.

² See also *Carpet Group Intl. v. Oriental Rug Imps.*, 256 F. Supp. 2d. 249, 266 (D.N.J. 2003) (lobbying of foreign governments protected under the *Noerr-Pennington* Doctrine); *Luxpro Corp. v. Apple, Inc.*, No. C 10–03058 JSW, 2011 WL 1086027, * 5 (N.D. Cal. Mar. 24, 2011) (*Noerr-Pennington* Doctrine protects efforts to petition foreign governments); *Coca-Cola Co. v. Omni Pac. Co., Inc.*, No. C 98-0784 S1, 1998 U.S. Dist. LEXIS 23277, *28-9 (N.D. Cal. Dec. 9, 1998) (same).

As a fallback, Plaintiff argues that the patent claims asserted by Foxconn (Kunshan) in the Chinese patent action are “objectively meritless.” (Opp. at 4). However, Plaintiff concedes that the patent suit asserts claims that will require “patent claim construction” to “resolve factual disputes between the parties” concerning the patents. (Opp. at 19). In so doing, Plaintiff necessarily concedes that the patent claims are not “objectively baseless.”³ Of course, the coverage of the Chinese patents and the merits of the infringement claims filed in China by Foxconn (Kunshan) should be decided by the Chinese courts. *See infra.* at Sec. I.I.

B. Plaintiff Fails to Show A Direct U.S. Effect as Required Under the FTAIA.

Plaintiff concedes that under the FTAIA, it must allege that Defendants’ conduct had a direct, substantial, and reasonably foreseeable effect on U.S. commerce. (Opp. at 5). However, the FAC fails to allege such facts.

Plaintiff argues that Defendants’ conduct has a direct effect on U.S. domestic and interstate commerce because: 1) the Contributors and Adopters Agreement were part of an organized effort on the part of promoters and manufacturers who desired to sell in the U.S.; 2) Defendants’ alleged “patent hold-up” efforts directly raised prices for USB 3.0 connectors and, consequently, the computers purchased by U.S. consumers; 3) the parties’ “business model” is directed at the U.S.; and 4) Defendants have availed themselves of the U.S. market in the manufacture and sale of USB 3.0 components. (Opp. at 7-8). All of these allegations are entirely conclusory and none of them adequately allege a direct effect on U.S. commerce. As an initial matter, Plaintiff must allege that the direct effect on U.S. commerce was an *immediate* consequence of Defendants’ conduct. Plaintiff here does not allege this.

³ *See Honeywell Int’l v. Universal Avionics Sys.*, 488 F.3d 982, 1000 (Fed. Cir. 2000) (A suit is “objectively baseless” only when “no reasonable litigant could realistically expect to secure favorable relief.”)

Plaintiff also urges this Court to adopt a broader view of the term “direct effect” than the court in *In re Intel Corp. Microprocessor Anti. Litig.*, 452 F. Supp. 2d 555 (D. Del. 2006) (finding no direct effects), and instead urges the Court to follow *In re TFT-LCD (Flat Panel) Anti. Litig.*, 822 F. Supp. 2d 953 (N.D. Cal. 2011). However, *TFT-LCD* court did not disagree with the reasoning in *Intel*, but simply distinguished the facts in *Intel* from the facts in *TFT-LCD*. In *Intel*, the alleged anticompetitive conduct reduced the plaintiff’s German subsidiary’s sales of German-made products in Germany, which in turn affected the profitability of plaintiff’s U.S. parents, which in turn affected the discounts offered for U.S. transactions, and in turn affected U.S. commerce. This chain of events was too speculative to constitute a “direct effect.” *TFT-LCD* 822 F. Supp. 2d at 965-66. In *TFT-LCD*, by contrast, the court found a “direct effect” where the effect was an “immediate consequence” of the defendants’ price-fixing and the effect of defendant’s anticompetitive conduct did not change significantly between the beginning of the process (overcharges for LCD panels) and the end (overcharges for end-products). *See id.* at 964 (direct effect proceeded without deviation or interruption from the LCD manufacturer to the American retail store).

The facts alleged by Plaintiff here are like *Intel* and not like *TFT-LCD*. This is not a price-fixing case like *TFT-LCD* (or *Empagran*, *Minn-Chem*, and other cases upon which Plaintiff relies). The Plaintiff is not alleging that the Defendants colluded in order to fix or increase prices of USB 3.0 connectors, which in turn caused an increase in the price of finished products sold in the United States. Instead, it alleges that Defendants’ breach of the USB-IF Contributors Agreement led to patent litigation in China, which it says in turn will lead to the shutdown of some of Plaintiff’s factories in China, which in turn will raise prices for USB 3.0 connectors manufactured and sold in China. (FAC ¶ 63; Opp. at 7-8). The effect alleged by Plaintiff is

hardly the type of direct effect in the U.S. that was found by the court in *TFT-LCD*. The “ripple effect” (FAC ¶ 67) described by Plaintiff here is much closer to the indirect effects in *Intel*, i.e. one involving many “twists and turns” and, like in *Intel*, the Court should find no “direct effect” here.⁴

C. Plaintiff’s Tortious Interference Claim Fails.

Plaintiff does not dispute in its Opposition that New York tortious interference law is unavailable where the conduct and injuries occurred outside of New York. While Plaintiff argues that there is a nexus to New York, Plaintiff concedes, as it must, that the alleged interference here occurred “by suing Lotes for patent infringement in China” (Opp. at 21).⁵ In addition, the alleged injury – cessation of production by Lotes and increased costs (Opp. at 12) affect Lotes where it is based, in Taiwan. Therefore, there is no nexus to New York and the tortious interference claim should be dismissed.

D. Plaintiff Fails to Allege Antitrust Injury.

Plaintiff argues in the FAC and in its Opposition that Defendants’ conduct will cause manufacturers of USB 3.0 connectors to suffer one of the following injuries: 1) cease production and exit the market; 2) take a license and absorb higher costs; or 3) litigate. (FAC ¶¶ 111, 118; Opp. at 12). None of these three alleged injuries qualifies as antitrust injuries.

First, the purported injuries, even if they exist, are injuries to Plaintiff alone. Plaintiff’s FAC does not identify any other competitors that have allegedly suffered similar injuries, or any that have been excluded from competition by any action of any Defendant. To the contrary,

⁴ In addition, Plaintiff does not allege that USB 3.0 connectors are a significant component of the final products into which they are incorporated. Without that allegation it is also impossible to conclude that the alleged increase in the price of USB 3.0 connectors will increase prices for computers bought by U.S. consumers which incorporate USB connectors.

⁵ Plaintiff adds the words “(and otherwise)” to this argument but does not explain what “(and otherwise)” means.

Plaintiff has acknowledged -- through a letter from its counsel in November, 2011 -- that Defendants have licensed their USB 3.0 related patents to “other USB 3.0 Adopters.” (See Ex. A to Lang Decl.).

Plaintiff claims that this letter constitutes an admission by one or more of the Defendants that they have extracted license fees from other USB 3.0 manufacturers in an anti-competitive “patent hold-up.”⁶ (Opp. at 10-11). This is not true. Defendants simply noted that a letter from Plaintiff’s own counsel reflects that Defendants have granted licenses to USB 3.0 patents to other manufacturers who compete with Plaintiff. (Opening Br. at 12). Plaintiff does not allege in the FAC that those licenses violate any obligation of Defendants in the Contributors Agreement or any other commitment of the Defendants to USB-IF participants. Its claims of injury to competition are thus refuted by its counsel’s own letter.

Second, Plaintiff urges the Court to adopt *Broadcom* and ignore the more recent Court of Appeals decision in *Rambus*. Defendants submit that the facts alleged in *Rambus* are more directly on point, but, in any event, both *Rambus* and *Broadcom* rest on the proposition that for alleged deception before a Standards Setting Organization (SSO) to constitute anticompetitive conduct, there must be an anticompetitive effect that results from the deception. See *Rambus v. FTC*, 522 F. 3d 456, 464 (D.C. Cir. 2008); *Broadcom v. Qualcomm*, 501 F.3d 297, 314 (3rd Cir. 2007).

In *Broadcom*, the court held that the patent holder’s false promise to SSO that it would license its technology on a fair, reasonable and non-discriminatory (FRAND) terms, “coupled

⁶ Plaintiff improperly introduces allegations of “patent hold-up” via the purported extraction of license fees in its Opposition Brief, allegations which were not made in the FAC. See *Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d. Cir. 1998) (a party is not entitled to amend its complaint through statements made in opposition memoranda). Similarly, Plaintiff argues that one of its alleged injuries is that it will be forced to “take a license and as a result absorb higher costs.” (Opp. at 12). This is not an injury that Plaintiff alleged in the FAC. (FAC ¶¶ 111, 118).

with the [SSO's] reliance on that promise when including the technology in a standard," was actionable anticompetitive conduct, on the basis that it increased the likelihood that the patent rights will confer monopoly power on the patent holder. *See Broadcom*, 501 F.3d at 314. An essential part of this holding is that the SSO relied on the patent holder's promise when including the technology in a standard, thus eliminating competing technologies. *Id.* at 318-19. The plaintiffs in *Broadcom* alleged that absent a FRAND commitment, the SSO would not have considered incorporating the technology at issue into the standard. *Id.* at 316.

The facts alleged in the instant case, however, are much closer to *Rambus* than to *Broadcom*. Lotes alleges that:

[h]ad the Defendants represented their plans accurately and honestly, the USB-IF likely would have excluded their IP from the standard and substituted an equivalent technology. Had the USB-IF determined that such an exclusion was impractical or impossible, it would have at a bare minimum-altered the Adopters Agreement to reflect the consequent limitations on the scope of RAND-Zero licenses. (FAC ¶ 50).

The scenario described in the second sentence above is similar to the allegation in *Rambus*. Namely, in the event that the SSO would simply have chosen to alter the Adopters' Agreement, the Defendants' patents would still be part of the SSO's standard and thus there would be no harm to competition resulting from Defendants' alleged deception. *See Rambus*, 522 F.3d at 464.

Furthermore, unlike *Broadcom*, Plaintiff here does not allege that Defendants' promise to license on RAND-Zero terms was an essential element of Defendants' technology being incorporated into the USB-IF standard, or that there were other viable technologies that were competing for inclusion into the standard. Without such allegations, Plaintiff cannot rely on

Broadcom to avoid dismissal of its claims for failure to allege conduct that caused antitrust injury.

E. Plaintiff Has Failed to Allege Facts to Show a Dangerous Probability That Defendants Will Acquire Monopoly Power.

The Plaintiff here fails to allege facts reflecting the Defendants' ability to lessen or destroy competition in the purported relevant market, *i.e.* the market for USB 3.0 connectors in the U.S. In its Opposition, Plaintiff continues to cite the FAC's recitation of alleged market shares in an "upstream" market (Opp. at 12), but the FAC is silent on the Defendants' purported share of the only market that matters – the alleged relevant market for USB 3.0 connectors in the U.S. (Opening Br. at 19-20). Plaintiff has simply failed to allege any facts to support an inference of Defendants' dangerous probability of achieving monopoly power in the only market relevant to its Section 2 claim.

F. Defendants Cannot Conspire Because They Are Closely Affiliated Companies.

Plaintiff appears to acknowledge that closely affiliated companies cannot conspire with one another under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).⁷ In response to Defendants' request for judicial notice to be taken of Hon Hai's 2011 Annual Report ("Annual Report"), Plaintiff suggests that the judicial notice rules only apply to documents filed with the U.S. SEC. (Opp. at 17). Plaintiff cites no cases for its position and

⁷ Plaintiff argues that the Defendants "defy the Court" in introducing the 2011 Annual Report of Hon Hai ("Annual Report"). (Opp. Brief at 16). Defendants advised the Court of the existence of the Annual Report on the Taiwanese Stock Exchange ("TWSE") website, and the Court directed Defendants to "Print it out, send it here, send it to your adversary. If it fits within the exception for publicly available documents then it should be considered by the Court and I will . . ." (Ex. 1, Tr. of Feb. 5, 2013 Hearing, 15:23-25-16:1). That is exactly what Defendants have done. Defendants provided Plaintiff with a copy of the Annual Report on Feb 6, 2013.

Defendants are unaware of any authority which so limits the judicial notice rules.⁸ Plaintiff further argues that the Annual Report contradicts Defendants' Rule 7.1 Disclosure Statement (Dkt No. 15). That is incorrect. The disclosure stated that Hon Hai, a named Defendant in this case, "is a publicly traded corporation and holds 10% or more of Foxconn Electronics stock." This is consistent with the Annual Report, which reflects that Foxconn Electronics is 56.65% owned by two wholly-owned subsidiaries of Defendant Hon Hai, and is thus controlled by Hon Hai via its majority ownership interests through those two subsidiaries. The additional disclosure statement that "Foxconn Electronics has no parent corporation (only non-publicly traded minority shareholders)" reflects the simple reality reflected in the Annual Report, that no *single* entity is an immediate direct "parent" (*i.e.*, 50% or more ownership) of Foxconn Electronics.

Plaintiff also argues that courts can take judicial notice only to confirm the presence of a publicly available document. Even if the Court takes judicial notice of the Annual Report only to confirm its public availability and Plaintiff's lack of any specific objection to its authenticity (and not for the truth of the matter asserted within), the existence of the Annual Report reflects that Plaintiff failed to meet its pre-Complaint burden of conducting due diligence to discover the relationships between the Defendants. Had it conducted due diligence, by examining the TWSE website, where its own securities filings are publicly available also, it could not validly allege an antitrust "conspiracy" among the Defendants solely on information and belief. *See Jefferson v. Collins*, No. 12-239 (RBW), 2012 WL 5941953, at *16 (D.D.C. Nov. 28, 2012) (dismissing

⁸ Plaintiff has not identified any specific issues calling into question the authenticity or accuracy of the Annual Report on the TWSE website, where its own securities filings are also available. Similar to SEC filings that are governed by the Sarbanes-Oxley Act, the Taiwanese Securities and Exchange Act governs the accuracy of disclosures made by publicly listed companies on the TWSE. *See* <http://eng.selow.com.tw/ShowNews.asp?LSID=FL007304>.

complaint where pleading on information and belief facts that were publicly available and were not peculiarly within the possession and control of the defendant).⁹

G. Plaintiff Fails to Allege Breach of Contract With Sufficient Facts.

Plaintiff has failed to allege sufficient facts to support its breach of contract claim to survive a motion to dismiss. Plaintiff simply cites to FAC Exhibits G-1 and H-1, which are the patents that Defendants assert in China. Plaintiff's FAC does not allege which *claims* within these patents form the basis for its breach of contract claim. (Opening Br. at 21).

H. Plaintiff's Promissory Estoppel Claim is Improperly Pled.

Promissory estoppel is unavailable where an express contract covers the subject matter. (Opening Br. at 22). Although the Plaintiff may plead an alternative claim under Fed. R. Civ. P. 8(d), it may not include in its alternative claim allegations of an express contract. *See Telefonix v. Response Engineering, Inc.*, No. 12C4362, 2012 WL 5499437, at *5-6 (N.D. Ill. Nov. 13, 2012) (dismissing alternative claims that incorporate paragraphs alleging the existence of a contract). Here Plaintiff's promissory estoppel claim, as pertaining to the Contributors and Adopters Agreements, must be dismissed because it incorporates allegations that a valid contract exists. (FAC ¶¶ 28-29).

Lotes also argues that certain of its claims extend to promises on "Non-Necessary" claims that fall outside of the contracts at issue. Defendants pointed out in their Opening Brief, however, that Plaintiff failed to allege any injury sustained by Plaintiff by reason of its reliance on Defendants' promise to license "Non-Necessary Claims." (Opening Br. at 22-23). Plaintiff offers no response to this fatal deficiency and therefore the claim must be dismissed. *See Uy v. The Mount Sinai Hosp.*, No. 10 Civ. 5674 (LAP), 2012 WL 4560443, at *7 (S.D.N.Y. Sept. 30,

⁹ If the Court does not dismiss the conspiracy claim, Defendants request that discovery on the alleged conspiracy among the Defendants be limited, in the first instance, to the relationship among the Defendants.

2012) (failure by plaintiff to address an argument in its opposition brief is deemed abandonment of the claim at issue).

I. The Courts in China Should Decide Plaintiff's Declaration Claims.

Plaintiff asks the court to ignore clear precedent holding that only a foreign court applying its law can determine infringement of patents granted under the foreign jurisdiction's law (Opening Br. at 23-24), and grant a declaration of waiver and a declaration that Plaintiff is licensed to the Necessary Claims under 28 U.S.C. § 2201(a).

In urging the Court to grant its declaratory claims, the Plaintiff asks the court to follow *Microsoft v. Motorola*, 696 F.3d 872, 883 (9th Cir. 2012). *Microsoft* is inapposite because it involved an anti-suit injunction. In contrast, here Plaintiff is asking the Court to declare that “the patent claims in the Asserted Patents are Necessary Claims.” (See FAC ¶ 102). This is precisely what *Microsoft* stated should be resolved by the foreign court where the foreign patent infringement litigation is pending. *See Microsoft*, 696 F.3d at 883 (if the district court “had based its injunction in an expectation that U.S. patent claims could dispose of German patent claims, then it would have erred”) (citing *Stein Assocs., Inc. v. Heat & Control, Inc.*, 748 F.2d 653, 658 (Fed. Cir. 1984) (holding that only a British court, applying British law can determine validity and infringement in British actions)).¹⁰

II. CONCLUSION

For the above reasons, Defendants respectfully request that the Court grant their Motion to Dismiss the FAC in its entirety for failure to state any claim upon which relief can be granted.

¹⁰ It is also worth noting that the *Microsoft* court criticized the defendants in that case of forum-shopping and duplicative and vexatious litigation for filing the German litigation while the U.S. litigation was pending. *See Microsoft*, 696 F.3d at 886. This is precisely the type of behavior the Plaintiff in this case has engaged in by filing the instant litigation after the Defendant Foxconn (Kunshan) asserted its patents in the courts in China.

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Respectfully submitted,

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