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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 NOTICE OF MOTION AND MOTION TO DISMISS THE SECOND AMENDED COMPLAINT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF Hearing Date: January 8, 2015 Time: 8:00 a.m. Place: Courtroom 8 Judge: Hon. William H. Alsup

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 8, 2015, at 8:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 8 of the above-entitled Court, located at the San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendants the Internet Society ("ISOC") and the Internet Engineering Task Force ("IETF") (collectively the "ISOC Defendants") will, and hereby do, move this Court to dismiss Plaintiffs' Second Amended Complaint ("SAC") pursuant to Rules 8(a) and 12(b)(6) of the Federal Rules of Civil Procedure. This Motion is based on the grounds that Plaintiffs have failed to allege sufficient facts to state plausible claims upon which any relief can be granted as against the ISOC Defendants under Rules 8(a) and 12(b)(6).

This Motion is based upon this Notice, the accompanying Memorandum of Points and Authorities, Rules 8(a) and 12(b)(6) of the Federal Rules of Civil Procedure, all cited authorities and matters subject to judicial notice by the Court, all pleadings and papers on file in this action, and upon such other matters as may be presented to the Court.

DATED: December 1, 2014

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: /s/ Jason D. Russell
JASON D. RUSSELL
Attorneys for Defendants
THE INTERNET SOCIETY and INTERNET ENGINEERING TASK FORCE

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendants the Internet Society ("ISOC") and the Internet Engineering Task Force (the "IETF") (collectively, the "ISOC Defendants") move this Court to dismiss with prejudice Plaintiffs' Second Amended Complaint (the "SAC") because it fails to state a claim upon which relief may be granted as to the ISOC Defendants.[1]

I. PRELIMINARY STATEMENT

The SAC represents Plaintiffs' third attempt to seek relief from numerous defendants for what appears to be a dispute between Plaintiffs and defendant Microsemi, Inc. ("Microsemi") over the ownership of certain patent rights. Like the First Amended Complaint (the "FAC")—which this Court struck because it suffered from "so many deficiencies that it would be hopeless to proceed" (Dkt. 109, at 3)—the SAC is virtually incomprehensible and does not contain factual allegations that establish any cause of action against the ISOC Defendants.

The SAC is replete with naked assertions that the ISOC Defendants have infringed (and induced infringement) on Plaintiffs' patent rights and engaged in antitrust violations, but it does not provide any factual basis whatsoever to support these allegations. Like the FAC before it, the SAC contains legal terms of art that suggest the existence of various causes of action, but is devoid of any *facts* that would state a plausible claim against—or even identify any wrongful activity by—the ISOC Defendants. Moreover, the facts alleged against the ISOC Defendants in the SAC, which do not differ materially from those alleged in the FAC, demonstrate that Plaintiffs cannot succeed on their claims even with further amendment.

In striking the FAC, this Court identified various deficiencies for Plaintiffs to cure, including properly alleging claims, demonstrating that their claims are not time barred, and demonstrating standing to assert certain claims. (*Id.* at 4.) The SAC does not cure these deficiencies, as it (i) fails to establish the necessary elements for any cause of action against the

[1] To the extent the SAC can be read as extending to ISOC "members" and "managing Board Members" (*see* SAC ¶ 239), all arguments made on behalf of the ISOC Defendants in this motion to dismiss also extend to such persons or entities.

ISOC Defendants; (ii) alleges that Plaintiffs' claims originated 10-15 years ago; and (iii) does not establish standing for any infringement or antitrust claims. Accordingly, and to prevent Plaintiffs from filing a *third* amended complaint that no doubt will suffer from the same deficiencies (*see* SAC ¶ 169), the SAC should be dismissed with prejudice as to the ISOC Defendants.

II. STATEMENT OF FACTS

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

Plaintiffs brought this suit against various corporations and the IETF on August 11, 2014, but did not name ISOC as a defendant at that time. (*See* Cplt., Dkt. 1.) Plaintiffs then filed the FAC on August 25, 2014, adding the ISOC and several other entities—including participants in the IETF—as defendants. (Dkt. 6.) On September 25, 2014, the ISOC Defendants moved to dismiss the FAC. (Dkt. 73.) On October 30, 2014, this Court struck the FAC in its entirety and identified numerous deficiencies that had to be cured in any amended pleading. (Dkt. 109.) Plaintiffs filed the SAC on November 13, 2014. (Dkt. 112.[4])

The SAC contains ten counts, only one of which is asserted against the ISOC Defendants.[5] This one count purports to include claims against the ISOC Defendants both for "infringement" and antitrust violations. Neither of these claims has merit.[6]

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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

[4] The SAC replaced a slightly different second amended complaint that Plaintiffs had filed the previous day. (*See* Dkt. 110.)

[5] Although the SAC labels the count against the ISOC Defendants as "Count 9," it is actually the eighth count.

[6] The SAC also makes passing references to fraud and conversion, but does not assert causes of action against the ISOC Defendants for those allegations. Nevertheless, the SAC would fail to state a claim for fraud or conversion for the reasons set forth in the ISOC Defendants' motion to dismiss the FAC. (Dkt. 73, at 8-10; Dkt. 87, at 4-5.)

III. ARGUMENT

The Court should dismiss the SAC with prejudice because it fails to state a claim upon which relief may be granted as against the ISOC Defendants.

The FAC Fails to State a Claim upon Which Relief May Be Granted

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

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

Like Plaintiffs' prior two attempts at filing a complaint, the SAC is replete with conclusory statements and accusations without any factual basis. As a threshold matter, the SAC does not assert any count against ISOC—nor even allege any activity by ISOC. Nevertheless, because the IETF is an operating activity of ISOC that is not a legal entity, for purposes of this motion to dismiss, the ISOC Defendants will treat the SAC as though Plaintiffs had also made their

allegations against the ISOC Defendants collectively.[7] The SAC does not cure the deficiencies of the FAC, but merely repackages Plaintiffs' unsupported assertions that the entire world is conspiring to infringe upon their purported patent rights. Once again, Plaintiffs have failed to allege facts that support the elements for *any* of their claims against the ISOC Defendants, and the SAC is wholly devoid of the specificity necessary to demonstrate a plausible claim. Indeed, Plaintiffs have even acknowledged that the plausibility of their claims "sounded Looney originally." (*See* SAC ¶ 136.) The allegations in the SAC do not alter that conclusion.

1. Antitrust Claims

The SAC merely contains "a bare assertion of conspiracy," which does "not suffice" to establish an antitrust claim. *Twombly*, 550 U.S. at 556. For example, Plaintiffs suggest that the mere existence of the IETF is "a continuous and ongoing conspiracy between the parties to create network standards." (SAC ¶ 249.) Moreover, the current antitrust allegations against the ISOC Defendants suffer from the same deficiencies as those in the FAC: they neither assert antitrust injury, nor identify a plausible relevant product market.

Antitrust injury "is an element of all antitrust suits." *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App'x 554, 557 (9th Cir. 2008) (citation omitted); *see also Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990). Antitrust injury refers to "harm to the process of competition and consumer welfare, not harm to individual competitors." *LiveUniverse*, 304 F. App'x at 557. Here, the SAC fails to allege harm to competition—*i.e.*, reduced output or increased prices—but rather only asserts personal economic loss. (*See, e.g.*, SAC ¶ 82 ("Defendants actively conspired and waged an ongoing war to prevent plaintiffs from either recovering the actual executed settlement agreement from Microsemi or being able to enforce it.").) Accordingly, Plaintiffs cannot establish antitrust injury.

[7] Because the IETF is not a legal entity, all claims against the IETF as such should be dismissed. *See Nnachi v. City & Cty. of San Francisco*, No. 13-cv-5582, 2014 WL 1230771, at *3 (N.D. Cal. Mar. 21, 2014).

In addition, an antitrust complaint 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's failure to allege *any* product market whatsoever provides additional grounds for dismissing Plaintiffs' antitrust claims against the ISOC Defendants. To the extent that Plaintiffs' allegation that the IETF is "the sole publisher of Internet networking standards on Earth" attempts to assert a relevant product market (SAC ¶ 217), Plaintiffs fail to allege a *plausible* market. Moreover, the SAC acknowledges that the IETF is only one of many different Internet standards organizations. (*See id.* ¶¶ 36, 135 (identifying OASIS, IEEE, and OpenGeoSpatial—entities that are not related to the ISOC Defendants—as other Internet standards organizations).) Moreover, the use of IETF standards is completely voluntary, and the IETF does not enforce the use of those standards.[8]

The ISOC Defendants identified these precise deficiencies in their motion to dismiss the FAC (Dkt. 73, at 5; Dkt. 87, at 1-2), yet Plaintiffs have made no attempt to cure them. Instead, the SAC merely adds equally specious "hub and spoke" allegations that still fail to demonstrate either antitrust injury, a plausible relevant product market, or any other elements of an antitrust claim.[9]

Even if Plaintiffs could properly allege antitrust claims against the ISOC Defendants, their allegations that the "conspiracy" dates back to 1999 (SAC ¶¶ 59-62) demonstrates that the four-year statute of limitations for such an action has long passed. *See* 15 U.S.C. § 15b.

Accordingly, the antitrust claims against the ISOC Defendants should be dismissed with prejudice.

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[8] *See* http://www.ietf.org/rfc/rfc3935.txt

[9] Although the Count asserted against the ISOC Defendants purports to include a Clayton Act claim, Plaintiffs' allegations appear limited to the Sherman Act.

2. Infringement

(a) Patent Infringement

Plaintiffs lack standing to bring an infringement claim. The root of all allegations in the SAC appears to be a dispute—to which the ISOC Defendants are not a part—over the *ownership* of the patent upon which Plaintiffs' infringement claims rely (US6370629). In the FAC, Plaintiffs acknowledged that Microsemi was an assignee of the patent at issue in this case. (FAC ¶¶ 129, 142; *see also* Dkt. 109, at 4.) Plaintiffs futilely attempt to get around this admission by adding language to the SAC that asserts they are the "sole owner" of the patented technologies at issue. Yet elsewhere in the SAC, Plaintiffs acknowledge the existence of other ownership interests to those patented technologies. For example, in challenging a prior settlement agreement related to the patented technologies, Plaintiffs allege: "if the Settlement is voided by the court . . . it would trigger the contingency transfer language in the Co-Inventor Agreement making the original 992 Patent and the Amended 629 Patent property solely of Plaintiffs." (SAC ¶ 129; *see also* Dkt. 123 (seeking order "that Plaintiffs be awarded full custody of both the 629 and 992 patents"), Dkt. 141 (seeking reassignment of patent US6393126).) This assertion necessarily acknowledges that the interests of other parties must be terminated in order for Plaintiffs to become the sole owners of the patented technology.

In addition, Plaintiffs frequently assert that they have "third party enforcement rights" to the patented technology. (*E.g.* SAC ¶¶ 4, 129.) These assertions recognize and depend upon other parties having vested interests in the patented technology. Indeed, the assignment records at the Patent & Trademark Office indicate that Plaintiffs have assigned at least some of the relevant patent rights.[10] Because other co-owners or assignees of the patented technology are *defendants* in this action (and not joining in Plaintiffs' infringement claims), Plaintiffs cannot assert a patent infringement claim against the ISOC Defendants. *See Ethicon, Inc. v. U.S. Surgical Corp.*, 135 F.3d 1456, 1467 (Fed. Cir. 1998) ("An action for infringement must join as plaintiffs all co-

[10] http://assignments.uspto.gov/assignments/q?db=pat&qt=pat&reel=&frame=&pat=6370629&pub=&asnr=&asnri=&asne=&asnei=&asns

owners.") (affirming dismissal of patent infringement claim where all owners did not join in or consent to the lawsuit); *cf. Nolen v. Lufkin Indus., Inc.*, 469 F. App'x 857, 860 (Fed. Cir. 2012) ("[A] claim for patent infringement does not arise under the patent laws when it requires judicial action to vest title in the party alleging infringement.") (dismissing infringement claims for lack of subject matter jurisdiction).

Even if Plaintiffs did have standing to bring an infringement claim, the SAC still fails to state a claim for relief. Plaintiffs allege that the IETF infringed upon their patent rights by issuing publications and standards that *discussed* software containing the patent. A patent infringement claim may only be brought where the alleged infringer "makes, uses, offers to sell, or sells any patented invention." 35 U.S.C. § 271(a). The ISOC Defendants, as mere convenors of technical collaboration and publishers of the resulting standards, do not engage in the activities necessary for infringement, and Plaintiffs fail to identify how publication of IETF standards constitutes infringement of their alleged patent rights.

Despite many vague assertions concerning the IETF's alleged unauthorized incorporation of Plaintiffs' patented technology into its "standards," Plaintiffs do not identify any infringing product or specific use by the ISOC Defendants, but rather broadly assert that all computers in the world infringe upon their patent rights (*See* SAC ¶¶ 138 ("none of the defendants named can operate without infringing"), 221 ("today's Internet stops working without Defendants' continued infringements")). These allegations are wholly conclusory and lack any detail as to what aspects of the ISOC Defendants' operations infringe upon any patent rights. Where a patent infringement claim fails to provide "enough specificity to give the defendant notice of what products or aspects of products allegedly infringe" upon the plaintiff's rights, the claim should be dismissed. *Bender v. LG Elecs. U.S.A., Inc.*, No. 09-02114, 2010 WL 889541, at *5-*6 (N.D. Cal. Mar. 11, 2010) ("Sufficient allegations would include, at a minimum, a brief description of what the patent at issue does, and an allegation that certain named and specifically identified products or product components also do what the patent does, thereby raising a plausible claim that the named products are infringing.").

(b) Inducement of Patent Infringement

To the extent that Plaintiffs suggest the ISOC Defendants are inducing third parties to infringe upon Plaintiffs' purported patent rights by publishing standards that discuss patented technology, this claim also must fail. In order to state a claim for inducement of patent infringement, Plaintiffs must show that (i) the ISOC Defendants knew or should have known their actions would induce actual infringement of Plaintiffs' rights; (ii) the ISOC Defendants specifically intended to induce infringement by third parties; and (iii) actual infringement by third parties. *Avocet Sports Tech., Inc. v. Garmin Int'l, Inc.*, No. 11-04049, 2012 WL 1030031, at *4 (N.D. Cal. Mar. 22, 2012).

As demonstrated above, Plaintiffs cannot bring any claim for direct infringement, which is a necessary element of inducement of infringement. In addition, although Plaintiffs allege that the ISOC Defendants are "re-licensing" the patented technology (SAC ¶¶ 63, 220), this assertion is directly contradicted by the IETF's public positions concerning intellectual property rights that are implicated by IETF standards. These positions are set forth in documents identified in the SAC and filed separately by Plaintiffs. (*See id.* ¶¶ 220, 250-51).[11] First, the IETF has taken the public position that its standards "shall not be deemed to grant any right under any patent, patent application, or other similar intellectual property right disclosed by the Contributor." (Dkt. 80-3, at 11, § 5.5 (BCP 78).) Second, the IETF's policy on intellectual property rights is as follows:

> The IETF takes no position regarding the validity or scope of any Intellectual Property Rights or other rights that might be claimed to pertain to the implementation or use of the technology described in this document or the extent to which any license under such rights might or might not be available; nor does it represent that it has made any independent effort to identify any such rights.

[11] Plaintiffs referenced and relied upon BCP 78 and BCP 79 throughout both the FAC and SAC, and also filed the documents both in opposition to the ISOC Defendants' initial motion to dismiss and in support of one of Plaintiffs' recently-filed motions for summary judgment. (*See* Dkts. 80-3, 80-4, 140-1, 140-2.)

(Dkt. 80-4, at 8, 21 (BCP 79); *see also* https://www.ietf.org/ipr/policy.html.) These policies and disclaimers negate the intent element of an inducement claim, as well as any assertion that the IETF is improperly sublicensing Plaintiffs' patented technology.

The ISOC Defendants also raised the foregoing deficiencies in its motion to dismiss the FAC. (*See* Dkt. 73, at 6-7; Dkt. 87, at 2-4.) Accordingly, any claims against the ISOC Defendants sounding in patent infringement should be dismissed with prejudice.

(c) Copyright Infringement

Although the SAC does not include a formal count for copyright infringement, Plaintiffs suggest that their copyright "performance rights" have been infringed. (SAC ¶ 226; *see also id.* ¶¶ 160-61 (alleging violation of Section 102 of the Copyright Act).) In order to state a claim for copyright infringement, a plaintiff must show ownership of a valid copyright and copying of original constituent elements of that work. *See San Jose Options, Inc. v. Ho Chung Yeh*, No. 14-00500, 2014 WL 1868738, at *3 (N.D. Cal. May 7, 2014). Although this Court specifically informed Plaintiffs that they must allege "ownership of a valid copyrighted work" to bring a copyright claim (Dkt. 109, at 4), the SAC does not identify a single copyrighted work that Plaintiffs own. As such, any claim sounding in copyright infringement should be dismissed with prejudice.[12]

[12] For these same reasons, Plaintiffs' recently-filed motion for partial summary judgment about "performance rights standing" (Dkt. 139) should be denied. In an abundance of caution, however, the ISOC Defendants will be filing a brief in opposition to that motion.

CONCLUSION

For all of the above reasons, and given that Plaintiffs have already amended their complaint twice and demonstrated that further amendment would be futile, the Court should dismiss the SAC as against Defendants the ISOC and the IETF with prejudice.

DATED: December 1, 2014

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: /s/ Jason D. Russell
JASON D. RUSSELL
Attorneys for Defendants
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 1st 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