



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

OPTIS WIRELESS TECHNOLOGY, LLC,
OPTIS CELLULAR TECHNOLOGY, LLC,
UNWIRED PLANET, LLC, UNWIRED
PLANET INTERNATIONAL LIMITED,
AND PANOPTIS PATENT
MANAGEMENT, LLC,

Plaintiffs,

v.

APPLE INC.,

Defendant.

Civil Action No. 2:19-cv-00066-JRG

JURY TRIAL DEMANDED

ORAL ARGUMENT REQUESTED



**APPLE INC.'S MOTION TO DISMISS COUNT VIII FOR
LACK OF SUBJECT MATTER JURISDICTION**



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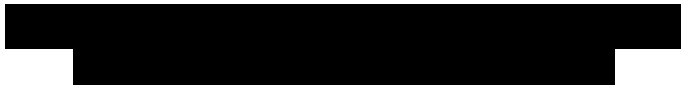
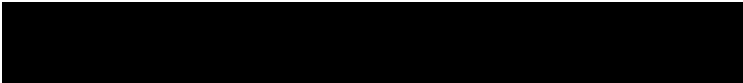


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[REDACTED]

I. INTRODUCTION

Count VIII of Plaintiffs’ Amended Complaint seeks a declaration that Plaintiffs “negotiated in good faith and otherwise complied with FRAND” with respect to “a *global* license to Plaintiffs’ [declared] essential patents.” ECF No. 26 (“Am. Compl.”) at 109.¹ Finding that it lacks jurisdiction to adjudicate a claim as to foreign patents and legal obligations, this Court dismissed “any portion of Count VIII that seeks a declaration that Plaintiffs have complied with their obligations under foreign laws or as they relate to foreign patents,” yet left the door open to reconsider whether Count VIII—as limited to *U.S.* patents and *U.S.* law—remains justiciable after full development of the factual record. ECF No. 102 (“Dismissal Order”) at 6, 8.

In assessing subject matter jurisdiction, a court may consider “undisputed facts evidenced in the record” or “undisputed facts plus the court’s resolution of disputed facts.” *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). The completed record confirms Count VIII is not justiciable. [REDACTED]

[REDACTED]

[REDACTED]

But “post-complaint facts cannot create jurisdiction where none existed at the time of filing.” *Microsoft Corp. v. DataTern, Inc.*, 755 F.3d 899, 906 (Fed. Cir. 2014). Plaintiffs’ attempt to seek an advisory opinion on Apple’s negotiation conduct under French law fares no better; as this Court has already held, foreign law has no place in these proceedings. Accordingly, Apple respectfully requests that the Court dismiss Count VIII with prejudice.

II. ISSUE PRESENTED

Whether a case or controversy exists as to Count VIII of Plaintiffs’ Amended Complaint,

¹ Emphases added in quotations throughout unless otherwise noted.

[REDACTED]
[REDACTED]
where [REDACTED]
[REDACTED]

before the commencement of this suit.

III. STATEMENT OF UNDISPUTED MATERIAL FACTS

A. The Court's Dismissal Of Count VIII Of Plaintiffs' Amended Complaint As To Foreign Patents And Obligations Under Foreign Law

On May 13, 2019, Plaintiffs filed an Amended Complaint alleging that “[t]here is a dispute between the Plaintiffs and Apple concerning whether the Plaintiffs’ history of offers to Apple for a *global* license to the Plaintiffs’ essential patents complies with Plaintiffs’ commitment to license their essential patents on FRAND terms and conditions pursuant to ETSI and ETSI’s IPR Policy.” Am. Compl. ¶ 143; *see also id.* ¶ 1. Specifically, Count VIII of the Amended Complaint sought “[a] declaration that Plaintiffs, in their history of negotiations with Apple in regard to a *global* license to the Plaintiffs’ essential patents, have negotiated in good faith and otherwise complied with FRAND” *Id.* at 109. Apple moved to dismiss Count VIII explaining that (1) the Court lacks jurisdiction to adjudicate Count VIII as to foreign patents (ECF No. 31 at 6-9); (2) even if the Court had jurisdiction over Count VIII as to foreign patents, it should decline to exercise it (*id.* at 9-10); (3) Plaintiffs alleged no controversy limited to U.S. patents (*id.* at 10-12); and (4) Count VIII fails to set forth a justiciable cause of action (*id.* at 12-15).

On March 2, 2020, the Court granted-in-part and denied-in-part Apple’s motion to dismiss Count VIII. In doing so, the Court dismissed “any portion of Count VIII that seeks a declaration that Plaintiffs have complied with their obligations under foreign laws or as they relate to foreign patents, or that Apple may not raise a FRAND defense in a foreign jurisdiction.” Dismissal Order 6. Specifically, the Court explained, “[l]ike claims for foreign patent infringement, claims asking the Court to pass upon foreign obligations under foreign laws related to foreign patents are best left to the courts of those foreign countries.” *Id.* While the Court declined to dismiss Count VIII

[REDACTED]

as to U.S. patents (*id.* at 7), the Court cautioned that “[w]hether or not Plaintiffs can *prove* these allegations in a manner sufficient to allow this Court to issue declaratory relief is a separate issue more appropriately analyzed under Rule 56 or at trial.” *Id.* at 8 (emphasis in original). The Court further concluded that it “remains under ‘a continuing obligation to examine the basis of [its] jurisdiction’ and will not issue an advisory opinion if it becomes clear that there is no justiciable controversy before the Court.” *Id.* (citation omitted).

B.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

PanOptis acquired Unwired Planet in April 2016. Ex. 6 (POAP_00102095-097). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Plaintiffs filed this lawsuit against Apple on February 25, 2019. [REDACTED]

[REDACTED]

C. Plaintiffs' Post-Lawsuit Conduct

[REDACTED]

[REDACTED]

[REDACTED], Plaintiffs also served the report of Ms. Johanna Dwyer. Ex. 27 (May 6, 2020 Initial Expert Report of Johanna Dwyer (“Dwyer Rpt.”)). [REDACTED]

[REDACTED] Ms. Dwyer stated: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

IV. LEGAL STANDARD

The Constitution limits a federal court’s jurisdiction to actual “cases and controversies” and precludes judicial adjudication of cases involving “a difference or dispute of a hypothetical or abstract character” or “one that is academic or moot.” *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-241 (1937). A declaratory judgment claimant must demonstrate that “there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (internal quotation omitted). “[T]he dispute must be definite and concrete, real and substantial, and admit of specific relief through a decree of a conclusive character.” *Vantage Trailers, Inc. v. Beall Corp.*, 567 F.3d 745, 748 (5th Cir. 2009).

Moreover, “[a] declaratory judgment plaintiff must plead facts sufficient to establish jurisdiction *at the time of the complaint*, and post-complaint facts cannot create jurisdiction where none existed at the time of filing.” *Microsoft Corp.*, 755 F.3d at 906; *see also Innovative Therapies, Inc. v. Kinetic Concepts, Inc.*, 599 F.3d 1377, 1383 (Fed. Cir. 2010) (acts occurring after filing of original complaint “did not establish that an actual controversy existed at that earlier

[REDACTED]

time”); *Benitec Australia, Ltd. v. Nucleonics, Inc.*, 495 F.3d 1340, 1344 (Fed. Cir. 2007) (“The burden is on the party claiming declaratory judgment jurisdiction to establish that such jurisdiction existed at the time the claim for declaratory relief was filed and that it has continued since.”); *Vantage Trailers*, 567 F.3d at 748 (“The declaratory judgment plaintiff must establish that this requirement was satisfied at the time the complaint was filed—post-filing conduct is not relevant.”).

The Court has “a continuing obligation to examine the basis of [its] jurisdiction.” Dismissal Order 8 (quotation marks omitted); *see* Fed R. Civ. P. 12(h)(3). “The objection that a federal court lacks subject-matter jurisdiction ... may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment.” *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006). “Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.” *Ramming*, 281 F.3d at 161 (citation omitted).

V. ARGUMENT

Plaintiffs seek a declaration that their “offers to Apple for a global license to the Plaintiffs’ essential patents compl[y] with the Plaintiffs’ commitment to license their essential patents on FRAND terms...” Am. Compl. ¶ 143. This Court has already determined that it lacks jurisdiction over “any portion of Count VIII that seeks a declaration that Plaintiffs have complied with their obligations under foreign laws or as they relate to foreign patents, or that Apple may not raise a FRAND defense in a foreign jurisdiction.” Dismissal Order 6. Thus, had Plaintiffs offered a U.S.-patents-only offer (they did not), the relevant inquiry would be whether Plaintiffs’ offers to Apple for a license to Plaintiffs’ *U.S. patents* comply with Plaintiffs’ obligations. But there is no justiciable controversy for resolution because it is undisputed that [REDACTED]

[REDACTED]

[REDACTED]. There is thus no justiciable claim to adjudicate.

A. The Undisputed Facts Demonstrate that [REDACTED]

It is undisputed that Plaintiffs never [REDACTED] and therefore there is no justiciable controversy as to whether Plaintiffs complied with their FRAND obligations with respect to *U.S. patents*. Plaintiffs’ Amended Complaint does not allege that Plaintiffs offered a U.S.-patents-only license. Indeed, it refers only to Plaintiffs’ negotiation of and offers for a “*global* FRAND license.” Am. Compl. at ¶ 1; *see id.* 109, ¶¶ 37, 143. The undisputed facts now confirm that Plaintiffs made [REDACTED] leaving nothing left to adjudicate.

While Plaintiffs [REDACTED]

[REDACTED] *See supra* pp. 2-7; [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] That is, [REDACTED]

[REDACTED]

[REDACTED] In view of the Court’s Dismissal Order, the only remaining

question is whether the record—depicting the facts at the time of filing—presents a case or controversy as to the existence of a U.S.-patents-only offer. The answer is no: [REDACTED]

[REDACTED] Count VIII is not justiciable.

This conclusion is consistent with this Court’s decision in *Huawei*, where this Court determined after a bench trial that Plaintiffs Optis Wireless, Optis Cellular, and PanOptis failed to present any evidence that they offered a U.S.-patents-only license. *See Optis Wireless Tech., LLC v. Huawei Device USA, Inc.*, No. 2:17-CV-00123-JRG, 2019 WL 1244707, at *6-7 (E.D. Tex. Mar. 18, 2019). Because the Court could not “determine whether [the plaintiff] complied

[REDACTED]

with its FRAND obligations as to the U.S. SEPs in its offer to Huawei,” it concluded that “any declaration by the Court would amount to an advisory opinion” and declined to grant the requested relief. *Id.* at *7. The undisputed facts here indicate that Plaintiffs never made an offer as to U.S. patents only. As in *Huawei*, granting the requested relief would do no more than “inject confusion and uncertainty into this area of both law and commerce.” *Id.*

Additionally, in determining whether to exercise declaratory judgment jurisdiction, courts consider “whether retaining the lawsuit would serve the purposes of judicial economy.” *Sherwin-Williams Co. v. Holmes Cnty.*, 343 F.3d 383, 388 (5th Cir. 2003); *see also Celestine v. Nat’l Union Fire Ins. Co.*, 115 F. App’x 658, 660 (5th Cir. 2004) (per curiam). Allowing Count VIII to proceed to trial would be a significant waste of the Court’s and parties’ resources, especially given that Plaintiffs can point to no evidence that they offered a U.S.-patents-only license. Indeed, Plaintiffs concede that [REDACTED] confirming that adjudication of Count VIII will amount to no more than an advisory opinion. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Simply

put, the parties and the Court would be better-served devoting their time and resources to the adjudication of other issues, such as Plaintiffs’ patent claims and Apple’s defenses to those claims.

B. Plaintiffs’ Post-Suit Conduct Cannot Establish A Justiciable Case Or Controversy.

Apparently recognizing that [REDACTED]

[REDACTED] Plaintiffs [REDACTED]—*more than a year after this lawsuit was filed*—[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] But Plaintiffs' belated litigation-inspired [REDACTED]

cannot establish a justiciable case or controversy as to Count VIII.

As explained above (pp. 7-8), there must be a justiciable case or controversy "*at the time of the complaint*," and post-complaint facts cannot create jurisdiction where none existed at the time of filing." *Microsoft Corp.*, 755 F.3d at 906; *see Vantage Trailers*, 567 F.3d at 748 ("post-filing conduct is not relevant"). Plaintiffs' [REDACTED] sent more than a year after Plaintiffs' filed this case, does not (and cannot) cure the jurisdictional defect that existed at—and remains since—the outset of the litigation. *See Innovative Therapies*, 599 F.3d at 1383; *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 570–71 (2004) ("[T]he jurisdiction of the court depends on the state of things at the time the action is brought.'.... This time-of-filing rule is hornbook law (quite literally) taught to first-year law students in any basic course on federal civil procedure."); *Ford Motor Co. v. United States*, 688 F.3d 1319, 1324 (Fed. Cir. 2012).

Plaintiffs' failure to provide evidence of [REDACTED] is fatal to Count VIII. Moreover, even if Plaintiffs could establish jurisdiction based on a self-serving [REDACTED] sent long after this litigation was filed (they cannot), Plaintiffs' [REDACTED]

[REDACTED] Instead, Plaintiffs merely assert— [REDACTED]

[REDACTED]

[REDACTED]

Nor can Plaintiffs rely on the conclusory testimony of their expert, Johanna Dwyer, to establish the existence of a justiciable case or controversy. [REDACTED]

[REDACTED]

[REDACTED] But, as discussed above (pp. 6-7), the [REDACTED]

[REDACTED]

neither pre-dates the filing of this case nor constitutes [REDACTED] giving rise to the purported dispute that Plaintiffs seek to have adjudicated.

Moreover, Ms. Dwyer’s “opinion” that the [REDACTED] satisfies Plaintiffs’ FRAND obligations—like [REDACTED] itself—[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]² Ms. Dwyer’s opinion is not only divorced from the factual record in this case, but is also unsupported by any industry practice, or generally accepted methodology. Indeed, as Ms. Dwyer conceded, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Her conclusory opinion—[REDACTED]

[REDACTED]—cannot establish the existence of a case or controversy

with respect to Count VIII.³

²

[REDACTED]

But a supposedly “conservative opinion in that sense does not equate to a scientific one.” *Stragent, LLC v. Intel Corp.*, No. 6:11-CV-421, 2014 WL 1389304, at *4 (E.D. Tex. Mar. 6, 2014) (quoting *Ayers v. Robinson*, 887 F. Supp. 1049, 1060 (N.D. Ill. 1995)).

³ Apple has also separately challenged the admissibility of Ms. Dwyer’s testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

[REDACTED]

C. The Remainder Of Count VIII Is Not Justiciable.

To the extent that Plaintiffs contend that Count VIII encompasses more than [REDACTED] that argument too should be rejected. While Count VIII accuses Apple of “bad-faith conduct” and vaguely seeks to preclude Apple from “rais[ing] a FRAND defense” (Am. Compl. ¶ 143), Plaintiffs have asserted no legal theory or cause of action *under U.S. law* (or facts in support thereof) under which Apple must [REDACTED]

[REDACTED] or PanOptis’ commitment to license on FRAND terms and conditions can be nullified.⁴

As an initial matter, Plaintiffs have no legal right under U.S. law to impose on Apple an obligation to negotiate a license to Plaintiffs’ portfolios of declared-essential patents or forfeit any defenses for failing to do so. For example, this Court has held that a patentee’s FRAND commitment *does not* impose a contractual obligation on a third party such as Apple to negotiate for or take a license. *Core Wireless Licensing S.a.r.l. v. Apple Inc.*, No. 6:12-CV-100-JRG, 2015 WL 4775973, at *4 (E.D. Tex. Aug. 11, 2015) (dismissing plaintiffs’ “contract claims as to the entire portfolio”); Ex. 31, Order at 1, *Core Wireless*, No. 6:12-CV-100 (E.D. Tex. May 2, 2014), Dkt. No. 207 (rejecting plaintiffs’ attempt to adjudicate a portfolio royalty and instead directing the case to proceed focused only on the patents that had been *actually asserted*); *Apple Inc. v. Telefonaktiebolaget LM Ericsson, Inc.*, No. 15-cv-00154-JD, 2015 WL 1802467, at *2 (N.D. Cal. Apr. 20, 2015) (“there exists no legal basis upon which Apple may be compelled to take a license

⁴ It is unclear what relief Plaintiffs seek in attempting to preclude Apple from raising a “FRAND defense.” There is no dispute that Plaintiffs are obligated to license the patents-in-suit under FRAND terms and conditions. *See* Am. Compl. ¶ 30 (acknowledging that ETSI IPR Policy requires granting a license on FRAND terms). And even if Plaintiffs were somehow released from that obligation, the Federal Circuit has recognized that “reasonable royalties for SEPs generally—and not only those subject to a RAND commitment—must not include any value flowing to the patent from the standard’s adoption.” *Commonwealth Sci. & Indus. Research Organisation v. Cisco Sys., Inc.*, 809 F.3d 1295, 1305 (Fed. Cir. 2015).

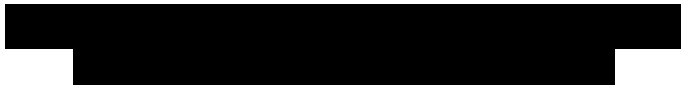
[REDACTED]

for Ericsson’s patents on a portfolio-wide basis”); *Ericsson, Inc. v. D-Link Sys.*, No. 6:10-cv-473, 2013 WL 4046225 at *21 (E.D. Tex. Aug. 6, 2013), *aff’d in part, rev’d in part*, 773 F.3d 1201 (Fed. Cir. 2014) (recognizing Court could not obligate defendants to pay RAND royalties for patents they had not been found to infringe); *InterDigital Commc’ns, Inc. v. ZTE Corp.*, No. 13-CV-00009, 2014 WL 2206218, at *3 (D. Del. May 28, 2014). It is for that reason that Plaintiffs have resorted to relying on the *French civil code* as imposing an obligation on Apple to “negotiate in good faith.” Ex. 28 (May 6, 2020 Initial Report of Jean-Sebastien Borghetti ¶¶ 49-51) (citing Article 1104 of French Civil Code as imposing an obligation to negotiate in good faith). But this Court has already determined that adjudications of “foreign obligations under foreign laws related to foreign patents are best left to the courts of those foreign countries.” Dismissal Order 6.

The question whether Apple’s negotiation conduct satisfies a “good faith” standard imposed by the French civil code (it does) has no place before this Court. At best any such determination would amount to nothing more than “a data point from which the parties could continue negotiations.” *InterDigital*, 2014 WL 2206218, at *3. And as the Supreme Court has explained, declaratory judgment actions that merely seek to “gain a litigation advantage” by asking the court to “determine a collateral legal issue governing certain aspects of [a] pending or future suit[]” are not allowed. *Calderon v. Ashmus*, 523 U.S. 740, 747 (1998). “[A] federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them.” *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (internal quotation marks omitted). But that is precisely what Plaintiffs seek to do here. Plaintiffs’ improper request for an advisory opinion under French law should be rejected.

VI. CONCLUSION

For the reasons stated above, Apple respectfully requests that the Court dismiss Count VIII for lack of subject matter jurisdiction.



Dated: June 18, 2020

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). Plaintiffs' counsel of record were served with a true and correct copy of the foregoing document by electronic mail on June 18, 2020.

/s/ Melissa R. Smith _____

