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7 THE INTERNET SOCIETY and INTERNET
ENGINEERING TASK FORCE

8

UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA

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SAN FRANCISCO DIVISION

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TODD S. GLASSEY and MICHAEL E.
12 MCNEIL,

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Plaintiffs,

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v.

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MICROSEMI INC; THE IETF and ISOC, and
19 THE US GOVERNMENT and INDUSTRY
PARTNERS (INCLUDING BUT NOT
LIMITED TO APPLE, CISCO,
20 EBAY/PAYPAL, GOOGLE, JUNIPER
NETWORKS, MICROSOFT, NETFLIX and
21 ORACLE), USPTO ALJ PETER CHEN ESQ,
and TWO INDIVIDUALS (MARK
22 HASTINGS and ERIK VAN DER KAAY) AS
"NAMED DOES",

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Defendants.

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) CASE NO.: 14-CV-3629 (WHA)
)
) DEFENDANTS THE INTERNET
) SOCIETY AND INTERNET
) ENGINEERING TASK FORCE'S NOTICE
) OF MOTION TO DISMISS THE
) COMPLAINT AND MEMORANDUM OF
) POINTS AND AUTHORITIES IN
) SUPPORT THEREOF
)
) Hearing Date: November 20, 2014
) Time: 8:00 a.m.
) Place: Courtroom 8
) Judge: Hon. William H. Alsup

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Defendants the Internet Society (“ISOC”) and the Internet Engineering Task Force (“IETF”)¹ (collectively, the “ISOC Defendants”) move this Court to dismiss with prejudice Plaintiffs’ first amended Complaint (the “FAC”) because it (1) fails to state a claim upon which relief may be granted as to the ISOC Defendants; and (2) fails to plead any elements of fraud with particularity.

The FAC offers nothing more than meandering accusations that are accompanied by legal terms and claims that are unsupported by Plaintiffs’ allegations. Plaintiffs name the ISOC Defendants among various other defendants—including, for example, the United States Government (and various federal agencies), Apple, Cisco, eBay, Google, Microsoft, Oracle, and Paypal—broadly alleging that Plaintiffs own a patent that controls “most all online commerce globally.” (See FAC ¶¶ 38-39.)

The FAC is replete with naked assertions that the ISOC Defendants have engaged in copyright and patent infringement, inducement of infringement, antitrust violations, fraud, tortious interference with prospective economic advantage, theft of trade secrets, and conversion without providing a factual basis to support these allegations. Yet despite including legal terms of art to suggest the existence of various causes of action, Plaintiffs’ incoherent allegations do not assert any *facts* that would state a plausible claim against—or even identify any wrongful activity by—the ISOC Defendants.

Accordingly, the FAC should be dismissed with prejudice as to the ISOC Defendants.

¹ To the extent the first amended Complaint can be read as extending to IETF “management” and “membership” (see FAC ¶ 12(a)), all arguments made on behalf of IETF in this motion to dismiss also extend to such persons or entities.

1 **II. STATEMENT OF FACTS**

2 The ISOC is a Washington, D.C. corporation that promotes “the open development,
3 evolution, and use of the Internet for the benefit of all people throughout the world.”² The IETF is
4 an organized activity of ISOC; it is not a legal entity. Through the IETF, the ISOC seeks to
5 facilitate the smooth operation of and growing participation in Internet standards.³

6 Plaintiffs brought this suit against various corporations and the IETF on August 11, 2014,
7 but did not name the ISOC as a defendant at that time. (*See* Cplt., ECF. No. 1.) Plaintiffs then
8 filed the FAC on August 25, 2014, adding the ISOC and several other entities—including
9 participants in the IETF—as defendants. The FAC contains ten counts, none of which are asserted
10 against the ISOC Defendants. Only Count Six even contains allegations pertaining to the ISOC
11 Defendants. (FAC ¶¶ 157-72.) Count Six alleges tortious interference with prospective economic
12 advantage and Sherman Act violations. Count Six then has a subheading that purports to challenge
13 “IETF Copyright ss107 Status and MGM v Grokster Standings”—continuing the largely
14 unintelligible allegations that (i) suggest (but do not actually allege) the ISOC Defendants induced
15 patent infringement (while precluding a copyright fair use defense), and (ii) contain stray and
16 vague assertions of fraud, copyright infringement, theft of trade secrets, and “intentional damage to
17 the IP” due to the abandonment of certain international patents. (*Id.* ¶¶ 168-72.)

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² <http://www.internetsociety.org/who-we-are/mission>

³ <http://www.internetsociety.org/what-we-do/internet-technology-matters/open-internet-standards>

1 **III. ARGUMENT**

2 The Court should dismiss the FAC with prejudice because it (1) fails to state a claim upon
3 which relief may be granted as against the ISOC Defendants; and (2) fails to plead any elements of
4 fraud with particularity.

5 **A. The FAC Fails to State a Claim upon Which Relief May Be Granted**

6 Rule 8(a) requires a complaint to provide sufficient facts to state a claim that demonstrates
7 entitlement to relief. “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to
8 relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a
9 cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (second
10 alteration in original) (citation omitted).

11 To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient
12 factual matter that, if true, states a claim for relief that is plausible on its face. *See Ashcroft v.*
13 *Iqbal*, 556 U.S. 662, 678 (2009). The Supreme Court has made clear that district courts “must
14 retain the power to insist upon some specificity in pleading” before allowing an action to go
15 forward and potentially expensive discovery to proceed. *Twombly*, 550 U.S. at 558. To be facially
16 plausible, a complaint must include “factual content that allows the court to draw the reasonable
17 inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. Factual
18 allegations must raise more than a speculative right to relief. *Twombly*, 550 U.S. at 555-56. Thus,
19 a complaint must contain “more than an unadorned, the-defendant-unlawfully-harmed-me
20 accusation,” and such assertions are insufficient when supported only by conclusory
21 statements. *Iqbal*, 556 U.S. at 678.

22 The FAC does not specifically assert any counts against the ISOC Defendants, and only one
23 of the ten Counts in the FAC even mentions them. Although Plaintiffs make passing accusations
24 of copyright and patent infringement, inducement of infringement, theft of trade secrets, and even
25 include a stray mention of conversion, the only official Count in the FAC that mentions the ISOC
26 Defendants is for tortious interference with prospective economic advantage, antitrust violations,
27 and a declaration that the ISOC Defendants are not entitled to claim fair use as a defense to
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1 infringement claims that were never pled. Although Plaintiffs have included certain terms of art in
2 the FAC, they fail to provide any details or specificity necessary to state a claim for relief.

3 **1. Tortious Interference with**
4 **Prospective Economic Advantage**

5 The FAC asserts a claim for tortious interference with prospective economic advantage.
6 This claim appears to be based on conclusory allegations that the ISOC Defendants have worked
7 with defendant Microsemi, Inc. (“Microsemi”) to prevent Plaintiffs from enforcing their patent
8 rights. (FAC ¶¶ 160-62.)

9 In order to state a tortious interference claim, a plaintiff must establish:

- 10 (1) an economic relationship between the plaintiff and some third
11 party, with the probability of future economic benefit to the plaintiff;
12 (2) the defendant’s knowledge of the relationship; (3) intentional
13 [wrongful] acts on the part of the defendant designed to disrupt the
14 relationship; (4) actual disruption of the relationship; and (5)
15 economic harm to the plaintiff proximately caused by the acts of the
16 defendant.

17 *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1151 (9th Cir. 2008) (alteration in
18 original) (citation omitted). To the extent that the FAC alleges an economic relationship between
19 Plaintiffs and Microsemi, it still fails to allege that the ISOC Defendants knew of or intended to
20 disrupt that purported relationship, nor does the FAC allege any actual disruption to said
21 relationship by the ISOC Defendants. Accordingly, the claim for tortious interference with
22 prospective economic advantage must be dismissed.⁴

23 Even if Plaintiffs could assert a claim for tortious interference, such claim would be barred
24 by the two-year statute of limitations. *See Knoell v. Petrovich*, 76 Cal. App. 4th 164, 168 (Cal. Ct.
25 App. 1999). Because the FAC alleges that Plaintiffs informed the ISOC Defendants of the “alleged
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27 ⁴ Plaintiffs suggest that the IETF has refused to “enforce its own rules and practices,” which has
28 caused “intentional damage” to their intellectual property rights due to the abandonment of certain
international patents. (FAC ¶ 172.) Even if this assertion were accurate, Plaintiffs have failed to
identify a cause of action that would arise from such abandonment. To the extent that these
allegations may relate to the tortious interference claim, the allegations still fail to assert any
disruption (or intent to disrupt) by the IETF of a relationship between Plaintiffs and a third party.
Nor does the FAC identify any action by the ISOC Defendants that relates in any way to the
abandonment of any alleged patent rights.

1 frauds which the primary defendant Microsemi committed with in concert with the Global
2 Standards Organization IETF (the Internet Society)” in 2004, any claim for tortious interference is
3 barred by the statute of limitations.⁵ (FAC ¶ 34; *see also id.* ¶ 15.)

4 2. Antitrust Claims

5 The FAC contains two accusations that the IETF is engaging in “Sherman Act violations.”
6 (FAC ¶¶ 163, 172.) Plaintiffs provide no further specificity other than the allegation that the IETF,
7 in conjunction with Microsemi, incorporated Plaintiffs’ patents into the IETF’s “standards,” which
8 “constituted market division or allocation schemes” to prevent Plaintiffs from asserting their patent
9 rights. (*Id.* ¶ 163.)

10 Although Plaintiffs do not specify which section of the Sherman Act the IETF has violated,
11 the FAC fails to allege that Plaintiffs have suffered “antitrust injury,” which “is an element of all
12 antitrust suits.” *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App’x 554, 557 (9th Cir. 2008)
13 (citation omitted) (dismissing Section 2 claim); *see also Atl. Richfield Co. v. USA Petroleum Co.*,
14 495 U.S. 328, 344 (1990) (Section 1 claim requires allegation of “antitrust injury”). Antitrust
15 injury refers to “harm to the process of competition and consumer welfare, not harm to individual
16 competitors.” *LiveUniverse*, 304 F. App’x at 557. Here, the FAC fails to allege harm to
17 competition—*i.e.*, reduced output or increased prices—but rather only asserts personal economic
18 loss. Accordingly, Plaintiffs cannot establish antitrust injury.

19 In addition, an antitrust complaint must allege a plausible relevant product market in which
20 the anticompetitive effects of the challenged activity can be assessed. *See Jefferson Parish Hosp.*
21 *Dist. No. 2 v. Hyde*, 466 U.S. 2, 29 (1984). The FAC’s failure to allege *any* product market
22 whatsoever provides additional grounds for dismissing Plaintiffs’ antitrust claims against the ISOC
23 Defendants.

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27 ⁵ These allegations demonstrate that, even if Plaintiffs had alleged fraud claims with sufficient
28 specificity, such claims would also be time-barred. Cal. Civ. Proc. Code § 338(d).

1 **3. Infringement**

2 (a) Copyright Infringement and Inducement of Copyright Infringement

3 In order to state a claim for copyright infringement, a plaintiff must show ownership of a
4 valid copyright and copying of original constituent elements of that work. *See San Jose Options,*
5 *Inc. v. Ho Chung Yeh*, No.14-00500, 2014 WL 1868738, at *3 (N.D. Cal. May 7, 2014). Similarly,
6 relief for contributory or vicarious copyright infringement depends upon the existence of direct
7 infringement of a copyrighted work. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545
8 U.S. 913, 930 (2005) (“One infringes contributorily by intentionally inducing or encouraging direct
9 infringement, and infringes vicariously by profiting from direct infringement while declining to
10 exercise a right to stop or limit it.” (internal citation omitted)). The FAC does not identify a single
11 copyrighted work that Plaintiffs own. As such, any claim for copyright infringement (direct,
12 contributory, or vicarious) must be dismissed.

13 (b) Patent Infringement and Inducement of Patent Infringement

14 The FAC appears to allege that the IETF infringed upon Plaintiffs’ patent rights by issuing
15 publications and standards that discussed software containing the patent. (FAC ¶ 164; *see also*
16 *id.* ¶¶ 12, 25-27, 30-32, 36-38, 125, 160, 171-72.) Despite many vague assertions concerning the
17 IETF’s alleged unauthorized use of Plaintiffs’ patented technology in the IETF’s “standards,” the
18 FAC lacks any specificity as to *which* of the IETF’s standards or programs are using this
19 technology or *how* the ISOC Defendants are infringing upon this technology.⁶ (*E.g., id.* ¶ 31 (“And
20 additionally for their (the Standards Agency and its parent the ISOC) use of those infringing
21 programs in their own operations.”).) Where a patent infringement claim fails to provide “enough
22 specificity to give the defendant notice of what products or aspects of products allegedly infringe”
23 upon the plaintiff’s rights, the claim must be dismissed. *Bender v. LG Elecs. U.S.A., Inc.*, No. 09-
24 02114, 2010 WL 889541, at *5-*6 (N.D. Cal. Mar. 11, 2010) (“Sufficient allegations would

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26 ⁶ The only IETF standard specifically mentioned in the FAC is “BCP 79,” which Plaintiffs
27 reference not in the context of infringement by the IETF, but rather as a standard that the IETF
28 allegedly has failed to enforce. (FAC ¶ 171.)

1 include, at a minimum, a brief description of what the patent at issue does, and an allegation that
 2 certain named and specifically identified products or product components also do what the patent
 3 does, thereby raising a plausible claim that the named products are infringing.”).

4 To the extent that Plaintiffs suggest the ISOC Defendants are inducing third parties to
 5 infringe upon Plaintiffs’ purported patent rights by publishing standards that discuss patented
 6 technology, this claim also must fail. In order to state a claim for inducement of patent
 7 infringement, Plaintiffs must show that (i) the ISOC Defendants knew or should have known their
 8 actions would induce actual infringement of Plaintiffs’ rights; (ii) the ISOC Defendants specifically
 9 intended to induce infringement by third parties; and (iii) actual infringement by third parties.
 10 *Avocet Sports Tech., Inc. v. Garmin Int’l, Inc.*, No. 11-04049, 2012 WL 1030031, at *4 (N.D. Cal.
 11 Mar. 22, 2012); *see also Grokster*, 545 U.S. at 936-37 (in copyright context, plaintiff must
 12 demonstrate affirmative intent to promote infringement).

13 Even if the ISOC Defendants promoted standards that discuss or include technology
 14 patented by Plaintiffs, the FAC still fails to allege that the ISOC Defendants promulgated standards
 15 with the specific intent of fostering infringement upon Plaintiffs’ patent rights.⁷ *See Grokster*, 545
 16 U.S. at 937 (“The classic instance of inducement is by advertisement or solicitation that broadcasts
 17 a message *designed* to stimulate others to commit violations.” (emphasis added)).

18 Accordingly, any claims against the ISOC Defendants for patent infringement or
 19 inducement of patent infringement must be dismissed.

20 **4. Other Allegations**

21 The FAC also includes passing references to theft of trade secrets and conversion, neither
 22 of which are sufficient to state a claim for relief.

23 (a) Misappropriation of Trade Secrets

24 The FAC includes a solitary allegation that the IETF’s use of Plaintiffs’ technology
 25 constitutes a “theft of Trade Secrets.” (FAC ¶ 172.) In order to establish a claim for
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27 ⁷ The FAC also contains nothing more than conclusory allegations of direct infringement by third
 28 parties.

1 misappropriation of trade secrets, Plaintiffs must demonstrate ownership of a trade secret that the
2 ISOC Defendants acquired through improper means, which caused damage to Plaintiffs. *See*
3 *Cytodyn, Inc. v. Amerimmune Pharms., Inc.*, 160 Cal. App. 4th 288, 297 (Cal. Ct. App. 2008). In
4 order to be considered a trade secret, Plaintiffs' technology must derive value from "not being
5 generally known to the public" and must be the subject of "efforts that are reasonable under the
6 circumstances to maintain its secrecy." Cal. Civ. Code § 3426.1(d).

7 The FAC does not identify any trade secrets that Plaintiffs own, but rather contains various
8 allegations relating to Plaintiffs' purported patent rights. Accordingly, to the extent that Plaintiffs
9 attempt to assert a claim for misappropriation of trade secrets, such claim must be dismissed. *See*
10 *Cytodyn*, 160 Cal. App. 4th at 297-98 ("It is impossible to read CytoDyn's complaint without
11 concluding that the sum and substance of its lawsuit was the alleged misappropriation of its patents
12 and trademarks. . . . But patents and marks are not trade secrets, and the misappropriation of
13 patents and marks is not a subject with which the [Uniform Trade Secrets Act] is concerned.").

14 (b) Conversion

15 The FAC contains a stray, solitary allegation that the IETF encoded Plaintiffs' patents into
16 its "Standards," making "anyone using that standard equally culpable for their actions as third-
17 parties to the alleged conversion of private property this suit alleges." (FAC ¶ 32.) To the extent
18 that this allegation purports to assert a claim for conversion, such claim is rooted in Plaintiffs'
19 assertions that their patent rights are being misappropriated. Accordingly, any claim for
20 conversion is preempted by federal law and must be dismissed. *Gerawan Farming, Inc. v. Rehrig*
21 *Pac. Co.*, No. 11-01273, 2012 WL 691758, at *7 (E.D. Cal. Mar. 2, 2012).

22 **B. Plaintiffs' Fraud Allegations Fail to Meet the Heavy Burden of Rule 9(b)**

23 The FAC also contains general accusations of fraud involving the ISOC Defendants that do
24 not identify any representation by the ISOC Defendants, but rather appear directed at defendant
25 Microsemi. Plaintiffs allege that Microsemi committed "a set of alleged frauds" "in concert with
26 the Global Standards Organization IETF (the Internet Society)" to prevent Plaintiffs from enforcing
27 their alleged intellectual property rights. (FAC ¶¶ 34, 162.) Plaintiffs also claim there is "alleged
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1 fraud inside the very standards process itself,” which they allege Microsemi could have stopped,
2 but for which IETF is also responsible. (*Id.* ¶ 40.)⁸ The FAC does not contain further detail to
3 support Plaintiffs’ fraud accusations against the ISOC Defendants.

4 To the extent that the FAC can be construed to allege a cause of action against the ISOC
5 Defendants rooted in fraud, Plaintiffs must “state with particularity the circumstances constituting
6 fraud.” Fed R. Civ. P. 9(b). To ensure that a plaintiff does not assert false or unsubstantiated fraud
7 claims, Rule 9(b) imposes a heavy burden—not even distantly met here—requiring a plaintiff to
8 plead the facts supporting a fraud claim with specificity and to provide detailed factual allegations
9 for every element of the alleged fraud. *Bly-Magee v. Cal.*, 236 F.3d 1014, 1018 (9th Cir. 2001).

10 The Ninth Circuit explained the critical importance underlying this heavy burden:

11 Rule 9(b) serves not only to give notice to defendants of the specific fraudulent
12 conduct against which they must defend, but also “to deter the filing of
13 complaints as a pretext for the discovery of unknown wrongs, to protect
14 [defendants] from the harm that comes from being subject to fraud charges, and
15 to prohibit plaintiffs from unilaterally imposing upon the court, the parties and
16 society enormous social and economic costs absent some factual basis.”

17 *Id.* (alteration in original) (citation omitted); *accord Kearns v. Ford Motor Co.*, 567 F.3d 1120,
18 1125 (9th Cir. 2009).

19 To satisfy Rule 9(b), “the pleader must state the time, place, and specific content of the
20 false representations as well as the identities of the parties to the misrepresentation.” *Shreiber*
21 *Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Thus, Plaintiff is
22 required to provide the “who, what, when, where, and how of the misconduct alleged.” *Kearns*,
23 567 F.3d at 1126. The allegations of fraud must be “specific enough to give defendants notice of
24 the particular misconduct which is alleged to constitute the fraud charged so that they can defend
25 against the charge and not just deny that they have done anything wrong.” *Neubronner v. Milken*,
26 6 F.3d 666, 671 (9th Cir. 1993) (citation omitted).

27 ⁸ To the extent that the FAC can be read to allege that IETF is misrepresenting itself as a “Research
28 Organization under the Copyright 107 exemption” (FAC ¶ 168), such allegation is irrelevant
because 17 U.S.C. § 107 merely provides a fair use defense to a copyright infringement claim, and
the FAC does not identify any copyrights that are owned or registered by Plaintiffs. *See*
§ III.A.3.a, *supra*.

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CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically on this 25 day of September, 2014. As of this date, all counsel of record, except Plaintiff Michael E. McNeil, in *pro se*, have consented to electronic service and are being served with a copy of this document through the Court's CM/ECF System.

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I further certify that a true and correct copy of the foregoing document was served on the non-registered party:

MICHAEL E. McNEIL
P.O. Box 640
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(BY MAIL) I am readily familiar with the firms' practice for the collection and processing of correspondence for mailing with the United States Postal Service and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business; on this date, the above-referenced correspondence was placed for deposit at Palo Alto, California and placed for collection and mailing following ordinary business practices.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on September 25, 2014 at Palo Alto, CA.


Sarah Wood

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7 THE INTERNET SOCIETY and INTERNET
ENGINEERING TASK FORCE

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UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA

10

SAN FRANCISCO DIVISION

11

TODD S. GLASSEY and MICHAEL E.
12 MCNEIL,

) CASE NO.: 14-CV-3629 (WHA)

13

) [PROPOSED] ORDER GRANTING
) DEFENDANTS THE INTERNET
) SOCIETY AND INTERNET
) ENGINEERING TASK FORCE'S
) MOTION TO DISMISS

14

Plaintiffs,

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) Hearing Date: November 20, 2014

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v.

) Time: 8:00 a.m.

17

) Place: Courtroom 8

) Judge: Hon. William H. Alsup

18

MICROSEMI INC; THE IETF and ISOC, and
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[PROPOSED] ORDER

Having considered the Motion to Dismiss the complaint as to defendants the Internet Society and the Internet Engineering Task Force, and good cause appearing, the Court hereby **GRANTS** the Motion. The complaint is hereby **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

DATED: _____, 2014

By: _____
Hon. William H. Alsup