United States Court of Appeals for the Federal Circuit

2019-2039

CONVERSANT WIRELESS LICENSING S.A.R.L.,
Plaintiff-Appellant,

v.

APPLE INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of California in No. 5:15-cv-05008, Judge Nathanael M. Cousins.

BRIEF OF *AMICUS CURIAE* NOKIA TECHNOLOGIES OY IN SUPPORT OF APPELLANT CONVERSANT WIRELESS LICENSING S.A.R.L.

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September 16, 2019

CERTIFICATE OF INTEREST

Counsel for *amicus curiae* Nokia Technologies Oy certifies the following:

1. The full name of every party or amicus represented by me is:

Nokia Technologies Oy

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Not Applicable

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

Nokia Technologies Oy is wholly-owned by Nokia Corporation, a publicly held corporation. No other publicly held corporation owns 10 percent or more of the stock of Nokia Technologies Oy.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this Court are (and who have not or will not enter an appearance in this case) are:

Not Applicable

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47.4(a)(5) and 47.5(b):

Not Applicable

Dated: September 16, 2019

/s/ John D. Haynes______
John D. Haynes

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae is Nokia Technologies Oy.[1] Nokia[2] is a leading innovator in the telecommunications industry. Nokia has cumulatively invested approximately $140 billion in research and development predominantly relating to mobile communications over the past two decades, and as a result of this commitment, currently owns around 20,000 patent families. Nokia has also played a prominent role in developing technologies that are incorporated in the 2G, 3G, 4G, and 5G mobile cellular standards that have been vital to the success of the global mobile telecom market. Nokia is a significant owner of cellular standards-essential patents ("SEPs") and has a significant number of licensees to those cellular SEPs (including licenses with Apple). Nokia remains at the forefront of developing cellular technologies, including in emerging 5G standards, and continues to contribute technologies covered by its patented inventions as well as to renew its industry-leading patent portfolio.

Nokia also has been for many years and continues to be one of the largest manufacturers of wireless, fixed, and optical telecommunications network equipment, and continues to invest heavily in related research and development,

[1] No counsel for any of the parties authored any portion of this brief. No entity other than *amicus curiae* Nokia Technologies Oy monetarily contributed to the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

[2] References to Nokia in this section include Nokia Technologies Oy and its parent, Nokia Oyj, and its affiliates.

including around $5.3 billion in 2018. As part of its ongoing businesses, which employ over 100,000 people and operate in roughly 130 countries, Nokia has also negotiated and secured licenses to cellular SEPs owned by other industry players. Thus, Nokia has extensive experience as both an SEP licensor and licensee.

Nokia has been involved in numerous patent cases in U.S. district courts, both as a plaintiff and a defendant, including cases involving SEPs.

Nokia believes that its perspective will assist the Court in evaluating certain of the issues presented in this appeal. As both the owner of a substantial portfolio of SEPs and a manufacturer of standards-compliant products, Nokia has a strong interest in making sure that the right balance is struck, and the proper evidentiary requirements are met when litigants pursue the extreme remedy of declaring patents unenforceable. Additionally, as an active participant in standards-setting activities at the European Telecommunications Standards Institute ("ETSI") and the Third Generation Partnership Project ("3GPP") for more than thirty years, Nokia offers substantial experience and context as to how standards-setting organizations ("SSOs") operate, industry practices when it comes to declaring patents, and the expectations of SSO participants like Nokia.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a)(3) Nokia submits a motion for leave to file herewith.

SUMMARY OF ARGUMENT

Nokia did not gain any extra benefit during the standards-setting process. There is no evidence that the relevant standard would have been any different if Nokia had disclosed its pending patent application in 1998 in connection with its technical contribution to ETSI. Indeed, ETSI working group participants were expressly charged under the ETSI IPR Policy with selecting the best technical alternatives for the standard. Even Dr. Walker, Apple's own expert, agreed that "[ETSI] wouldn't choose something just because it was IPR-free" because "[their] requirement is to…choose the best technical solution." Appx970, at 1420:8-10. Given this mandate and based on Nokia's extensive experience at ETSI, working group participants were neither concerned with nor discussed whether particular technologies were covered by patents (or patent applications) when selecting technologies to include in the standard, provided those participants (or their employers) had or would likely commit to license their essential IPR in accordance with ETSI's IPR policy. Instead, the background assumption always has been that technical contributions may be covered by pending patents or patent applications. As a result, Nokia's disclosure of a patent application related to its technical contribution in 1998 would have had zero impact on the technical decisions made by the relevant ETSI working group to ultimately adopt another proposal from Ericsson. Thus, there was no benefit to Nokia by making its specific declaration and disclosure in 2002 versus 1998. ETSI and its members' primary concern was then, and remains today, that patents are available under FRAND terms.

Because patent rights in the United States are important property rights emanating from the Constitution and the Patent Act (*see SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1353 (2018)), federal courts impose a high burden on parties that seek to render such rights unenforceable under a theory of implied waiver. First, any request to render a patent unenforceable must be established by clear and convincing evidence—not conjecture or speculation. *See Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1290 (Fed. Cir. 2011). And second, in assessing whether an equitable remedy may be appropriate, courts are obligated to fashion a fair, just, and equitable response reflective of the circumstances surrounding the purportedly offending conduct. *See Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465 (1979). The extreme remedy of unenforceability can only be imposed in cases where the conduct at issue is egregious (i.e., part of a pre-meditated scheme to deceive) or has directly and materially led to an unfair benefit when compared to the "but for" world if the conduct had not occurred.

Nokia respectfully submits that a case like this does not come close to meeting the high threshold for unenforceability. As the district court found below, "Nokia's misconduct was not egregious or extraordinary." Appx38. Further, as noted above, there is no evidence that Nokia's specific disclosure of the '151 patent in 2002 (as opposed to the patent application in 1998) materially and directly led to any unfair or inequitable benefits to Nokia or anyone else, or in fact changed anything at all.

Additionally, the timing of Nokia's patent-specific declaration generated no undue financial benefit to Nokia because Nokia had already given an undertaking to being prepared to offer a license to the essential IPR at issue on FRAND terms in accordance with ETSI's IPR Policy from the moment it made a general declaration in 1997 covering any of its IPR that may prove to be essential to the GSM/GPRS standards prior to their adoption. Therefore, Nokia's patent-specific FRAND-undertaking in 2002 changed nothing from a licensing perspective. Nokia was no less obligated to offer a license to the specific patent at issue on FRAND terms in accordance with ETSI's IPR policy in 1998 than it was in 2002.

In a case like this where there is no proof of egregious misconduct or any benefit at all (much less an unfair benefit) flowing directly from the challenged disclosure practice, Nokia believes the remedy of unenforceability cannot and should not be imposed. Such a result is particularly troublesome when viewed in the context of the prevailing industry practice of the time: industry participants generally disclosed IPR to ETSI *after* the technical standard was published. Appx3083 at ¶ 53 (citing Anne Layne Farrar, *Accessing IPR Disclosures Within Standard Setting: An ICT Case Study* (2011)). In addition, to the extent patent infringers are permitted to render patents unenforceable without showing that any unjust benefit directly flowed from the challenged conduct, it will lead to an inequitable windfall for the infringer who suddenly does not have to pay anything at all for the valuable technologies developed by others. From Nokia's perspective, imposing the severe remedy of unenforceability in these circumstances could potentially have far-reaching and unintended consequences in the industry.

ARGUMENT

I. PROOF OF INEQUITABLE BENEFITS REQUIRES "CLEAR AND CONVINCING EVIDENCE," AND EVEN THEN, A REMEDY OF UNENFORCEABILITY IS NOT AUTOMATIC

The remedy of unenforceability has been referred to as the "atomic bomb of patent law." *Therasense, Inc. v. Becton, Dickinson & Co*., 649 F.3d 1276, 1288 (Fed. Cir. 2011) (internal quotation marks and citation omitted). This Court has thus required that unenforceability be shown by the heightened clear and convincing evidence standard—a standard Apple itself agreed it had to meet on remand. *Id*. at 1287; *see also Buildex Inc. v Kason Indus., Inc*., 849 F.2d 1461, 1463 (Fed. Cir. 1988) (defining clear and convincing standard as "evidence which produces in the mind of the trier of fact an abiding conviction that the truth of [the] factual contentions are highly probable" (internal quotation marks and citation omitted)); *see also* Appx2537 (listing among the "Issues to Be Decided" "[w]hether clear and convincing evidence supports a finding that…Nokia or Core Wireless inequitably benefited…").

Moreover, the "remedy [of unenforceability] should not be automatic" but instead depends on equitable considerations arising from the circumstances involved and "should be fashioned to give a fair, just and equitable response reflective of [the patentee's] offending conduct." *Qualcomm Inc. v Broadcom Corp.*, 548 F.3d 1004, 1024 (Fed. Cir. 2008); *see also Qualcomm Inc. v. Broadcom Corp.*, 539 F. Supp. 2d 1214, 1216-17 (S.D. Cal. 2007), *affirmed in part and vacated in part by Broadcom*, 548 F.3d at 1004. The "remedy [should be] properly limited in relation to the underlying breach" after "properly consider[ing] the extent of the materiality of the withheld information and the circumstances of the non-disclosure related to the [SSO] proceedings." *Broadcom*, 548 F.3d at 1026. In inequitable conduct cases, this typically involves examining: (i) whether the patent owner engaged in intentionally deceptive conduct that (ii) materially affected the outcome at the Patent and Trademark Office. *See Therasense*, 649 F.3d at 1290-92.

Implied waiver cases illustrate the high burden that must be met under the clear and convincing evidence standard to establish unenforceability. In *Broadcom*, for example, the district court pointed to a detailed and extensive evidentiary record for its conclusion that the patent holder was engaged in a pre-meditated scheme to deceive and hold-up the industry by:

> [C]losely monitor[ing] and participat[ing] in the development of the H.264 standard, all the while concealing the existence of at least two patents it believed were likely to be essential to the practice of the standard, until after the development was completed and the standard was published internationally. Then, without any prior letter, email, telephone call, or even a smoke signal, let alone attempt to license Broadcom, Qualcomm filed the instant lawsuit against Broadcom for infringement of the ’104 and ’767 patents, seeking damages and [a] permanent injunction against Broadcom based on its development and manufacture of H.264 compliant products.

539 F. Supp. 2d at 1220. The district court further found clear and convincing evidence of extensive litigation misconduct by the patent holder’s employees, hired witnesses, and outside counsel, including concealment of evidence, repeated misrepresentations regarding such evidence, and even false testimony. *Id*. at 1227-28. Even a cursory comparison of *Broadcom* to the facts of this appeal reveals that they are night and day. This high standard must be maintained consistently to avoid the overapplication of the unenforceability remedy.

II. A FINDING OF UNENFORCEABILITY IS UNWARRANTED BECAUSE NOKIA DID NOT OBTAIN AN UNFAIR BENEFIT

A. The Undisputed Facts Show That The Challenged Conduct Did Not Directly Result In An “Unfair Benefit,” Precluding Application Of The Extreme Remedy Of Unenforceability

As the Court has instructed in the analogous inequitable conduct context, “courts must be vigilant in not permitting the defense to be applied too lightly.” *Star Sci., Inc. v. R.J. Reynolds Tobacco Co*., 537 F.3d 1357, 1366 (Fed. Cir. 2008) (addressing inequitable conduct defense); *see also Core Wireless Licensing S.A.R.L. v. Apple Inc*., 899 F.3d 1356, 1368 (Fed. Cir. 2018) (because “implied waiver . . . like inequitable conduct involves the breach of a disclosure duty," "analogous" requirements apply). Because implied waiver may render an entire patent unenforceable, this Court has stated that the doctrine "should only be applied in instances where the patentee's misconduct ***resulted*** in [an] unfair benefit," *Core Wireless*, 899 F.3d at 1368 (emphasis added) (quoting *Therasense*, 649 F.3d at 1292), and has also required "but for" materiality. *Therasense*, 649 F.3d at 1296. Moreover, this Court in *Core Wireless* remanded for a determination of whether "inequitable consequence ***flowed from*** Nokia's failure to disclose its patent application." 899 F.3d at 1368 (emphasis added).

The "but for" standard should not permit a party seeking unenforceability to simply *assume* that benefits flow from the challenged conduct or to conflate an "unfair benefit" with the general benefits derived from owning or enforcing patent rights because those general benefits are unrelated to any alleged misconduct. Instead, the party seeking unenforceability should be required to come forward with clear and convincing proof that benefits directly flowed from the conduct being challenged. In this case, Apple failed to put forward such proof because it argued merely that "Conversant obtained benefits in the form of licensing fees and by increasing its leverage over industry participants who must produce standards-compliant products." Appx41. These alleged benefits—enforcement and licensing—are common to *all* patent holders. If they qualified as unfair benefits, even though they are totally divorced from the conduct at issue, it would completely eviscerate the required "but for" standard of causation and have potentially far-reaching impacts on SDO participants. If simply owning the patent or successfully enforcing it against an infringer was sufficient to establish an "unfair benefit," there would have been no need for this Court to have remanded this case for further proceedings.

Turning to the specific issues of this case, the conduct at issue on remand was Nokia's disclosure of the '151 patent in 2002 instead of its patent application in 1998. The fundamental question is therefore how the world would have differed (if at all) if Nokia had disclosed the '151 patent application in 1998 instead of the '151 patent in 2002, where Nokia had already given an undertaking to be prepared to offer a license to its essential IPR on FRAND terms in accordance with the ETSI IPR policy prior to 1998.

The undisputed facts show that there would have been no relevant difference had Nokia made its specific disclosure of the '151 patent application in 1998. ***First***, in 1997 Nokia made a general declaration that it would be prepared to offer a license to its IPR that are essential to the relevant standard on FRAND terms in accordance with the ETSI IPR Policy. Thus, it would have been clear to ETSI participants in 1997 and 1998 that Nokia had no intention of making any of its essential IPR for the relevant standard (including the '151 patent to the extent it was essential) "unavailable" to those implementing the standard. ETSI achieves its goal of making sure IPR is "available," in the first instance, by encouraging members to make umbrella FRAND declarations for ETSI standards early on in the process (as Nokia did for GPRS in January 1997, and other significant contributors did as well).[3] *See* Appx3498 ("The IPR ad hoc group **recommends** that the TB Chairman's Guide on IPR should encourage Members to use general IPR undertakings/declarations and then provide or refine detailed IPR disclosures as more information becomes available.") (emphasis in original). In other words, this was not a situation where ETSI participants had to worry about Nokia potentially engaging in hold-up or patent ambush.

Second, ETSI participants actually rejected Nokia's own proposal related to the '151 patent's technology and instead adopted a proposal put forward by Ericsson; no one disputes that, not even Apple. Appx2540; Appx957, at 1366:1-8;

[3] General declarations related to GSM/GPRS were given by Nokia and Ericsson and both put ETSI members on notice that Nokia and Ericsson believed they would hold IPR covering the GPRS standards. *See* Appx3534 ("Ericsson is of the opinion that it has patent(s)/pending patent application(s) for the above proposed ETSI Standards. Ericsson is willing to grant licenses for the patent rights."); Appx3548 ("The SIGNATORY has notified ETSI that it is the proprietor of the IPRs (pending patent applications) and has informed ETSI that it believes that the IPRs may be considered ESSENTIAL to the GSM standard (relating to HSCSD and GPRS). The SIGNATORY and/or its AFFILIATES hereby declare that they are prepared to grant irrevocable licenses under these IPRs on terms and conditions which are in accordance with Clause 6.1 of the ETSI Interim IPR Policy…").

Appx958, at 1371:6-13, 1371:24-1372:5; Appx658, at 893:11-894:20. Thus, the question is whether Nokia's disclosure of a patent application covering Nokia's *rejected* proposal, where Nokia had already made a general FRAND declaration, would have caused ETSI participants to likewise reject Ericsson's proposal and replace it with a non-infringing alternative. ETSI's stated goals and standard practices show that this would not have happened. ETSI's stated goals have always been (i) for ETSI members to choose the **best *technical* solution** between competing proposals; and (ii) to ensure that SEPs covering the best technical solutions **are not "unavailable"** to standards implementers—meaning that the SEP owner will not refuse to make licenses available to the essential IPR on FRAND terms. ETSI IPR Policy, § 3.1 (emphasis added). As a result, the focus at ETSI has always been on securing FRAND commitments (ensuring availability) and picking the best technical solutions.

In fact, the Ad Hoc Group on ETSI's IPR Policy Operation formed by ETSI's General Assembly has stated "[t]he main task of a Technical Body is the search for the best technical solution and [] the existence of essential IPRs is not a barrier. Non-disclosure of essential IPR in a specific technical solution ***is not a problem for the Technical Body unless, ultimately, licenses are not available under FRAND conditions.***" Appx3496 (emphasis added). And against this backdrop, participants in working group meetings generally expect that technical contributions may be covered by patents (or applications) and would not be surprised to later learn that there was a patent or patent application covering a contribution that was available for license on FRAND terms. Consequently, the issue of whether individual technical contributions under consideration are covered by patents is an afterthought in the technical work of the working groups drafting standards.

The question of whether ETSI participants would have rejected Ericsson's proposal based solely on a specific declaration by Nokia in 1998 to Nokia's proposal then leads to the ***third*** important undisputed fact—the testimony of Apple's own expert on ETSI procedure. Dr. Walker testified in unequivocal terms that "[ETSI] wouldn't choose something just because it was IPR-free" because "[their] requirement is to…choose the best technical solution." Appx970, at 1420:8-10.[4] Apple made no attempt here to show that there was a proposal competing with Ericsson's proposal that would have met this test or that Ericsson's

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[4] Dr. Walker further testified that the only situation in which the existence of IPR might even conceivably come into play would be if "two solutions were technically the best, then you're more likely to choose the one for which there was no cost ultimately to your company than the one that ultimately, no matter how small, there would be some cost." Appx970, at 1420:11-14. While Dr. Walker's test undermines Apple's position, Nokia disagrees with it because it assumes that ETSI working group participants knew about and then would have taken into account patent coverage when weighing and voting on specific competing proposals. In Nokia's experience, they did not, primarily because they were expressly tasked by the ETSI IPR Policy with focusing on technical merit alone.

proposal itself was a "no cost" proposal. In fact, there was simply no evidence presented to the district court on the availability of alternative solutions to Ericsson's proposal.

Finally, this is further bolstered by the ***fourth*** undisputed fact: that most patent-specific disclosures at ETSI take place after the relevant standard is adopted and are done periodically in large tranches.

For example, a recent study conducted by a patent practitioner and ten-year in-house lawyer at Blackberry, Kelce Wilson, found that 86 percent of patents disclosed to ETSI for the 3G and 4G standards were untimely disclosed under the test recently adopted by the Court based on the limited record before it at the time of appeal.[5] Mr. Wilson's conclusion from the data was that:

> [T]he common conduct of ETSI members is late disclosures, per Dr. Walker's (Apple's) timeliness definition. . . . Therefore, long-standing, widespread practice by ETSI members indicates a fundamentally different interpretation of ETSI's IPR Disclosure Policy than as represented by Dr. Walker.

Appx3425, Appx3428. Mr. Wilson's conclusions are consistent with academic research published by economist Dr. Anne Layne-Farrar in 2011, which concluded that "most official IPR disclosures at ETSI are made ex post—often many years after the relevant standard components were published." Appx3469. Based on her

[5] For clarity, Nokia disagrees that its disclosure of the '151 patent in 2002 was untimely, as previously stated by this Court, but Nokia acknowledges the terminology as stated in this Court's August 16, 2018 decision.

analysis of empirical data, Dr. Layne-Farrar concluded that 88.7 percent of ETSI patent disclosures were made after the standard was adopted and those results "make[] clear that late IPR declarations are a broad practice for ETSI's mobile telecom standards" and "almost all ETSI members, and certainly all the major industry players, typically declare their patents to ETSI after the relevant standard component (TS) has been published." Appx3478, Appx3482, Appx3486. In fact, the Dutch Court of Appeals recently issued a decision in a very similar matter disagreeing with Apple's position as stated in this case and directly rejecting the argument that specific patent disclosures given after the standard had been finalized would qualify as untimely. Hof's-Haag 7 mei 2019, (Koninklijke Philips N.V./Asustek Computers Inc.)(ECLI:NL:GHDHA:2019:1065; Case No. 200.221.250 / 01)(Neth.).

This approach was also taken consistently by Apple itself and its expert, Dr. Walker, during his time as head of IPR at Vodafone. Mr. Wilson examined both and found that Apple itself disclosed its patents *late 88 percent of the time* and Vodafone (where Dr. Walker was head of IPR) disclosed its patents *late 100 percent of the time*. Appx3433. Moreover, Mr. Wilson noted that a large number of Apple's disclosures did not even identify any particular ETSI technical specification covered by the patent. Apple's behavior is thus inconsistent with the world it tries to depict where, supposedly, ETSI participants scrupulously examine patent declarations and disclosures before deciding on changes to technical specifications. Appx3461.

A simple review of disclosures to the GSM/GPRS standards lodged in the publicly-available ETSI IPR database for the period of January 1, 1990 through December 31, 1998 likewise shows that ETSI participants were not making a flurry of individualized patent disclosures in connection with technical contributions, but were instead making disclosures for larger tranches of patents on a periodic basis. In two official reports from ETSI listing IPR disclosed to ETSI standards—one issued in June 1998 and the other in November 1999—a grand total of two patent disclosures were listed for GPRS (both made by Deutsche Telekom) even though it is obvious from the record below that there was substantial work being done in the ETSI working groups on the GPRS standards. Appx3575-3840. This is a point emphasized by Dr. Layne-Farrar:

> It is important to note that firms tend to make many IPR declarations at once. In other words, official disclosure is "lumpy" and does not occur smoothly over time. . . As the table indicates, a single declaration date tends to cover double digit percentages of a given firm's total disclosed IPR. In fact, two firms posted *all* of their relevant IPR on a single date. The fact that declarations come in bursts is not surprising given the time and cost involved in identifying patents to declare as potentially reading on a standard currently under development. In light of the effort involved, firms appear to make such determinations infrequently, on an as-needed basis.

Appx3484-3485. In addition, Nokia employee and long-time ETSI working group chair Antti Toskala provided the undisputed statement in his expert rebuttal report below that he never heard an ETSI participant declare or disclose IPR (patents or applications) for their technical contributions in the course of working group meetings even though working group meetings in the 1997 to 1998 timeframe were often chaotic and intensive with contributions sometimes being provided for the first time in the course of the working group meetings themselves.[6] Dr. Walker agreed. Appx2948 (citing Walker Depo. Tr. at 87:7-12).

Intel explained the issue well in responding to requests for comments from the Federal Trade Commission on SSO disclosure rules:

> The Commission should not assume that disclosures of patent rights to other SSO members are an unmitigated and virtually cost-free good. In practice, disclosures are less valuable than the simple holdup paradigm would suggest, and disclosure requirements can impose significant costs.
>
> The benefits of patent disclosure are modest at best. In theory, disclosures of potential patent rights would serve to alert SSO members to other companies' patent interests and enable them to investigate nonproprietary alternatives for inclusion in the standard. In practice, however, disclosures almost never result in the hypothesized careful, fully informed cost-benefit assessment of alternative unpatented technologies. To begin with, the sheer number of patents and patent applications implicated by a proposed standard is often huge, and the SSO members are unable to assess all of them. Moreover, mere disclosure of the existence of a potentially relevant patent or patent application is of limited value because it says nothing about the validity and scope of the claims that will eventually issue. In addition, SSO members recognize and accept that other, undisclosed patents may surface... ***As a result, disclosure of patent interests rarely has a significant effect on***

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6 The relatively chaotic and fast-moving working group proceedings described by Mr. Toskala of course belies Apple's insinuation that somehow ETSI participants would have had the time or inclination to step back and study both the technical merits and IPR implications of every technical contribution before having voted on them.

> ***what technology goes into a standard. Instead, its practical effect is usually only to trigger RAND or other licensing obligations, which can be achieved without requiring patent disclosure.***

See Appx3526 (emphasis added).

The net impact of all this evidence is that there would have been no benefit to be gained by Nokia in the standards-setting process from delaying disclosure if Nokia was simply following the same practices as every other ETSI participant. In other words, Nokia's proposal would not have appeared to ETSI participants as a unique, IPR-free solution in a world where patent-specific declarations for other technical contributions on the table at the time also had not been made. And it also makes it highly unlikely that, at the time ETSI selected the Ericsson proposal at issue in this case, ETSI participants would have presumed to know the full scope of potential IPR covering each and every technical contribution (even rejected ones) because their own companies also did not declare essential IPR on an ad hoc basis for each contribution prior to adoption of the standard. Moreover, Apple also failed to present evidence that there actually were other IPR-free technologies that would have been adopted into the standard (or even whether such alternatives were even feasible) had Nokia declared its unpublished Finnish patent application in 1998. Again, Apple's expert actually took the opposite position when he conceded there was "no evidence that [ETSI] would have chosen another technology . . . but for Nokia's supposedly untimely disclosure of the '151 IPR." Appx975, at 1437:5-

9. Instead, Apple simply speculates that there *could* or *might* have been another alternative. Nokia submits that this is insufficient to support a finding of unenforceability under the clear and convincing evidence standard.

In short, this evidence is fatal to Apple's conclusory argument (without any evidentiary support whatsoever) that the disclosure of Nokia's patent application in 1998 (as opposed to the '151 patent in 2002) for its proposal (at a time when Nokia had already made an umbrella FRAND declaration) would necessarily have resulted in ETSI rejecting or modifying the Ericsson proposal that was ultimately adopted. Apple's *ipse dixit* conclusion simply makes no logical sense given the express charge to ETSI participants (to pick the best technical solution), the considerations at play under the ETSI IPR Policy's disclosure rules (what IPR will be unavailable because no FRAND commitment has been given), and the state of affairs at ETSI in the relevant timeframe with regard to knowledge of the IPR landscape (88 percent of IPR disclosures occurring post-adoption of the standard).

B. There Is No Evidence That Nokia Or Conversant Received Any Unfair Financial Benefit

Apple also presented no evidence on remand that Nokia or Conversant obtained any financial benefits that resulted or flowed solely from disclosure in 2002 as opposed to 1998. Instead, Apple simply contended that the '151 patent had been licensed among a portfolio of other patents and this necessarily meant that the financial benefit of those licenses must have necessarily resulted or flowed from the disclosure issue. But this is not a case where delayed disclosure resulted in patent ambush or hold-up that somehow increased Nokia's or Conversant's leverage with regard to the '151 patent. Nokia's conduct was utterly inconsistent with attempted hold-up or ambush. Nokia provided not just one, but actually two separate, written FRAND undertakings covering the '151 patent. Nokia made the first of those undertakings for any essential IPR that relates to GSM/GPRS in January 1997—prior to its specific technical contribution to ETSI and before it even filed the '151 patent application. Apple ignored this fact. Nokia's umbrella general FRAND declaration necessarily meant that Nokia had no ability to hold up, block, or ambush manufacturers of standards-compliant products who were willing to take a license on FRAND terms.[7] *See* Appx3546-3548. When Nokia later declared the '151 patent itself, Nokia provided yet another patent-specific FRAND undertaking for the '151 patent. *See* Appx3549-3571. This conduct was fundamentally inconsistent with an intent to "hold-up" the industry or lay a "classic patent ambush." There is no allegation in this case (much less proof) that

[7] Nokia's general FRAND declaration covered any and all of its SEPs to the GSM/GPRS standards. This general declaration applied equally in 1998 as it did in 2002. If Apple were to have sold standard compliant devices then—though it of course did not sell any such devices until 2007—it would have been able to rely on this general FRAND declaration if it sought a license in the same way it would have relied on any specific declaration made by Nokia, whether in 1998 or 2002.

Nokia (or Conversant for that matter) ever refused to abide by those FRAND undertakings. The evidence is to the contrary.

CONCLUSION

For the reasons set forth above, *amicus* respectfully submits that in reviewing attempts by an infringer to declare a patent unenforceable, this Court should continue to impose the high burdens of: (i) clear and convincing evidence; and (ii) “but for” materiality, before finding implied waiver. In a case like this one, where the infringer presents no evidence of any unjust benefit flowing from the challenged conduct, the Court should not find unenforceability based solely on ill-founded assumptions and inferences or benefits that flow simply from ownership of a patent as opposed to the challenged conduct because it would lead to an inequitable windfall for the infringer. To lower the bar and find that Apple met its burden in this case could potentially have serious consequences going forward on continued investment in research and development by patent owners who make their inventions available for use by those implementing highly-successful industry standards.

Date: September 16, 2019

Respectfully submitted,

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Nokia Technologies Oy

United States Court of Appeals
for the Federal Circuit
Conversant Wireless Licensing S.a.r.l. v. Apple Inc.
No. 2019-2039

CERTIFICATE OF SERVICE

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On **September 16, 2019** counsel has authorized me to electronically file the foregoing **BRIEF OF *AMICUS CURIAE* NOKIA TECHNOLOGIES OY IN SUPPORT OF APPELLANT CONVERSANT WIRELESS LICENSING S.A.R.L.** with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including the following principal counsel for the other parties:

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September 16, 2019

/s/ Julian Hadiz
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and Federal Circuit Rule 32(a). This brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b), contains 5,206 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word, in 14 Point Times New Roman.

Date: September 16, 2019

By: /s/ John D. Haynes

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