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.*	Civil Action No. 15-723-RGA

MICROSOFT'S ANSWERING BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND MOTION TO STRIKE

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Plaintiffs Microsoft Mobile, Inc. and Microsoft Mobile Oy (collectively, "Microsoft") hereby respond to the Motion to Dismiss and Motion to Strike of Defendants InterDigital, Inc., InterDigital Communications, Inc., InterDigital Technology Corporation, InterDigital Patent Holdings, Inc., and IPR Licensing, Inc. (collectively, "InterDigital" or "IDC").

I. INTRODUCTION AND SUMMARY OF ARGUMENT

IDC did not acquire monopoly power in the relevant technology markets by having a superior product. Instead, IDC monopolized the relevant markets through deception in the process of developing standards for third-generation ("3G") and fourth-generation ("4G") cellular technologies and by making false promises to license its standard essential patents ("SEPs") on fair, reasonable, and non-discriminatory ("FRAND") terms. Now, having subjected Microsoft and other implementers of the 3G and 4G standards to monopolistic licensing practices, IDC seeks—without any legitimate basis—to escape any judicial scrutiny of its conduct. IDC's Motion to Dismiss should be denied.

Indeed, controlling Third Circuit precedent, *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297 (3d Cir. 2007), establishes the viability of Microsoft's claim for monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2, based upon IDC's false FRAND licensing commitments in the standard-setting process. As the Third Circuit observed, "the FRAND commitments that SDOs [standards-determining organizations] required of vendors were intended as a bulwark against unlawful monopoly." *Id.* at 305. Microsoft alleges the same essential facts that the *Broadcom* court (and other courts across the country) have found sufficient to state a claim. *See, e.g., Apple v. Motorola, Inc.*, No. 11-cv-178-bbc, 2011 WL 7324582 (W.D. Wis. June 7, 2011); *Research in Motion Ltd. v. Motorola, Inc.* ("*RIM*"), 644 F. Supp. 2d 788 (N.D. Tex. 2008); *Zenith Elecs., LLC v. Sceptre, Inc.*, No. LA CV 14-5150 JAK, 2015 U.S. Dist. LEXIS 33661 (C.D. Cal. Feb. 5, 2015).

The *Noerr–Pennington* doctrine provides no shelter to IDC. The premise of IDC's *Noerr–Pennington* argument—that Microsoft's claim is entirely predicated upon IDC's litigation activities—is false. IDC Br. at 17. IDC's monopolistic licensing practices are not limited to coercive threats of exclusion orders from the International Trade Commission ("ITC"). IDC has refused to comply with its FRAND commitment (the "bulwark against unlawful monopoly"), demanded excessive and discriminatory royalties from Microsoft and other implementers of 3G and 4G technologies, and unlawfully tied access to its SEPs to non-essential patents. Even as to its series of unsuccessful ITC actions, IDC is not entitled to antitrust immunity, particularly on a motion to dismiss and particularly when its CEO has publicly acknowledged that the objective of those actions was not to obtain the legal relief it sought. *See* Compl. ¶ 75; *see also, e.g.*, *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, No. 14-481, 2015 U.S. App. LEXIS 19694, at *38–40 (3d Cir. Nov. 12, 2015) (confirming the standard for *Noerr–Pennington* immunity involving a series of legal actions).

IDC's reliance upon *dicta* and mooted observations by various administrative law judges ("ALJs") from the ITC is misplaced. None of the cited ALJ analysis has been adopted by the Commission, which has exonerated Microsoft from every infringement charge leveled by IDC. Moreover, IDC disregards the most recent finding of ALJ Essex, who noted that a party should be resistant in negotiations with IDC and is not acting in bad faith when the record establishes that it does not infringe any valid asserted patent. *In the Matter of Certain 3G Mobile Handsets & Components Thereof*, ITC Inv. No. 337-TA-613 (remand) ("*613 Remand ID*"), 2015 WL 6561709, at *24 (ITC April 27, 2015). As ALJ Essex further noted, in referring to Microsoft, the "exercise of legal rights by a party cannot amount to 'holdout.'" *Id.*

IDC's monopolistic conduct has harmed competition in the relevant technology markets, which are defined by reference to IDC's declared SEPs. As the Third Circuit observed in *Broadcom*, "[i]t is the incorporation of a patent into a standard—not the mere issuance of a patent—that makes the scope of the relevant market congruent with that of the patent." 501 F.3d at 315. By falsely promising to license its essential patents on FRAND terms, IDC has unlawfully acquired the power to engage in "patent hold-up" and extract supra-competitive royalties. *Id.* at 310. As a user of the relevant cellular technology, Microsoft has standing to seek relief from IDC's monopolistic scheme. Antitrust law does not compel Microsoft to make the Hobson's choice, as IDC wrongly urges, between paying supra-competitive royalties and enduring the burdens and litigation expense associated with protracted infringement litigation. *See, e.g., RIM*, 644 F. Supp. 2d at 793–96 (denying motion to dismiss antitrust claim based on threat of being forced to pay supra-competitive royalties). Likewise, no case holds that the court should sit idle and watch that antitrust harm unfold before exercising its equity powers.

Accordingly, IDC's Motion to Dismiss and Motion to Strike should be denied.

II. SUMMARY OF ALLEGATIONS[1]

Through a consensus driven process, the European Telecommunications Standards Institute ("ETSI") promulgates standards with which cellular devices must comply in order to communicate with network infrastructure equipment. Compl. ¶ 26. By creating those standards, ETSI members choose which technologies will be included in the standards and therefore available to consumers and which technologies will be excluded. *Id.* Cellular devices that do not conform to the adopted standards are not commercially viable. *Id.*

Standards may incorporate technology that is covered by patents, which are called "essential" patents or "SEPs." *Id.* ¶¶ 3, 28. Because standard-compliant devices must practice every SEP, an SEP owner can, unless restrained, demand and obtain exorbitant royalties for its patents. *Id.* ¶ 29. Such demands—known as "patent hold-up"—harm competition and impede implementation of standards. *Id.* ¶ 30. Requiring SEPs to be licensed on FRAND terms mitigates the potential for hold-up and other anticompetitive abuses. ETSI's Intellectual Property Rights ("IPR") Policy seeks an irrevocable FRAND licensing commitment from owners of potential SEPs. *Id.* ¶¶ 32, 34.

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[1] On a Rule 12(b)(6) motion to dismiss, "[a]ll allegations in the complaint must be accepted as true, and the plaintiff must be given the benefit of every favorable inference to be drawn" from those allegations. *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011) (citation omitted); *Bayer Cropscience AG v. Dow Agrosciences LLC*, 288 F.R.D. 84, 86 (D. Del. 2012). Additional allegations of the Complaint are set forth in the argument section as appropriate.

Recognizing the enhanced market power of SEPs, IDC participated in the development of the 3G and 4G standards (collectively "Standards") to ensure that they would include IDC's patented technologies. *Id.* ¶ 42. To induce ETSI members to adopt standards that incorporated its patented technologies, IDC falsely promised to license its SEPs on FRAND terms. *Id.* ¶¶ 4, 44, 52. Between 2001 and 2014, IDC made at least nineteen submissions to ETSI declaring that certain of its patents or patent applications may be or become essential to the cellular standards under consideration, and it committed to license any such patents on FRAND terms. *Id.* ¶¶ 44–45, Exs. 1–19 (IDC's declarations). IDC also misappropriated others' technologies by obtaining patents on technologies that other firms developed and disclosed in the standard-setting process. *Id.* ¶¶ 47–51. But for IDC's deception, alternate and potentially unpatented technologies would have been included in the ETSI Standards or no particular technology would have been adopted. *Id.* ¶ 46.

Because the Standards require technologies over which IDC claims to have patents—and firms must implement the Standards to have a viable product—IDC has the leverage to extract supra-competitive royalties. *Id.* ¶¶ 54, 84. IDC has exploited its unlawfully acquired monopoly power at least by: refusing to honor the obligation to license its SEPs on FRAND terms; demanding excessive and discriminatory royalties from implementers; transferring SEPs to a related entity to "double dip" in its royalty demands; tying access to its U.S. patents to a license for its foreign patents, along with the requirement that licensees must pay royalties on worldwide sales; and tying access to its SEPs to the licensing of its non-essential patents. *Id.* ¶¶ 6, 56–69.

As an additional part of its monopolistic scheme, IDC has pursued a series of baseless and bad faith infringement actions—including requests for exclusionary remedies—designed to increase Microsoft's costs and coerce it to capitulate to IDC's non-FRAND demands. *Id.* ¶¶ 6, 70–78. In public statements, IDC's CEO has conceded that the purpose of these actions is not to obtain the relief nominally requested but to use the leverage of an exclusion order threat in negotiations with prospective licensees. *Id.* ¶ 75. Indeed, IDC's repeated refusal to accept payments at even its own inflated rates for the patents it has asserted in litigation against

Microsoft, preferring instead to maintain the threat of obtaining an injunction or exclusion order, shows that it seeks far more than FRAND compensation for its patents. *Id.* ¶¶ 78–79.

IDC's conduct has harmed competition in the relevant markets by excluding alternative technologies, obscuring the costs of including IDC's patented technologies in the Standards, and denying implementers, including Microsoft, access to necessary technology on reasonable and non-discriminatory terms. *Id.* ¶ 80. By raising prices in the upstream technology markets, IDC's conduct also raises prices to consumers in downstream markets for Standard-compliant devices, reduces innovation, and limits consumer choice. *Id.* ¶ 83.

Given IDC's unlawful monopolization of the relevant markets, Microsoft faces the choice of capitulating to IDC's supra-competitive licensing demands or incurring the costs, risks, and uncertainty of protracted patent litigation. For Microsoft, these have represented a constant additional cost to its cellular business. In addition to the costs themselves, Microsoft's inability to obtain a license, in conjunction with the near-constant threat that it may be subject to an exclusionary remedy, gives rise to irreparable harm to customer loyalty, brand recognition, and goodwill for Microsoft's cellular devices. *Id.* ¶¶ 85–86. In the absence of the injunctive relief requested in Microsoft's Complaint, there is a substantial threat that Microsoft will be forced to capitulate to IDC's excessive licensing demands, which threatens further loss of market share. *Id.* Whichever way IDC exploits its unlawfully-acquired monopoly power, the harm to Microsoft is both imminent and irreparable. *Id.* ¶¶ 86, 90–91.

III. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) should be granted only if the plaintiff does not plead enough facts to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Motions to strike under Rule 12(f) generally are disfavored. *Aoki v. Benihana Inc.*, 839 F. Supp. 2d 759, 764 (D. Del. 2012). "[T]he standard for striking under Rule 12(f) is strict and . . . only allegations that are so unrelated to the plaintiffs' claims as to be unworthy of any consideration should be stricken." *Rock v. Voshell*, No. 05-

1468, 2006 WL 1409734, at *10 (E.D. Pa. May 18, 2006) (quotations omitted).

IV. MICROSOFT HAS SUFFICIENTLY IDENTIFIED IDC'S MONOPOLY POWER AND EXCLUSIONARY CONDUCT

In *Broadcom*, the Third Circuit set forth the elements of a monopolization claim based on deception before a standard-setting organization. The Third Circuit held that:

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

501 F.3d at 314.

Microsoft's Complaint alleges each of these elements. *See, e.g.*, Compl. ¶¶ 26 (ETSI's standards set by consensus), 4, 44–45 (IDC made intentionally false promises to license its IPR on FRAND terms which were relied upon in incorporating IDC technology in the standards), 56–61 (IDC refuses to provide a license to its SEPs on FRAND terms). Allegations like these have repeatedly been held sufficient to survive a motion to dismiss. *See, e.g.*, *RIM*, 644 F. Supp. 2d. 788; *Apple*, 2011 WL 7324582; *Zenith Elecs.*, 2015 U.S. Dist. LEXIS 33661. IDC nowhere argues that the *Broadcom* elements have not been met, nor does it even reference those elements. Instead, IDC seeks to impose on Microsoft pleading requirements that are legally unsupported—but satisfied in any event.

A. Microsoft Has Sufficiently Identified IDC's Monopoly Power

IDC's first argument that Microsoft has failed to allege IDC has monopoly power can be rejected easily by reference to the Complaint. The Complaint alleges that IDC has monopoly power in the "Relevant Technology Markets," which are defined as the markets for "technologies covered by the [IDC] patents issued in the United States and elsewhere that are essential, or alleged to be essential, to the 3G and 4G cellular standards . . . , together with all other alternative technologies to the [IDC] patents that could have been used in the cellular standards." *See, e.g.*, Compl. ¶¶ 38, 52–54. "The markets encompassed within the Relevant

Technology Markets can . . . be identified from [IDC]'s licensing declarations to ESTI." *Id.* ¶ 39. Further, with respect to the Relevant Technology Markets, the Complaint establishes the element of monopoly power, by alleging that IDC is the sole supplier in the Relevant Technology Markets, has through its conduct achieved exclusion of all other technologies, and has the power to extract supra-competitive prices. *Id.* ¶¶ 52–54; *see also United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) ("monopoly power [i]s the power to control prices or exclude competition.") (quotation marks omitted). Such allegations are sufficient. *See, e.g.*, *Apple*, 2011 WL 7324582, at *13; *RIM*, 644 F. Supp. 2d. at 794.

IDC seeks to impose a new requirement that a claim based upon the defendant's false FRAND commitments requires alleging the essentiality of specific patents. IDC Br. at 7. IDC relies on a vague reference to *Broadcom* (*id.*), but the portion of *Broadcom* cited addresses a different, separate claim that Qualcomm's acquisition of a company with technology potentially relevant to next-generation standards violated Section 7 of the Clayton Act. *See Broadcom*, 501 F.3d at 320–22. The Third Circuit faulted that claim not for failing to allege monopoly power (which is not an element of a Section 7 claim), but because Broadcom's claim of injury depended on the uncertain future development of next-generation standards. *Id.*

In any event, the Complaint does allege that the 3G and 4G Standards as written include technologies over which IDC claims to have patents, such that any manufacturer of Standard-compliant devices needs a license to those patents. *See, e.g.*, Compl. ¶¶ 42, 45, 50–51, 54. The Complaint further alleges that IDC claims to hold patents essential to the Standards. *Id.* ¶¶ 53–54. Indeed, in its Opening Brief, IDC continues to insist that simply by selling Standard-compliant products, Microsoft has necessarily used IDC patents. *See* IDC Br. at 1, 17. These allegations parallel those in Broadcom's complaint, which did not allege that Qualcomm's patents *were* essential, but rather that Qualcomm *claimed them to be*. *See* First Am. Compl., *Broadcom Corp. v. Qualcomm, Inc.*, No. 05-3350 (MLC) (D.N.J. Sept. 19, 2005), ¶¶ 83–84 (*see* Exhibit A hereto). As in *Broadcom*, Microsoft's claim rests not on the merits of specific patent claims, but instead on IDC's false commitments and subsequent abusive licensing practices.

B. Microsoft Has Sufficiently Identified IDC's Exclusionary Conduct

IDC's argument that Microsoft has insufficiently alleged exclusionary conduct fares no better. The Complaint is replete with examples of IDC's exclusionary conduct, ranging from inducing ETSI and its members to include its patents in the Standards by making false FRAND commitments to its ongoing refusal to license those patents on FRAND terms, which together constitute "actionable anticompetitive conduct" under *Broadcom*. *See, e.g.*, Compl. ¶¶ 42–51.

IDC does not dispute this, but seeks to impose an added requirement that Microsoft identify other technologies that were not adopted because of IDC's conduct. IDC Br. at 8. *Broadcom* squarely rejected such an obligation, instead finding adequate Broadcom's allegation that absent Qualcomm's false FRAND commitment, ETSI would not have selected Qualcomm's technology even if that technology was the only candidate. *Broadcom*, 501 F.3d at 316 ("[E]ven 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."). Microsoft's Complaint includes virtually identical allegations regarding ETSI's selection of IDC's technology—*see, e.g.*, Compl. ¶ 46 ("But for [IDC's] deception, alternate technologies would have been adopted by ETSI or no particular technology would have been specified.")—and therefore satisfies the *Broadcom* standard.

IDC's reliance on *Rambus v. FTC*, 522 F.3d 456 (D.C. Cir. 2008) (cited in IDC Br. at 8), is misplaced. *Rambus* did not hold that a complaint predicated on allegations that the defendant made false FRAND commitments must identify the excluded technologies. *Rambus* involved different anticompetitive conduct—a defendant's *failure to disclose* its pending patent applications. *Id.* at 459. The D.C. Circuit expressed "serious concerns" as to whether such disclosure was even required there. *Id.* at 462. But, where a defendant made false FRAND commitments to get its technology into a standard, it is sufficient to allege that the standard otherwise would not have included that technology. *Broadcom*, 501 F.3d at 316.

IDC's reliance on *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-0186-LHK, 2011 WL 4948567 (N.D. Cal. Oct. 18, 2011), and *ChriMar Systems v. Cisco Systems*, 72 F. Supp. 3d 1012

(N.D. Cal 2014), is similarly unfounded. In the portion of the *Apple* decision IDC cites, the court was expressly addressing Apple's Section 2 claim relating to Samsung's alleged *failure to disclose* its intellectual property (as in *Rambus*), and *not* Apple's antitrust claim based upon Samsung's alleged false FRAND commitments. *Compare Apple*, 2011 WL 4948567, at *4 (addressing false FRAND declarations), *with id*. at *5–6 (addressing failure to disclose intellectual property). In *ChriMar*, the court explained that "in contrast to the theory that a patent holder misrepresented to a SSO that it would license its intellectual property on [F]RAND terms, courts have been more reluctant to find an antitrust violation based on the theory that a failure to disclose intellectual property rights in a declared essential patent created monopoly power." 72 F. Supp. 3d at 1018–19. It was in the latter context—not relevant here—that the *ChriMar* court dismissed the Section 2 claim. *Id.* Here, Microsoft's Complaint expressly alleges that ETSI would have adopted a different standard—or no standard at all—but for IDC's anticompetitive conduct. Compl. ¶ 46.

V. MICROSOFT HAS SUFFICIENTLY ALLEGED THAT IDC OBTAINED MONOPOLY POWER BY MAKING FALSE FRAND COMMITMENTS

IDC urges that the heightened pleading standards of Rule 9(b) apply because Microsoft's Section 2 claim is "predicated on allegations of fraudulent behavior." *See* IDC Br. at 9. But, while the Third Circuit has not required claims based on false FRAND commitments to be pled with specificity, *see Broadcom*, 501 F.3d at 315, n.9, Microsoft's Complaint does so.

A plaintiff satisfies the requirements of Rule 9(b) by pleading the "date, place or time" of the fraud. *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984). Identifying "the specific patents for which [the defendant] made fair, reasonable, and non-discriminatory commitments, to whom the commitments were made and the dates on which they were made" satisfies this requirement for a false FRAND antitrust claim. *Apple*, 2011 WL 7324582, at *14. Microsoft's Complaint specifically identifies IDC's false FRAND commitments, at least through the 19 declarations that IDC submitted (*see* Compl. ¶¶ 42–46 and

Exs. 1–19), which identify specific patents, who made the commitments, and when they were made.

IDC's further suggestion that Rule 9(b) requires that Microsoft allege "facts with particularity demonstrating that [IDC's] statements to ETSI were false when made" (IDC Br. at 9) is wrong. Intent may be averred generally. Fed. R. Civ. P. 9(b). For that reason, the Third Circuit held that Broadcom's allegations, which mirror Microsoft's (*see* Compl. ¶ 45), satisfied the Rule 9(b) standard. *See Broadcom*, 501 F.3d at 315, n.9; *see also Zenith Elecs.*, 2015 U.S. Dist. LEXIS 33661, at *17 (denying motion to dismiss because, "although Defendant only alleges generally that Plaintiff's FRAND promises were false, Fed. R. Civ. P. 9(b) allows 'intent . . . and other conditions of a person's mind' to be alleged generally.").[2]

VI. THE *NOERR–PENNINGTON* DOCTRINE DOES NOT IMMUNIZE IDC'S ANTICOMPETITIVE CONDUCT

A. IDC's Anticompetitive Conduct Is Not Limited To Its Litigation Activities

Microsoft's Complaint is not—as IDC claims—"predicate[d]" on IDC's litigation activities, nor do "[m]ost of Microsoft's allegations relate to the lengthy history of litigation between IDC and Nokia." IDC Br. at 1, 11. The core allegations of Microsoft's Complaint are that IDC wrongfully obtained monopoly power by having its technology incorporated into the Standards on the basis of false FRAND commitments and that it has abused that monopoly power by, among other things, demanding excessive and discriminatory royalties in violation of its commitments to license its SEPs on FRAND terms, tying access to its U.S. patents to a license to its foreign patents, and tying access to its SEPs to the licensing of its non-SEPs. *See,*

[2] *Exergen Corp. v. Wal-Mart Stores*, 575 F.3d 1312 (Fed. Cir. 2009), which IDC cites for the proposition that a plaintiff must plead "sufficient underlying facts from which a court may reasonably infer that a party acted with the requisite state of mind" (IDC Br. at 9), is inapposite. That case addressed the pleading requirements for an inequitable conduct defense, not a false FRAND monopolization claim. Moreover, Microsoft has pleaded specific facts concerning IDC's conduct and its bankrupt interpretation of its FRAND commitments that support the conclusion that it did not intend to honor those commitments when they were made. *See, e.g.*, Compl. ¶¶ 52, 56–61.

e.g., Compl. ¶ 6. Standing alone, these allegations establish a Section 2 claim. *See Broadcom*, 501 F.3d at 314; *RIM*, 644 F. Supp. 2d at 796; *Apple, Inc. v. Motorola Mobility, Inc.*, 2011 WL 7324582, at *13; *Zenith Elecs.*, 2015 U.S. Dist. LEXIS 33661, at *14–20.

To be sure, the Complaint further alleges that IDC's litigation activities "support[] its hold-up and discrimination against Standards implementers, like Microsoft" (Compl. ¶ 70), but those allegations are in addition to IDC's monopolistic scheme. In such circumstances, even good faith litigation can be considered as a part of an overall anticompetitive scheme where—as is alleged here—"the other aspects of the scheme independently produce anticompetitive harm." *Zenith Elecs.*, 2015 U.S. Dist. LEXIS 33661, at *18 n.2 (quoting *Hynix Semiconductor Inc. v. Rambus, Inc.*, 527 F. Supp. 2d 1084, 1097 (N.D. Cal. 2007)); *cf. In re Neurontin Antitrust Litig.*, No. 02-1390, 2009 WL 2751029, at *17, n.42 (D.N.J. Aug. 28, 2009) (evidence of otherwise immune petitioning activity can be relevant "to an evaluation of [defendant's] anticompetitive scheme, if such conduct is causally linked to the scheme"). "[I]f the antitrust violation is intentional deception of the standard-setting organization, the fact that one of the ways that causes harm is that the patentee sues adopters and seeks an injunction shouldn't defeat the antitrust claims based on the conduct before the standard-setting organization." Hovenkamp, Janis, Lemley & Leslie, *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law*, § 35.5b2 (Wolters Klewer 2013).

B. The *Noerr–Pennington* Doctrine Does Not Immunize IDC's Serial Litigation Campaign Against Microsoft

Even as to those portions of the Complaint that relate to IDC's efforts to obtain ITC exclusion orders and U.S. district court injunctions against Microsoft, IDC is not entitled to immunity under the *Noerr–Pennington* doctrine.

1. IDC's FRAND Commitments Limit Its Rights To Pursue Injunctive Relief Against Microsoft

Microsoft's Complaint alleges that "[i]n making the FRAND promises required to have its patented technologies written into ETSI standards, . . . [IDC] surrendered the right to exclude standard implementers who are able to license on FRAND terms." Compl. ¶ 72. The Complaint alleges that IDC's FRAND commitments were intended to guarantee that IDC would not attempt to prevent implementers from using its patented technology by seeking injunctions, but would instead proffer licenses on FRAND terms, which IDC has not done. *Id.* ¶¶ 56, 72.

Microsoft's allegations are consistent with judicial and regulatory interpretations that FRAND commitments foreclose the pursuit of injunctive relief except in circumstances where an implementer is unwilling or unable to take a license on FRAND terms. *See, e.g.*, *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1048 (9th Cir. 2015) ("[A] patent holder who signs such a sweeping promise as a RAND agreement at least arguably . . . guarantee[s] that the patent-holder will not take steps to keep would-be users from using the patented material, such as seeking an injunction, but will instead proffer licenses consistent with the commitment made.") (internal quotations omitted); *Apple, Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1331–32 (Fed. Cir. 2014), *overruled in part on other grounds by Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015) (affirming denial of injunction for infringement of SEP because the FRAND commitment ordinarily establishes the adequacy of monetary damages, but declining to adopt per se rule against injunctions because of the possibility an infringer might refuse to accept FRAND terms). In fact, the U.S. Department of Justice observed earlier this year:

> Inherent in such a RAND commitment is a pledge to make licenses available to those who practice such essential patent claims as a result of implementing the standard—in other words, not to exclude these implementers from using the standard unless they refuse to take a RAND license.

Letter from R. Hesse, Acting Asst. Attorney General, to M. Lindsay, dated Feb. 2, 2015, *available at* http://www.justice.gov/sites/default/files/atr/legacy/2015/02/02/311470.pdf.

The Complaint alleges facts showing that Microsoft has sought to pay FRAND royalties for any use of IDC's SEPs; Microsoft twice tendered substantial payments to IDC for its U.S. sales of Standard-compliant products at IDC's demanded worldwide rates—first for $25 million and later for $28.5 million—only to have IDC refuse those payments. Compl. ¶¶ 78–79. Having promised not to seek injunctions against firms willing to take a FRAND license, IDC cannot now claim that the First Amendment protects its efforts to do so against Microsoft. *Noerr–Pennington* "does not protect patent holders from liability for asserting rights in violation of a commitment not to enforce those rights." *Microsoft*, 795 F.3d at 1047 (citations omitted); *cf. Spear Pharm., Inc. v. William Blair & Co.*, 610 F. Supp. 2d 278, 287–88 (D. Del. 2009) (First Amendment does not protect petitioning activity that involves conduct that breaches an agreement or fiduciary duty).

Indeed, several courts have "held that *Noerr–Pennington* does not protect a patent holder from liability for filing infringement actions in violation of its covenant to negotiate with a RAND-rate license-seeker." *Microsoft*, 795 F.3d at 1048 (citing *Powertech Tech.*, 872 F. Supp. 2d at 931; *Apple, Inc. v. Motorola Mobility, Inc.*, 886 F. Supp. 2d 1061, 1078 (W.D. Wis. 2012)). So too here, *Noerr–Pennington* should not immunize IDC for pursuing injunctive relief against Microsoft when IDC got its patents enshrined in the 3G and 4G Standards on the basis of its false commitment not to do so.[3]

In *Apple, Inc. v. Motorola, Inc.*, the court distinguished Apple's claims for breach of contract, to which *Noerr-Pennington* was held not to apply because "Motorola had waived . . . its petitioning rights through contract," from Apple's antitrust claim.[4] 886 F. Supp. 2d at 1078.

[3] As one of the authorities cited by IDC points out, "[a]sking for the relief alone does not monopolize the market because courts independently assess the proper outcome." Douglas H. Ginsburg, Taylor M. Owings, & Joshua D. Wright, *Enjoining Injunctions: The Case Against Antitrust Liability for Standard Essential Patent Holders Who Seek Injunctions*, The Antitrust Source, at 6 (Oct. 2014) (cited at IDC's Br. at 12). But, Microsoft's monopolization claim rests on IDC's having obtained its market position by making false FRAND commitments that IDC has reneged far beyond merely asking for injunctions, including refusing to license its SEPs on FRAND terms.

[4] In *Apple*, the court found after discovery and on summary judgment that Apple had made no meaningful effort to present evidence sufficient to raise a genuine issue that the sham exception applied. 886 F. Supp. 2d at 1076–77 (noting that Apple devoted only one paragraph to arguing Motorola's litigation was a sham). Here, Microsoft has alleged that it is injured as a result of its inability to obtain a license to IDC's SEPs on FRAND terms, which threatens to increase Microsoft's costs, erode customer loyalty and goodwill, and reduce Microsoft's market share, and it has alleged ample facts indicating that IDC's litigation activities are not immune. Compl.

But, if a SEP holder has relinquished its First Amendment right to pursue injunctions by having made a FRAND commitment, it should not matter on what legal theory liability rests. Indeed, in *Microsoft v. Motorola*, the Ninth Circuit discussed concerns from an earlier FTC enforcement proceeding about whether the FTC's imposition of "liability on Google and Motorola (under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45) for seeking injunctions and exclusion orders would offend the First Amendment." 795 F.3d at 1048. The Ninth Circuit approvingly recounted the FTC's response: "Concluding that the (F)RAND commitments in question 'preclude[d] seeking an injunction or exclusion order against a willing licensee of its SEPs,' the Commission reasoned that taking action against Google and Motorola [under Section 5 of the FTC Act] was 'simply requir[ing] those making promises to keep them.'" *Id.* (quoting FTC Letter, *Motorola Mobility LLC & Google Inc.*, FTC File No. 121-0120 at 3 (July 23, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724GoogleMotorolaletter.pdf). Given that IDC made the same promise, it too relinquished any First Amendment right to seek exclusionary remedies against firms like Microsoft. Accordingly, even if Microsoft's allegations concerning IDC's pursuit of those remedies were integral to Microsoft's Section 2 claim, IDC could not shield its actions behind the *Noerr–Pennington* doctrine.

2. IDC's Litigation Campaign Is Not Immune Under The Supreme Court's *California Motor* Decision And The Third Circuit's *Hanover 3201 Realty* Decision

In any event, IDC's campaign of serial infringement actions against Microsoft is not protected under *Noerr–Pennington* because it falls within the sham exception.

Microsoft alleges that IDC "has pursued a campaign of multiple, sequential infringement actions" against Microsoft seeking to exclude from the U.S. Microsoft's standard-compliant products. Compl. ¶ 70. The Complaint discusses three actions in the ITC, which IDC's motion

¶¶ 85–86, 90. At the pleading stage, as the *Apple* court recognized, these kinds of allegations are sufficient to state a claim. *Apple*, 2011 WL 7324582, at *14.

acknowledges were accompanied by several parallel district court actions. *Id.*; IDC Br. at 3. IDC claims that, under *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993) ("*PRE*"), Microsoft must allege with specificity that each of these actions was both "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" and "subjectively baseless" in that it intended to interfere directly with the business relationships of a competitor through use of litigation "as an anticompetitive weapon." IDC Br. at 12–13. That is the wrong standard. The Third Circuit's recent decision in *Hanover 3201 Realty* confirms that where a series of legal actions underlies an antitrust claim, *PRE*'s strict two-step inquiry does not apply.[5] 2015 U.S. App. LEXIS 19694, at *38–40.

Instead, "a more flexible standard is appropriate when dealing with a pattern of petitioning." *Id.* at *39. Specifically, the question is not whether any one such action "has merit—some may turn out to, just as a matter of chance—but whether they are brought pursuant

[5] IDC's claim that Federal Circuit, rather than Third Circuit, law governs the applicability of the sham exception (*see* IDC. Br. at 10, n.3, 13 (citing *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059 (Fed. Cir. 1998)) misapprehends both choice of law and the scope of the Federal Circuit's jurisdiction. District courts have applied the Federal Circuit's *Noerr–Pennington* law in cases that "arise" under patent law due to substantial issues of patent law, thereby making the Federal Circuit the source of the governing appellate law. *See, e.g.*, *Hynix Semiconductor v. Rambus, Inc.*, 527. F. Supp 2d 1084, 1088 (N.D. Cal. 2007), and 645 F.3d 1336 (Fed. Cir. 2011). In contrast, Microsoft's claim does not "arise" under patent law. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988) (claim does not arise under the patent law if it is supported by at least one non-patent law theory); *Meijer v. Ferring B.V.*, 585 F.3d 677, 684–87 (2d Cir. 2009) (rejecting argument that Federal Circuit had appellate authority over plaintiffs' antitrust claim and explaining that simply "because an element that is essential to a particular theory might be governed by federal patent law does not mean that the entire monopolization claim arises under patent law") (internal quotation marks and citation removed). Accordingly, the Third Circuit, not the Federal Circuit, provides the governing law here concerning the contours of the sham exception. *See, e.g.*, *In re Lipitor Antitrust Litig.*, No. 3:12-cv-2389, 2013 U.S. Dist. LEXIS 126468, at *55–59 (D.N.J. Sept. 5, 2013) (because plaintiffs' antitrust claims did not arise under patent law, the Third Circuit's, not the Federal Circuit's, law applied to plaintiffs' claims); *Meijer*, 585 F.3d at 694 (because claim did not arise under patent law, applying Second Circuit law to determine sufficiency of plaintiffs' sham litigation allegations). In any event, there is no contrary Federal Circuit authority rejecting application of the Supreme Court's decision in *California Motor* to sham claims based upon a series of petitions, as adopted by the Third Circuit in *Hanover 3021 Realty*.

to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." *Id.* at *38 (quoting *USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, AFL-CIO*, 31 F.3d 800, 811 (9th Cir. 1994), and applying the standard set forth in *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972)). In making this assessment, rather than focus solely on whether there was probable cause to institute the legal proceedings, as IDC suggests (IDC Br. at 14), courts are to "perform a holistic review that may include looking at the defendant's filing success" and "other evidence of bad-faith as well as the magnitude and nature of the collateral harm imposed on the plaintiffs by defendants' petitioning activity (*e.g.*, abuses of the discovery process and interference with access to governmental agencies)." *Hanover 3201 Realty*, 2015 U.S. App. LEXIS 19694, at *40–41.

Microsoft's allegations establish that IDC's campaign of ITC and other actions seeking exclusionary remedies against Microsoft are not immune under *Hanover 3201 Realty* and *California Motor*. As an initial matter, resolution of whether the sham exception to the *Noerr–Pennington* doctrine applies is generally "not proper before discovery."[6] *S3 Graphics Co., Ltd. v. ATI Techs. ULC*, No. 11–1298-LPS, 2014 WL 573358, at *3 (D. Del. Feb. 11, 2014); *Shionogi Pharma, Inc. v. Mylan, Inc.*, No. CIV.A. 10-1077-RGA, 2011 WL 3860680, at *6 (D. Del. Aug. 31, 2011) (same); *In re Metoprolol Succinate Direct Purchaser Antitrust Litig.*, No. 06-52-GMS, 2010 WL 1485328, at *10 (D. Del. Apr. 13, 2010) (same). Here, the allegations of the Complaint warrant discovery. For example, Microsoft has alleged that IDC's use of ITC proceedings, which cannot award the monetary compensation IDC promised to accept for use of its SEPs, shows its bad faith. *See* Compl. ¶¶ 72–73; *cf. Realtek Semiconductor Corp. v. LSI Corp.*, No. C-12-03451 RMW, 2012 WL 4845628, at *6 (N.D. Cal. Oct. 10, 2012) ("The court is

[6] For this reason, many of the decisions on which IDC relies are inapposite because they were decided after discovery was completed. *See, e.g.*, *Apple, Inc.*, 886 F. Supp. 2d at 1076–77 (summary judgment on *Noerr* grounds after discovery); *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1327 (Fed. Cir. 2000) (affirming summary judgment on claim based upon threat of patent litigation absent any improper conduct in obtaining monopoly position or other form of abuse).

troubled by defendants' decision to choose, in the first instance, a forum for enforcing their patent rights in which money damages are unavailable and the only relief is injunctive in nature."). Microsoft has also identified direct evidence—the statements of IDC's CEO—showing that IDC's ITC actions were not brought to seek legal redress, but rather to coerce parties like Microsoft into agreeing to license terms favorable to IDC. Compl. ¶ 75. Microsoft's additional allegations that IDC has avoided any determination of the FRAND value of its SEPs and refused substantial payments tendered for Microsoft's past U.S. sales just to maintain the threat of an exclusion order further demonstrate IDC's bad faith. Compl. ¶¶ 76, 78–79.

Finally, Microsoft has alleged facts showing that IDC had no objective basis, given adverse rulings in prior ITC cases, to maintain its efforts to obtain exclusionary relief in at least the latest round of ITC proceedings. Compl. ¶ 77. IDC subjected Microsoft to the expense and inconvenience of an ITC trial and post-trial proceedings to maintain the threat of an exclusion order despite the fact that (1) the same components were found not to infringe the same patents in an earlier proceeding in a ruling that IDC chose not to appeal, and (2) the Federal Circuit had affirmed a claim construction that applied to the patents asserted in the 613 Investigation that likewise foreclosed any finding of infringement. *Id.* IDC's continued pursuit of these claims was objectively baseless, demonstrates bad faith, and produced the kind of substantial collateral harm that takes IDC's activity outside any protections of the First Amendment.

IDC cites various ITC ALJ initial determinations on FRAND issues solely to sling mud. None can justify dismissal of Microsoft's Complaint. None involved antitrust claims centered on IDC's unlawful acquisition of monopoly power from false FRAND commitments. And none involved a determination of the terms and conditions that would be FRAND for a license to all or a portion of IDC's patent portfolio. Indeed, even if they had, they would not be entitled to preclusive effect, but are of limited precedential value and remain subject to *de novo* review by the Commission. *See* 19 C.F.R. § 210.45(c).

Regardless, the cited ALJ decisions were either *dicta* when they were made or rendered moot as a result of subsequent review by the Commission. *See* IDC Br. at 4 n.2 (acknowledging that the "ALJs found patents not to be infringed"). In both the 800 and 868 Investigations, the ALJs' preliminary public interest findings were *dicta* as the ALJs also found that Microsoft did not infringe any valid IDC patent. In the 868 Investigation, the Commission affirmed the ALJ's finding of non-infringement and IDC did not appeal. In the 800 Investigation, both the Commission and the Federal Circuit affirmed the finding of no violation. In those Investigations, the Commission either declined to take a position on FRAND issues, or it stated that the FRAND issues remained under its *de novo* review. Notice, Inv. No. 337-TA-868, 2014 ITC LEXIS 526, at *5–8 (Aug. 14, 2014); Notice, Inv. No. 337-TA-800, 2013 ITC LEXIS 1838, at *7–9 (Dec. 19, 2013).

In the 613 Investigation, the ALJ's opinion that Microsoft had engaged in improper "hold-out" was premised on his incorrect conclusion that Microsoft's products infringed the asserted patents, which was contrary to controlling Federal Circuit precedent as the Commission made clear in reversing that determination. *613 Remand ID,* 2015 WL 6561709 (Apr. 27, 2015); *In the Matter of Certain 3G Mobile Handsets & Components Thereof*, ITC Inv. No. 337-TA-613 (Remand), Commission Opinion, at 25–26, 34 (Sept. 2, 2015); Compl. ¶ 77. Given that Microsoft did not infringe the asserted patents, even under the ALJ's reasoning Microsoft's reluctance to take a license was understandable and could not have been the basis for "hold-out." *613 Remand ID*, 2015 WL 6561709, at *24 (the "exercise of legal rights by a party cannot amount to 'holdout'"). Having reversed the ALJ's finding of a violation, the Commission deemed further review of his FRAND findings—which it did not endorse—to be "moot." *In the Matter of Certain 3G Mobile Handsets & Components Thereof*, ITC Inv. No. 337-TA-613 (Remand), Commission Opinion, at 50, n.27 (Sept. 2, 2015).

VII. MICROSOFT'S ALLEGATIONS OF INJURY ESTABLISH ITS STANDING

IDC argues that Microsoft's complaint should be dismissed because it has not yet been forced to succumb and pay the non-FRAND royalties that IDC demands. IDC Br. at 18–19. But, when the threatened harm is of the type the antitrust laws were intended to prevent, Microsoft need not have capitulated to IDC's anticompetitive demands to state a Section 2 claim.

A. Microsoft Need Not Have Capitulated To IDC's Non-FRAND Demands To Have Standing To Pursue Injunctive Relief

IDC's motion focuses exclusively on the requirements in private actions for damages under Section 4 of the Clayton Act (*see* IDC Br. at 18), but it ignores that Microsoft's Complaint seeks several forms of injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26. Under Section 16, a private antitrust plaintiff bringing a claim for injunctive relief need show only (1) *threatened* loss or injury cognizable in equity (2) proximately resulting from the alleged antitrust violation. *McCarthy v. Recordex Serv.*, 80 F.3d 842, 856 (3d Cir. 1996); *In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 399 (3d Cir. 2000) (distinguishing recovery under Section 16 from Section 4, and explaining "Section 16 is not as demanding" and that it requires only "a significant threat of injury" from an antitrust violation). As a consumer in the Relevant Technology Markets, Microsoft is clearly among the class of plaintiffs who may suffer antitrust injury as a result of the competition-reducing effects of IDC's monopolistic scheme. *See W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 101 (3d Cir. 2010) (to be "antitrust injury," the alleged harm must be "attributable to . . . a competition-reducing aspect or effect of the defendant's behavior" and "the class of plaintiffs capable of satisfying the antitrust-injury requirement is limited to consumers and competitors in the restrained market") (citations and quotation marks omitted). Indeed, Microsoft has alleged that, as a proximate result of IDC's monopolistic scheme, it faces such threatened loss or injury in the form of supra-competitive licensing fees. *See* Compl. ¶ 81 (Microsoft and other implementers face higher costs as a result of IDC's violations). This threatens Microsoft's competitive position in the market, and it harms competition and consumers more generally. *Id.* ¶ 83 (higher costs harm consumers through increased prices and reduced choice); ¶ 85 (threat of eroded customer loyalty, brand recognition, customer goodwill); ¶ 86 (threat of loss of market share); ¶ 90 (threat of loss of customers and potential customers, and loss of product image and goodwill). Microsoft thus, at a minimum, has standing to pursue its claims for injunctive relief.

B. Microsoft Has Sufficiently Alleged A Cognizable Claim For Damages

Microsoft also has alleged injury-in-fact sufficiently to pursue its claim for antitrust damages. As a victim of IDC's monopolistic scheme, Microsoft has been denied the ability to obtain a license to IDC's SEPs on FRAND terms, which negatively affects its competitive position, and has borne the costs of defending IDC's baseless, bad-faith litigation. *Id.* ¶¶ 84–85. *See, e.g.*, *Hynix*, 527 F. Supp. 2d at 1098 ("[T]he patent litigation is properly included as an element of the alleged unlawful scheme. If proven, this scheme would entitle the [plaintiffs] to at least their legal expenses incurred in defending the patent litigation.").

Pleading allegations of injuries like these has repeatedly been found sufficient at the pleading stage to support a Section 2 claim for damages relating to false FRAND claims. *See, e.g.*, *RIM*, 644 F. Supp. 2d at 793 (denying motion to dismiss where the plaintiff alleged injury based on the threat of being forced to pay supra-competitive royalties and the uncertainty created by the SEP holders refusal to negotiate a FRAND rate); *Apple v. Samsung*, 2011 WL 4948567, at *6 (finding that allegations of antitrust injury based on the threats of increased prices, the exclusion of rivals, and "increase[d] royalties and other costs associated with the manufacture of downstream wireless communication devices that implement the . . . standard and chill competition to develop and sell innovative new [standard]-compliant products, resulting in increased prices and decreased quality and innovation in downstream product markets and complementary innovation markets" were "clearly" sufficient to allege both harm to Apple and competition generally); *Apple. v. Motorola*, 2011 WL 7324582, at *14 (Apple had sufficiently "alleged injury to itself and the relevant market" by alleging it "suffered the threat of being forced to pay exorbitant royalties, the uncertainty created by Motorola's refusal to offer" FRAND terms, "the expense of multiple patent infringement suits," and "imminent loss of profits, loss of current and potential customers and loss of goodwill and product image."). IDC's invitation that the Court ignore Microsoft's equivalent allegations should be rejected.

VIII. IDC'S STATUTE OF LIMITATIONS ARGUMENT FAILS

There is no basis for IDC's claim that portions of Microsoft's allegations of misconduct taking place prior to August 20, 2011 should be dismissed as time-barred.[7] *See* IDC Br. at 24. As an initial matter, IDC's request that the court parse Microsoft's allegations of IDC's anticompetitive conduct—dismissing some but not others—is inappropriate. *See Glaberson v. Comcast Corp.*, No. 03-6604, 2006 WL 2559479, at *13–14 (E.D. Pa. Aug. 31, 2006).

IDC's argument also fails under the continuing violation doctrine, which provides that even if the overt act that demonstrates the antitrust violation occurs outside the statute of limitations period, an injurious act within the limitations period may serve as the basis for a timely antitrust suit. *See In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1172 (3d Cir. 1993). Indeed, "each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997).

Here, the Complaint alleges that after its misrepresentations at ETSI (the last of which occurred in September 2014), IDC has engaged in, and continues to engage in, a non-FRAND licensing scheme that has resulted in continued injury to both Microsoft and competition generally. Accordingly, those injurious acts fall within the scope of the continuing-violation doctrine, thereby permitting Microsoft to recover for the *injuries* it sustained in the four-year period prior to the filing of its complaint, even if some portion of the associated anticompetitive *conduct* occurred outside of that period. *See, e.g., Zenith Elecs.*, 2015 U.S. Dist. LEXIS 33661, at *19–20 (applying the continuing violation doctrine to deny motion to dismiss on statute of limitations grounds a Section 2 claim based on misrepresentations made before a SSO).

IX. IDC'S MOTION TO STRIKE SHOULD BE DENIED

IDC's motion to strike Prayers for Relief C, D, and F is premature and provides no valid basis to strike Microsoft's requested relief.

[7] IDC's statute of limitations argument only challenges Microsoft's ability to claim damages. IDC Br. at 24. IDC implicitly concedes that its statute of limitations argument does not apply to Microsoft's claims for injunctive relief.

A. It Would Be Improper To Strike Any Of Microsoft's Prayer's For Relief

IDC's motion to strike is premised on the incorrect assertion that the requested equitable remedies at issue "have no bearing on [Microsoft's] alleged antitrust claims or remedying harm allegedly suffered by Microsoft." IDC. Br. at 20. But as even the authorities on which IDC relies note, "when faced with allegations that could possibly serve to achieve a better understanding of plaintiff's claims or perform any useful purpose in promoting the just disposition of the litigation, courts generally deny such motions to strike." *Del. Health Care*, 893 F. Supp. at 1292 (cited at IDC Br. at 20). Here, the anticompetitive conduct alleged against IDC bears an "important relationship to the claim[s] for relief . . . being pleaded," establishing a "colorable nexus" between IDC's anticompetitive conduct and the equitable relief requested sufficient to defeat any motion to strike. *Id.* at 1291–92.

B. Microsoft's Prayers For Relief C, D, And F Are Appropriate

1. The Court May Declare IDC's U.S. SEPs Unenforceable Based On The Conduct Alleged In The Complaint

In Prayer for Relief C, Microsoft seeks a declaration that each of IDC's U.S. patents declared by it to be essential to the Standards is unenforceable. Such relief is appropriate because (1) Microsoft has been injured by IDC's refusal to license each of IDC's U.S. SEPs on FRAND terms, (2) each of those patents (and more) have been involved in IDC's injurious conduct because IDC insists on licensing them only tied to its worldwide portfolio, and (3) a declaration of unenforceability would redress the injury. Contrary to IDC's assertion, Microsoft need not allege facts showing unenforceability as to each individual patent, such as misconduct at the USPTO that would render each patent unenforceable "under the patent laws." IDC Br. at 21–22. It is enough to seek a declaration of unenforceability under this court's equitable powers that Microsoft has alleged that IDC has engaged in standards-setting misconduct that relates to each of IDC's U.S. SEPs. *Cf. Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004, 1026 (Fed. Cir. 2008) (holding that a district court may in appropriate circumstances order patents unenforceable as a result of silence in the face of an SSO disclosure duty, as long as the scope of the remedy is properly limited in relation to the underlying breach).

2. The Court May Declare That Any Contracts Entered Into In Furtherance Of IDC's Antitrust Violations Are Void

Microsoft's Prayer for Relief D, requesting that the Court declare that "any and all contracts or agreements that IDC has entered in furtherance of its unlawful conduct are void" is also appropriate. Contrary to IDC's assertion (IDC Br. at 21), Microsoft has alleged that it has been injured by IDC's contracts with other licensees because it has alleged that IDC has used those agreements to discriminate against it. Compl. ¶ 67.[8] In any event, contracts that violate a federal statute—including the Sherman Act—are void and unenforceable as a matter of public policy. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 81–82 (1982). Microsoft's request that the Court declare "that any and all contracts or agreements that IDC has entered *into in furtherance of its unlawful conduct* are void" thus rests firmly in antitrust law.[9]

3. The Court May Require IDC To Make A Non-Confidential Agreement With FRAND Terms Available To Microsoft

Microsoft's Prayer for Relief F—which seeks injunctive relief requiring that IDC make a non-confidential license on FRAND terms available to Microsoft and that the terms of IDC's other licenses (or offers to license) be disclosed to Microsoft—is necessary to redress the injury that has been caused by IDC's anticompetitive conduct. As the Third Circuit explained in *Broadcom*, private standard setting, "which might otherwise be viewed as a naked agreement among competitors not to manufacture, distribute, or purchase certain types of products," is tolerated only in the "presence of meaningful safeguards that prevent the standard-setting process

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[8] For the same reasons, the Third Circuit's test for the exercise of declaratory judgment jurisdiction that the court consider the "adversity of interest between the parties, conclusivity that a declaratory judgment would have on the legal relationship between the parties, and the practical help, or utility, of a declaratory judgment" are met with respect to Prayers for Relief C and D. *Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 411 (3d Cir. 1992).

[9] IDC's assertion that Microsoft seeks "a declaration that *any and all* contracts or agreements [IDC] has entered into *with third parties* are void" (IDC Br. at 21 (emphasis added)) overstates the relief Microsoft has actually requested.

from being biased by members with economic interests in stifling product competition." 501 F.3d at 309–10 (citations and quotations omitted). The obligation to license SEPs on FRAND terms is such a "safeguard," providing a "'bulwark' against the unlawful accumulation of monopoly power that the antitrust laws are designed to prevent." *RIM*, 644 F. Supp. 2d at 795–96. Requiring IDC to make a license available on FRAND terms ensures that this prerequisite to lawful standard-setting is not evaded.

This case is unlike Nokia's previous declaratory judgment counterclaim, which requested the Court to "find that [IDC] has not offered a FRAND rate to Nokia and for the Court to determine what FRAND license terms would be." *InterDigital Commc'ns, Inc. v. ZTE Corp.*, No. 13-020-RGA, 2014 U.S. Dist. LEXIS 72389, at *6 (D. Del. May 28, 2014). There, the Court found that there would be no "useful purpose" in exercising declaratory judgment jurisdiction because there was no firm commitment by Nokia to sign a license based on the determined FRAND rate (and therefore the court could not enforce its ruling) and because there would remain other license disputes beyond the FRAND rate that could become "sticking points" in completing an agreement. *Id.* at *9–10. By contrast, here, Microsoft is not seeking a declaratory judgment, but rather injunctive relief tailored to IDC's anticompetitive conduct, which would hold IDC to its duty to provide Microsoft a complete FRAND *license* or have such terms set by a court.

Microsoft's further request—that IDC be ordered to disclose the terms on which it has provided its SEPs to others—addresses IDC leveraging supposed confidentiality to facilitate discrimination among licensees. *See* Compl. ¶¶ 65–66. Disclosure can be appropriately tailored to address any legitimate third party interests that emerge in discovery. But IDC's objection that disclosure of its SEP license agreements would harm Microsoft's competitors is difficult to understand, particularly when IDC's price is supposed to be non-discriminatory. The solution to any concern about selective disclosure should be broader disclosure, not continued secrecy which enables—indeed, is both necessary for and promotes—discrimination.[10]

X. CONCLUSION

For the foregoing reasons, IDC's motion to dismiss and strike should be denied.

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Respectfully submitted,

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[10] IDC's assertion that "Microsoft itself routinely asserts in litigation that its licensing information is highly sensitive and cannot be disclosed to competitors" is a non sequitur. IDC Br. at 23 n.10. Microsoft's protection of its confidential licensing information in general does not justify IDC shielding its SEP licenses, which are subject to a non-discriminatory licensing commitment, in order to circumvent that commitment.