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

THE UNITED STATES' REPLY TO PLAINTIFFS' RESPONSE TO THE UNITED STATES' STATEMENT OF INTEREST

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In light of the plaintiffs' response (D.I. 23) to the United States' statement of interest (D.I. 13), the United States replies as follows:

The plaintiffs' attempt to minimize the United States' legal arguments as merely "the views of the current leadership of the Antitrust Division" or the U.S. Department of Justice's "policy preferences," D.I. 23, at 1, should be seen for what it is: a distraction from the deficiencies in the complaint. Over the past several decades, the United States' approach to antitrust law and intellectual property has been consistent in its goal of preserving incentives for competition, innovation, and continued participation in standards-development activity. As the United States gains experience—and as case law, research, and technology advance over time—the United States' position naturally and understandably develops in how it seeks to ensure an appropriate balance between patent holders and standards implementers. *See* Letter from Makan Delrahim, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, to Michael A. Carrier and Timothy J. Muris 1 (May 18, 2018), https://src.bna.com/yYl (explaining that "the policies of the United States reflect our observations and understanding of, among other things, actual standard setting activity, actions of participants in [standards-development organizations] (including both patent holders and implementers), the current state of theoretical and empirical research into these matters, and, of course, the status of patent rights under the U.S. Constitution").

While some academics and industry groups have labeled the United States' policy a shift, *see* sources cited in D.I. 23, at 2,[1] in reality the arguments for greater antitrust intervention to

[1] Indeed, the plaintiffs selectively rely on a 10-year-old speech, D.I. 23 at 5, while conveniently failing to cite experts like Judge Douglas H. Ginsburg of the U.S. Court of Appeals for the D.C. Circuit and Judge Paul R. Michel (Ret.), formerly Chief Judge of the U.S. Court of Appeals for the Federal Circuit, who have applauded the United States' recent policy statements on antitrust and intellectual property. *See, e.g.*, Letter from Judges, Former Judges and Government

combat supposed anticompetitive behavior by patent holders acting unilaterally are a recent invention—and courts rightly have been skeptical of such claims. *See, e.g.*, *FTC v. Qualcomm, Inc.*, No. 19-16122, slip op. at 39 (9th Cir. Aug. 11, 2020), https://cdn.ca9.uscourts.gov/datastore/opinions/2020/08/11/19-16122.pdf ("[W]e note the persuasive policy arguments of several academics and practitioners with significant experience in [standards-development organizations], FRAND, and antitrust enforcement, who have expressed caution about using the antitrust laws to remedy what are essentially contractual disputes between private parties engaged in the pursuit of technological innovation."); *see also* D.I. 27 (Notice of Supplemental Authority).

As the statement of interest explains, D.I. 13, at 7, 11-12, 14, certain aspects of the plaintiffs' antitrust theories, if accepted, could create significant uncertainty for all those participating in standards development and interfere with procompetitive standards-development activity that provides many benefits to consumers. For purposes of this Court's analysis, however, the United States' policy position is beside the point; well-established legal precedent demonstrates that the complaint has serious flaws.

First, in attempting to downplay the United States' Section 1 arguments, the plaintiffs' response ignores the United States' extensive explanation of Section 1 case law, D.I. 13, at 7-10, and notably does not cite a single case applying Section 1 to the actions of a patent holder that allegedly breached its commitment to a standards-development organization to license its patents on fair, reasonable, and nondiscriminatory ("FRAND") terms. Instead, the plaintiffs cite

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Officials, Legal Academics, and Economists to Makan Delrahim, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice (Feb. 13, 2018), https://src.bna.com/yYl.

Microsoft Corp. v. Motorola, Inc., 696 F.3d 872 (9th Cir. 2012), a case involving *contract claims* over alleged FRAND breaches—not antitrust claims. D.I. 23, at 3.

In any event, Section 1 requires more than an allegation that a defendant unilaterally breached its FRAND commitment, *see* D.I. 13, at 10-14. *Cf.* D.I. 1 (Compl.) ¶¶ 104-105. Under *Bell Atlantic Corp. v. Twombly*, in order to survive a motion to dismiss, a Section 1 plaintiff must plead enough facts, taken as true, "to suggest that an agreement was made." 550 U.S. 544, 556 (2007). The agreement, moreover, must concern the conduct alleged to be anticompetitive. *See, e.g.*, *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984) (defining agreement or concerted action as "a conscious commitment to a common scheme designed to achieve an unlawful objective"). Here, however, as the statement of interest explains, the complaint concedes that the standards-development process was "consensus-driven," D.I. 1 ¶ 42, and does not claim that there was a conspiratorial agreement among the participants to adopt InterDigital's technology for reasons other than its technical merits.[2] *See* D.I. 13, at 12-13. The statement of interest is rooted in core Section 1 precedent and is not derived from "policy preferences for what the law should be," *contra* D.I. 23, at 1.

Second, the plaintiffs mischaracterize the United States' argument about their Section 2 claims as mere disagreement with *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007). *See* D.I. 23, at 1, 5. In fact, the United States "recognize[d] that this Court must follow *Broadcom*" and argued from the position that *Broadcom* is binding authority here. D.I. 13, at 16 n.16. To say that the United States' submission simply "reflect[s] the DOJ's hostility to

[2] The plaintiffs also contradictorily assert that InterDigital's conduct is not unilateral because "standards themselves represent agreements among competitors regarding which technologies will, and will not, be used," D.I. 23, at 4, when their complaint acknowledges that the cooperative efforts of standards-development bodies legitimately focus on which technologies will be essential to a particular standard, *see* D.I. 1 (Compl.) ¶ 42.

Broadcom," D.I. 23, at 5, misses that key premise. As the United States explained, *Broadcom* must be read in light of subsequent cases like *Rambus Inc. v. FTC*, 522 F.3d 456, 466 (D.C. Cir. 2008), and *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438, 454 (2009), as well as the settled understanding that the antitrust laws do not require "courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited," *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). D.I. 13, at 15-17. That argument is entirely consistent with *Broadcom*.

Third, to the extent that the plaintiffs argue that the United States' invocation of Fed. R. Civ. P. 9(b) is "misguided" or "disregard[s] inconvenient . . . law," D.I. 23, at 5, they point only to authority that undermines them. In *Microsoft Mobile, Inc. v. InterDigital, Inc.* (cited at D.I. 23, at 5), this Court held that a prior claim that InterDigital "entered into a FRAND commitment with the intent not to comply with that commitment" "sounds in fraud" and thus "must meet the Rule 9(b) pleading standards." No. CV 15-723-RGA, 2016 WL 1464545, at *4 (D. Del. Apr. 13, 2016); *see also Wi-LAN Inc. v. LG Elecs., Inc.*, 382 F. Supp. 3d 1012, 1022 (S.D. Cal. 2019) (same). Similarly, in *Apple Inc. v. Samsung Electronics Co.* (cited at D.I. 23, at 5-6), the court applied "the heightened pleading standards of Rule 9(b)" to "allegations of . . . false FRAND declarations." No. 11-CV-1846, 2012 WL 1672493, at *7 (N.D. Cal. May 14, 2012). The plaintiffs point to no authority that holds or even suggests otherwise, confirming that the Rule 9(b) pleading standard is the accepted standard in this context.

Fourth, the plaintiffs cannot convincingly argue that their *Broadcom*-based claims mirror those that other courts have found to satisfy Rule 9(b) because their complaint differs in key respects. Most notably, InterDigital's offer to arbitrate the FRAND dispute, *see* D.I. 1 (Compl.) ¶¶ 89-90, undercuts the allegation that InterDigital made "false and misleading" FRAND

commitments. *See* D.I. 13, at 17. None of the cases plaintiffs cite (D.I. 23, at 5-6) included allegations (or counterclaims) that the patent holder offered to allow a neutral decisionmaker to resolve the dispute over the appropriate FRAND rate.

On all other points in the plaintiffs' response (D.I. 23), the United States rests on the statement of interest (D.I. 13).

Respectfully submitted,

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