IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

CELERITY IP, LLC, ASUS TECHNOLOGY LICENSING INC., AND INNOVATIVE SONIC LTD., Plaintiffs, v. **AT&T CORP., AT&T MOBILITY LLC, AT&T MOBILITY II LLC, AND AT&T SERVICES, INC., CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS, T-MOBILE USA, INC. AND ERICSSON, INC.,** Defendants.	Civil Action No. 2:24-cv-721 **JURY TRIAL**

DEFENDANTS' OPPOSITION IN PART TO PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED PLEADINGS (DKT. NO. 84)

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Defendants AT&T Corp., AT&T Mobility LLC, AT&T Mobility II LLC, AT&T Services, Inc., Cellco Partnership d/b/a Verizon Wireless, and T-Mobile USA, Inc. (collectively, the "Carriers") and Ericsson, Inc. file this Opposition in Part to Plaintiffs' Motion for Leave to File Amended Pleadings (Dkt. No. 84).

INTRODUCTION

For six months, Plaintiffs have marshaled an assortment of antitrust, tortious interference, and unfair competition claims to collaterally attack Defendants' joint defense of patent infringement and licensing claims pending in this Court in a consolidated set of cases styled *ASUS Technology Licensing Inc., v. AT&T Inc.*, Case No. 2:23-cv-486-JRG-RSP (the "Infringement Case"). The Court recognized that Plaintiffs' collateral litigation "has the appearance that it's a tactical decision," Dkt. No. 82-1 at 26:17-25, and expressed concern that these collateral claims produce "a chilling effect on the way the Defendants would go about their joint defense in the [I]nfringement [C]ase." *Id*. at 4:18-22. The Court explained that pursuing the collateral attack would necessitate a stay of the Infringement Case. Rather than face a stay, Plaintiffs told the Court they would dismiss the claims against the Carriers with prejudice. But when Plaintiffs failed to follow through on their representations that they would dismiss their claims in this action with prejudice, the Court entered an order staying the Infringement Case. Infringement Case, Dkt. 328 ("[T]he Court explained the concern and gave Plaintiffs an opportunity to address a course of action. The effort did not ultimately bear fruit.").

In the wake of the stay order, Plaintiffs have finally agreed to dismiss with prejudice the claims collaterally attacking the joint defense of the Infringement Case, which dismissal the Carriers of course consent to, but they once again seek to amend their pleadings. Plaintiffs seek leave to add a sweeping claim seeking a global declaratory judgment that Plaintiffs have abided by, and

Defendants have breached, their respective contractual obligations to certain Standard Setting Organizations ("SSOs"). The Court should deny Plaintiffs' request to add that SSO claim to this case for one straightforward reason: there are SSO claims and counterclaims already pending in the Infringement Case, and the parties have been litigating them for more than a year. Allowing Plaintiffs to file a duplicative SSO claim in this case that arises out of the same failed licensing negotiations would violate the rule against claim splitting and thus be a futile amendment. It would also be prejudicial and unfair to Defendants to allow Plaintiffs to pursue duplicative collateral litigation.

At bottom, this duplicative claim arises from the same conduct at issue in the Infringement Case, and it belongs in that action. Though the deadline to amend pleadings without leave in the Infringement Case has passed, Defendants would not oppose Plaintiffs refiling the present motion in that case, provided the Court order an amendment to the Infringement Case schedule to ensure that all SSO claims are litigated together with the deeply intertwined willful patent infringement claims. This would streamline the case management of these claims, promote the efficient adjudication of the Infringement Case, avoid duplicative and wasteful litigation, and ensure that all of the parties' claims (including Ericsson's and AT&T's non-infringement counterclaims still pending in this action) would proceed together on a single track through discovery and the pretrial phase.

Accordingly, Defendants request that the Court enter an order dismissing with prejudice Counts 1 and 2 (claims for Violations of Section 1 and Section 2 of the Sherman Act), Counts 3-4 (tortious interference), and Count 5 (unfair competition) from Plaintiffs' First Amended Complaint and deny Plaintiffs' Motion for Leave to File a Second Amended Complaint. Defendants attach as Exhibit 1 a proposed order to that effect.

After the Court dismisses Plaintiffs' current claims with prejudice, the parties can discuss the manner in which Plaintiffs' new SSO claim and Ericsson's and AT&T's non-infringement counterclaims can be addressed in the Infringement Case, as well as an appropriate case schedule.

BACKGROUND

A. Plaintiffs file antitrust claims premised on the defense of the Infringement Case.

On July 17, 2024, Plaintiffs Celerity IP, LLC, Innovative Sonic Limited, and ASUS Technology Licensing Inc. filed this lawsuit against the Carriers and Ericsson in Dallas County Court, alleging violations of Texas unfair competition law. Those claims were premised on the Carriers' and Ericsson's joint defense of the infringement and licensing claims pending in the Infringement Case.

On August 15, 2024, AT&T and Ericsson filed answers and counterclaims in Dallas County Court and asserted claims for declaratory judgment of non-infringement of certain patents owned by Plaintiffs, including the eight patents asserted in the Infringement Case and four patents not asserted in the Infringement Case. AT&T, joined by Ericsson, removed the case to the Northern District of Texas, pursuant to 28 U.S.C. § 1454. T-Mobile and Verizon consented to the removal. The Carriers and Ericsson subsequently filed a Motion to Stay in the Infringement Case. That motion noted Plaintiffs' attempt to mount a collateral attack on Defendants' joint defense of the Infringement Case and the likelihood that Plaintiffs would seek to pry into privileged communications in this action. *See* Infringement Case Dkt No. 211.

After Judge Kinkeade transferred this action to the Eastern District of Texas, Plaintiffs amended their pleadings to add federal antitrust claims and drop the equivalent state-law claims. *See* Dkt. No. 34.

B. The Court explains that pursuing the antitrust claims would require a stay of the Infringement Case.

On November 19, 2024, the Court held a Case Management Conference and heard argument on whether it should stay the Infringement Case pending the resolution of this action. At the Conference, the Court expressed concern about this action proceeding in parallel with the Infringement Case, explaining that "the presence of the antitrust claims and the way in which they're being framed has a chilling effect on the way the Defendants would go about their joint defense of the infringement case." Dkt. No. 82-1 at 4:18-22. To resolve this inherent prejudice, the Court decided to "delay the patent infringement case unless there is some resolution of the concerns . . . on [Defendants'] ability to defend the patent infringement case unhindered . . . either by motion practice, summary judgment, trial, whatever it takes." *Id*. at 22:23-23:6. Plaintiffs quickly pivoted and volunteered to dismiss their claims against the Carriers to avoid a stay. *Id*. at 24:15-16 ("[M]y expectation is the client will just dismiss it with prejudice.").

But instead of dismissing the antitrust claims as they had represented they would, Plaintiffs proposed amended pleadings that repackaged the same problematic allegations that underpinned the federal antitrust claims, rebranding them as Texas antitrust and tortious-interference claims. *See* Dkt. No. 79-2 ¶¶ 36-57. After reviewing Plaintiffs' proposal and Defendants' oppositions, the Court stayed the Infringement Case. It found "the chilling effect of the Antitrust Case on Defendants' joint defense of the Infringement Case is too prejudicial to allow the Infringement Case to proceed as scheduled." Infringement Case, Dkt. No. 328, at 5. The Court noted its surprise that "despite having more than adequate opportunity to do so, Plaintiffs' Counsel did not indicate at the hearing that Plaintiffs planned to reassert any collateral claims against the Carriers (whether couched as antitrust claims or as now pleaded—tortious interference claims)." *Id*.

C. Plaintiffs propose yet another amendment to circumvent the stay.

Within hours of the Court staying the Infringement Case, Plaintiffs pivoted again. Rather than simply dismiss with prejudice their problematic antitrust and tortious-interference claims, Plaintiffs filed the present Motion for Leave to File Amended Pleadings. Dkt. No. 84. The proposed Second Amended Complaint *adds* a new claim against the Carriers and Ericsson for "Declaratory Judgment that the Plaintiffs Have Complied with SSO Obligations and that the Carriers and Ericsson Have Not." Dkt. No. 84-1, at 8.

This new claim – which Plaintiffs never raised at the scheduling conference or otherwise – aims at the parties' compliance with or breach of their respective SSO contractual obligations in connection with licensing negotiations. For instance, the proposed claim asserts that "the Carriers have not negotiated in good faith," and have "failed to reciprocate the Plaintiffs' good faith efforts." *Id*. ¶ 37. Plaintiffs further assert that "the Service Providers have refused to license Plaintiffs' patents on the FRAND terms the Plaintiffs have offered." *Id*. ¶ 38. These so-called "SSO" claims cover not only the ETSI IPR Policy but the "IEC, ISO, ITU Guidelines for Implementation of the Common Patent Policy." *Id*. ¶¶ 40-41. The new SSO claim overlaps significantly with claims Plaintiffs previously asserted against the Carriers in the Infringement Case. *Compare* Dkt. No. 84-1 *with* Infringement Case Dkt. No. 21.

ARGUMENT

A. Defendants do not oppose Plaintiffs dismissing their antitrust, tortious-interference, and unfair-competition claims with prejudice.

As a threshold matter, Defendants do not oppose Plaintiffs' requests to "dismiss with prejudice Counts 1 and 2 (claims for Violations of Section 1 and Section 2 of the Sherman Act), Counts 3-4 (tortious interference), and Count 5 (unfair competition)." Dkt. No. 84 at 1. But Plaintiffs' Proposed Order, Dkt. No. 84-2, does not accomplish that goal. It does not explicitly dismiss the

antitrust, tortious-interference, or unfair-competition claims with prejudice. Without an order to that effect, Plaintiffs may try to simply re-file these claims in another court. To address this issue, Defendants request that the Court enter the Proposed Order that accompanies this opposition (attached as Exhibit 1) and dismisses the antitrust, tortious-interference, and unfair-competition claims with prejudice alongside any order the Court enters to resolve the pending Motion.

B. Plaintiffs' proposed SSO claim is duplicative of the SSO claims in the Infringement Case.

Plaintiffs' Motion for Leave should be denied because the proposed Second Amended Complaint violates the rule against claim splitting. "The rule against claim splitting prohibits a party or parties in privity from simultaneously prosecuting multiple suits involving the same subject matter against the same defendants." *General Land Off. v. Biden*, 71 F.4th 264, 269-70 (5th Cir. 2023). This rule is based on principles of *res judicata* and "protect[s] the defendant from being harassed by repetitive actions based on the same claim." *Id*. at 270 (quoting *In re Super Van, Inc*., 92 F.3d 366, 371 (5th Cir. 1996). To determine whether a challenged claim violates the rule against claim splitting when compared to another pending claim, courts evaluate: (1) whether the parties are the same or in privity; and (2) whether the same claim or cause of action is involved in both suits. *Armadillo Hotel Group, LLC v. Harris*, 84 F.4th 623, 628 (5th Cir. 2023). Courts apply a transactional test to evaluate whether two claims are the same. "[T]he critical issue is whether the two actions were based on the 'same nucleus of operative facts,'" and "[courts] look to the factual predicate of the claims asserted, not the legal theories upon which the plaintiff relies." *Eubanks v. FDIC*, 977 F.2d 166, 171 (5th Cir. 1992) (citation omitted).

With respect to the first prong of the analysis, there can be no dispute that the parties to this case are all parties to the Infringement Case. Specifically, Plaintiff Celerity IP, LLC is a Plaintiff and Counterclaim-Defendant in each of the eight actions consolidated in the Infringement

Case.[1] Innovative Sonic Limited is a Plaintiff and Counterclaim-Defendant in the four consolidated cases concerning patents from its portfolio.[2] And ASUS Technology Licensing Inc. is likewise a Plaintiff and Counterclaim-Defendant in the four consolidated cases regarding its portfolio.[3] Ericsson is a Defendant in this case and a Defendant-Intervenor and Counterclaim Plaintiff in all eight consolidated cases. Each of the Carriers is a Defendant and Counterclaim-Plaintiff in one case against Celerity IP, LLC and Innovative Sonic Limited, and one case against Celerity IP, LLC and ASUS Technology Licensing Inc.[4]

As for the second prong, the SSO claim for broad declaratory relief in the Proposed Second Amended Complaint is duplicative of Plaintiffs' and Defendants' SSO claims that are already pending in the Infringement Case. Plaintiffs' Proposed Second Amended Complaint seeks declaratory relief that "Plaintiffs have complied with SSO obligations and that the Service Providers and Ericsson have not." Dkt. No. 84-2 at 8. In the Infringement Case, Plaintiffs seek a nearly identical "declaratory judgment that Plaintiffs have complied with ETSI obligations and competition law and that the Defendants [i.e., the Service Providers] have not." Infringement Case, Dkt. No. 69 at 34 (First Amended Complaint against AT&T).[5] In its Amended Answers in Intervention in the Infringement Case, Ericsson asserts counterclaims against Plaintiffs for breach of the ETSI IPR Policy's requirement that parties negotiate licenses in good faith. *See* Infringement Case, Dkt. No.

[1] Infringement Case, Dkt. Nos. 21-23, 34-36; Case No. 2:23-cv-490 (lead case), Dkt. Nos. 19-21, 29-31.

[2] Case No. 2:23-cv-490 (lead case), Dkt. Nos. 19-21, 29-31.

[3] Infringement Case, Dkt. Nos. 21-23, 34-36.

[4] Infringement Case, Dkt. Nos. 21-23, 34-36; Case No. 2:23-cv-490 (lead case), Dkt. Nos. 19-21, 29-31.

[5] Plaintiffs have identical claims against T-Mobile and Verizon Wireless. *See Id*.

217 at 33-34. Thus, Plaintiffs' proposed SSO claim in this action encompasses every SSO claim that the Parties filed in the Infringement Case.

Plaintiffs' proposed SSO claim in this case also shares the same factual predicates as the SSO claims in the Infringement Case. The proposed SSO claim in this action arises from contractual obligations under the ETSI IPR Policy, just like the SSO claims in the Infringement Case. *Compare* Dkt. No. 84-1 *with* Infringement Case Dkt. No. 21. In both cases, the alleged breach and compliance with those policies arises from Plaintiffs' licensing negotiations with Defendants regarding patents and patent portfolios purportedly essential to the 4G and 5G standards. *Compare* Dkt. No. 84-1 *with* Infringement Case Dkt. No. 21. The table below summarizes the significant overlap between the proposed SSO claim in this case and those pending in the Infringement Case.

SSO Allegations in this Case (Dkt. No. 84-2)	**SSO Allegations in the Infringement Case (Dkt. No. 69)**[6]
"In an abundance of caution and to ensure their compliance with ETSI's IPR Policy, the Plaintiffs informed the Service Providers that they were prepared to grant Defendants a license, on FRAND terms, to the Plaintiffs' patents." ¶ 33.	"In an abundance of caution and to ensure their compliance with ETSI's IPR Policy, the Plaintiffs informed AT&T that they were prepared to grant AT&T a license, on FRAND terms, to the Plaintiffs' patents that relate to AT&T's infringing Wireless Networks." ¶ 119.
"Not later than August 25, 2022, the Plaintiffs sent the Service Providers, in their individual capacities, correspondence initiating the Plaintiff's good faith efforts to license their patents to the Service Providers on FRAND terms." ¶ 34.	"Not later than August 25, 2022, the Plaintiffs sent AT&T correspondence initiating the Plaintiff's good faith efforts to license their patents to AT&T on FRAND terms." ¶ 120.
"Over the following months, the Plaintiffs' representatives routinely corresponded with	"Over the following months, the Plaintiffs' representatives routinely corresponded

[6] These representative allegations are taken from Plaintiffs' First Amended Complaint against AT&T in the Infringement Case. Virtually identical allegations are found in Plaintiffs' First Amended Complaint against Verizon Wireless (Dkt. No. 23) and First Amended Complaint against T-Mobile (Dkt. No. 22).

SSO Allegations in this Case (Dkt. No. 84-2)	SSO Allegations in the Infringement Case (Dkt. No. 69)[6]
the Service Providers' representatives on several occasions. The Plaintiffs' representatives provided, in good faith, materials concerning their patents and technical details evidencing the use of their patents, including the Patent-In-Suit." ¶ 35.	with AT&T representatives on several occasions. The Plaintiffs' representatives provided, in good faith, materials concerning their patents and technical details evidencing the use of their patents, including the Patents-In-Suit." ¶ 121.
"The Plaintiffs have provided the Service Providers multiple opportunities to license the Plaintiffs' patents on FRAND terms. Despite this, the Service Providers have not reciprocated Plaintiffs' good faith efforts. The Service Providers have instead declined to take a FRAND license, while continuing to operate infringing Wireless Networks without a license to the Plaintiffs' patents." ¶ 36.	"The Plaintiffs have provided AT&T multiple opportunities to license the Plaintiffs' patents on FRAND terms. Despite this, AT&T has not reciprocated Plaintiffs' good faith efforts. AT&T has instead declined to take a FRAND license, while continuing to operate the infringing AT&T Wireless Networks without a license to the Plaintiffs' patents." ¶ 122.
"The parties' license negotiations have been unsuccessful because the Service Providers have not negotiated in good faith. The Service Providers have failed to reciprocate the Plaintiffs' good faith efforts." ¶ 37.	"The parties' FRAND license negotiations have been unsuccessful because AT&T has not negotiated in good faith. AT&T has failed to reciprocate the Plaintiffs' good faith efforts." ¶ 123.

As this chart shows, Plaintiffs assert the same factual allegations against the Carriers in the Infringement Case that they propose to assert in the Second Amended Complaint in this action. Given the overlap of parties and the factual allegations between the proposed SSO claim in this case and the SSO claims pending in the Infringement Case, Plaintiffs' proposed amendment runs afoul of the rule against claim splitting.

Plaintiffs argue that the proposed amendment imposes no undue prejudice "because these claims do not expand the scope of the dispute between the parties." Mot. at 3.[7] But the fact that

[7] This is factually inaccurate. The existing SSO claims in the Infringement Case center on the ETSI IPR Policy. Plaintiffs' proposed SSO claim also posits breaches of the ITU Guidelines for Implementation of the Common Patent Policy Obligations, which apply to patents that are essential to certain video decoding standards (*e.g.*, H.265).

the new SSO claim encompasses the parties' dispute—which is already being litigated in another action—is precisely why there is undue prejudice. Forcing Defendants to litigate what Plaintiffs concede is essentially the same dispute in two actions is inherently prejudicial, inefficient, and could lead to the very sort of inconsistent outcomes that the rule against claim splitting seeks to avoid. *See Hlavaty v. Integrated Prod. Servs., Inc.*, No. 5:16-CV-949-DAE, 2017 WL 10699610, at *2 (W.D. Tex. Jan. 27, 2017) ("Claim splitting and res judicata both promote judicial economy and shield parties from 'vexatious concurrent or duplicative litigation.'") (quoting *Katz v. Gerardi*, 655 F.3d 1212 1218 (10th Cir. 2011)).

C. Plaintiffs should have filed the new SSO claim in the Infringement Case.

Given that the Parties are already litigating SSO claims in the Infringement Case, Plaintiffs should have filed any SSO-related claims in that action. Though the deadline to amend pleadings in the Infringement Case has passed, should Plaintiffs file a motion in the Infringement Case to add this claim (when and if the stay is lifted), Defendants would not oppose that amendment provided the Court amends the Infringement Case schedule to ensure that all SSO claims are litigated in parallel with the current claims. *See* Infringement Case, Dkt. No. 52 at 5 (setting November 20, 2024 as deadline to amend pleadings without leave). Defendants wish to put an end to this sideshow and focus their efforts on the Infringement Case.

Directing all of the SSO claims to proceed in the Infringement Case would ensure an efficient discovery and pretrial process. This is particularly true given that the SSO claims share significant factual overlap with the willfulness and damages issues in the Infringement Case. For instance, the dispute regarding whether Defendants have acted willfully and whether the parties have negotiated in good faith necessarily entails a close examination of the parties' pre- and post-suit licensing communications, as well as a careful assessment of the merits of the infringement claims and the reasonableness of Defendants' non-infringement and validity positions. A damages

analysis – if any – would similarly involve the very same licensing issues that underpin the existing and proposed SSO claims. Given the thicket of intertwined facts and claims that accompany these sorts of licensing disputes, this Court routinely tries infringement, willfulness, and SSO issues together. *See, e.g., G+ Comms. LLC v. Samsung Elecs. Co., Ltd.*, Case No. 2:22-cv-00078-JRG, Dkt. No. 584 (E.D. Tex. Jan. 26, 2024).

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court enter the Defendants' Proposed Order, attached as Exhibit 1, dismissing with prejudice Plaintiffs' antitrust, tortious-interference, and unfair-competition claims from the First Amended Complaint. Defendants also respectfully request that the Court deny Plaintiffs' Motion for Leave to File Amended Pleadings. Defendants would not oppose Plaintiffs re-filing their motion in the Infringement Case, provided the Court makes common sense adjustments to the Infringement Case schedule.

Dated: December 20, 2024

Respectfully submitted,

MCKOOL SMITH P.C.

/s/ Nicholas Matthews
Nicholas Mathews
TX Bar No. 24085457
nmathews@McKoolSmith.com
Alan S. Loewinsohn
Bar No. 12481600 aloe-winsohn@mckoolsmith.com
MCKOOL SMITH, P.C.
300 Crescent Court Suite 1500
Dallas, Texas 75201
Telephone: +1 214 978 4000
Telecopier: +1 214 978 4044

James H. Smith
NY Bar No. 4610853
jsmith@mckoolsmith.com
John Briody
NY Bar No. 4231270
jbriody@mckoolsmith.com
Eliza Beeney
NY Bar No. 5518972
ebeeney@mckoolsmith.com
MCKOOL SMITH, P.C.
1301 Avenue of the Americas, 32nd Floor
New York, New York 10019
Telephone: +1 212 402 9400
Facsimile: +1 212 402 9444

Attorneys for Defendants Cellco Partnership d/b/a Verizon Wireless, T-Mobile USA, Inc., and Ericsson Inc.

O'MELVENY & MYERS LLP

/s/ Timothy S. Durst
Timothy S. Durst
Bar No. 00786924
tdurst@omm.com
Scott Drake
Bar No. 24026812
sdrake@omm.com
O'MELVENY & MYERS LLP
2801 North Harwood Street
Suite 1600
Dallas, Texas 75201-2692
Telephone: +1 972 360 1900
Facsimile: +1 972 360 1901

Ian Simmons (*pro hac vice*)
DC Bar No. 439645
isimmons@omm.com
Julia Schiller (*pro hac vice*)
DC Bar No. 986369
jschiller@omm.com
Brian P. Quinn (*pro hac vice*)
DC Bar No. 1048323
bquinn@omm.com
O'MELVENY & MYERS LLP
1625 Eye Street, Northwest
Washington, District of Columbia 20006
Telephone: +1 202 383 5300
Facsimile: +1 202 383 5414

Attorneys for Defendants AT&T Corp., AT&T Mobility LLC, AT&T Mobility II LLC, and AT&T Services, Inc.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

/s/ Elsbeth Bennett

Elsbeth Bennett (*pro hac vice*)
D.C. Bar No. 1021393
ebennett@chsh.com
David Gelfand
D.C. Bar No. 416596
dgelfand@cgsh.com
Daniel P. Culley (*pro hac vice*)
D.C. Bar No. 988557
dculley@cgsh.com
CLEARY GOTTLIEB STEEN & HAMILTON LLP
2112 Pennsylvania Avenue, Northwest
Washington, District of Columbia 20037
Telephone: +1 202 974 1500
Facsimile: +1 202 974 1999

Attorneys for Defendant T-Mobile USA, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been served on all counsel of record via the Court's ECF system on December 20, 2024.

/s/ *Nicholas Mathews*
Nicholas Mathews