IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SAP America, Inc.	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 24-cv-756-GBW**
	§	
Valtrus Innovations Ltd., Key Patent Innovations Ltd., and Patent Platform Services, LLC	§	**JURY TRIAL DEMANDED**
	§	**FILED UNDER SEAL**
Defendants.	§	

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION, PERSONAL JURISDICTION, UNDER THE FIRST-TO-FILE RULE, AND FOR FAILURE TO STATE A CLAIM[1]

Dated: October 9, 2024

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[1] Defendants Valtrus Innovations Ltd. and Key Patent Innovations, Ltd. moved under the first-to-file rule and under Rule 12(b)(6) only in the alternative, in the event the Court denies their motion with respect to the lack of subject-matter jurisdiction under Rule 12(b)(1) and personal jurisdiction under Rule 12(b)(2).

TABLE OF CONTENTS

Page

I. Introduction 1

II. The Court Lacks Subject-Matter Jurisdiction Over Counts IV-V and VII-IX and Should Decline Jurisdiction or Transfer as to the Remaining Counts 2

III. SAP's Opposition Brief Confirms that the Court Lacks Personal Jurisdiction Over KPI and Valtrus (All Counts) 4

A. SAP's Arguments About Rule 4(k)(2) Are Grounded in Misstatements of Black-Letter Law and Otherwise Lack Factual Support 4

B. The Court Lacks Personal Jurisdiction Over KPI and Valtrus 6

IV. SAP's DCFA and Related Claims (Counts I-III) Should be Dismissed 10

VALTRUS EXHIBIT 2017
SAP v. VALTRUS IPR2025-00416
PAGE 2 of 15

TABLE OF AUTHORITIES

Page(s)

Federal Cases

ACCO Brands USA LLC v. Performance Designed Prods. LLC,
2024 WL 181545 (D. Del. Jan. 17, 2024).....6

Blair v. Infineon Techs. AG,
720 F. Supp. 2d 462 (D. Del. 2010).....10

Cardinal Chem. Co. v. Morton Int'l, Inc.,
508 U.S. 83 (1993).....2

Daimler AG v. Bauman,
571 U.S. 117 (2014).....5, 6, 7

Grupo Dataflux v. Atlas Glob. Grp., L.P.,
541 U.S. 567 (2004).....2

JetBlue Airways Corp. v. Helferich Pat. Licensing, LLC,
960 F. Supp. 2d 383 (E.D.N.Y. 2013).....7

Morris v. Off. of Compliance,
608 F.3d 1344 (Fed. Cir. 2010).....5

Pontchartrain Partners, L.L.C. v. Tierra de Los Lagos, L.L.C.,
48 F.4th 603 (5th Cir. 2022).....3

Prasco, LLC v. Medicis Pharm. Corp.,
537 F.3d 1329 (Fed. Cir. 2008).....2, 3

In re Stingray IP Sols., LLC,
56 F.4th 1379 (Fed. Cir. 2023).....4

Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com de Equip. Medico,
563 F.3d 1285 (Fed. Cir. 2009).....5

Touchcom, Inc. v. Bereskin & Parr,
574 F.3d 1403 (Fed. Cir. 2009).....5

Trachtenberg v. Marriott Int'l, Inc.,
2021 WL 5299823 (D. Del. Nov. 15, 2021).....8

Walden v. Fiore,
571 U.S. 277 (2014).....5

VALTRUS EXHIBIT 2017
SAP v. VALTRUS IPR2025-00416
PAGE 3 of 15

State Cases

AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.,
871 A.2d 428 (Del. 2005) 7

CLP Toxicology, Inc. v. Casla Bio Holdings,
2020 WL 3564622 (Del. Ch. June 29, 2020).....7, 8

Hedger v. Medline Indus., Inc.,
2017 WL 396770 (Del. Super. Ct. Jan. 27, 2017) 8, 9

Xactus, LLC v. Sike,
2024 WL 3947319 (Del. Ch. Aug. 27, 2024) 7

Rules

Fed. R. Civ. P. 4(e)(1).....5

Fed. R. Civ. P. 4(f)(2)(A).....5

Fed. R. Civ. P. 4(g) 5

Fed. R. Civ. P. 4(k)(1)(A).....5

Fed. R. Civ. P. 4(k)(2).....4, 5, 6

VALTRUS EXHIBIT 2017
SAP v. VALTRUS IPR2025-00416
PAGE 4 of 15

I. Introduction

Subject Matter Jurisdiction and Transfer: SAP acknowledges that the parties have not discussed the patents at issue in Counts IV-V and VII-IX ("Non-Overlapping Patents") since January. And Valtrus sued SAP on different patents in the Eastern District of Texas that the parties have been litigating for the last eight months, without threat or mention of the Non-Overlapping Patents. SAP's only argument that there is a controversy of "sufficient immediacy and reality to warrant" the requested relief is that, in response to a post-complaint request, Valtrus declined to give an unbounded covenant not to sue for the life of the patents. That is wrong twice over: It is black-letter law that jurisdiction must have existed at the time the complaint was filed and, further, that such a refusal alone is insufficient to create an actual controversy.

Moreover, Valtrus is the undisputed first filer in an ongoing case between the parties. SAP points to a pending dispute about standing, but that is for the Texas court to resolve. Regardless, KPI and Valtrus have already cured any purported issue by filing a protective complaint, such that the first-filed court can keep its existing schedule without disruption. SAP is the true defendant and cannot flee to its preferred forum simply because it moved to dismiss the first-filed case.

Personal Jurisdiction: SAP took broad jurisdictional discovery yet offers no rebuttal to the facts in the Quinlan and Kumar declarations: Neither Valtrus nor KPI has any presence in Delaware whatsoever, and neither has ever done business in Delaware in any capacity. Nor have they ever licensed (or even attempted to license) a Valtrus patent to a Delaware headquartered company. Instead, SAP weaves a tall tale, hinged on false "facts," about how the defendants are all agents and alter egos of each other. This is both false and legally irrelevant. PPS is simply not an alter ego of KPI and Valtrus—it has separate employees, offices, and board meetings. It is irrelevant whether PPS is an "agent" because, under Delaware law, contracting with an entity that is incorporated within Delaware does not support a finding of jurisdiction.

Delaware State Law Claims: SAP asserts that "a cursory reading of the Complaint demonstrates" that some alleged wrongful act occurred in Delaware, as is required under black-letter DCFA law. But SAP tellingly fails to quote any allegation in the Complaint or submit a declaration, and for good reason: Nothing happened in Delaware. SAP has no cause of action.

II. The Court Lacks Subject-Matter Jurisdiction Over Counts IV-V and VII-IX and Should Decline Jurisdiction or Transfer as to the Remaining Counts

SAP, as the party invoking the Court's jurisdiction, "has the burden of establishing the existence of an actual case or controversy." *E.g.*, *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 95 (1993). To do so, it must demonstrate a "*real and immediate* injury or threat of future injury." *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1339 (Fed. Cir. 2008) (emphasis in original). A "speculative fear of future harm" cannot satisfy that "objective standard." *Id.* SAP does not dispute that the parties have not discussed the Non-Overlapping Patents since January, months before it filed this case in June. Nor does it dispute that Valtrus filed suit against SAP in Texas without asserting or mentioning those patents ever again. Any lingering fear that Valtrus will sue on those patents is pure speculation, not a "real and immediate injury" or threat of injury. It is no surprise that SAP does not cite a single case finding jurisdiction in similar circumstances.

SAP's only other argument is that its litigation counsel sent an email in the middle of briefing on this motion asking for a broad covenant not to sue for the life of the patents that would have covered any current or future products. But, SAP's post-complaint attempt to manufacture jurisdiction is irrelevant. A declaratory judgment plaintiff, like any other, must establish jurisdiction at the time it files its complaint. *See, e.g.*, *Grupo Dataflux v. Atlas Glob. Grp., L.P.,* 541 U.S. 567, 570-71 (2004). "[L]ater events may not create jurisdiction where none existed at the time of filing . . . ." *Prasco*, 537 F.3d at 1337 (attribution omitted).

Even setting aside the timing, SAP's singular fact falls far short. SAP relies on *Prasco* for

the proposition that Valtrus's "refusal to agree to a covenant not to sue is an important consideration in this analysis." D.I. 23 at 9-10. But what SAP calls "important," the Federal Circuit in fact called "relevant" but "not sufficient." *Prasco*, 537 F.3d at 1341. *Prasco* held that the district court lacked jurisdiction despite the patentee's refusal to grant a covenant, explaining that "[a] patentee has no obligation to . . . make a definitive determination, at the time and place of the competitors' choosing, that it will never bring an infringement suit." *Id.* The "failure to sign a covenant not to sue" can of course be considered "in evaluating the totality of the circumstances," but without more, it is "not sufficient to create an actual controversy." *Id.* Because SAP points to no other facts supporting declaratory judgment jurisdiction, Counts IV-V and VII-IX should be dismissed.

More broadly, this dispute should not be in Delaware. SAP is the true defendant. It is an accused patent infringer; the fact that it threw in some fanciful state law claims does not change that. Valtrus indisputably filed first in Texas, and the parties are actively litigating there, with *Markman* and trial fast approaching. SAP raised a flawed standing argument in the first-filed case (based on long-since overruled law) and now thinks it gets to preemptively file a new suit in the forum of its choice while that motion plays out. That is not what the Declaratory Judgment Act is for. *See Pontchartrain Partners, L.L.C. v. Tierra de Los Lagos, L.L.C.*, 48 F.4th 603, 606 (5th Cir. 2022) (DJ plaintiff's "'race to the courthouse' represented a misuse of the Declaratory Judgment Act that attempted to preempt the proper plaintiff's forum choice.").

In any event, the outcome of the standing dispute should not determine venue. Rather, it is undisputedly fixable—SAP argues that Valtrus's parent company, KPI, should have also been a plaintiff. And any purported problem has already been fixed; KPI and Valtrus have re-filed in Texas as a protective measure, such that even if the Texas court agrees with SAP's standing

argument, it can pick up the protective complaint and adjudicate it on the same schedule. SAP's run-to-the-courthouse approach—it filed this complaint before moving to dismiss in Texas and even before dismissing its prior lawsuit in this Court—is nothing more than bad faith misuse of the Declaratory Judgment Act. The Court should not condone it.

III. SAP's Opposition Brief Confirms that the Court Lacks Personal Jurisdiction Over KPI and Valtrus (All Counts)

Despite significant discovery, SAP offers no rebuttal to Defendants' jurisdictional evidence, including the following facts: Valtrus and KPI are Irish entities that are not registered to do business in Delaware; have no employees, offices, board members, assets, or other connections in or to Delaware; have never granted a license of any Valtrus patent to a Delaware-headquartered company; and have never set foot in Delaware for a business reason. D.I. 16 ¶ 6. SAP's responses are not persuasive. Its "agent" arguments are legally irrelevant, and its convoluted "alter ego" argument is belied by the facts.

SAP alternatively relies on Civil Rule 4(k)(2), arguing that Valtrus and KPI cannot simply consent to personal jurisdiction in Texas. Fair enough, but Valtrus and KPI did far more than that. It is now undisputed that Valtrus and KPI have actively enforced and licensed the Valtrus portfolio in Texas and via Texas-based licensing executives. That is not mere post-complaint "consent"; these are specific facts with uncontested evidentiary support that subject Valtrus and KPI to jurisdiction in Texas, making Rule 4(k)(2) inapplicable.

A. SAP's Arguments About Rule 4(k)(2) Are Grounded in Misstatements of Black-Letter Law and Otherwise Lack Factual Support

SAP misunderstands Rule 4(k)(2)'s "negation requirement"—the requirement that a "defendant is not subject to jurisdiction in any state's courts of general jurisdiction." *In re Stingray IP Sols., LLC*, 56 F.4th 1379, 1384 (Fed. Cir. 2023) (quoting Fed. R. Civ. P. 4(k)(2)(A)). Specifically, SAP argues that Valtrus and KPI failed to justify the inapplicability of Rule 4(k)(2)

because they relied on specific personal jurisdiction in Texas "and not general jurisdiction there." D.I. 23 at 12-14. But general personal jurisdiction is not the same legal concept as being "subject to jurisdiction in any state's courts of general jurisdiction." The first concept concerns whether a defendant is "at home" in a particular forum such that it can be sued there "on any and all claims." *See, e.g.*, *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014); *id.* at 126-27 (explaining the distinction between general and specific personal jurisdiction). The second concept, by contrast, refers to a kind of court: one of general, rather than limited, jurisdiction. *See, e.g.*, *Morris v. Off. of Compliance*, 608 F.3d 1344, 1346 (Fed. Cir. 2010) (distinguishing federal courts' "limited jurisdiction" from that of "state trial courts of general jurisdiction") (attribution omitted).

Rule 4(k)(2)—like Rule 4's four other references to the concept, *see* Fed. R. Civ. P. 4(e)(1), (f)(2)(A), (g), (k)(1)(A)—considers whether that type of court could exercise personal jurisdiction over the defendant, whether general or specific. The negation requirement asks simply where else "the plaintiff could have brought suit." *Touchcom, Inc. v. Bereskin & Parr*, 574 F.3d 1403, 1415 (Fed. Cir. 2009); *see id.* at 1410, 1415 (holding that Rule 4(k)(2) applied because the defendant was subject to neither general nor specific personal jurisdiction in Virginia's courts of general jurisdiction); *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com de Equip. Medico*, 563 F.3d 1285, 1296 (Fed. Cir. 2009) (Rule 4(k)(2) "serves as a federal long-arm statute").[2] It is irrelevant whether Valtrus and KPI are subject to general jurisdiction in Texas; so long as this suit could have been brought there, Rule 4(k)(2) does not apply.

SAP alternatively argues that Rule 4(k)(2) is satisfied because Valtrus and KPI cannot rely

[2] *See also Walden v. Fiore*, 571 U.S. 277, 283-84 (2014) (considering, in a specific jurisdiction case, whether the defendant was subject to jurisdiction in a Nevada "court of general jurisdiction" (quoting Fed. R. Civ. P. 4(k)(1)(A)). SAP's reading would effectively make the negation requirement meaningless because almost no foreign entity is subject to general personal jurisdiction (*i.e.*, "at home") in a U.S. state.

on "self-serving, ex-post consent to jurisdiction in Texas." D.I. 23 at 13. This is beside the point because it is not what Valtrus and KPI did here. Valtrus and KPI provided actual evidence, predating the complaint, demonstrating that they are subject to specific personal jurisdiction in Texas and thus that this suit could have been brought there. Specifically, Ms. Quinlan explained that before this case was filed, Valtrus brought suit in the Eastern District of Texas on various patents, including against SAP on the overlapping patents at issue in this case. D.I. 16 ¶ 7.[3]

Ms. Kumar explained that she had "primary responsibility for handling, in conjunction with PPS's Valtrus team, all aspects of Valtrus's licensing discussions with SAP." D.I. 17 ¶ 6. She continued, "I handled most of those discussions from Texas," where PPS has its principal place of business. *Id.* SAP does not even acknowledge Ms. Kumar's evidence, let alone demonstrate that Valtrus and KPI are not subject to personal jurisdiction in Texas. Quite the opposite: SAP invokes Valtrus and KPI's contacts with Texas as evidence of their contacts with the United States. D.I. 23 at 15. SAP has thus failed to satisfy Rule 4(k)(2)'s negation requirement.

B. The Court Lacks Personal Jurisdiction Over KPI and Valtrus

1. SAP first argues that Valtrus and KPI are subject to general personal jurisdiction in Delaware because they received "substantial revenue from services offered to residents of Delaware." D.I. 23 at 16. That is not the law. Absent "exceptional" circumstances, general jurisdiction is available over a corporation only where it "is fairly regarded as at home." *Daimler*, 571 U.S. at 137. Absent exceptional circumstances, that paradigmatically means its place of

[3] Defendants explained in their Opening Brief that courts in Texas have jurisdiction over Valtrus and KPI because both have engaged in "enforcement activities" in that state, citing *Avocent Huntsville Corp. v. Aten Int'l Co.,* 552 F.3d 1324 (Fed. Cir. 2008) and *ACCO Brands USA LLC v. Performance Designed Prods. LLC,* 2024 WL 181545 (D. Del. Jan. 17, 2024). D.I. 14, p. 19. SAP's only responsive argument is that these cases concerned "specific" personal jurisdiction, not "general" personal jurisdiction. As discussed above, SAP is wrong that applicability of Rule 4(k)(2) hinges on "general" personal jurisdiction.

incorporation and principal place of business. *Id.* "Substantial, continuous, and systematic course of business" is not enough. *Id.* at 137-38 (attribution omitted). Nor can Delaware's long-arm statute make it so. *Contra* D.I. 23 at 16. The constraints on general jurisdiction are "imposed by federal due process." *Daimler*, 571 U.S. at 125 (applying California's long-arm statute).[4]

For that matter, SAP's asserted basis for general jurisdiction would not even suffice for specific jurisdiction. It is undisputed that Valtrus and KPI have never sought to license Valtrus's patents to a Delaware-headquartered company, or even sent a notice letter into Delaware. D.I. 16 ¶¶ 6, 10; D.I. 17 ¶ 6.[5] SAP cites no authority (and Defendants are not aware of any) suggesting that sending notice letters *outside* Delaware to companies headquartered *outside* Delaware can subject Defendants to personal jurisdiction *in* Delaware, no matter where those companies happen to be incorporated. *See Xactus, LLC v. Sike*, 2024 WL 3947319, at *7 (Del. Ch. Aug. 27, 2024) ("There are a lot of Delaware corporations that operate nationwide and may have Delaware licensed operators. That does not mean that communications with these companies give rise to specific jurisdiction in Delaware."). Nor does SAP cite authority for its argument that KPI and Valtrus are subject to jurisdiction in Delaware just because they have investors, such as Valinvest, incorporated here. D.I. 23, Ex. AD, 15:24-16:1. To the contrary, "the holding of an interest in a Delaware entity is not an act in Delaware sufficient to confer specific jurisdiction" under Delaware's long-arm statute. *CLP Toxicology, Inc. v. Casla Bio Holdings*, 2020 WL 3564622, at *14 (Del. Ch. June 29, 2020); *accord AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d

[4] The sole authority SAP cites is a district court case that predates and is irreconcilable with *Daimler* and, in any event, involved contacts with the forum state not present here (i.e., contacts with New York *headquartered* companies). *Compare JetBlue Airways Corp. v. Helferich Pat. Licensing, LLC*, 960 F. Supp. 2d 383, 389 (E.D.N.Y. 2013).

[5] SAP does its best to publicize every license Valtrus has ever entered, and the specific amounts paid, even though those facts are irrelevant to its arguments. Not one of the companies SAP identifies is headquartered in Delaware, and Valtrus never engaged with them in Delaware.

428, 439 (Del. 2005) (mere "ownership of a Delaware subsidiary does not" suffice).

2. Next, SAP argues that KPI and Valtrus are subject to personal jurisdiction based on their supposed agency relationship with PPS and Valinvest. That too is wrong.

[redacted] SAP does not explain why it thinks Valinvest is an "agent" under the law. SAP walks through four "factors" for determining agency, but ignores Valinvest for all but the second, relating to Valinvest's capital injections. D.I. 23 at 19-20.

Second, regardless of whether PPS or Valinvest are "agents," they still did not do anything in Delaware relating to the Valtrus portfolio, either licensing or otherwise. SAP does not even allege or argue that they did.[6] Rather, SAP argues that because PPS and Valinvest are Delaware LLCs, this should be "imputed" to each of KPI and Valtrus. That is simply not the law. *See CLP Toxicology*, 2020 WL 3564622, at *14 ("[I]n Delaware, it is well-established law that merely contracting with an entity that is incorporated within a forum state does not provide necessary connections between the contract and the forum to support a finding of jurisdiction." (attribution omitted)). The cases SAP cites, such as *Trachtenberg v. Marriott Int'l, Inc.*, 2021 WL 5299823 (D. Del. Nov. 15, 2021), are inapposite; for one, they come out the other way, finding no personal jurisdiction, and for another, they considered jurisdiction over a parent company based on the actions of a subsidiary. D.I. 23, at p. 19. PPS is not a subsidiary of KPI or Valtrus and, as set forth above, SAP barely argues that Valinvest is an "agent" of KPI (it discusses only one of four factors). In any event, neither entity did anything in Delaware. Other Delaware courts have deemed

[6] SAP claims that Valtrus "conceded" that PPS functions as both Valtrus and KPI's agent and alter ego. D.I. 23 at 5. Not so. KPI and Valtrus simply explained that SAP's pleadings were internally inconsistent because SAP alleged that Defendants are all alter egos and agents of each other, yet also alleged a conspiracy—which cannot coexist as a matter of law. D.I. 14 at p. 24.

arguments mirroring SAP's to be frivolous. *Hedger v. Medline Indus., Inc.*, 2017 WL 396770, at *5 (Del. Super. Ct. Jan. 27, 2017) ("[i]t would be frivolous to argue for specific jurisdiction" where no pertinent transaction, act, or omission "is alleged to have occurred in Delaware").

3. Finally, SAP includes a throw-away "alter ago" argument, based on made-up "facts" about the relationship among KPI, Valtrus, and PPS. D.I. 23 at pp. 19, 22. Two PPS employees are board members of KPI and Valtrus (less than a majority). D.I. 24, Ex. T, 17:1-16 (identifying the Valtrus and KPI directors); D.I. 23 at p. 20 (SAP acknowledges that only Messrs. Riley and Seaman are PPS employees). That is the extent of the overlap.[7] PPS does not share any employees, office space, or even document storage systems with either KPI or Valtrus. *Compare* D.I. 16, ¶ 4-5 (all KPI employees are in Ireland) and D.I. 17, ¶ 5 (all PPS employees are in the U.S.); D.I. 24, Ex. T, 12:4-11 (only certain members of PPS have access to KPI SharePoint).[8] They each have independent Board meetings. D.I. 24, Ex. T, 71:14-16 (Valtrus has independent Board meetings); *id.* at 6:5-16 and 41:21-22 (Ms. Quinlan is on Valtrus and KPI Board but does not know who is on the PPS Board). PPS is free to contract with other entities, in addition to KPI and Valtrus. D.I. 24, Ex. I. And SAP presents no evidence (because there is none) that PPS had anything to do with financing or approval of the HPE acquisition.[9] The factual record simply does not support SAP's representations on these issues. On top of all of that, SAP does not seriously argue that it

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[7] SAP argues that Ms. Angela Quinlan is a "shared director . . . across Defendants' entities." But Ms. Quinlan has no role in, and is not a director of, Defendant PPS. SAP knows this because it deposed her and asked this exact question. D.I. 24.20 at 7.

[8] SAP asserts PPS was "formed in Delaware for the sole purpose of benefiting KPI and Valtrus." D.I. 23 at 19. That is not true; the witness never said it was the "sole" purpose. D.I. 25.6, Exh. AD, 50:6-8.

[9] SAP falsely asserts that Paul Seaman [redacted] D.I. 23, p. 6. Mr. Seaman was not even a Director of KPI at the time of the acquisition in early 2021 (and SAP provides no evidence that he was). *Compare* D.I. 24.22 (Mr. Seaman a Director in *2022*) to D.I. 25.5 (HPE purchase agreement dated Jan. 15, *2021*).

alleged an "element of fraudulent intent," as is required to plead such an alter ego theory in Delaware. *See Blair v. Infineon Techs. AG*, 720 F. Supp. 2d 462, 470 (D. Del. 2010).

IV. SAP's DCFA and Related Claims (Counts I-III) Should be Dismissed

SAP's DCFA-related claims should be dismissed for multiple reasons. First, SAP asserts that it has a cause of action because "the Complaint alleges specific facts as to Defendants' ongoing activities in Delaware." D.I. 23 at 24. The complaint alleges nothing of the sort. SAP cites D.I. 2 ¶¶ 39, 44, and 49-53. *Id.* These paragraphs do not say anything about licensing discussions—or anything underlying SAP's DCFA claim—occurring in Delaware. At best, they allege that PPS is a Delaware LLC and that Defendants licensed companies incorporated in Delaware (in unrelated transactions). The complaint does not allege that Defendants undertook any of these activities in Delaware or that Defendants corresponded with anyone in Delaware while negotiating the licenses. And it alleges absolutely nothing about licensing discussions *with SAP* (*i.e.*, those that form the basis of its DCFA claim) taking place in Delaware. Nor could it, because nothing happened in Delaware, and SAP knows it, given that it was the counterparty in the pre-suit negotiations and also took discovery. Perhaps that is why SAP does not counter Defendants' declarations, *see* D.I. 17 ¶ 6, or identify in its brief any alleged wrongful conduct that occurred in Delaware.

Second, SAP argues that Defendants are liable under the DCFA because they did not, for example, "discuss good-faith licensing terms with SAP," and proposed a license amount without also justifying the valuation. D.I. 23 at 23. These facts, even if true, should not amount to a DCFA claim—they are just routine licensing discussions where one party wants a lower price. Not surprisingly, SAP does not cite a single case suggesting that the DCFA extends this far. Nor does SAP even cite a case from another jurisdiction holding that a comparable consumer protection statute covers failed patent licensing negotiations in this manner.

SAP's DCFA and related claims are meritless, and the Court should dismiss them.

Dated: October 9, 2024

Respectfully submitted,

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