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8 **UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

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10 INTEL CORPORATION and APPLE INC.,

Plaintiffs,

11 v.

12 FORTRESS INVESTMENT GROUP LLC,
FORTRESS CREDIT CO. LLC, UNILOC 2017
13 LLC, UNILOC USA, INC., UNILOC
LUXEMBOURG S.A.R.L., VLSI
14 TECHNOLOGY LLC, INVT SPE LLC,
INVENTERGY GLOBAL, INC., DSS
15 TECHNOLOGY MANAGEMENT, INC., IXI
IP, LLC, and SEVEN NETWORKS, LLC,

Defendants.

No. 3:19-cv-7651-EMC

**BRIEF OF THE R STREET INSTITUTE,
THE CENTER FOR DEMOCRACY &
TECHNOLOGY, PUBLIC KNOWLEDGE,
ENGINE ADVOCACY, AND THE
ELECTRONIC FRONTIER FOUNDATION
AS AMICI CURIAE IN SUPPORT OF
NEITHER PARTY**

Hon. Edward M. Chen
Date: April 23, 2020
Time: 1:30 PM
Dept.: Courtroom 5

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1 **INTEREST OF *AMICI CURIAE***

2 *Amici curiae*¹ are nonprofit organizations that study and promote intellectual property law
3 that is informed, balanced, and sensitive to a wide range of innovator and consumer interests.

4 The R Street Institute is a nonprofit, nonpartisan public policy research organization.
5 R Street’s mission is to engage in policy research and educational outreach that promotes free
6 markets as well as limited yet effective government, including properly calibrated legal and reg-
7 ulatory frameworks that support economic growth and individual liberty.

8 The Center for Democracy & Technology is a nonprofit public interest organization working
9 to ensure that democracy and individual rights are at the center of the digital revolution, and that
10 technology serves as an empowering force for people worldwide.

11 Public Knowledge is a nonprofit organization that is dedicated to preserving the openness of
12 the Internet and the public’s access to knowledge, promoting creativity through balanced intel-
13 lectual property rights, and upholding and protecting the rights of consumers to use innovative
14 technology lawfully.

15 Engine Advocacy is a nonprofit technology policy, research, and advocacy organization that
16 bridges the gap between policymakers and startups, working with government and a community
17 of high-technology, growth-oriented startups across the nation to support the development of
18 technology entrepreneurship. Engine conducts research, organizes events, and spearheads cam-
19 paigns to educate elected officials, the entrepreneur community, and the general public on issues
20 vital to fostering technological innovation. Part of amplifying startup concerns includes high-
21 lighting the unique challenges small startups face when confronted with abusive, and typically
22 opaque, patent litigation.

23 The Electronic Frontier Foundation is a nonprofit civil liberties organization that has worked
24 for more than 25 years to protect innovation, free expression, and civil liberties in the digital
25

26 ¹This brief is being tendered with a motion for leave to file this brief. Pursuant to Federal
27 Rule of Appellate Procedure 29(c)(5), no counsel for a party authored this brief in whole or in
28 part, and no counsel or party made a monetary contribution intended to fund the preparation or
submission of the brief. No person or entity, other than *amici*, their members, or their counsel,
made a monetary contribution to the preparation or submission of this brief.

1 world. EFF and its more than 30,000 active donors have a powerful interest in ensuring that
2 intellectual property laws serve the general public by promoting more creativity and innovation
3 than they deter.²

4 5 **SUMMARY OF ARGUMENT**

6 Defendants' motion to dismiss rests in part on a common but crucial misunderstanding of
7 patent law. Based on the various references in the complaint to their portfolios of "weak" patents,
8 Defendants make the seemingly attractive argument that they cannot violate the antitrust laws
9 because weak patents, being weak, are incapable of giving rise to market power. *See, e.g.*, Defs.'
10 Mot. Dismiss 15–16 (Doc. No. 111).

11 Yet it is the nature of patent law that weak patents are not only capable of conferring market
12 power, but are particularly likely to do so. A "weak" patent, as that term is often used, is one that
13 is drawn to encompass a wide range of products and services within its ambit of infringement—
14 so wide a range as to render the patent likely invalid, or "weak" to challenges of invalidity. One
15 might draft a patent application so broadly as to try to capture technologies or inventions that go
16 far beyond the actual inventive contribution meriting a patent, potentially in hopes of extract-
17 ing licensing fees from a broader range of manufacturers, vendors, and users of technologies. By
18 virtue of having exceptionally broad coverage, patents that are weak for overbreadth have repeat-
19 edly shown themselves to be powerful tools for manipulating markets, controlling competition,
20 and extracting undue value from small businesses and consumers.

21 One might hope that overbroad weak patents would be eliminated through invalidity liti-
22 gation or patent cancellation proceedings, but legal and economic incentive barriers mean that
23 weak patents remain under-challenged. Weak patents are thus ideal vehicles for harming com-
24 petition and consumers in ways well within the scope of the antitrust laws. While this brief does
25 not take a position on the particular patents or parties at issue, this Court should be aware of and
26 not acquiesce in the legal error in Defendants' motion to dismiss.

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28 ²In the interest of disclosure, EFF is an intervenor in a separate appeal involving Apple and
the Uniloc parties.

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ARGUMENT

Contrary to Defendants’ Assertions, Weak Patents Can Give Rise to Market Power

The motion to dismiss repeatedly argues that “‘weak’ patents—whether individually or combined into a portfolio of ‘weak’ patents—would possess no market power at all.” *Id.* at 15; *accord id.* at 16 & n.6 (concluding that it is “implausible” for Defendants “to use their purportedly ‘weak’ patents to control prices or exclude competition in the alleged market”); *id.* at 29 (treating allegations of “weak” patents as “contradicted by Plaintiffs’ admission elsewhere that Defendants own ‘potentially valuable patents’”). Yet by the nature of current United States patent law, a “weak” patent is in fact quite likely to give rise to market power—and the opportunity to abuse that power.

I. A “Weak” Patent Is One Likely to Sweep Up Numerous Firms and Market Products Within Its Scope of Infringement

When it comes to patents, “weak” is not synonymous with “useless.” On the contrary, a weak patent can confer great power, with significant potential to affect competitors and markets because of the manner in which patents are drafted and obtained.

A patent is a government-conferred instrument giving the holder a right to demand licenses from and bring suit against others who practice or sell a particular invention. *See* 35 U.S.C. § 271. Over the last few decades, patents have been weaponized across many industries, including the information and communications technology sector. For example, it is estimated that there are between 250,000 and 314,000 patents covering smartphones, with dozens of high-stakes litigation actions over alleged infringements of those patents. *See* RPX Corp., Registration Statement (Form S-1), at 59 (Sept. 2, 2011), *available online*;³ Joel Reidenberg et al., *Patents and Small Participants in the Smartphone Industry*, 18 *Stan. Tech. L. Rev.* 375, 382 tbl.2 (2015).

A critical component of the right to stop others from using a patented invention, then, is how the “invention” is defined in the patent; that is, what products or services constitute infringement

³Locations of authorities available online are shown in the Table of Authorities.

1 within the scope of a particular patent. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370,
2 373–74 (1996). Defining the scope of the patented invention is doubly important because how
3 the invention is defined determines whether the invention is eligible, new, and not obvious, the
4 three conditions that an invention must meet to be patentable. *See* 35 U.S.C. §§ 101–103.

5 Under 35 U.S.C. § 112(b), the scope of a patent is defined by its claims, which specify the metes
6 and bounds of what constitutes infringement. In much the same way that liability for a crime (e.g.,
7 burglary) requires meeting all the elements that legally define the crime (e.g., breaking, entering,
8 a house, at night, intent to commit a felony), infringement of a patent requires meeting all of the
9 elements of a claim in the patent. *See, e.g., Pennwalt Corp. v. Durand-Wayland, Inc.*, 833 F.2d 931,
10 949 (Fed. Cir. 1987) (quoting 4 Donald S. Chisum, *Chisum on Patents* § 18.03[4] (1986)).

11 Patent claims are written by inventors applying for patents, subject to approval by the U.S.
12 Patent and Trademark Office. *See Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S.
13 722, 740 (2002). This means that the patent applicant chooses the scope, drafting many detailed
14 elements in the claims to obtain a narrow patent of limited scope, or writing few generalized
15 elements to obtain a broad patent of expansive scope.

16 A broad patent is more valuable and desirable because “the broader the scope, the larger the
17 number of competing products and processes that will infringe the patent.” Robert P. Merges &
18 Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 Colum. L. Rev. 839, 839 (1990).
19 But that breadth can come at a cost: If the patent scope is so broad that it encompasses inventions
20 that were known or obvious *before* the patent was applied for, then the patent is invalid and thus
21 ineffectual. *See* 35 U.S.C. § 102 (invention wholly known before filing date); § 103 (invention obvi-
22 ous before filing date). In an ideal world, the Patent Office would identify and reject applications
23 for patents of erroneously broad scope before they issue as patents, but time pressures and lim-
24 ited access to technical information prevent the Patent Office from examining perfectly, meaning
25 that at least some proportion of issued patents are invalid. *See* Michael D. Frakes & Melissa F.
26 Wasserman, *Irrational Ignorance at the Patent Office*, 72 Vand. L. Rev. 975, 982–87 (2019). Thus,
27 “courts must be mindful of the fact that a patent, in the last analysis, simply represents a legal

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1 conclusion reached by the Patent Office.” *In re K-Dur Antitrust Litig.*, 686 F.3d 197, 215 (3d Cir.
2 2012) (quoting *Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969)).

3 Applicant choice of patent scope and errors in patent examination are what give rise to the
4 “weak” patent: A patent with claims drawn at a high level of generality to cover a vast range of
5 products and technologies, and that is likely to be invalid based on some prior technical knowl-
6 edge predating the patent, making it “weak” to challenges to the patent’s validity. This definition
7 of patent weakness, as susceptibility to a validity challenge, is the one predominantly used by
8 courts, legislators, executive officials, and commentators. *See, e.g., Fed. Trade Comm’n v. Actavis,*
9 *Inc.*, 570 U.S. 136, 158 (2013) (“detailed exploration of the validity of the patent” is one way of de-
10 termining a “patent’s weakness”); *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 184–85
11 (1952) (discussing incentives of “owners of weak patents to avoid real tests of their patents’ valid-
12 ity”); *In re Cipro Cases*, 348 P.3d 845, 156 (Cal. 2015) (distinguishing “strong, likely valid patents”
13 from “weak patents”); *Substantial New Question of Patentability in Reexamination Proceedings*,
14 H.R. Rep. No. 107-120, at 2 (2001) (describing a hypothetical “weak patent application” with “a
15 ‘smoking gun’ bearing on its validity”); Stanley N. Barnes et al., *Report of the Attorney General’s*
16 *National Committee to Study the Antitrust Laws* 223 (1955) (describing “‘weak’ patents” as a prob-
17 lem requiring “improved Patent Office issuance procedures”); Joseph Farrell & Carl Shapiro, *How*
18 *Strong Are Weak Patents?*, 98 *Am. Econ. Rev.* 1347, 1347 n.5 (2008); David Encaoua & Yassine
19 Lefouili, *Licensing “Weak” Patents*, 57 *J. Indus. Econ.* 492, 493 (2009).

20 Plaintiffs recite a more expansive definition of “weak” patents in their complaint, encompass-
21 ing patents that “are easily designed around” as well as those of “questionable validity.” Compl.
22 ¶ 35 (Doc. No. 1). But it is clear that at least some, if not most, of the patents they are concerned
23 with are weak in the sense of being broadly scoped and likely invalid. Plaintiffs describe the
24 effect of Defendants’ patent aggregation as “eliminating substitutes” and removing “feasibility
25 of redesigning products.” *Id.* ¶ 38. These consequences are natural characteristics of overbroad,
26 likely invalid patents. The complaint further references multiple examples of invalidations of
27 Defendants’ patents. *See id.* ¶¶ 88–94, 124 & 162. Thus, at least some portion of the Defendants’
28 patents of concern to Plaintiffs are weak in the sense of being so broad as to be likely invalid.

1 With expansive, generalized claims written to cast a wider net of infringement, such patents
2 enable their holders to bring more lawsuits; accuse more products and services; and potentially
3 collect more in damages, royalties, and settlements. *See* Farrell & Shapiro, *supra*, at 1362. Though
4 nominatively “weak,” these patents of broad scope are especially powerful.

5
6 **II. Broad-Scoped Patents, Especially Those Characterized as Weak, Are Quite Likely**
7 **to Confer Anticompetitive Market Power and Inflict Consumer Harm**

8 The breadth and power of these so-called weak patents makes them likely candidates for
9 market power, contrary to Defendants’ protestations.

10 “[A] patent does not necessarily confer market power.” *Ill. Tool Works Inc. v. Indep. Ink, Inc.*,
11 547 U.S. 28, 46 (2006). But the Supreme Court has recognized that a patent holder might still
12 have market power in certain provable circumstances. *See id.* at 42–43. In determining whether
13 a patent owner has monopoly power in the relevant market, then, courts frequently look to the
14 breadth of the patent claims. *See, e.g., Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 315 (3d Cir.
15 2007) (comparing scope of patent with relevant market for standardized technology); *New York ex*
16 *rel. Schneiderman v. Actavis plc*, 787 F.3d 638, 651–52 (2d Cir. 2015); *Rambus Inc. v. FTC*, 522 F.3d
17 456, 463 (D.C. Cir. 2008); *see also* U.S. Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Guidelines*
18 *for the Licensing of Intellectual Property* 4 (2017) (“The Agencies will not presume that a patent,
19 copyright, or trade secret necessarily confers market power As in other antitrust contexts,
20 however, an intellectual property owner could illegally acquire or maintain market power. Fur-
21 thermore, even if it lawfully acquired or maintained that power, the owner could still engage in
22 anticompetitive conduct in connection with such property.”).

23 Patents that are overbroad are particularly likely to give rise to market power. Indeed, the
24 Supreme Court has recognized the relationship between patent weakness and anticompetitive
25 conduct. In *Actavis*, the Court held that an unusual “reverse payment” settlement arrangement
26 between a patent-holding pharmaceutical firm and a generic manufacturer may violate the Sher-
27 man Act as an improper “restraint of trade or commerce.” 570 U.S. at 141 (quoting 15 U.S.C. § 1).

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1 The Court agreed that the settlement would have been within the legitimate power of a “valid
2 and infringed” patent, but “an *invalidated* patent carries with it no such right,” meaning that an-
3 ticompetitiveness in a hypothetical reverse-payment case turns at least in part on the patent’s
4 weakness to a validity challenge. *Id.* at 147; *see also id.* at 157–58 (discussing need for courts to
5 assess “patent validity to answer the antitrust question”).⁴ In so holding, *Actavis* relied heavily
6 on *United States v. Singer Manufacturing Co.*, which found illegal collusion where two sewing ma-
7 chine firms agreed to settle a patent dispute over validity challenges, enabling the firms “to secure
8 as broad coverage for the patent as possible, the more effectively to stifle competition.” *United*
9 *States v. Singer Mfg. Co.*, 374 U.S. 174, 190 (1963), *cited in Actavis*, 570 U.S. at 149. Both *Singer* and
10 *Actavis* thus drew connections between the likelihood that a patent would be invalidated and the
11 likelihood of violation of the antitrust laws.

12 Beyond market power against technology firms, weak patents give rise to a variety of con-
13 sumer harms. Being patents of exceptional breadth, weak patents tend to implicate ordinary,
14 widely used consumer technologies, and are a favorite tool of patent assertion entities that blan-
15 ket small businesses with demand letters alleging patent infringement. In one example, a firm
16 claimed to possess a patent on a basic functionality of document scanners, which it used to send
17 over 16,000 demand letters to small businesses. *See In re MPHJ Tech. Invs., LLC*, 159 F.T.C. 1004,
18 1006, 1010–11 (Mar. 13, 2015). In another, a company held a patent describing a method of trans-
19 mitting documents by fax machine, but with claims so broadly drawn seemingly as to encompass
20 email messaging, based on which the company filed over a hundred lawsuits. *See Eon-Net LP v.*
21 *Flagstar Bancorp*, 653 F.3d 1314, 1320 (Fed. Cir. 2011). In both cases, the patents were ultimately
22 deemed invalid, with the patent owner in the latter case being sanctioned for the frivolousness
23 of its arguments. *See MPHJ Tech. Invs., LLC v. Ricoh Americas Corp.*, 847 F.3d 1363, 1371 (Fed. Cir.
24 2017); *Eon-Net*, 653 F.3d at 1327 (patent owner “acted in bad faith by exploiting the high cost to
25 defend complex litigation to extract a nuisance value settlement”). To be sure, these especially
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27 ⁴To be sure, the Court remanded for further assessment of the validity or infringement of
28 the patent at issue, and did not rely on potential overbreadth as the sole driver of invalidity in
reverse-payment antitrust cases. *See id.* at 159–60.

1 weak patents were ultimately rendered invalid, but only after a great deal of publicity, litigation
2 costs, and harm to consumers and small businesses who became the targets of massive, harmful
3 patent assertion campaigns.

4 These cases are not unique: One study found that 40% of small companies surveyed reported
5 a “significant operational impact” resulting from this sort of patent demand. *See* Colleen Chien,
6 *Startups and Patent Trolls*, 17 *Stan. Tech. L. Rev.* 461, 465 (2014). Weak patents have the propensity
7 to do a great deal of damage to markets, competition, and consumers.

8
9 **III. Economic Disincentives and Legal Impediments Diminish the Effectiveness of In-**
10 **validation Proceedings for Dealing with Weak Patents**

11 The capacity of weak patents to create market power and threaten industries might be lim-
12 ited if those patents, where actually invalid, were duly adjudicated as such in due course of litiga-
13 tion. However, there are several legal and economic roadblocks to comprehensive adjudication of
14 patent validity, meaning that weak patents are likely in many cases to remain in force as powerful
15 tools of anticompetitive conduct.

16 First, patent law places a statutory thumb on the scale against invalidation even of weak
17 patents. Under 35 U.S.C. § 282, “[e]ach claim of a patent . . . shall be presumed valid.” Courts
18 have interpreted this provision to mean that patents must be proved invalid under a heightened
19 standard of “clear and convincing evidence.”⁵ *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 95
20 (2011).

21 Intuitively, the presumption of validity (and other aspects of patent litigation that disfavor
22 invalidation⁶) would likely prevent invalidation of truly invalid patents. This intuition can be

24 ⁵The presumption of validity does not apply in proceedings for patent cancellation before the
25 Patent Office, under 35 U.S.C. § 311(a) for example. There are other barriers in those proceed-
26 ings, however: The legal grounds for cancellation are fewer than those available in district court
27 litigation, the petitioner must make an initial showing of “a reasonable likelihood that the peti-
28 tioner would prevail,” and the Patent Office may deny institution of the proceeding on wholly
discretionary grounds.

⁶*See, e.g.,* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 *S. Cal. L. Rev.* 241, 251–70 (2016)
(noting procedural advantages for patent plaintiffs in the Eastern District of Texas); Brian J. Love
& James Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of*

1 proved through observation of an adverse selection or “lemons” phenomenon. Because § 282
2 applies with equal force to all patents, weak patents at risk of invalidation gain the most benefit
3 from that provision in the same way that a used car dealer profits most by selling lemons to a
4 buyer who evaluates all cars equally. See George A. Akerlof, *The Market for “Lemons”: Quality*
5 *Uncertainty and the Market Mechanism*, 84 Q.J. Econ. 488, 489–90 (1970). Thus, just as economists
6 predict that the used car dealer will gravitate toward selling lemons rather than quality cars, see
7 *id.* at 490, one might anticipate that patent asserters would gravitate toward weak patents in their
8 lawsuits.

9 In fact, the statistics bear out this prediction about weak patents. Although it is estimated
10 that about 28% of patents are invalid as a general matter, patents that are litigated fully through
11 trial are invalidated at least 43% of the time. Compare Shawn P. Miller, *Where’s the Innovation:*
12 *An Analysis of the Quantity and Qualities of Anticipated and Obvious Patents*, 18 Va. J.L. & Tech. 1,
13 45 (2013), with John R. Allison, Mark A. Lemley & David L. Schwartz, *Understanding the Realities*
14 *of Modern Patent Litigation*, 92 Tex. L. Rev. 1769, 1801 (2014). This 54% higher invalidity rate in
15 litigation, relative to baseline invalidity, suggests that weak patents are systematically preferred
16 for assertion, so at least in the view of patent asserters, the presumption of validity does shield
17 weak patents from proper adjudication and invalidation even where invalidation is merited.

18 Second, putting the legal barriers to invalidation aside, patent litigants face an economic dis-
19 incentive to mounting comprehensive invalidation cases. Invalidation of a patent is a “public
20 good,” insofar as when a patent is invalidated, everyone enjoys the benefit of being able to use
21 the formerly patented invention free of legal threat. See, e.g., *Blonder-Tongue Labs., Inc. v. Univ. of*
22 *Ill. Found.*, 402 U.S. 313, 338–40 (1971); Megan M. La Belle, *Patent Law as Public Law*, 20 Geo. Ma-
23 son L. Rev. 41, 53–54 (2012). But the costs of that public good are borne by a private actor—often
24 a company or firm that, by invalidating a patent, ends up helping its rivals and competitors who
25 now can also use the invention without paying the costs of invalidity litigation. See, e.g., John
26 R. Thomas, *Collusion and Collective Action in the Patent System: A Proposal for Patent Bounties*,

27 _____
28 *Texas*, 20 Stan. Tech. L. Rev. 1, 5 (2017) (Eastern District of Texas’s favorability to plaintiffs “is the
accumulated effect of several marginal advantages”).

1 2001 U. Ill. L. Rev. 305, 333–34 (2001). Patent invalidation thus presents a free-rider problem: Lit-
2 igants face diminished incentives to press the strongest patent invalidity arguments or to devote
3 resources to building an invalidity case, in the same way that a private party is unlikely to invest
4 in upkeep of parkland if everyone is allowed to enjoy its benefits for free.

5 While patent litigants are not wholly discouraged from seeking patent invalidation—about
6 half of fully-litigated patents are in fact invalidated, as noted above—the free-rider problem man-
7 ifests itself in several observable ways. Patent litigants tend to use claim construction, the exercise
8 of a court interpreting the language of patent claims in ways that render the patent marginally
9 broader or narrower, to shift litigation issues toward noninfringement arguments about whether
10 the supposedly infringing products actually meet the elements of the claims, sidestepping ques-
11 tions of invalidity. See Roger Allan Ford, *Patent Invalidity Versus Noninfringement*, 99 Cornell L.
12 Rev. 71, 94–98 (2013).

13 Litigants also may settle cases on especially favorable terms on the eve of an invalidity deci-
14 sion, or even agree to vacatur of an invalidation decision. See *id.* at 113; Megan M. La Belle, *Against*
15 *Settlement of (Some) Patent Cases*, 67 Vand. L. Rev. 375, 424–28 (2014). That leaves the patent
16 owner free to assert that patent against others (including the litigants’ competitors), particularly
17 in situations where the patent would otherwise have been invalid and rendered unassertable. In
18 fact, the patentasserter may also immediately moot a patent case by tendering a royalty-free
19 license. See *Super Sack Mfg. Corp. v. Chase Packaging Corp.*, 57 F.3d 1054, 1059–60 (Fed. Cir. 1995).
20 This practice of “super-sacking” patent cases lets the patentasserter unilaterally avoid an adverse
21 validity determination. See Ford, *supra*, at 113 n.163.

22 Patent case litigants thus face a variety of disincentives for pursuing patent invalidation, in-
23 cluding the presumption of validity and the free-rider problem. As a result, patent invalidation
24 procedure is not sufficient to eliminate weak patents, leaving them in force as broad, powerful
25 tools for controlling markets and competitors, perhaps in anticompetitive ways.

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CONCLUSION

For the foregoing reasons, Defendants’ assertion that weak patents cannot confer market power is erroneous and should be disregarded.

Respectfully submitted,

Dated: March 19, 2020

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