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**UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

TODD S. GLASSEY and MICHAEL E.
MCNEIL,

Plaintiffs,

v.

MICROSEMI INC; et al.,

Defendants.

CASE NO.: 3:14-cv-03629-WHA

**DEFENDANTS' RESPONSE TO ORDER
TO SHOW CAUSE [DKT. 152] WHY
PLAINTIFFS' SECOND AMENDED
COMPLAINT [DKT. 112] SHOULD BE
STRICKEN**

Complaint Filed: August 11, 2014
FAC Filed: August 25, 2014
SAC Filed: November 13, 2014

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendants Microsemi Corporation (“Microsemi”), together with the Internet Engineering
4 Task Force and The Internet Society (collectively referred to as the “ISOC Defendants”), Apple
5 Inc., Cisco Systems, Inc., Juniper Networks, Inc., Microsoft Corporation, Oracle Corporation, eBay
6 Inc., PayPal, Inc., Google Inc., and Netflix, Inc. (collectively “Internet Company Defendants”)
7 (collectively Microsemi, the ISOC Defendants, and the Internet Company Defendants are referred
8 to as “Defendants”), hereby respond to the Court’s Order to Show Cause why Plaintiffs’ Second
9 Amended Complaint (“SAC”) should be stricken.

10 After years of unsuccessfully litigating against Microsemi over a host of grievances,
11 Plaintiffs filed the instant suit purporting to be the victims of a vast governmental and private
12 sector conspiracy that infringes on their intellectual property rights and deprives them of judicial
13 redress. So far as can be discerned, Plaintiffs claim an alleged interest in Microsemi’s
14 technology—an interest which Plaintiffs contend permits them to recover infringement damages
15 for virtually every computer in the world—despite the fact that they long ago assigned all right,
16 title and interest in any patents to Microsemi.

17 While *pro se* litigants are accorded some leeway, Plaintiffs have—as is apparent from the
18 docket in this case—exhausted all leeway and then some. Plaintiffs have filed three complaints
19 (Dkts. 1, 6, and 112), two motions for a three-judge panel (Dkts. 15 and 138), and four motions for
20 partial summary judgment that seek manifestly improper relief (*i.e.*, prospective declaration of tax
21 liability). (Dkts. 118, 122, 123, and 139.)

22 The Court struck Plaintiffs’ First Amended Complaint (“FAC”), noting that it “suffers from
23 so many deficiencies that it would be hopeless to proceed.” (Dkt. 109 at 3:24-25.) The same is
24 true for the SAC, which is largely a rehash of the factually deficient allegations of the FAC, and
25 should likewise be stricken *with prejudice* for: (1) lack of standing to assert patent and copyright
26 infringement; and (2) failure to state a claim for which relief may be granted as to all claims. For
27 example, Plaintiffs’ antitrust claims (as far as intelligible) fail, at a minimum, to plead the requisite
28

1 antitrust injury and plausible relevant product market. Likewise, Plaintiffs fail to allege ownership
 2 of any valid copyrighted work. To the extent the SAC can be construed to assert additional claims
 3 (*i.e.*, tortious interference by Microsemi), those claims fail to allege any facts that comprise an
 4 element of a claim. Moreover, any conceivable claim Plaintiffs might imagine is time-barred, as
 5 Plaintiffs' own pleadings establish that they have been on notice of their purported claims since at
 6 least 2002.

7 The deficiencies in Plaintiffs' pleadings are not the product of *pro se* procedural missteps
 8 that could be rectified by amendment. Rather, Plaintiffs' claims are substantively unfounded and
 9 have no support in fact or law. Accordingly, following the Court's order stating that "Plaintiffs
 10 must plead their best and most plausible case and further opportunities to plead will not likely be
 11 allowed" (Dkt. 109 at 4:27-5:2), Plaintiffs should not be permitted to file a third amended
 12 complaint, and this case should be dismissed with prejudice.

13 **II. FACTUAL BACKGROUND**

14 Defendants provide this background to familiarize the Court with the present issues. A
 15 more comprehensive background is found in Microsemi's Opposition to Plaintiffs' Motion to Void
 16 the Settlement Agreement. (Dkt. 145 at 2:11-6:23.)

17 **A. Current Status of the Action**

18 Plaintiffs filed the FAC in the present action on August 25. After this Court struck the FAC
 19 on October 30, Plaintiffs filed an amended complaint on November 12. (Dkt. 110.) Plaintiffs
 20 subsequently filed the "corrected" SAC¹ on November 13. (Dkt. 112.) The SAC contains ten
 21 counts, of which Counts 1 through 8 are directed against Defendants²:

22 **Count 1**: Alleged infringement of the '629 Patent, Sherman Act and
 23 Clayton Act violations, and tortious interference against Microsemi.
 24 (SAC ¶¶ 171-183.)

25
 26 ¹ All references to the SAC are to the pleading filed as Dkt. 112.

27 ² While the SAC mentions Defendant Netflix in passing, none of the enumerated counts are
 28 directed to Netflix.

1 **Counts 2 through 7:** Alleged infringement of the '629 Patent against
2 Microsoft, Google, Apple, Oracle, Ebay and Paypal, Cisco, and
3 Juniper. (SAC ¶¶ 184-214.)

4 **Count 8:** Alleged infringement of the '629 Patent and Sherman Act
5 and Clayton Act violations against the ISOC Defendants. (SAC ¶¶
6 215-252.)³

7 Both the ISOC Defendants and Microsemi have filed motions to dismiss, and Defendants
8 incorporate the arguments made in those motions as further grounds for striking the SAC. (*See*
9 Dkt. 142, Dkt. 153.) Various Defendants also have filed briefs in opposition to Plaintiffs'
10 numerous meritless motions for summary judgment. (*E.g.*, Dkt. 145, Dkt. 155.)

11 **B. Relationship Between the Plaintiffs, Microsemi's Predecessors, and Microsemi**

12 The factual background includes two entities, Digital Delivery, Inc. ("DDI") and Datum,
13 Inc. ("Datum"), that have since been merged into Defendant Microsemi. Around July 1999, DDI
14 became a wholly owned subsidiary of Datum. (SAC ¶ 25.) In 2002, Datum was acquired by
15 Symmetricom. (SAC ¶ 21.) In 2013, Symmetricom was acquired by Microsemi.

16 In 1998, Plaintiffs and DDI (Microsemi's predecessor-in-interest) agreed to jointly pursue
17 the patent application that ultimately issued as the '629 Patent. (*See* Dkt. 123-4 at Recitals
18 Paragraph B.) To facilitate the patent filing, Plaintiffs and DDI entered into an interim "Co-
19 Inventor Agreement" to memorialize ownership rights and to define the parties' contribution to the
20 '629 Patent and the application for that patent (collectively referenced as the "Controlling Access
21 Patent" in the Co-Inventor Agreement). (*See* Dkt. 123-4 at Recitals Paragraphs B and D.) For
22 example, DDI would retain ownership of its own "Confidential Courier" technology and
23 corresponding patent. (Dkt. 124-4 at Recital A., Section 1A., Section 1B. ("[Plaintiffs] shall have
24 no rights to any part of the Courier Patent, or to the claims regarding the Courier Patent which are
25

26 ³ Although the SAC labels the count against the ISOC Defendants as "Count 9," it is actually the
27 eighth count. The allegations in this count also refer to Plaintiffs' purported "performance rights"
28 under the Copyright Act.

1 incorporated in the Controlling Access Patent or to the Confidential Courier product now produced
2 by [DDI]”); *see* FAC ¶ 76.)

3 On the same date they signed the Co-Inventor Agreement, Plaintiffs assigned all right, title,
4 and interest in the '629 Patent to DDI. (Dkt. 19-1 at 4-7 (document titled “ASSIGNMENT,” which
5 states “For valuable consideration, we [Michael E. McNeil and Todd S. Glassey] hereby assign to
6 [DDI] and its successors and assigns [] the entire, right, title and interest throughout the world in
7 the inventions and improvements which are subject of an application for United States patent
8 signed by us, entitled CONTROLLING ACCESS TO STORED INFORMATION”).)

9 **C. Relevant Agreements and Ownership of the '629 Patent**

10 In November 1999, to settle a dispute between Datum/DDI and Plaintiffs, Datum/DDI and
11 Plaintiffs entered into two contracts referred to as the Datum/TTI Settlement (Dkt. 123-5) and the
12 DDI/Controlling Access Settlement (Dkt. 123-6). The DDI/Controlling Access Settlement
13 superseded the Co-Inventor Agreement and became the “definitive” and only agreement setting
14 forth the parties’ rights with respect to the '629 Controlling Access Patent. (*See* Dkt. 123-6 at
15 Sections 1.1, 1.4, 1.5, 3.7.) This agreement confirms that Plaintiffs assigned all rights in the '629
16 Controlling Access Patent, including rights to both U.S. and foreign patents and patent
17 applications, to Microsemi: “**GMT/GLASSEY/MCNEIL assign all rights, title and interest in**
18 **the Controlling Access Patent and the application therefor, to DATUM.**” (Dkt. 123-6 at
19 Sections 2.2, 3.2 (emphasis added).)

20 Plaintiffs maintained rights to technology referenced as the “Phase II Technology,” but
21 granted to Datum a perpetual and irrevocable license to this technology in connection with
22 products and technology covered by the Controlling Access Patent. (*See* Dkt. 123-6 at Section
23 3.3.) Today, Microsemi, which is Datum’s successor-in-interest, remains the current assignee of
24 the '629 Patent.⁴ (*See* FAC ¶ 129 (“The Controlling Access Settlement is still in force and serves
25 as the basis for Microsemi’s continuing claim to be the assignee of the '629 Patent.”).)

26 ⁴ The USPTO database shows the assignment record on February 13, 2014 to Microsemi.
27 [http://assignments.uspto.gov/assignments/q?db=pat&qt=pat&reel=&frame=&pat=6370629&pub=
28 &intn=&asnr=&asnri=&asne=&asnei=&asns=](http://assignments.uspto.gov/assignments/q?db=pat&qt=pat&reel=&frame=&pat=6370629&pub=&intn=&asnr=&asnri=&asne=&asnei=&asns=).

1 Neither the DDI/Controlling Access Settlement nor the Datum/TTI Settlement contains any
 2 provision that (i) required DDI to seek Plaintiffs' permission to file patent applications (U.S. or
 3 foreign); or (ii) required DDI to enforce or maintain the Controlling Access Patent (or any foreign
 4 counterparts) or any patents related to Phase II Technology. (Dkts. 123-5 and 123-6.) Both
 5 agreements are governed by California law. (Dkt. 123-6 at Section 8.1; Dkt. 123-5 at Section 8.1.)

6 **III. LEGAL STANDARDS**

7 **A. Dismissal for Lack of Subject Matter Jurisdiction**

8 "A court may exercise jurisdiction only if a plaintiff has standing to sue on the date it files
 9 suit." *Abraxis Bioscience, Inc. v. Navinta LLC*, 625 F.3d 1359, 1364 (Fed. Cir. 2010) (internal
 10 quotations and citation omitted). The plaintiff bears the burden of establishing that it has standing.
 11 *Id.*; *see also Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (plaintiff has burden of
 12 establishing subject matter jurisdiction). Standing to sue for patent infringement is conferred by
 13 the Patent Act, which provides that a patent's legal owner has the exclusive right to sue. *See* 35
 14 U.S.C. § 281; *see also Propat Intern. Corp. v. Rpost, Inc.*, 473 F.3d 1187, 1189-94 (2007) (finding
 15 purported transferee of patent lacked standing to sue because it had no true ownership interest in
 16 the patent). At the pleading stage, a plaintiff meets this burden by alleging sufficient facts to show
 17 a proper basis for the court to assert subject matter jurisdiction over the action. *McNutt v. Gen.*
 18 *Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

19 **B. Dismissal for Failure to State a Claim**

20 Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a pleading contain "a
 21 short and plain statement of the claim showing that the pleader is entitled to relief,' in order to
 22 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell*
 23 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47
 24 (1957)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); FED. R. CIV. P. 8(a)(2).

25 If that pleading fails to state a claim upon which relief can be granted, dismissal is
 26 appropriate under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See, e.g., Bell Atlantic*
 27 *Corp.*, 550 U.S. at 555, 570; *see also* FED. R. CIV. P. 12(b)(6). A claim's allegations must "possess
 28

1 enough heft” to show an entitlement to relief thus justifying that the costly process of litigation
2 continue. *Bell Atlantic Corp.*, 550 U.S. at 557.

3 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
4 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.
5 662, 678 (2009). “While a complaint . . . does not need detailed factual allegations . . . a plaintiff’s
6 obligation to provide the grounds of his entitlement to relief requires more than labels and
7 conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual
8 allegations must be enough to raise a right to relief above the speculative level.” *Bell Atlantic*
9 *Corp.*, 550 U.S. at 555 (internal quotation marks and citations omitted); *see also Ashcroft*, 556 U.S.
10 at 678 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory
11 statements, do not suffice.”). A court is not required to accept “legal conclusions cast in the form
12 of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged.”
13 *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994); *Warren v. Fox Family*
14 *Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). Moreover, the court need not assume the
15 validity of “allegations that contradict matters properly subject to judicial notice or by exhibit.”
16 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Rather, the court may
17 consider documents submitted as part of the complaint or upon which the complaint necessarily
18 relies. *Lauter v. Anoufrieve*, 642 F. Supp. 2d 1060, 1077 (C.D. Cal. 2008), adopted 642 F. Supp.
19 1060, 1069 (C.D. Cal. 2009).

20 Where the facts and dates alleged in the complaint indicate that a claim is barred by the
21 statute of limitations or preempted, dismissal is appropriate. *Jablon v. Dean Witter & Co.*, 614
22 F.2d 677, 682 (9th Cir. 1980).

23 **IV. ARGUMENT**

24 **A. Plaintiffs’ Allegations of Patent Infringement Must Be Stricken**

25 **1. Microsemi Owns All Rights to the ’629 Patent**

26 As a threshold matter, Plaintiffs’ claims in this action are dependent upon their purported
27 ownership of at least part of the ’629 Patent. However, Defendant Microsemi—not Plaintiffs—
28

1 owns all right, title and interest to the '629 Controlling Access Patent. In 1998, Plaintiffs assigned
2 all rights in the '629 Patent—including all U.S. and foreign patent and patent applications—to
3 Microsemi's predecessor DDI: **"For valuable consideration, [Plaintiffs] hereby assign to [DDI]
4 and its successors and assigns [] the entire, right, title and interest throughout the world in
5 the inventions and improvements which are subject of an application for United States patent
6 signed by us, entitled CONTROLLING ACCESS TO STORED INFORMATION"** (Dkt.
7 19-1 (emphasis added).)

8 And in the 1999 DDI/Controlling Access Settlement, Plaintiffs again assigned all legal
9 right, title and interest to the '629 Patent—including all U.S. and foreign patents and patent
10 applications—to Microsemi's predecessor Datum: **"GMT/GLASSEY/MCNEIL assign all
11 rights, title and interest in the Controlling Access Patent and the application therefor, to
12 DATUM."** (Dkt. 123-6 at Section 3.2 (emphasis added); *see also* Dkt. 123-6 at Section 2.2; FAC ¶
13 101.) The agreement provides no language giving Plaintiffs any rights, let alone enforcement
14 rights, in the '629 Patent. (Dkt. 123-6.)

15 Indeed, Plaintiffs admitted numerous times in the FAC that Microsemi is the assignee of the
16 '629 Patent and that the DDI/Controlling Access Settlement "is still in force and serves as the basis
17 for Microsemi's continuing claim to be the assignee of the '629 Patent." (FAC ¶ 129, *see also* ¶¶
18 101, 142.) In the wake of the Court's order striking the FAC, Plaintiffs now make a transparent
19 attempt to avoid dismissal of the SAC by asserting for the first time in the SAC that they own all
20 rights in portions of the '629 Patent relating to "PHASE-II technology." (SAC ¶¶ 163, 129.)
21 However, Plaintiffs fail to provide any factual basis for this new assertion. *See Lauter*, 642 F.
22 Supp. 2d at 1077 (The Court "is not required to accept as true conclusory allegations which are
23 contradicted by documents referred to in the complaint."). Tellingly, Plaintiffs continue to
24 acknowledge in many of their recent filings that Microsemi is the sole assignee of the '629 Patent.
25 (*See, e.g.*, Dkt. 122 at 2 (seeking tax loss benefits "for the loss of access to their PHASE-II IP
26 Enforcement Rights protected under US6370629"); Dkt. 154 at 3:7-10 (asking the Court to
27 "determine [who] owns the third party enforcement rights against the Phase-II IP protected inside
28

1 the US6370629”); *id* at 7:10-12 (referring to the ’629 Patent and stating “whichever [either
2 Plaintiffs or Microsemi] of the two owns the rights”).)

3 **2. Plaintiffs Lack Standing to Assert the ’629 Patent**

4 Because Microsemi owns the ’629 Patent, Plaintiffs do not have standing to assert claims
5 for infringement of that patent against any party. Accordingly, all patent infringement allegations
6 should be dismissed for lack of standing. *See Abraxis Bioscience, Inc.*, 625 F.3d at 1364 (“[I]n a
7 patent infringement action, ‘the plaintiff must demonstrate that it held enforceable title to the patent
8 at the inception of the lawsuit’ to assert standing.”); *Nolen v. Lufkin Indus., Inc.*, 469 Fed. App’x
9 857, 862 (Fed. Cir. 2012) (finding no subject matter jurisdiction because “Plaintiffs have failed to
10 make any plausible allegations of ownership of the patents at issue that do not first require judicial
11 intervention”); *cf. Ethicon, Inc. v. U.S. Surgical Corp.*, 135 F.3d 1456, 1467 (Fed. Cir. 1998) (“An
12 action for infringement must join as plaintiffs all co-owners.”).⁵

13 In apparent recognition of their lack of standing, Plaintiffs have asked this Court to convey
14 to them some ownership interest in the ’629 Patent. Setting aside that all such requests are time-
15 barred, as explained in the next section, the Federal Circuit has repeatedly held that “a claim for
16 patent infringement does not arise under the patent laws when it requires judicial action to vest title
17 in the party alleging infringement.” *Nolen*, 469 Fed. App’x at 860. Mere requests to rescind or
18 cancel a patent assignment agreement *are not* sufficient to convey standing to sue. *Id.* Thus, to
19 invoke federal jurisdiction, a plaintiff must “allege facts that demonstrate that he, and not the
20 defendant, owns the patent rights on which the infringement suit is premised.” *Id.* at 861
21 (quotation omitted). The allegations of ownership must “have a plausible foundation” and not be
22 “frivolous or insubstantial.” *Id.* (quotation omitted). Plaintiffs have failed on both counts. Thus,

23
24 ⁵ The patent infringement allegations should alternatively be stricken for failure to properly plead
25 a claim with the requisite specificity to put Defendants on notice of allegations against them.
26 *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *Bender v. LG Elecs.*
27 *U.S.A., Inc.*, No. C 09-02114 JF, 2010 WL 889541, at *5-6 (N.D. Cal. Mar. 11, 2010) (a patent
28 infringement claim must 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.”).

1 the patent infringement claims should be stricken against all Defendants. Moreover, because
2 Defendants Apple Inc., Cisco Systems, Inc., Juniper Networks, Inc., Microsoft Corporation, Oracle
3 Corporation, eBay Inc., PayPal, Inc., Google Inc., and Netflix, Inc. are not faced with any other
4 allegations, the SAC should be stricken in its entirety as to these Defendants.

5 **3. Plaintiffs' Requests to Rescind or Void Assignment of the '629 Patent**
6 **are Time-Barred**

7 Plaintiffs assert a myriad of claims to fabricate a basis for ownership of the '629 patent,
8 specifically, that the DDI/Controlling Access Settlement—which granted all rights in the '629
9 Patent to Microsemi—should be voided, rescinded, or otherwise ignored by this Court. All such
10 claims are time-barred.

11 Generally speaking, a claim accrues “when the plaintiff knows or has reason to know of the
12 injury which is the basis of the action.” *Lukovsky v. Cty. & Cnty. of San Francisco*, 535 F.3d 1044,
13 1048 (9th Cir. 2008). In the context of patent-related claims, the Supreme Court has held that upon
14 issuance and recordation of a patent, “[c]onstructive notice of their existence goes thus to all the
15 world.” *Sontag Chain Stores Co. Ltd. v. Nat’l Nut Co. of California*, 310 U.S. 281, 295 (1940)
16 (noting that one with such “implied knowledge” would be subject to the same privileges and
17 obligations as “would follow actual knowledge”); *see also Gen. Bedding Corp. v. Echevarria*, 947
18 F.2d 1395, 1398 (9th Cir. 1991) (constructive knowledge will be imputed from a patent’s issuance
19 if a party “had enough information to warrant an investigation which, if reasonably diligent, would
20 have led to discovery of [the cause of action]”); *IBM Corp. v. Zachariades*, No. C 91-20419-JW,
21 1993 WL 443409, at *2 (N.D. Cal. Oct. 27, 1993) (finding that “[t]he issuance of a patent gives a
22 plaintiff constructive notice of its claims if the patent reveals information sufficient to alert a
23 reasonable person of the need to inquire further.”).

24 Here, Plaintiffs themselves were *two of the four named inventors* listed on the face of the
25 '629 Patent. This alone provided sufficient constructive notice to start the clock. The statute of
26 limitations in California for breach of a written contract—such as the DDI/Controlling Access
27 Settlement Agreement—is only 4 years. *See* Cal. Code Civ. Proc. § 337. Accordingly, because the
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1 DDI/Controlling Access Settlement was signed in 1999, and the '629 Patent issued in 2002, the
2 time for Plaintiffs to allege a breach of contract or otherwise challenge the Controlling Access
3 Settlement has long passed.

4 Plaintiffs attempt to side-step this simple fact by contending they were not provided a copy
5 of the DDI/Controlling Access Settlement Agreement until 12 years after its execution and were
6 thus unable to enforce their rights. (*See* SAC ¶¶ 112-113.) Plaintiffs' contention necessarily fails
7 because a contract is enforceable even if it is not fully executed. *Bernard v. Walkup*, 272 Cal. App.
8 2d 595, 602 (1969) ("It is well established that the receipt and acceptance by one party of a writing
9 signed by the other only, and purporting to embody all the terms of a contract between the two,
10 binds the acceptor as well as the signor to the terms of the writing."). Here, Plaintiffs do not deny
11 that they received compensation under both contracts (*see, e.g.*, DDI/Controlling Access
12 Agreement compensated Plaintiffs \$300,000 (Dkt. 123-6 at Section 3.4) and Datum/TTI
13 Agreement paid Plaintiffs royalties (Dkt. 123-5 at Sections 3.1, 3.2, 3.15)), which evidences
14 Microsemi's acceptance of the contracts' terms, thereby binding both Microsemi as the acceptor
15 and Plaintiffs as the signors.

16 Plaintiffs also assert that their rights in Phase II Technologies are "the bulk of the claims (if
17 not all) of those documented" in the '629 Patent. (SAC ¶ 4.) However, Plaintiffs have no rights in
18 the '629 Patent and any claim that they own Phase II Technology within the '629 Patent is time-
19 barred as they were well-aware (or should have been well-aware) that the '629 Patent issued in
20 2002. If they believed that the '629 Patent contained unauthorized portions of Phase II technology,
21 then at the latest, Plaintiffs had until 2006 to bring their claims for breach.

22 Finally, Plaintiffs assert that "they have BOTH PATENT enforcement rights [created and
23 supported in the original filing Co-Inventor Agreement and the Settlement]" and that voiding the
24 DDI/Controlling Access Settlement would "trigger the contingency transfer language in the Co-
25 Inventor Agreement making the original '992 Patent and the Amended 629 Patent property solely
26 of PLAINTIFFS." (SAC ¶¶ 119, 124, 129.) To the contrary, the Co-Inventor Agreement was
27 superseded and extinguished by the later signed DDI/Controlling Access Settlement Agreement.

1 (See Dkt. 123-6 at Sections 1.1, 1.4, 1.5, 3.7.) And as explained above, the DDI/Controlling
2 Access Settlement Agreement recites that Microsemi owns all rights to the '629 Patent.
3 Regardless, if Plaintiffs sought to void the DDI/Controlling Access Settlement, they should have
4 filed a claim within four years of signing—by 2003—and are now time-barred.

5 Accordingly, Plaintiffs cannot now, or in the future, assert a valid claim for ownership of
6 the '629 patent. As explained in the previous section, Plaintiffs' patent infringement claims should
7 be stricken for lack of standing against all Defendants. Further, their patent infringement claims
8 should be stricken with prejudice because Plaintiffs' claims for ownership of the '629 Patent are
9 time-barred.

10 **B. Plaintiffs' Claims For Copyright Infringement Should Be Stricken**

11 Although the SAC does not include a formal count for copyright infringement, Plaintiffs
12 suggest that their copyright "performance rights" have been infringed by their inclusion in
13 unidentified IETF standards and the alleged implementation of those standards by other
14 Defendants. (SAC ¶ 226; *see also id.* ¶¶ 160-61 (alleging violation of Section 102 of the Copyright
15 Act).) The pleadings make clear, however, that these allegations are merely a backdoor attempt at
16 asserting Plaintiffs' nonexistent patent rights. (*See, e.g.*, Dkt. 154 at 10:2-6 (Plaintiffs arguing that
17 the SAC requests "an order establishing a series of performance rights under the Copyright Act for
18 programs which will be run which contain software that infringes the claims taught by [the '629
19 Patent]).)

20 In order to state a claim for copyright infringement, a plaintiff must show ownership of a
21 valid copyright and copying of original constituent elements of that work. *See Silvers v. Sony*
22 *Pictures Entertainment, Inc.*, 402 F.3d 881, 884 (9th Cir. 2005) (en banc); *see also San Jose*
23 *Options, Inc. v. Ho Chung Yeh*, No. 14-00500, 2014 WL 1868738, at *3 (N.D. Cal. May 7, 2014).
24 Although this Court specifically informed Plaintiffs that they must allege "ownership of a valid
25 copyrighted work" to bring a copyright claim (Dkt. 109 at 4), the SAC does not identify a single
26 copyrighted work that Plaintiffs own. As such, Plaintiffs cannot assert any claim sounding in
27 copyright infringement.

1 **C. Plaintiffs’ Antitrust Claims Should Be Stricken**

2 Plaintiffs also claim that their inability to enforce their purported (but nonexistent) rights to
3 the ‘629 Patent somehow is the result of antitrust violations. However, the antitrust allegations in
4 the SAC—for violations of Sections 1 and 2 of the Sherman Act, and Section 4 of the Clayton Act
5 Section 4—contain nothing more than “a bare assertion of conspiracy,” which does “not suffice” to
6 establish an antitrust claim. *Twombly*, 550 U.S. at 556.

7 Moreover, Plaintiffs fail to allege an antitrust injury, which “is an element of all antitrust
8 suits,” *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433, 1445 (9th Cir. 1995); *see also*
9 *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir. 1988); *LiveUniverse, Inc. v. MySpace,*
10 *Inc.*, 304 F. App’x 554, 557 (9th Cir. 2008) (citation omitted); *see also Atl. Richfield Co. v. USA*
11 *Petroleum Co.*, 495 U.S. 328, 344 (1990). The Ninth Circuit in “[p]arsing the Supreme Court’s
12 definition of ‘antitrust injury,’ [has] held that antitrust injury consists of four elements: ‘(1)
13 unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the
14 conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent.’” *Somers*
15 *v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013) (citations omitted) (finding a lack of antitrust
16 injury to plaintiff based on Apple’s iTunes pricing).

17 Antitrust injury refers to “harm to the process of competition and consumer welfare, not
18 harm to individual competitors.” *LiveUniverse*, 304 F. App’x at 557. With respect to the second
19 element, the injury to plaintiff must be an injury to competition beyond the impact on the plaintiff
20 himself. *See McGlinchy*, 845 F.2d at 811-12 (“The antitrust laws were enacted for “the protection
21 of competition, not competitors.”) (citations omitted). As to the fourth element, “antitrust laws
22 protect the process of competition, and not the pursuits of any particular competitor . . .” *Cascade*
23 *Health Solutions v. PeaceHealth*, 515 F.3d 883, 901 (9th Cir. 2007) (emphasis added).

24 Here, the SAC fails to allege harm to competition—*i.e.*, reduced output or increased
25 prices—but rather only asserts personal economic loss. For example, “Defendants actively
26 conspired and waged an ongoing war to prevent plaintiffs from either recovering the actual
27

1 executed settlement agreement from Microsemi or being able to enforce it.” (SAC ¶ 82.)

2 Similarly, the SAC states that:

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

8 (SAC ¶ 148 (emphasis added); *see also* ¶¶ 59, 82, 85, 147-159.) Accordingly, Plaintiffs have not
9 pled the requisite antitrust injury.

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

14 The ISOC Defendants identified these deficiencies in their motion to dismiss the FAC (Dkt.
15 73 at 5; Dkt. 87 at 1-2), yet Plaintiffs have made no attempt to cure them. Instead, the SAC merely
16 adds equally specious “hub and spoke” allegations that still fail to demonstrate antitrust injury, a
17 plausible relevant product market, or any other elements of an antitrust claim.

18 Finally, even if Plaintiffs could properly allege antitrust claims against the Defendants, their
19 allegations that the “conspiracy” dates back to 1999, *see* SAC ¶¶ 59-62, demonstrates that the four-
20 year statute of limitations for such an action has long passed. *See* 15 U.S.C. § 15b.

21 Accordingly, Plaintiffs cannot assert antitrust claims against the Defendants.

22 **D. Plaintiffs’ Other Claims Also Fail**

23 Plaintiffs have asserted a claim against Microsemi for tortious interference, but plead none
24 of the elements required to state such a claim under California law. Microsemi’s arguments are set
25 forth in its motion to dismiss, Dkt. 153, and incorporated by reference herein.

26 In addition, although no formal count for fraud has been asserted against the ISOC
27 Defendants, Plaintiffs’ contention in response to the Order to Show Cause that the IETF has
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1 engaged in “patent fraud” through the publication of copyrighted standards (Dkt. 159, at 8) is
2 nonsensical and fails to meet the pleading standards for fraud under Rule 9(b). Moreover,
3 Plaintiffs’ claim that they notified the IETF of their purported rights in 2009 (SAC ¶ 232)
4 demonstrates that any claims for fraud are barred by the statute of limitations. *See* Cal. Code Civ.
5 Proc. § 338(d).

6 Finally, the SAC references in passing various other causes action in relation to Defendants
7 without formally asserting such causes of action or stating any of the necessary elements.
8 Accordingly, to the extent the Court construes the SAC as making additional allegations against
9 Defendants, those allegations are deficient and should be stricken.

10 **E. Dismissal Should Be With Prejudice As Amendment Would Be Futile**

11 Given the deficiencies outlined above, and Plaintiffs’ previous failed state and federal
12 litigations relating to generally these same issues, no amount of re-pleading can cure the SAC’s
13 defects. *See Duetsche v. Turner Corp.*, 324 F. 3d 692, 718 n.20 (9th Cir. 2003) (noting that
14 granting leave to amend is futile where the claim would be barred by the statute of limitations).
15 Where, as here, amendment would be futile, there is no need to prolong litigation and the SAC
16 should be stricken without leave to amend. *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1039
17 (9th Cir. 2002).

18 The Ninth Circuit only permits amended pleadings that allege “facts consistent with the
19 challenged pleadings.” *Reddy v. Litton Indus.*, 912 F.2d 291, 296-97 (9th Cir. 1990). Plaintiffs
20 have admitted in their previous pleadings and in motion practice that they assigned the ’629 Patent
21 to Microsemi. They should not be permitted to file a third amended complaint asserting
22 infringement of this patent because they cannot allege standing without contradicting their earlier
23 statements. *Id.* (affirming dismissal with prejudice because “[i]t would not be possible for
24 [plaintiff] to amend his complaint ... without contradicting any of the allegations of his original
25 complaint”).

26 Furthermore, “[i]t is well established that a court may dismiss an entire complaint *with*
27 *prejudice* where plaintiffs have failed to plead properly after ‘repeated opportunities.’” *Destfino v.*

1 *Reiswig*, 630 F.3d 952, 959 (9th Cir. 2011) (citing *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir.
2 1993); *Semegen v. Weidner*, 780 F.2d 727, 730–31 (9th Cir. 1985) (dismissing with prejudice
3 second amended complaint after district court provided detailed instructions on how to remedy
4 deficiencies and plaintiffs failed to comply). Here, the Court noted the major deficiencies in
5 Plaintiffs' FAC with the caveat that Plaintiffs were:

6 to file a proper second amended complaint. It must cure the
7 deficiencies identified herein. Failure to do so may well result in
8 dismissal with prejudice. Plaintiffs must plead their best and most
9 plausible case and further opportunities to plead will not likely be
10 allowed.

11 (Dkt. 109 at 4:27-5:2.) Plaintiffs failed to cure the noted deficiencies, *see* Dkt. 109 at 4:1-20, and
12 should not be given another opportunity.

13 **V. CONCLUSION**

14 For all the reasons set forth above, Defendants respectfully request the Court dismiss
15 Plaintiffs' Second Amended Complaint (Dkt. 112) as against Defendants with prejudice.

16
17 Dated: December 19, 2014

Respectfully submitted,

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