

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**No. 14-17574**

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TODD S. GLASSEY AND MICHAEL E. MCNEIL,

*Plaintiffs-Appellants*

v.

MICROSEMI INC., INTERNET ENGINEERING TASK FORCE, THE  
INTERNET SOCIETY, UNITED STATES, APPLE INC., CISCO INC., EBAY  
INC., PAYPAL, INC., GOOGLE INC., JUNIPER NETWORKS, MICROSOFT  
CORP., ORACLE INC., AND NETFLIX, INC.,

*Defendants-Appellees*

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Appeal from the United States District Court for the Northern District of California  
in case no. 14-cv-03629, District Judge William H. Alsup

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**DEFENDANTS-APPELLEES MICROSEMI CORP., INTERNET  
ENGINEERING TASK FORCE, THE INTERNET SOCIETY, APPLE INC.,  
CISCO INC., EBAY INC., PAYPAL, INC., GOOGLE INC., JUNIPER  
NETWORKS, MICROSOFT CORP., ORACLE CORP., AND NETFLIX,  
INC.'S CORRECTED ANSWERING BRIEF**

**CORPORATE DISCLOSURE STATEMENTS**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure,  
Defendant-Appellee Apple Inc. hereby states that it has no parent corporation and  
no publicly held corporation owns 10% or more of its stock.

Dated: July 13, 2015

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Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants-Appellees the Internet Society (the “ISOC”) and the Internet Engineering Task Force (the “IETF”) hereby state that the ISOC is a non-profit membership corporation with no corporate parent. There is no publicly-held corporation that owns 10% or more of the ISOC. The IETF is an organized activity of the ISOC and is not a legal entity.

Dated: July 13, 2015

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## TABLE OF CONTENTS

	<u>Page</u>
I. JURISDICTIONAL STATEMENT .....	1
II. INTRODUCTION AND ISSUES FOR REVIEW .....	2
III. PROCEDURAL BACKGROUND .....	2
IV. STATEMENT OF RELEVANT FACTS .....	5
A. Relationship between Plaintiffs, Microsemi's Predecessors, and Microsemi .....	5
B. The Patents at Issue .....	7
V. SUMMARY OF ARGUMENT .....	8
VI. ARGUMENT .....	9
A. Plaintiffs' Opening Brief Fails to Provide Any Basis for Challenging the District Court's Order Striking the Second Amended Complaint or the District Court's Judgment. ....	9
B. The District Court Properly Struck the SAC .....	10
1. Plaintiffs lack standing to assert patent infringement because Microsemi is the assignee. ....	10
2. Plaintiffs' efforts to obtain ownership of the '629 patent are without merit and time-barred. ....	12
3. Plaintiffs' copyright infringement claims fail for lack of ownership of an infringed work. ....	15
4. Plaintiffs' antitrust claims fail because they lack essential allegations. ....	16
5. Plaintiffs' tortious interference claim is without merit. ....	19
6. The United States' Sovereign Immunity is not relevant to Defendants. ....	20
C. Plaintiffs' Numerous Motions Were Properly Denied .....	20
1. Plaintiffs' Renewed Motion for Three-Judge Panel was properly denied. ....	21
2. Plaintiffs' Motions for Partial Summary Judgment to Void the DDI and TTI Settlements were properly denied. ....	21
3. Plaintiffs' Motion for Partial Summary Judgment of Patent Inventorship was properly denied. ....	24
4. Plaintiffs' Motion for Partial Summary Judgment re "Performance Rights" was properly denied. ....	26

5.	Plaintiffs’ motions regarding FISA and alleged “Fraud Loss” relate only to the U.S. Government. ....	26
D.	Plaintiffs Raise Several Issues for the First Time on Appeal. ....	26
E.	Plaintiffs Should be Declared Vexatious Litigants. ....	27
VII.	CONCLUSION.....	28

**TABLE OF AUTHORITIES****Page(s)****CASES**

<i>Amarel v. Connell</i> , 102 F.3d 1494 (9th Cir. 1996) .....	17
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007) .....	17, 18
<i>Bernard v. Walkup</i> , 272 Cal. App. 2d 595 (1969) .....	14
<i>Brenden v. Carlson</i> , 586 F. App'x 354 (9th Cir. 2014) .....	10
<i>Brown v. Hoops</i> , No. CV-11-5414, 2013 WL 5329484 (C.D. Cal. Sept. 20, 2013) .....	27
<i>City of Philadelphia v. Klutznick</i> , 503 F. Supp. 657 (E.D. Pa. 1980) .....	21
<i>Community Commerce Bank v. O'Brien</i> , 312 F.3d 1135 (9th Cir. 2002) .....	9
<i>Contra Costa County Title Co. v. Waloff</i> , 184 Cal. App. 2d 59 (1960) .....	23
<i>Della Penna v. Toyota Motor Sales, USA, Inc.</i> , 11 Cal. 4th 376 (Cal. 1995) .....	19
<i>Essery v. Dept. of Transp.</i> , 857 F.2d 1286 (9th Cir. 1988) .....	17
<i>Ethicon, Inc. v. United States Surgical Corp.</i> , 135 F.3d 1456 (Fed. Cir. 1998) .....	24, 25
<i>Evon v. Law Offices of Sidney Mickell</i> , 688 F.3d 1015 (9th Cir. 2012) .....	20
<i>Gellman v. Telular Corp.</i> , 449 F. App'x 941 (Fed. Cir. 2011) .....	21, 22
<i>Gen. Bedding Corp. v. Echevarria</i> , 947 F.2d 1395 (9th Cir. 1991) .....	14
<i>Hess v. Advanced Cardiovascular Sys., Inc.</i> , 106 F.3d 976 (Fed. Cir. 1997) .....	24
<i>Hybritech, Inc. v. Monoclonal Antibodies, Inc.</i> , 802 F.2d 1367 (Fed. Cir. 1986) .....	24
<i>IBM Corp. v. Zachariades</i> , No. C 91-20419-JW, 1993 WL 443409 (N.D. Cal. Oct. 27, 1993), <i>aff'd in relevant part</i> , 70 F.3d 1278 (9th Cir. 1995) .....	14

<i>Jefferson Parish Hosp. Dist. No. 2 v. Hyde</i> , 466 U.S. 2 (1984) .....	19
<i>Knevelbaard Dairies v. Kraft Foods, Inc.</i> , 232 F.3d 979 (9th Cir. 2000) .....	16
<i>LiveUniverse, Inc. v. MySpace, Inc.</i> , 304 F. App'x 554 (9th Cir. 2008).....	18
<i>Los Angeles Equestrian Center, Inc. v. City of Los Angeles</i> , 17 Cal. App. 4th 432 (1993).....	22
<i>Lukovsky v. Cty. &amp; Cnty. of San Francisco</i> , 535 F.3d 1044 (9th Cir. 2008) .....	13
<i>Lum v. City of San Joaquin</i> , 584 F. App'x 449 (9th Cir. 2014) .....	27
<i>McGlinchy v. Shell Chemical Co.</i> , 845 F.2d 802 (9th Cir. 1988).....	18
<i>McHenry v. Renne</i> , 84 F.3d 1172 (9th Cir. 1996) .....	10
<i>McNeil, et al. v. Symmetricom, Inc.</i> , No. CV-165643 (Santa Cruz Sup. Ct.) .....	14, 15, 23
<i>Nolen v. Lufkin Indus., Inc.</i> , 469 F. App'x 857 (Fed. Cir. 2012) .....	12
<i>Price v. Symsek</i> , 988 F.2d 1187 (Fed. Cir. 1993) .....	25
<i>Rebel Oil Co. v. Atl. Richfield Co.</i> , 51 F.3d 1421 (9th Cir. 1995).....	18
<i>Seven Arts Filmed Entm't Ltd. v. Content Media Corp.</i> , 733 F.3d 1251 (9th Cir. 2013) .....	15
<i>Singleton v. Wulff</i> , 428 U.S. 106 (1976) .....	27
<i>Somers v. Apple, Inc.</i> , 729 F.3d 953 (9th Cir. 2013) .....	17
<i>Sontag Chain Stores Co. Ltd. v. Nat'l Nut Co. of California</i> , 310 U.S. 281 (1940).....	13
<i>Talbot v. Quaker-State Oil Ref. Co.</i> , 104 F.2d 967 (3d Cir. 1939).....	21, 22
<i>Youst v. Longo</i> , 43 Cal. 3d 64 (Cal. 1987).....	20

## STATUTES

17 U.S.C. § 411 .....	16
19 U.S.C. § 2904 .....	3
28 U.S.C. § 1291 .....	1, 27



28 U.S.C. § 1295 .....	4
28 U.S.C. § 1331 .....	1
28 U.S.C. § 1337 .....	1
28 U.S.C. § 1367 .....	1
28 U.S.C. § 2284 .....	21
Cal. Code Civ. Proc. § 337 .....	14

## **RULES**

Fed. R. App. P. 28 .....	9, 17
Fed. R. Civ. P. 8 .....	9, 10
Fed. R. Civ. P. 56 .....	21

**TABLE OF ABBREVIATIONS**

Defendants-Appellees Microsemi Corporation, Internet Engineering Task Force, The Internet Society, Apple Inc., Cisco Systems, Inc., eBay Inc., PayPal, Inc., Google Inc., Juniper Networks, Inc., Microsoft Corporation, Oracle Corporation, and Netflix, Inc.	Defendants
Plaintiffs-Appellants Todd S. Glassey and Michael E. McNeil	Plaintiffs
The Internet Engineering Task Force	IETF
Informal Opening Brief of Appellants (Dkt. 23-1)	Opening Brief
First Amended Complaint (Dkt. 6)	FAC
Corrected Second Amended Complaint (Dkt. 112)	SAC
District Court's December 29, 2014 Order Granting Motions to Dismiss, Striking Second Amended Complaint, Denying All Pending Motions for Summary Judgment, and Vacating Hearings (Dkt. 185)	Order Striking SAC
District Court's December 29, 2014 Judgment (Dkt. 186)	Judgment
U.S. Patent No. 6,370,629	the '629 patent or Controlling Access Patent
U.S. Patent No. 6,393,126	the '126 patent or TTI Patent
Datum, Inc.	Datum
Digital Delivery, Inc.	DDI
Appellees' Supplemental Excerpts of Record	SER

## **I. JURISDICTIONAL STATEMENT**

The District Court had original subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1337(a) based on Plaintiffs' Sherman Act and Clayton Act claims. The District Court also had supplemental jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367(a).

On December 29, 2014, the District Court entered its final judgment dismissing Plaintiffs' Second Amended Complaint ("SAC") with prejudice. Plaintiffs' SAC purports to state claims against one or more Defendants relating to patent infringement, copyright infringement, Sherman Act and Clayton Act violations, and tortious interference. Plaintiffs allege other claims against the United States, which are not relevant to Defendants and are separately addressed in the Answering Brief of the United States.

As explained below, Plaintiffs do not have standing to pursue their purported patent and copyright infringement claims: Plaintiffs do not own the patent that they claim to assert, nor are they able to identify a registered copyright they own that is alleged to be infringed. Accordingly, the District Court lacked original jurisdiction over Plaintiffs' patent and copyright infringement claims.

Plaintiffs filed a timely notice of appeal on December 29, 2014. This Court has jurisdiction under 28 U.S.C. § 1291.

## II. INTRODUCTION AND ISSUES FOR REVIEW

This appeal arises from an order of the United States District Court of the Northern District of California entering judgment in favor of Defendants. *See* SER at 16. Plaintiffs previously settled disputes with predecessors of defendant Microsemi regarding control of certain intellectual property rights and entered into two agreements in 1999 resolving those disputes. In 2014, Plaintiffs brought suit against ten technology companies, The Internet Society, the IETF, and the United States Government alleging that Plaintiffs' purported intellectual property rights are used by virtually every computer in the world entitling Plaintiffs to trillions of dollars in damages. The District Court properly dismissed the action, noting that Plaintiffs' allegations are "utterly frivolous." *Id.* at 14. Plaintiffs' appeal is similarly meritless and fails to identify proper issues for review. Defendants respectfully request that this Court uphold the District Court's order.

## III. PROCEDURAL BACKGROUND

Plaintiffs initially filed a complaint against Microsemi on August 11, 2014. SER at 17. On August 25, Plaintiffs filed a First Amended Complaint ("FAC") adding as parties the other Defendants and asserting a nearly unintelligible string of purported facts that allude to, but do not actually allege, patent infringement. *Id.* at 49. In the FAC, Plaintiffs admit that Microsemi is the assignee of the patent

purportedly in suit—the ’629 patent—as a result of a settlement agreement Plaintiffs signed in 1999 with Microsemi’s predecessor in interest. *Id.* at 64, 67.

Numerous Defendants moved to dismiss, and the District Court issued an order striking the FAC and addressing some of its fundamental deficiencies—in particular, Plaintiffs’ apparent lack of standing to assert the ’629 patent. SER at 5. The order instructed Plaintiffs to file an amended complaint that “must cure the deficiencies identified herein. Failure to do so may well result in dismissal with prejudice. Plaintiffs must plead their best and most plausible case and further opportunities to plead will not likely be allowed.” *Id.* at 5-6.

On November 12, 2014, Plaintiffs filed a second amended complaint followed by the “corrected” SAC the next day. SER at 91. The SAC sets forth 10 counts: Count 1 alleged infringement of the ’629 patent, Sherman Act and Clayton Act violations, and tortious interference against Microsemi. *Id.* at 141-144. Counts 2 through 7 alleged infringement of the ’629 patent against Microsoft, Google, Apple, Oracle, eBay and PayPal, Cisco, and Juniper. *Id.* at 145-152. Count 8 alleged infringement of the ’629 patent and Sherman Act and Clayton Act violations against the IETF and The Internet Society. *Id.* at 152-161. Count 9 alleged violation of 19 U.S.C. § 2904, “reciprocal nondiscriminatory treatment of International Patent (and IP complaints); FISA abuse, NAFTA violation, Violation of TRIPS and PCT agreements” against the United States. *Id.* at 162-163. Count

10 is against the State of California, which is not a party to this appeal. *Id.* at 163-165.

Once again, a number of Defendants filed motions to dismiss, and the District Court issued an order to show cause why the SAC should or should not be stricken. SER at 7. On December 29, 2014, the District Court issued an order (i) granting the motions to dismiss, (ii) denying all of Plaintiffs' motions and (iii) striking the SAC with prejudice, *id.* at 8-15, and issued a final judgment, *id.* at 16. Plaintiffs promptly filed their notice of appeal to this Court. *See* SER at 275.

In addition to this appeal, Plaintiffs filed a second co-pending appeal that was docketed in the Federal Circuit on February 11, 2015, *see* SER at 276, as appeal No. 15-1326. On March 2, 2015, Defendants moved to dismiss the Federal Circuit appeal for lack of appellate jurisdiction under 28 U.S.C. § 1295(a)(1) or any other basis. *Id.* at 278.

On June 10, 2015, the Federal Circuit granted Defendants' motion to dismiss that second appeal. SER at 281. The Federal Circuit agreed with the District Court's finding that Plaintiffs lack standing to assert patent infringement and concluded that it lacks jurisdiction over Plaintiffs' appeal because the "operative complaint, to the extent we can make out its allegations, asserts patent infringement but recognizes that the [plaintiffs] do not own the patent in question and seeks on various non-patent grounds to void the settlement agreements that

had transferred any ownership interest they had in the patent to Microsemi Inc.”

*Id.* at 282.

#### **IV. STATEMENT OF RELEVANT FACTS**

##### **A. Relationship between Plaintiffs, Microsemi’s Predecessors, and Microsemi**

In 1997, Plaintiffs began working with Datum (Microsemi’s predecessor in interest) to develop technology relating to controlled access to stored information. SER at 57-59. That same year, Plaintiffs also began working with DDI (another Microsemi predecessor in interest) to develop similar technology. *Id.* at 59-61.

In 1998, Plaintiffs and DDI agreed to jointly pursue the patent application that ultimately issued as the ’629 patent, titled “Controlling Access to Stored Information based on Geographical Location and Date and Time,” also referred to as the “Controlling Access Patent.” *See* SER at 201. Plaintiffs assigned to DDI all right, title, and interest in the ’629 patent:

For valuable consideration, we [Michael E. McNeil and Todd S. Glassey] hereby assign to [DDI] and its successors and assigns [ ] the entire, right, title and interest throughout the world in the inventions and improvements which are subject of an application for United States patent signed by us, entitled CONTROLLING ACCESS TO STORED INFORMATION.

*Id.* at 85-87.

Around July 1999, DDI became a wholly-owned subsidiary of Datum. SER at 103. In November 1999, to settle a lawsuit between Datum/DDI and Plaintiffs,

the parties entered into two settlement agreements. The first agreement concerns certain technology (the “Technology Settlement,” SER at 202-218), and the second concerns the ’629 patent (the “Patent Settlement,” SER at 219-229). Both agreements are governed by California law. *Id.* at 215, 226.

**The Technology Settlement** sets forth the parties’ rights concerning a defined set of “Protected Technology.” SER at 203-204. Specifically, Datum retained all intellectual property rights to the Protected Technology, and Plaintiffs agreed not to contest Datum’s ownership or patent rights:

3.4 Intellectual Property Rights Regarding the Protected Technology: GMT/GLASSEY/MCNEIL disclaim any ownership in, or rights to, the Protected Technology and hereby acknowledge, represent, and warrant that such Protected Technology is owned solely and exclusively by DATUM as its intellectual property, trade secret and proprietary information. GMT/GLASSEY/MCNEIL agrees not to contest DATUM’s ownership of any Protected Technology or labeling of the Protected Technology as intellectual property, trade secrets, and/or proprietary information.

*Id.* at 209 (emphasis added). In return, Plaintiffs received three years of royalty payments. *Id.* at 205-208, 212. The Technology Settlement provides that the Technology Settlement and Patent Settlement (discussed below) are the only two operable agreements between the parties. *See id.* at 209 (“Other Agreements Superseded and Terminated”).

**The Patent Settlement** became the “definitive” and only agreement setting forth the parties’ rights with respect to the ’629 patent. *See* SER at 219-220, 222.



The agreement confirmed that Plaintiffs assigned all rights relating to the '629 patent to Datum: "GMT/GLASSEY/MCNEIL assign all rights, title and interest in the Controlling Access Patent and the application therefor, to DATUM." *Id.* at 220-221. As defined, the term "Controlling Access Patent" included both U.S. and foreign patents and patent applications. *See id.* at 220, *see also id.* at 62.

Plaintiffs maintained rights to technology referenced as the "Phase II Technology" but granted to Datum a perpetual and irrevocable license to this technology in connection with products and technology covered by the '629 patent. SER at 221. Consistent with Datum's sole ownership of the patent rights, Section 3.6 prohibits Plaintiffs from making, using, or selling any products described or covered by the '629 patent. *Id.* at 221-222. Plaintiffs were also paid \$300,000. *Id.* at 221.

Neither the Patent Settlement nor the Technology Settlement contains any provision that (i) requires Plaintiffs' permission to file patent applications (U.S. or foreign), or (ii) requires the enforcement or maintenance of the '629 patent (or any foreign counterparts) or any patents related to Phase II Technology. *See generally* SER 202-229.

## **B. The Patents at Issue**

**U.S. Patent No. 6,370,629:** The '629 patent issued on April 9, 2002 with Datum listed as the sole assignee and Plaintiffs as two of the four named inventors.

SER at 81; *see also id.* at 63. In 2002, Datum was acquired by Symmetricom. *Id.* at 103. In 2013, Symmetricom was acquired by Microsemi. Plaintiffs admit that Microsemi remains the current assignee of the '629 patent. *See id.* at 64 (“The Controlling Access Settlement [*i.e.*, the Patent Settlement] is still in force and serves as the basis for Microsemi’s continuing claim to be the assignee of the '629 Patent.”).

**U.S. Patent No. 6,393,126:** The '126 patent issued on May 21, 2002 with Datum identified as the sole assignee. SER at 88-89. Like the '629 Patent, the '126 Patent is currently assigned to Microsemi. Plaintiffs are not listed as named inventors. *Id.*

## **V. SUMMARY OF ARGUMENT**

The District Court’s ruling below should be affirmed in its entirety. The allegations in the SAC, to the extent comprehensible, do not come close to stating a claim against any Defendant. In particular, the majority of Plaintiffs’ claims allege a violation of intellectual property rights that Plaintiffs do not actually own. In addition, Plaintiffs cannot assert antitrust injury, and many of their claims are time-barred. Finally, Plaintiffs’ numerous motions for affirmative relief were properly denied because Plaintiffs did not carry their burden of proof on such motions.

## VI. ARGUMENT

### A. **Plaintiffs' Opening Brief Fails to Provide Any Basis for Challenging the District Court's Order Striking the Second Amended Complaint or the District Court's Judgment.**

Plaintiffs' Opening Brief is nearly incomprehensible, and it fails to meet the basic minimum requirements of either an informal Ninth Circuit brief or Fed. R. App. P. 28(a). Plaintiffs repeatedly assert that the District Court erred, but fail to state the grounds for such purported error. Rather, ignoring the analysis of the District Court's order, Plaintiffs make unsupported statements that the District Court "dismissed without any substantive review every single question put to the Court" and "didn't apply any law[,] but fail to state the law that should have been applied. See Informal Opening Brief of Appellants (Dkt. No. 23-1, "Opening Brief") at 3, 13; 9th Cir. Informal Brief Template, at 3-4.

"[F]ailure to comply with Rule 28 [or the comparable requirements for an Informal Brief], by itself, is sufficient ground to justify dismissal of an appeal." *Community Commerce Bank v. O'Brien*, 312 F.3d 1135, 1136 (9th Cir. 2002) (dismissing appeal because of *inter alia* failure to include jurisdictional statement and summary of argument). Plaintiffs' appeal should be dismissed for this failure alone.

**B. The District Court Properly Struck the SAC.**

This Court reviews “for an abuse of discretion a dismissal for failure to comply with an order to amend the complaint to comply with Federal Rule of Civil Procedure 8.” *Brenden v. Carlson*, 586 F. App’x 354 (9th Cir. 2014) (citing *McHenry v. Renne*, 84 F.3d 1172, 1177 (9th Cir. 1996)). Dismissal is not an abuse of discretion when the plaintiff is given the opportunity to amend the complaint and “fail[s] either to respond to the district court’s order to show cause with a second amended complaint that complie[s] with Rule 8, or to explain why his action should not be dismissed.” *Brenden*, 586 F. App’x at 355.

1. Plaintiffs lack standing to assert patent infringement because Microsemi is the assignee.

Plaintiffs had two opportunities to properly plead a patent infringement claim against Defendants. In striking the FAC, the District Court identified as one of the “fundamental” deficiencies that “plaintiffs appear to lack standing to assert at least some of the claims ... [because] Microsemi appears to be the assignee ....” SER at 5.

The ensuing SAC could not and did not fix this deficiency. In striking and dismissing with prejudice the SAC, the District Court held that “plaintiffs lack standing to assert patent infringement for even they concede that they do not own the asserted patents.” SER at 14. Indeed, Plaintiffs repeatedly admit that Microsemi owns the patent rights: “[t]he Controlling Access Settlement [*i.e.*, the

Patent Settlement] is still in force and serves as the basis for Microsemi's continuing claim to be the assignee of the '629 Patent.” *Id.* at 64; *see also id.* at 62 (“Pursuant to Paragraph 3.2 of the [Patent Settlement], Plaintiffs assigned ‘all rights, title, and interest’ in the [’629 Patent] and foreign patents based thereon to Datum”); *id.* at 67 (“As a result of Microsemi’s . . . status as assignee of [the ’629 Patent], Microsemi has been unjustly enriched in the amount that it has benefitted in any way from the Phase-II Technology . . . .”). Plaintiffs then sought a ruling from the District Court “as to how Plaintiffs can enforce against [Phase II Technology] **if at all**.” Opening Brief at 16:12-15 (emphasis added).

There is no dispute that Microsemi is the owner of all right, title, and interest in the '629 patent. In 1998, Plaintiffs assigned all rights in the '629 patent—including all U.S. and foreign patent and patent applications—to Microsemi's predecessor DDI:

For valuable consideration, [Plaintiffs] hereby assign to [DDI] and its successors and assigns [] the entire, right, title and interest throughout the world in the inventions and improvements which are subject of an application for United States patent signed by us, entitled CONTROLLING ACCESS TO STORED INFORMATION . . . .”

SER at 82-87. And in the 1999 Patent Settlement, Plaintiffs reaffirmed the assignment of all legal right, title and interest to the '629 patent to DDI's successor Datum (later Microsemi's predecessor): “**GMT/GLASSEY/MCNEIL assign all**

**rights, title and interest in the Controlling Access Patent and the application therefor, to DATUM.”** *Id.* at 221 (emphasis added); *see also id.* at 220; *id.* at 62.

Because Microsemi owns all rights to the '629 patent, Plaintiffs do not have standing to assert infringement claims against any party. Accordingly, all patent infringement allegations were properly dismissed. *Nolen v. Lufkin Indus., Inc.*, 469 F. App'x 857, 860-861 (Fed. Cir. 2012) (explaining that “plaintiffs’ patent infringement claim [does] not confer federal question jurisdiction because the plaintiffs [do] not have ownership rights in the patent without judicial intervention”). A mere request that a court rescind a patent assignment agreement is *not* sufficient to convey standing to sue. *See id.* Thus, to invoke federal jurisdiction, a plaintiff must “allege facts that demonstrate that he, and not the defendant, owns the patent rights on which the infringement suit is premised.” *Id.* at 861 (quotation omitted). Plaintiffs have not and cannot allege such facts. Thus, the District Court properly struck the patent infringement claims against all Defendants.

2. Plaintiffs’ efforts to obtain ownership of the '629 patent are without merit and time-barred.

The District Court likewise gave Plaintiffs two opportunities to properly plead some basis to seek ownership of the '629 patent. In striking the FAC, the District Court identified one of the “fundamental” deficiencies Plaintiffs must cure is that “many of the claims are time barred. Plaintiffs’ dispute centers upon

agreements allegedly entered in the late 1990s and alleged torts from 2001 and 2004. The limitations period passed long ago.” SER at 5. Plaintiffs failed to cure that deficiency. In striking and dismissing with prejudice the SAC, the District Court held that “plaintiffs’ claims are time-barred. Most, if not all, of plaintiffs’ claims date back to the 1990s and early 2000s. The statute of limitations has long passed.” SER at 14.

Plaintiffs assert a myriad of claims to fabricate a basis for ownership of the ’629 patent. For example, they argue that the Patent Settlement—which granted all rights in the ’629 patent to Microsemi—should be voided, rescinded, or otherwise ignored by this Court because “the PHASE-II Intellectual Properties contained inside [the ’629 Patent]” belong to Plaintiffs. Opening Brief at 4:11-15; *see also id.* at 17:9-11. These claims are meritless and time-barred.

Generally speaking, a claim accrues “when the plaintiff knows or has reason to know of the injury which is the basis of the action.” *Lukovsky v. Cty. & Cnty. of San Francisco*, 535 F.3d 1044, 1048 (9th Cir. 2008). Here, Plaintiffs themselves were *two of the four named inventors* listed on the face of the ’629 patent, which when issued in 2002, identified Datum as assignee. This alone provided sufficient constructive notice to start the clock on any claims pertaining to ownership rights. Indeed, in the context of patent-related claims, the Supreme Court has held that upon issuance and recordation of patents, “[c]onstructive notice of their existence

goes thus to all the world.” *Sontag Chain Stores Co. Ltd. v. Nat’l Nut Co. of California*, 310 U.S. 281, 295 (1940) (noting that one with such “implied knowledge” would be subject to same privileges and obligations as “would follow actual knowledge”).<sup>1</sup>

The statute of limitations in California for breach of a written contract—such as the Patent Settlement—is four years. *See* Cal. Code Civ. Proc. § 337. Accordingly, because the Patent Settlement was signed in 1999, and the ’629 patent issued in 2002, Plaintiffs had until 2006 to bring their claims for breach or otherwise challenge the Patent Settlement. Here, Plaintiffs did not file suit until 2009, when they brought *McNeil, et al. v. Symmetricom, Inc.*, No. CV-165643 (Santa Cruz Sup. Ct.).

Plaintiffs attempt to sidestep this simple fact by contending they were not provided a copy of the Patent Settlement until 12 years after its execution and were thus unable to enforce their rights. *See* SER at 127. This contention necessarily fails because a contract is enforceable even if it is not fully executed. *Bernard v. Walkup*, 272 Cal. App. 2d 595, 602 (1969) (“It is well established that the receipt

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<sup>1</sup> *See also Gen. Bedding Corp. v. Echevarria*, 947 F.2d 1395, 1398 (9th Cir. 1991) (constructive knowledge imputed from patent’s issuance if party “had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of [the cause of action]”); *IBM Corp. v. Zachariades*, No. C 91-20419-JW, 1993 WL 443409, at \*2 (N.D. Cal. Oct. 27, 1993), *aff’d in relevant part*, 70 F.3d 1278 (9th Cir. 1995) (finding “issuance of a patent gives a plaintiff constructive notice of its claims if the patent reveals information sufficient to alert a reasonable person of the need to inquire further”).



and acceptance by one party of a writing signed by the other only, and purporting to embody all the terms of a contract between the two, binds the acceptor as well as the signer, to the terms of the writing.”). Further, Plaintiffs do not deny that they received compensation under both contracts (the Patent Settlement compensated Plaintiffs \$300,000 (SER at 221) and the Technology Settlement paid Plaintiffs royalties (SER at 205-208, 212)), which evidences Microsemi’s acceptance of the contracts’ terms, thereby binding both Microsemi as the acceptor and Plaintiffs as the signors.

Accordingly, the District Court correctly ruled that Plaintiffs failed to assert a valid ownership claim of the ’629 patent.

3. Plaintiffs’ copyright infringement claims fail for lack of ownership of an infringed work.

Plaintiffs provide no grounds for overturning the dismissal of their copyright claims. In order to state a claim for copyright infringement, Plaintiffs must establish ownership of a valid copyright and copying of original constituent elements of that work. *Seven Arts Filmed Entm’t Ltd. v. Content Media Corp.*, 733 F.3d 1251, 1254 (9th Cir. 2013). None of Plaintiffs’ filings in this action—let alone the SAC—come close to meeting those requirements.

The Internet Society and IETF first pointed out that Plaintiffs had failed to allege ownership of a valid copyright in their motion to dismiss the FAC. *See* SER at 90. In its order striking the FAC, the District Court observed that “no ownership

of a valid copyrighted work is alleged,” and specifically instructed Plaintiffs to cure this defect in any amended pleading. *Id.* at 5-6. Nevertheless, the SAC still failed to identify any copyright owned by Plaintiffs, instead alleging infringement upon Plaintiffs’ “performance rights” to *patented* technology. *See, e.g., id.* at 155 (“The question is one as to PLAINTIFFS’ PERFORMANCE RIGHTS of the patent protected IP . . .”).<sup>2</sup>

The essence of Plaintiffs’ copyright claims is that standards published by the IETF discuss certain patented technology—patents which, as set forth above, Plaintiffs do not actually own—and that various Defendants have implemented that technology. Thus, Plaintiffs’ allegations are nothing more than an attempt to improperly re-cast their patent infringement claims as copyright claims. Accordingly, the dismissal of Plaintiffs’ copyright claims should be affirmed.

4. Plaintiffs’ antitrust claims fail because they lack essential allegations.

The District Court struck Plaintiffs’ antitrust claims for failure to allege antitrust injury. SER at 14. In general, dismissal of antitrust violations is reviewed *de novo*. *See Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 984 (9th

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<sup>2</sup> Plaintiffs submitted a document titled “Location Based Control System” with their brief in this appeal. (App. Dkt. 23-4.) Although that document contains a copyright notice, neither the SAC nor any of Plaintiffs’ briefing identifies any specific instances in which that document was copied. Moreover, Plaintiffs have not demonstrated that they own *registered* copyrights in the Location Based Control System or any other work. *See* 17 U.S.C. § 411(a) (requiring registration of copyright as prerequisite to infringement claim).

Cir. 2000). Here, Plaintiffs fail to identify any law, facts, or injury relating to their antitrust allegations on appeal, thus the issue of antitrust injury is not properly before this Court and this Court need not revisit Plaintiffs' antitrust claims. *See* 9th Cir. Informal Brief Template at 2-4; Fed. R. App. P. 28(a)(9) (requiring that the appellant's brief contain "appellant's contentions and the reasons for them"); *Essery v. Dept. of Transp.*, 857 F.2d 1286, 1288 n.1 (9th Cir. 1988). Any future arguments Plaintiffs may assert before the Court are barred as not timely appealed. *See id.*

Nevertheless, even if Plaintiffs' antitrust claims were properly before this Court, their substantive allegations are without merit. There are four elements to an antitrust claim: "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Somers v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013) (citations omitted). A "bare assertion of conspiracy will not suffice" to prove unlawful conduct, and "without some further factual enhancement [a bare assertion] stops short of the line between possibility and plausibility." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007).

The SAC contains blanket assertions of antitrust injury relating to supposed violations of Sections 1 and 2 of the Sherman Act and Section 4 of the Clayton

Act,<sup>3</sup> but does not substantiate the claims with allegations of specific facts. For instance:

MICROSEMI has allegedly committed a number of Sherman Act violations (Section One and Section Two) and several Clayton Act (Section Four) violations in its alleged efforts to prevent PLAINTIFFS from being able utilize their property and to dilute its Market Power in violation of US Antitrust Law.

SER at 136; *see also id.* at 112, 118-119, 136-138. This and similar statements evince the dearth of factual specificity necessary to fulfill the elements to establish an antitrust cause of action.

First, absent from Plaintiffs' conclusory conspiracy allegations is a reference to any agreement by Defendants to act in concert. *See Twombly*, 550 U.S. at 556. The mere possibility of such an agreement—as established through an unsupported allegation of conspiracy or parallel conduct—does not equate to plausibility. *See id.* Plaintiffs failed, in all three iterations of the complaint, to plead facts sufficient to meet the threshold of Rule 8(a)(2).

Second, Plaintiffs failed to allege an antitrust injury, a necessary element to a successful antitrust claim. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433, 1445 (9th Cir. 1995). In alleging an antitrust injury, a plaintiff must show

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<sup>3</sup> The requirements for each of these three causes of action differ. However, they all require a showing of unlawful conduct and antitrust injury and therefore may be addressed collectively as to those elements. *See generally Amarel v. Connell*, 102 F.3d 1494, 1521-22 (9th Cir. 1996) (articulating the elements for Section 1 and Section 2 Sherman Act claims).

“harm to the process of competition and consumer welfare, not harm to individual competitors.” *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App’x 554, 557 (9th Cir. 2008); *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 811-12 (9th Cir. 1988) (“The antitrust laws were enacted for the protection of competition, not competitors.”) (citations omitted).

Plaintiffs failed to allege any harm to competition—*i.e.*, reduced output or increased prices. Instead, Plaintiffs asserted only personal economic loss stemming from their alleged inability to enforce their settlement agreement with Microsemi. *See* SER at 118; *see also id.* at 112, 119, 136-138. Because Plaintiffs did not allege any injury to the market or a detrimental impact on the number of marketplace players, Plaintiffs have not pled an antitrust injury.

In addition to the four general elements for an antitrust claim, a plaintiff must allege a plausible relevant product market in which the anticompetitive effects of the challenged activity can be assessed. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29 (1984). The SAC failed to allege any such market. Accordingly, the District Court correctly dismissed Plaintiffs’ claims.

5. Plaintiffs’ tortious interference claim is without merit.

In striking Plaintiffs’ claim for tortious interference against Microsemi in the FAC, the District Court specifically pointed out that the claim was alleged “[i]n a conclusory fashion.” SER at 5. The SAC did nothing to correct this deficiency

(see SER at 135, 137, 143), and was thus properly stricken by the District Court. *Id.* at 14; see also *Della Penna v. Toyota Motor Sales, USA, Inc.*, 11 Cal. 4th 376, 379 n.1 (Cal. 1995) (reciting the elements required to allege tortious interference with a prospective economic advantage); *Youst v. Longo*, 43 Cal. 3d 64, 71, n.6 (Cal. 1987) (same). Plaintiffs have provided no basis for reversing the District Court's decision.

6. The United States' Sovereign Immunity is not relevant to Defendants.

Plaintiffs' sovereign immunity arguments apply only to defendant United States and are addressed in the United States' brief.

**C. Plaintiffs' Numerous Motions Were Properly Denied.**

Plaintiffs made various procedural and substantive motions, which were all properly denied. As to the summary judgment motions, this Court reviews denials of motions for summary judgment de novo. *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1024 (9th Cir. 2012). "Summary judgment is to be granted only if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party, show that there is no genuine issue as to a material fact, and the moving party is entitled to judgment as a matter of law." *Id.* (citation and quotation omitted).

1. Plaintiffs' Renewed Motion for Three-Judge Panel was properly denied.

The District Court properly denied Plaintiffs' motion for a three-judge panel, holding that no such panel is required. *See* SER at 10. A three-judge panel is required when an action "challeng[es] the constitutionality" of apportionment of congressional or statewide districts. Plaintiffs do not challenge the constitutionality of any apportionment or apportionment statute. 28 U.S.C. § 2284; *City of Philadelphia v. Klutznick*, 503 F. Supp. 657, 658 (E.D. Pa. 1980) ("[I]n a case . . . involving a challenge only to the constitutionality of the conduct of the census and involving no challenge to any existing apportionment statute, the convening of a three-judge court is not required.").

2. Plaintiffs' Motions for Partial Summary Judgment to Void the DDI and TTI Settlements were properly denied.

Plaintiffs filed motions for partial summary judgment asserting that the *Gellman* and *Talbot* cases<sup>4</sup> support voiding the Technology Settlement and the Patent Settlement.<sup>5</sup> The District Court denied Plaintiffs' motion on the grounds that (1) Plaintiffs failed to plead such relief, (2) *Gellman* and *Talbot* are inapplicable, and (3) any such claims are barred by the statute of limitations. SER at 11-12.

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<sup>4</sup> *Gellman v. Telular Corp.*, 449 F. App'x 941 (Fed. Cir. 2011) and *Talbot v. Quaker-State Oil Ref. Co.*, 104 F.2d 967 (3d Cir. 1939).

<sup>5</sup> Plaintiffs filed Dkt. 123 purported to supersede largely repetitive Dkt. 118. *See* SER at 198. The District Court reviewed both sets of briefing. *Id.* at 11.

First, Rule 56 of the Federal Rules of Civil Procedure states that “[a] party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought.” Plaintiff failed to plead a claim for relief seeking to void either agreement, and the District Court properly dismissed Plaintiffs’ motions on this basis alone.

Next, the District Court held that Plaintiffs’ reliance on *Gellman* and *Talbot* was misplaced. SER at 11-12. Specifically, *Gellman* involves whether a patent infringement suit could be maintained if all the legal owners of the asserted patent were not parties. 449 F. App’x at 944-45. And *Talbot* involves whether one joint owner of a patent had the power to grant a license to the patent without the consent of the co-owner. 104 F.2d at 967-68. Neither case relates to “voiding” an agreement.

To the extent intelligible, Plaintiffs argue that based on *Gellman* and *Talbot*, the two agreements should be void because “both contracts are missing too many of the key pieces necessary for a shared Patent (or protected IP) under Talbot” and should be void based on Microsemi’s alleged unauthorized patent filings. See SER at 171-172. Plaintiffs’ arguments are misplaced. First, the two agreements themselves are clear on their face that there are no shared patent rights. Courts regularly interpret contract language during summary judgment proceedings. *Los Angeles Equestrian Center, Inc. v. City of Los Angeles*, 17 Cal. App. 4th 432, 445



(1993) (interpreting contract language because “[w]here no extrinsic evidence bears upon the interpretation of [a contract], its construction becomes a matter of law determinable in a summary judgment proceeding”). As set forth in Section 3.4 of the Technology Settlement, SER at 202-218, and Section 3.2 of the Patent Settlement, *id.* at 219-229, Microsemi holds all intellectual property rights.

Second, with respect to alleged unauthorized patent filings, neither the Patent Settlement nor the Technology Settlement contains any provision that required DDI (now Microsemi) to seek Plaintiffs’ permission to file patent applications (U.S. or foreign). *See generally* SER 202-229. Thus, voiding the contract on either basis would be improper.

Moreover, while Plaintiffs purport to seek rescission of the agreements, “[t]here is no arbitrary right to rescind [a contract]. Allegations of fraud and misrepresentation, unsupported in fact, do not form the legal basis for rescinding a contract.” *Contra Costa County Title Co. v. Waloff*, 184 Cal. App. 2d 59, 65 (1960). Plaintiffs’ unsupported ramblings fall far short of carrying the burden to rescind either contract. *See* SER 173-183.

Finally, the District Court held that Plaintiffs’ claims are time-barred because Plaintiffs signed the agreements in 1999, and although they argue that they only received a countersigned copy recently, Plaintiffs filed a state court action based on the same agreement in 2009, which they voluntarily dismissed. *See* SER

at 9 (citing to *McNeil, et al. v. Symmetricom, Inc.*, No. CV-165643 (Santa Cruz Sup. Ct.)). Thus, the four year statute of limitations based on a written contract passed in 2013, at the latest. *See* SER at 202-229; *id.* at 12. Plaintiffs did not file this action until 2014.

Plaintiffs' only stated basis for reversal is that "[t]he District Court blocked without providing that review the Sufficiency Hearing Motions." Opening Brief at 7:13-15. Plaintiffs' bald statement is insufficient, particularly in view of the above discussion, to warrant reversal.

3. Plaintiffs' Motion for Partial Summary Judgment of Patent Inventorship was properly denied.

Plaintiffs moved to add themselves as named inventors and reassign the '126 patent. SER at 247-248. The issuance of a patent creates a presumption that the named inventors listed on the face of the patent are the only true inventors. *Hess v. Advanced Cardiovascular Sys., Inc.*, 106 F.3d 976, 980 (Fed. Cir. 1997); *Ethicon, Inc. v. United States Surgical Corp.*, 135 F.3d 1456, 1460 (Fed. Cir. 1998). To overcome this presumption, Plaintiffs must show that the named inventors derived the invention from Plaintiffs' own work by clear and convincing evidence. *Hess*, 106 F.3d at 980. The same burden applies if Plaintiffs seek to be added as inventors. *Ethicon*, 135 F.3d at 1461.

To meet this burden, a plaintiff must present proof that he contributed to the conception of "a definite and permanent idea of the complete and operative

invention, as it is hereafter to be applied in practice.” *Hybritech, Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1367, 1376 (Fed. Cir. 1986); *Ethicon*, 135 F.3d at 1461, 1463 (determining whether plaintiff should be added as co-inventor requires allegations and proof of what plaintiff’s “contribution was and then whether that contribution’s role appears in the claimed invention”). An alleged inventor’s testimony, standing alone, is insufficient to rise to the level of clear and convincing proof and must be supported by corroborating evidence. *Ethicon*, 135 F.3d at 1461; *see Price v. Symsek*, 988 F.2d 1187, 1194 (Fed. Cir. 1993).

The only “evidence” proffered by Plaintiffs to support their claim that Microsemi derived the subject matter of the ’126 patent from them rests on the Technology Settlement. But this agreement does not provide any evidence regarding the inventorship of the ’126 Patent. The District Court correctly held that Plaintiffs’ uncorroborated arguments fall far short of their burden: “[t]here is no evidence in the record, let alone clear and convincing evidence, supporting the relief demanded by plaintiffs.” SER at 12-13. With respect to reassignment, Plaintiffs are not the inventors of the ’126 patent, nor do they have any other basis to assert ownership rights. Reassignment would therefore be improper.

Plaintiffs’ only stated basis for reversal is “[t]he District Court dismissed without any review of the US6393126 patent without review [sic] **we assume** because it in fact probably does control aspects of the PRISM and FBI Stingray

Evidence-Capture and Timestamping-of-evidence service systems.” Opening Brief at 9:11-14 (emphasis added). Plaintiffs’ assumptions are insufficient to warrant reversal of the District Court’s decision.

4. Plaintiffs’ Motion for Partial Summary Judgment re “Performance Rights” was properly denied.

Unable to identify any copyrights of their own, Plaintiffs challenge the denial of their motion for partial summary judgment requesting “performance rights standing,” which was apparently made with respect to copyrights owned by the IETF. The District Court properly rejected that motion not only because Plaintiffs have provided no grounds whatsoever to suggest that they have any ownership interest in the IETF’s copyrights, but also because they have failed to identify any particular work for which the District Court should have granted them “performance rights standing.” SER at 13-14.

5. Plaintiffs’ motions regarding FISA and alleged “Fraud Loss” relate only to the U.S. Government.

Plaintiffs’ motions regarding FISA and “Fraud Loss” only concern defendant United States and are addressed in the United States’ brief.

**D. Plaintiffs Raise Several Issues for the First Time on Appeal.**

Plaintiffs apparently want this Court to quash the “Enforcement Blockage from US DoJ” of an alleged “Sale Order from US BK 01-54207-MM” and qualify the “Enforcement Blockage” as a taking. Opening Brief at 12:1-19. Defendants do not know what this claim pertains to, and in any event, this issue was not before

the District Court. Similarly, Plaintiffs now seek several new remedies—“Relief 2” through “Relief 6” of their Opening Brief—that were never raised before the District Court. *Id.* at 18:20-19:15, “Relief 2” through “Relief 6.” These issues have no place in this appeal because they were never raised below. *See* 28 U.S.C. § 1291; *see also Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (“It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.”); *Lum v. City of San Joaquin*, 584 F. App’x 449, 451 (9th Cir. 2014).

**E. Plaintiffs Should be Declared Vexatious Litigants.**

As the District Court recognized, Plaintiffs have “commenced several actions in [this] district.” SER at 3. Plaintiffs have bombarded both this Court and the District Court with numerous frivolous filings, which generally consist of unfounded accusations and/or included requests for relief that have no foundation in the SAC or otherwise. These unfounded filings waste both the Defendants’ and this Court’s resources, ignore well-settled law, and turn a blind eye to the clear public record. Accordingly, Defendants respectfully request that this Court deem Plaintiffs vexatious litigants and require them to receive leave of the Court for any future filings for affirmative relief related to this action. *See Brown v. Hoops*, No. CV-11-5414, 2013 WL 5329484, at \*1 (C.D. Cal. Sept. 20, 2013) (deeming plaintiff a vexatious litigant and directing clerk to “no longer accept for filing any

further motions and/or any further requests for affirmative relief in this action . . . [unless] this Court has granted leave for plaintiff to file the document.”).

## VII. CONCLUSION

For the foregoing reasons, the District Court’s order should be affirmed and Plaintiffs should be declared vexatious litigants.

Dated: July 13, 2015

Respectfully submitted,

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**STATEMENT OF RELATED CASES PURSUANT TO  
NINTH CIRCUIT RULE 28-2.6**

Pursuant to Rule 28-2.6(a) of the United States Court of Appeals for the Ninth Circuit, Defendants-Appellees Microsemi Corporation, Internet Engineering Task Force, The Internet Society, Apple Inc., Cisco Systems, Inc., eBay Inc., PayPal, Inc., Google Inc., Juniper Networks, Inc., Microsoft Corporation, Oracle Corporation, and Netflix, Inc. hereby state that they are not aware of any cases related to this appeal.

Dated: July 13, 2015

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Pursuant to Circuit Rule 25-5(f), I attest that all other signatories on whose behalf the filing is submitted concur in the filing's content.

By: /s/ Heather F. Auyang  
Heather F. Auyang

9th Circuit Case Number(s) 14-17574

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