IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LENOVO (UNITED STATES) INC. and MOTOROLA MOBILITY LLC, Plaintiffs, v. INTERDIGITAL TECHNOLOGY CORPORATION, IPR LICENSING, INC., INTERDIGITAL COMMUNICATIONS, INC., INTERDIGITAL HOLDINGS, INC., and INTERDIGITAL, INC., Defendants.	Civil Action No. 20-493-LPS

<u>STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA</u>

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The United States respectfully submits this statement pursuant to 28 U.S.C. § 517, which permits the United States to attend to its interests in any case pending in federal court, and states as follows:

INTEREST OF THE UNITED STATES

The Antitrust Division of the U.S. Department of Justice enforces the federal antitrust laws and has a strong interest in their correct application, including in private suits. The United States has a particular interest in cases, like this one, that join antitrust law and intellectual property law. The United States has long studied and helped to clarify the intersection of those two bodies of law,[1] including the proper application of antitrust law to standards-development activity.[2] With this statement, the United States offers its experience and perspective to ensure that the antitrust laws are applied in a way that promotes innovation and enhances consumer welfare.

BACKGROUND

I. Patent Law and Antitrust Law Both Promote Dynamic Competition

The U.S. patent regime allows markets, not regulators, to determine how best to reward inventors for their technological advances. With a constitutional guarantee of "exclusiv[ity]," U.S. Const. art. I, § 8, cl. 8, inventors may reap the benefits of their investments in research and development by marketing and selling their new technologies, or by licensing their patent rights

[1] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (2017), https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf [hereinafter IP Guidelines]; U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf [hereinafter 2007 Antitrust-IP Report].

[2] *See, e.g.*, 2007 Antitrust-IP Report ch. 2. This statement uses the phrases "standards-development activity" and "standard-setting activity" interchangeably.

to implementers who can more efficiently deliver those technologies to end users.

Strong intellectual property (IP) rights help level the competitive playing field for small innovative companies. Without strong IP protection, larger firms are generally better able to appropriate the benefits of innovation. The U.S. patent regime aims to reduce the influence of market size and market share on firms' incentives to innovate and hence on their capacity to compete.

The antitrust laws also strengthen the cycle of competition and innovation,[3] and like the patent laws, the antitrust laws rely on free markets as the best means of allocating resources and determining prices. Indeed, antitrust law is about more than just ensuring low prices. For instance, high demand for a creative new product might drive up its price in the short run. Antitrust law promotes rather than punishes this dynamic, because it gives others an incentive to innovate and compete themselves, all for the benefit of consumers—a cycle of dynamic competition.

In this regard, the policies of the patent laws and the antitrust laws are aligned, with a mutual aim of fostering dynamic competition through innovation. They do so by ensuring that innovators have adequate incentives to invest in, and monetize, their technological advances.

II. Standards Development Can Have Procompetitive and Anticompetitive Aspects

Industry-wide standards are an integral, if often overlooked, component of the infrastructure of the modern economy. By ensuring the interoperability of a wide range of

[3] *See Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990) ("[T]he aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition."); IP Guidelines § 1.0; Joshua D. Wright & Douglas H. Ginsburg, *Whither Symmetry? Antitrust Analysis of Intellectual Property Rights at the FTC and DOJ*, 9 Competition Pol'y Int'l, no. 2, Autumn 2013, at 41, 41 ("[E]ach regime spurs dynamic competition.").

related products, they "make products less costly for firms to produce and more valuable to consumers." 2007 Antitrust-IP Report 33. They also help fuel dynamic competition by ensuring market-wide acceptance of innovative new technologies.

Many products in the modern economy, especially those that rely on advanced technologies and patented inventions, are standardized. For example, computers communicate with each other over the Internet based on agreed-upon protocols that define a message format that can be sent and received by any user on the network. If there were no standard protocol, a user might send a message in a format that is not compatible with the recipient's network or computer, making it unreadable or undeliverable. To remedy this, firms would have to make routers and computers capable of receiving and interpreting a wide array of message formats, making computers and routers more expensive and increasing the costs of developing new ones. This is the "'Tower of Babel' effect that increases costs, reduces utility, and frustrates consumers." *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1335 (Fed. Cir. 2010).

Establishing a standard format, by contrast, makes it cheaper to produce such products, and to develop new technology that builds on the standard. In general, standards "enable different firms to produce products that are compatible with one another," which "promot[es] innovation and competition." *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 400 (2d Cir. 2014). Consumers see considerable benefits as a result. By ensuring interoperability among products that work together (complements) as well as products that can replace one another (substitutes), industry-wide standards tend to lower production costs, reduce switching costs, increase price competition, increase the value of individual products, and facilitate the adoption and development of new technology.[4]

Standards are adopted through a variety of means. Firms might vigorously compete in a "winner-take-all standards war" to see their technology become the *de facto* standard, as happened with VCR and Betamax. *See* 2007 Antitrust-IP Report 34. In many cases, however, standards are adopted through private, voluntary standards-development organizations ("SDOs"), in which firms come together to establish "a standard that all firms, regardless of whether they participate in the process, then can use in making products." *Id.* at 33. SDOs help "avoid many of the costs and delays of a standards war, thus substantially reducing transaction costs to both consumers and firms." *Id.* at 34.

In an SDO process, competition among firms occurs *ex ante*, before the standard is adopted rather than after. *See Rambus Inc. v. FTC*, 522 F.3d 456, 459 (D.C. Cir. 2008) (noting that standardization "shifts" competition so that it occurs "[b]efore an [SDO] adopts a standard"); *see also* 2007 Antitrust-IP Report 34. Indeed, "there is often vigorous competition among different technologies for incorporation into th[e] standard." *Rambus*, 522 F.3d at 459. Once the winning technologies are chosen, the *ex ante* competition is replaced by consensus as industry members implement the new standard—though competition among rival standards, or among standardized and nonstandardized products, might remain.

The Supreme Court has recognized that "private standards can have significant procompetitive advantages," but only when SDOs promulgate them "through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492,

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[4] *See Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 875-76 (9th Cir. 2012); *Princo*, 616 F.3d at 1335; 2007 Antitrust-IP Report 33-35; Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889, 1896-98 (2002).

501 (1988). The Court was sensitive to the fact that, because standard setting involves cooperation between competing firms, it comes with a risk that the firms will seek to abuse the process and harm competition for their own advantage.

Perhaps it is no surprise, then, that SDOs and participating firms are frequent "objects of antitrust scrutiny." *Id.* at 500. In antitrust lawsuits, collective standard-setting activity has typically been analyzed under the effects-based rule-of-reason approach, which weighs the procompetitive benefits of the conduct against its potential anticompetitive effects. *Id.* at 501; *see also* 2007 Antitrust-IP Report 37. Rule-of-reason treatment might not be appropriate, however, if the standardization is merely cover for conduct condemned as *per se* illegal under the Sherman Act, such as price fixing. *See* 2007 Antitrust-IP Report 37 (giving examples of *per se* illegal activities among members of an SDO); *see also* 15 U.S.C. § 4301(c)(3) (excluding "any agreement or conspiracy that would set or restrain prices of any good or service" from the Standards Development Organization Advancement Act's definition of "standards development activity"—activity that the Act subjects to the rule of reason, *see infra* note 12).

III. Factual Allegations and Procedural History

Lenovo (United States) Inc. and Motorola Mobility LLC ("Motorola") (collectively, "Lenovo" or "Plaintiffs") make and sell wireless devices, like laptops and cellphones, that rely on industry-wide cellular standards commonly known as 3G and 4G, which were developed and promulgated through SDOs (namely, 3GPP and ETSI).[5] D.I. 1 (Compl.) ¶ 1. InterDigital, Inc.

[5] This statement draws its factual discussion from the Plaintiffs' complaint. When weighing dismissal under Fed. R. Civ. P. 12(b)(6), courts "accept all factual allegations in the complaint as true, construe the complaint in the light favorable to the plaintiff, and ultimately determine whether [the] plaintiff may be entitled to relief under any reasonable reading of the complaint." *Mayer v. Belichick*, 605 F.3d 223, 229 (3d Cir. 2010).

and five related entities[6] (collectively, "InterDigital" or "Defendants") constitute primarily a patent licensing business, which claims to hold more than 30,000 patents and patent applications worldwide, including thousands of patents essential to the cellular standards on which the Plaintiffs' products rely. *Id.* ¶ 27.

On April 9, 2020, Lenovo sued InterDigital in the District of Delaware, alleging that InterDigital "has engaged in a multi-pronged scheme" with its competitors in the SDOs, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1-2).[7] Compl. ¶ 4. According to Lenovo's complaint, InterDigital carried out this scheme "[t]hrough agreement, the collective action of standard-setting, and the resulting standards," all of which "restrain[ed] competition" in "the market for wireless devices compliant with Cellular Standards." *Id.* ¶¶ 4-5.

On June 22, 2020, Defendants moved to dismiss Plaintiffs' claims under Fed. R. Civ. P. 12(b)(6),[8] with prejudice. D.I. 8 (Mot.). Primarily, Defendants contend that Plaintiffs' Section 1 claim is nonviable because it is does not sufficiently allege anything more than unilateral conduct, *id.* at 14-18, and that the Section 2 claim is nonviable because it does not sufficiently allege conduct that is anticompetitive, *id.* at 7-13.

ARGUMENT

Applied properly, the antitrust laws promote competition and support the incentives for innovation that patents and the standards-development system provide. Nonetheless, the primary theories of competitive harm embodied in Lenovo's Sherman Act claims lack key required

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[6] The other defendants are InterDigital Technology Corporation, IPR Licensing, Inc., InterDigital Communications, Inc., InterDigital Holdings, Inc., and InterDigital Patents Holdings, Inc.

[7] This statement does not address Plaintiffs' third count, breach of contract. *See* Compl. ¶¶ 119-125.

[8] This statement does not address Defendants' other grounds for dismissal.

elements and thus would expand Sherman Act liability in a way that could chill procompetitive, innovative activity. A viable Section 1 claim requires more than an allegation that a patent holder breached its commitment to an SDO to license its patent on fair, reasonable, and nondiscriminatory ("FRAND") terms—and more generally, a solo actor's allegedly anticompetitive conduct does not satisfy Section 1's concerted-action requirement. Condemning an otherwise lawful SDO process under Section 1 based on one firm's *ex post* pricing decisions would cast a needless pall of uncertainty over standards development generally. In addition, holding a patent holder liable under Section 2 for over-disclosing standard-essential patents ("SEPs") *ex ante* or charging high royalties *ex post*, without more, could jeopardize important patent disclosures and chill participation in the standards-development process altogether.

I. Applying Section 1 of the Sherman Act in the Standards Context

A. Section 1 Requires an Unlawful Agreement to Unreasonably Restrain Trade

Section 1 of the Sherman Act outlaws "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. "Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *accord Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). Participants in the standards-development process "often have economic incentives to restrain competition." *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 500 (1988). As the Supreme Court has explained, an agreement to develop a standard "implicitly" contains an agreement, often among competitors, "not to manufacture, distribute, or purchase" nonstandardized products or inputs. *Id.* at 500. Consequently, Section 1 violations can arise in the context of standards development, particularly "in circumstances involving the manipulation of the standards-setting process or the improper use of the resulting standard to gain competitive advantage over rivals." 2007 Antitrust-IP Report 34-35. Standard setting can have numerous procompetitive benefits, but it can also facilitate collusion or exclusion that is actionable under Section 1. *E.g.*, Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 2231 (2d ed. 2005).

Accordingly, there are a variety of examples of Section 1 violations in the standards-development context. For instance, it has long been recognized that product standardization can be used to facilitate price fixing. *See, e.g.*, *Nat'l Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421, 426 (7th Cir. 1965); *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 497 (9th Cir. 1952); *Bond Crown & Cork Co. v. FTC*, 176 F.2d 974, 979 (4th Cir. 1949); *Milk & Ice Cream Can Inst. v. FTC*, 152 F.2d 478, 482 (7th Cir. 1946).

Courts have also found standards-development agreements actionable when they do not just establish requirements for achieving a voluntary standard but effectively decide which products, from which competitors, will be sold at all. For example, in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, the Supreme Court found that the plaintiff adequately had alleged a *per se* violation of Section 1 when it claimed: (1) that its competitors had manipulated the American Gas Association's certification standards so that the plaintiff's gas burner would not be certified as safe, and (2) that the Association's gas-distributor members had agreed not to supply gas for the plaintiff's uncertified gas burners. 364 U.S. 656, 658-60 (1961); *see also Allied Tube*, 486 U.S. at 501 n.6 ("Concerted efforts to enforce (rather than just agree upon) private product standards face more rigorous antitrust scrutiny." (citing *Radiant Burners*, 364 U.S. at 659-60)).

Similarly, in *American Society of Mechanical Engineers v. Hydrolevel Corp.*, the Supreme Court found a Section 1 violation arising from a deliberate misapplication of one of the

American Society of Mechanical Engineers' (ASME) industrial codes. 456 U.S. 556, 574 (1982). Noting that standards-development organizations "can be rife with opportunities for anticompetitive activity," *id*. at 571, the Court found ASME liable for actions by its agents that caused ASME to issue a baseless letter—ginned up by one of the plaintiff's competitors—indicating that the plaintiff's water boiler safety device did not comply with ASME's code, thereby discouraging sales. *Id.* at 571-72, 577.

Still in other cases, industry members threatened by a rival have agreed to manipulate the standards-development process itself to exclude their competitors, which can violate Section 1. For example, in *Allied Tube*, an upstart firm asked the National Fire Protection Association to allow the firm to make electrical conduits from plastic instead of steel. Steel companies were "[a]larmed that, if approved, [the new plastic conduit] might pose a competitive threat," so they "collectively agreed" to sink the proposal by "packing the upcoming annual meeting with new Association members whose only function would be to vote against" it. 486 U.S. at 496. The Supreme Court held that the steel companies' conduct, which "biased" the association's standards-development process in favor of "members with economic interests in restraining competition," could violate Section 1. *Id*. at 509-10; *see also Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 107 F.3d 1026, 1039 (3d Cir. 1997) (recognizing that "enforcement of an anticompetitive standard which injures [a plaintiff] would not be immune from possible antitrust liability").

These cases demonstrate that firms with "economic interests in restraining competition" can twist standards and standards-development processes to their advantage, and their collaboration in this context can violate Section 1. *Allied Tube*, 486 U.S. at 509; *see ASME*, 456 U.S. at 571. Accordingly, in the United States' view, "[s]tandard setters are not allowed to create and leverage unbalanced processes to adopt favorable self-regulation that constitute[s] a competitive advantage for the incumbent participants, to the detriment of consumer choice.”[9]

B. Unilaterally Evading a FRAND Commitment Does Not, By Itself, Constitute a Section 1 Violation

According to Lenovo, InterDigital’s agreements with competitors to develop standards through various SDOs violate Section 1 because InterDigital evaded its FRAND licensing commitment thereafter. Compl. ¶¶ 11, 101-102. While a FRAND commitment is an important contractual mechanism that can facilitate patent licensing,[10] it is one of many criteria an SDO uses to evaluate a technology for inclusion in a standard.[11] The competitive process for choosing the winning technology can still be unbiased, value-driven, and procompetitive despite the inherent ambiguity of a FRAND commitment. *See infra* p. 12.

SDOs employ a variety of procedural safeguards to help ensure that the standards-development process results in the best technical solutions and enables industry competition. The Supreme Court has recognized that, when private associations promulgate standards

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[9] Letter from Makan Delrahim, Assistant Attorney Gen., Antitrust Div., U.S. Dep’t of Justice, to Timothy Cornell, Esq., Clifford Chance US LLP 9 (Nov. 27, 2019), https://www.justice.gov/atr/page/file/1221321/download (capping a two-year investigation in which the Department of Justice determined that the trade association GSMA had used its industry influence to steer the design of mobile eSIMs technology by excluding certain stakeholders from the process, prompting GSMA to draft new standards-development procedures that incorporated more input from nonoperator members of the mobile communications industry).

[10] Office of Mgmt. & Budget, Exec. Office of the President, *OMB Circular No. A-119: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities* 2(d), 5(a)(v), 81 Fed. Reg. 4673 (Jan. 27, 2016), https://www.nist.gov/document/revisedcirculara-119asof01-22-2016pdf (recognizing that standards bodies often have patent policies “that include provisions requiring that owners of relevant patented technology incorporated into a standard make that intellectual property available to implementers of the standard on nondiscriminatory and royalty-free or reasonable royalty terms”).

[11] In fact, not all SDOs require a FRAND commitment. *See generally* 2007 Antitrust-IP Report 42-43, 45-46 (discussing SDOs’ use of disclosure and licensing rules).

"through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition[,] . . . those private standards can have significant procompetitive advantages." *Allied Tube*, 486 U.S. at 501. Important safeguards include ensuring that the process is open to interested parties, is consensus-based, and is balanced, and that the SDO has due process procedures in place. *See* Standards Development Organization Advancement Act ("SDOAA"), 15 U.S.C. § 4301(a)(8) (listing "the attributes of openness, balance of interests, due process, an appeals process, and consensus" to define a "standards development organization"); OMB Cir. A-119, *supra* note 10, at 2(e); Am. Nat'l Standards Inst., *United States Standards Strategy* 7 (2015). Although such safeguards can make the process more procompetitive and even mitigate antitrust liability,[12] no single safeguard is dispositive. Indeed, participants in a standards-development process incorporating these procedures might still be able to use the process to engage in anticompetitive conduct. *See, e.g.*, *TruePosition, Inc. v. LM Ericsson Tel. Co.*, Civ. Action No. 11-4574, 2012 WL 3584626, at *4 (E.D. Pa. Aug. 21, 2012) (declining to dismiss allegations that defendants agreed to manipulate 3GPP's process to prevent or delay the standardization of TruePosition's technology in the 3GPP 4G LTE Standard).

By comparison, hinging Section 1 liability on whether a patent holder violated its FRAND commitment, as Lenovo alleges here, *see* Compl. ¶¶ 103, 105, would create a "sea of doubt" in standards development. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284

[12] The SDOAA provides (1) rule-of-reason treatment for "a standards development organization while engaged in a standards development activity" and (2) limited recovery in antitrust suits based on "standards development activity engaged in by a standards development organization." 15 U.S.C. §§ 4302(2), 4303(a). The SDOAA defines "standards development organization" with reference to "procedures that incorporate the attributes of openness, balance of interests, due process, an appeals process, and consensus." *Id.* § 4301(a)(8).

(6th Cir. 1898) (Taft, J.); *see id.* at 293 (rejecting a standard for Sherman Act liability premised in part on whether a cartel fixed "reasonable" prices).

In essence, Lenovo's view is that Section 1 liability can be predicated solely on whether the prices a defendant charges for implementing a standard—*after* the standard is set—are reasonable. The Supreme Court, however, has cautioned strenuously that uncertainty will arise from a liability rule based on assessing whether prices are "fair" or "reasonable," *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 454 (2009), and in the United States' view, this case is no exception. The United States recently observed that a FRAND commitment "is, by design, indefinite and requires *ex post* negotiation" by sophisticated parties that will implement the standard. Statement of Interest of the United States, *Continental Auto. Sys., Inc. v. Avanci, LLC*, No. 3:19-CV-02933-M, at 8 (N.D. Tex. Feb. 27, 2020), https://www.justice.gov/atr/case-document/file/1253361/download. Even if InterDigital disregarded its FRAND commitment post-standardization, that does not suggest that the standards-development process itself was "biased" or anticompetitive. Condemning an otherwise lawful collaboration under Section 1 based on one firm's *ex post* pricing decisions, or its allegedly "supra-FRAND" rates, would inject unnecessary uncertainty into standards development.

Moreover, as InterDigital points out, Mot. 16, Lenovo's allegations focus on InterDigital's unilateral breach of its FRAND commitment, and purely unilateral conduct is not actionable under Section 1. *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 159 (3d Cir. 2003) ("Unilateral activity by a defendant, no matter the motivation, cannot give rise to a section 1 violation."). Lenovo does not allege that any other participant in the standards-development process knew that InterDigital would evade its FRAND commitment or that any other participant entered into a conspiratorial agreement with InterDigital expecting that to happen. Indeed, Motorola itself participated in ETSI, *see* Mot. 9, and Lenovo concedes that the standards-development process was "consensus-driven," Compl. ¶ 42. Even if Lenovo had pled a specific agreement, it offers no reason to think that the agreement would have altered the outcome of the standards-development process.[13]

"The Sherman Act contains a basic distinction between concerted and independent action." *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 767 (1984) (internal quotation marks omitted). This distinction is important because concerted action and independent action carry different risks. *Id.* Concerted action under Section 1 "is judged more sternly than unilateral activity under § 2" because when two firms act together they "suddenly increase[] the economic power moving in one particular direction." *Id.* at 768-69. The "anticompetitive potential" of this conduct "is sufficient to warrant scrutiny even in the absence of incipient monopoly." *Id.* at 769. A single firm can certainly still harm competition, but "Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization." *Id.* at 768. Harmful single-firm conduct is cognizable as unilateral action under Section 2 of the Sherman Act (15 U.S.C. § 2) rather than Section 1. *Id.* at 767 ("The conduct of a single firm is governed by § 2 alone."); *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 424 (4th Cir. 2015) ("[I]ndependent action is not proscribed by § 1." (internal quotation marks omitted)); *InterVest*, 340 F.3d at 159.

Simply put, the alleged breach of a FRAND commitment by one participant in the

[13] Lenovo's lawsuit here, to enforce the FRAND commitment, demonstrates that it (and other members of the standard-setting effort) expected InterDigital to abide by the FRAND commitment. In addition, even if InterDigital and another party *had* agreed that InterDigital would not abide by the FRAND commitment, such an agreement might have been frustrated, or functionally nullified, when InterDigital signed the FRAND declaration and gave implementers like Lenovo the power to enforce the FRAND commitment in court.

standards-development process, *see* Compl. ¶ 101, does not demonstrate that other participants had a "conscious commitment" to some "common scheme," *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984), that harms competition. Basing Section 1 liability on one participant's actions without requiring Lenovo to articulate an agreement with at least one other participant is not just legally insufficient, it also risks chilling participation in procompetitive standard-setting activity more broadly. As recognized in OMB Circular A-119, *supra* note 10, "the vibrancy and effectiveness of the U.S. standards system in enabling innovation depends on continued private sector leadership and engagement," which could stall if the antitrust risk of participation is too high.

Finally, accepting this version of Lenovo's claim could have the unintended consequence of forcing competitors to agree on more definite FRAND licensing terms before a standard is set, which in itself presents antitrust risk.[14] *See Goldfarb v. Va. State Bar*, 421 U.S. 773, 791-93 (1975) (striking down a state bar association's minimum fee schedule for attorneys, *i.e.*, "a fixed, rigid price floor"). It also would exclude participants that will not agree, *ex ante*, to FRAND licensing. Thus, Lenovo's rule has the potential to "stifle the beneficial functions of [SDOs], as fear of treble damages and judicial second-guessing would discourage the establishment of useful industry standards." *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 273 (5th Cir. 2008) (internal quotations marks omitted).

For these reasons, a single participant's alleged *ex post* breach of a FRAND commitment to an SDO, without more, is not actionable under Section 1.

[14] The United States evaluates *ex ante* licensing negotiations within an SDO under the rule of reason. *See* 2007 Antitrust-IP Report 53-54.

II. Applying Section 2 of the Sherman Act in the Standards Context

Lenovo's Section 2 claim likewise contains serious defects. First, a successful Section 2 claim—under *Broadcom*[15] or any other theory—must identify exclusionary conduct that harms the competitive *process*. A plaintiff's belief that the defendant is charging unfair prices, standing alone, is not sufficient. Second, in most cases, patent owners should not face antitrust liability for disclosing too many patents (or too few) during the standards-development process. This disclosure process, which occurs before a standard is set, involves uncertainty, and imposing treble damages on patent owners for unintentionally misidentifying which of their patents will actually become standard-essential could harm competition and innovation.

A. Establishing a Section 2 Claim Based on Fraudulent Representations to a Standards-Development Organization

A Section 2 violation consists of two elements: "(1) possession of monopoly power and (2) maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 186 (3d Cir. 2005) (internal quotations marks and ellipsis omitted). The second element involves showing that the defendant engaged in some form of "exclusionary conduct." *Id.* at 187. "That is, [the defendant's conduct] must harm the competitive *process* and thereby harm consumers." *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam). Possessing monopoly power, or charging monopoly prices, does not on its own constitute exclusionary conduct. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-

[15] *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007).

market system."); *see also linkLine Commc'ns*, 555 U.S. at 447-48 ("Simply possessing monopoly power and charging monopoly prices does not violate § 2.").

In *Broadcom*, the Third Circuit held that "a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms," in the context of the standards-development process and "coupled with an SDO's reliance on that promise when including the technology in a standard," could constitute exclusionary conduct. 501 F.3d at 314. The *Broadcom* ruling has been controversial, and subsequent courts have interpreted it narrowly, emphasizing that such a claim turns on a patent owner using "deceit" during the standards-development process to "lure[] the [SDO] away from non-proprietary technology." *Rambus Inc. v. FTC*, 522 F.3d 456, 466 (D.C. Cir. 2008). It is this distortion of the competitive process, not the royalty rate later demanded by the patent owner, that implicates the antitrust laws. *See Broadcom*, 501 F.3d at 313-14 ("Deception in a consensus-driven private standard-setting environment harms the competitive process by obscuring the costs of including proprietary technology in a standard."); *see also Rambus*, 522 F.3d at 466; *Microsoft Mobile Inc. v. InterDigital, Inc.*, No. CV 15-723-RGA, 2016 WL 1464545, at *2 n.1 (D. Del. Apr. 13, 2016); Statement of Interest of the United States, *Continental Auto. Sys.*, *supra*, at 18.

Invoking *Broadcom* requires plaintiffs to clear a high threshold—as it should.[16] Because *Broadcom* claims involve exclusionary conduct based on deceit, they "sound[] in fraud" and "must meet the Rule 9(b) pleading standards." *Microsoft Mobile*, 2016 WL 1464545, at *4. Moreover, "[i]t would be especially difficult to lure a sophisticated [SDO]—like ETSI, TIA, and

[16] In the United States' view, Section 2 of the Sherman Act does not impose any liability on a patent owner that "deceives" an SDO regarding its intended licensing rates pursuant to a FRAND commitment, which can be enforced under contract law, *see* Statement of Interest of the United States, *Continental Auto. Sys.*, *supra*, but this statement recognizes that this Court must follow *Broadcom*.

ATIS—that imposes a FRAND commitment as part of its [intellectual property rights] policy into an uninformed choice about the effect of such a commitment because the [SDO] intentionally designed the commitment to be somewhat vague in nature, to require *ex post* negotiation, and to bind equally all patent holders who offer their technologies for inclusion in the standard." Statement of Interest of the United States, *Continental Auto. Sys.*, *supra*, at 18-19; *see also Broadcom*, 501 F.3d at 317 (acknowledging that antitrust plaintiffs "must . . . allege facts sufficient to raise a right to relief above the speculative level" to survive a motion to dismiss (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). Finally, as InterDigital points out, its offer to arbitrate the FRAND dispute, *see* Compl. ¶¶ 89-90; Mot. 12, appears to contradict Lenovo's allegations that InterDigital made "false and misleading" commitments to license its patents on FRAND terms.

These allegations do not clear the high bar for pursuing a *Broadcom* claim.

B. Establishing a Section 2 Claim for Declaring Too Many Patents as Essential

Many standards incorporate patented technology. Before a standard is adopted, SDOs typically require participants to declare whether they possess any technology that, if incorporated into the standard and practiced by others, would infringe their patents. *See, e.g.*, Lemley, *supra* note 4, at 1902. Thus, those who could become standard-essential-patent owners if a proposal is incorporated into the standard must disclose their potentially standard-essential patents *ex ante*.

This *ex ante* disclosure requirement creates challenges for patent owners. For example, ETSI's intellectual property disclosure policy requires members to "draw the attention of ETSI" to any intellectual property, such as patents or patent applications, that "*might be* ESSENTIAL if [a] proposal is adopted." ETSI Intellectual Property Rights Policy ¶ 4.1 (2019), https://www.etsi.org/images/files/IPR/etsi-ipr-policy.pdf (emphasis added). The precise scope of a standard, however, is often unclear while it is being developed and even immediately after it is finalized. *See* Robin Stitzing et al., *Over-Declaration of Standard Essential Patents and Determinants of Essentiality* (Sept. 4, 2018) (manuscript at 21), https://ssrn.com/abstract=2951617. Moreover, patent applications that seem essential, or not, might evolve during prosecution. *Id.* Thus, deciding whether to declare patents as essential to a standard requires navigating uncertainty.

In addition, some courts have held that a patent owner's *failure* to disclose patents during this process can support a monopolization claim under Section 2 of the Sherman Act. For example, in *Rambus*, the FTC alleged that Rambus did not "fully disclose[] its intellectual property" and thereby "deceived [the SDO] about the nature and scope of its patent interests while the organization standardized technologies covered by those interests." 522 F.3d at 438. According to the D.C. Circuit, this failure to disclose, paired with an allegation that the SDO would have adopted another technology if the participants had had the benefit of this disclosure, could give rise to liability under Section 2. *Id.* at 438-42; *see also Core Wireless Licensing S.A.R.L. v. Apple Inc.*, 899 F.3d 1356, 1368-69 (Fed. Cir. 2018) (holding that failure to disclose a patent during the standards-development process might render it unenforceable). Cases like *Rambus* encourage patent owners to navigate the uncertainty involved in disclosing potentially essential patents by "err[ing] on the side of disclosing." *See, e.g.*, Mark A. Lemley & Timothy Simcoe, *How Essential Are Standard-Essential Patents?*, 104 Cornell L. Rev. 607, 629 (2019) ("Companies might rationally err on the side of disclosing rather than concealing, perhaps because they might view it as giving them an advantage in later royalty negotiations but also because the failure to disclose SEPs might violate the antitrust laws."); 1 Herbert Hovenkamp et al., *IP and Antitrust* § 35.05, at 151 (3d ed. Supp. 2019) ("*IP and Antitrust*") (arguing that

Rambus encourages SDO members "to err on the side of overdisclosure rather than risk liability for failing to disclose a patent ultimately determined to be related to a proposed standard").

Lenovo alleges that InterDigital engaged in "misleading" conduct "by declaring thousands of its patents as essential to the Cellular Standards without regard to whether those patents [were] actually—or reasonably [might have] become—essential." Compl. ¶¶ 10, 111. According to Lenovo, InterDigital's declarations were false, misleading, and ineffective, and therefore give rise to liability under Section 2. *Id.* ¶ 111. Lenovo does not articulate, however, how this conduct would harm competition, as is required under Section 2.

Moreover, even where the competitive effect from misrepresentation is clearly articulated, courts have consistently limited Section 2 liability to circumstances in which a representation was intentionally deceptive. *See, e.g.*, *Broadcom*, 501 F.3d at 314; *see also Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 176 (1965) (holding that antitrust liability extends to procuring patents "by intentional fraud"); IP Guidelines § 6 (collecting cases where courts imposed liability for seeking to enforce invalid intellectual property rights). For this reason, any pleading putting forward a claim of over-declaration should, at a minimum, satisfy the rigorous standards of Fed. R. Civ. P. 9(b). Otherwise, patent owners would be forced, not unlike Goldilocks, to find a "just right" level of disclosure or face antitrust liability and treble damages if they disclose too few patents (under *Rambus*) or too many (under Lenovo's theory). That would be a difficult task. SDO members "tend to be engineers, not patent lawyers, and it is unreasonable to expect them to construe the claims of every patent that might cover a potential standard." *IP and Antitrust*, *supra*, § 35.05, at 151. Requiring them to do so, moreover, might discourage disclosure without any benefit to competition, *cf.* Lemley & Simcoe, *supra*, at 629 (questioning whether overdisclosure harms competition overall), undermine patent owners' incentives to participate in standards development, and reduce patent owners' incentives to innovate in the first place.

The United States emphasizes that imposing liability based on these sorts of allegations—without an adequate evidentiary basis—carries real risks for innovation and competition. This is the precise opposite of what the antitrust laws mean to encourage.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court reject the overbroad interpretations of the antitrust laws reflected in Lenovo's complaint. The United States otherwise takes no position on the merits of the pending motion.

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