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THE INTERNET SOCIETY and INTERNET ENGINEERING TASK FORCE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TODD S. GLASSEY and MICHAEL E. MCNEIL, Plaintiffs, v. MICROSEMI INC; US GOVERNMENT – POTUS; THE STATE OF CALIFORNIA, GOVERNOR BROWN; THE IETF and THE INTERNET SOCIETY; APPLE INC.; CISCO INC.; eBAY INC.; PAYPAL INC.; GOOGLE INC.; JUNIPER NETWORKS; MICROSOFT CORP; NETFLIX INC.; ORACLE INC.; MARK HASTINGS; ERIK VAN DER KAAY; AND THALES GROUP AS UNSERVED DOES, Defendants.	CASE NO.: 14-CV-3629 (WHA) DEFENDANTS THE INTERNET SOCIETY AND INTERNET ENGINEERING TASK FORCE'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS THE SECOND AMENDED COMPLAINT Hearing Date: January 8, 2015 Time: 8:00 a.m. Place: Courtroom 8 Judge: Hon. William H. Alsup

ARGUMENT

In opposing the motion to dismiss of Defendants the Internet Society ("ISOC") and the Internet Engineering Task Force ("IETF") (collectively, the "ISOC Defendants"), Plaintiffs still fail to provide any allegations that would state a claim for relief against the ISOC Defendants. Plaintiffs use their opposition brief to reassert their conclusory allegations of infringement and antitrust violations by the ISOC Defendants (while also adding some arguments that have no bearing whatsoever on this motion to dismiss). What Plaintiffs fail to do, of course, is provide any basis for continuing this action against the ISOC Defendants or granting Plaintiffs leave for further amendment. Thus, Plaintiffs' opposition still fails to demonstrate that the Second Amended Complaint (the "SAC") alleges, or that Plaintiffs will be able to put before the Court, *any* set of facts that entitles them to relief against the ISOC Defendants.[1]

As a threshold matter, Plaintiffs cannot bring any claim sounding in patent infringement because they do not own the patent rights at issue—something that Plaintiffs effectively have acknowledged both in their opposition to this motion to dismiss (Dkt. 154 ("Pls. Opp."), at 7 ¶ 12, 8 ¶ 15) and by moving to void agreements that assigned the relevant rights to defendant Microsemi (Dkt. 123). (*See also* Microsemi Mot. to Dismiss, Dkt. 155, at 8:20-21; Defs.' Jt. Resp. to Order to Show Cause, Dkt 161, at 6-8.) In addition, Plaintiffs cannot assert any claim for copyright infringement (or "performance rights standing") because they still fail to identify ownership of any copyrighted work. Moreover, Plaintiffs' various pleadings have made clear that, to the extent the SAC even asserts copyright claims, such claims are merely a backdoor attempt to assert their nonexistent patent rights. (*E.g.*, Pls. Opp., at 10 ¶ 21 (noting that the SAC requests "an order establishing a series of performance rights under the Copyright Act for programs which will be run which contain software that infringes the claims taught by [their alleged patent rights]," and also

[1] Indeed as set forth in Defendants' joint response to this Court's order to show cause (Dkt 161), this Court should strike the SAC in its entirety and without leave to amend.

contending that such allegations "fully charges the Antitrust claims").)[2]

Finally, Plaintiffs' opposition confirms that their antitrust allegations against the ISOC Defendants also are nothing more than a repackaging of their infringement allegations. (*See, e.g.*, Pls. Opp., at 13 ¶ 31.) Rather than address the argument that their antitrust claims are fatally deficient because, among other reasons, Plaintiffs fail to allege antitrust injury or a plausible relevant product market, Plaintiffs' opposition simply echoes the SAC's naked and conclusory assertions of antitrust violations.

All of the above deficiencies were raised in the ISOC Defendants' motion to dismiss the first amended complaint, and this Court provided Plaintiffs with specific instructions for curing those deficiencies in striking that complaint. (*See* Dkt. 109, at 4.) Plaintiffs have already filed three complaints and numerous other motions in this action—all of which have been rambling and devoid of merit. In addition, the allegations in the SAC depend entirely on Plaintiffs' claims to certain technology for which they have not demonstrated, and cannot actually demonstrate, ownership. Accordingly, granting Plaintiffs further leave to amend would be futile and this action should be dismissed as to the ISOC Defendants with prejudice. *Destifino v. Reiswig*, 630 F.3d 952, 959 (9th Cir. 2011) ("It is well established that a court may dismiss an entire complaint with prejudice where plaintiffs have failed to plead properly after repeated opportunities.").

[2] Relatedly, although no formal count for fraud has been asserted against the ISOC Defendants, Plaintiffs' contention in response to this Court's Order to Show Cause (Dkt. 152) that the IETF has engaged in "patent fraud" through the publication of copyrighted standards (Dkt. 159, at 8) is nonsensical and fails to meet the pleading standards for fraud under Rule 9(b). Moreover, Plaintiffs' claim that they notified the IETF of their purported rights in 2009 (SAC ¶ 232) demonstrates that any claims for fraud are barred by the statute of limitations. *See* Cal. Civ. Proc. Code § 338(d).

CONCLUSION

Plaintiffs have amended their complaint twice and provided a clear picture of what a third amended complaint would look like. The SAC does not state a claim for relief, and Plaintiffs have failed to identify any facts that will cure those deficiencies. Accordingly, and for all of the above reasons, the Court should dismiss the SAC as against Defendants ISOC and the IETF with prejudice.

DATED: December 22, 2014

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: /s/ Jason D. Russell
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THE INTERNET SOCIETY and INTERNET ENGINEERING TASK FORCE

ECF CERTIFICATION

I hereby certify that a true and correct copy of the foregoing document was filed electronically on this 22nd day of December, 2014. As of this date, plaintiffs in pro se and all counsel of record have consented to electronic service and are being served with a copy of this document through the Court's CM/ECF System.

/s/ Jason D. Russell
JASON D. RUSSELL