No. 2018-1367

United States Court of Appeals for the Federal Circuit

INTELLECTUAL VENTURES I LLC, INTELLECTUAL VENTURES II LLC,

Plaintiffs-Appellees,

INVENTION INVESTMENT FUND II, LLC, INTELLECTUAL VENTURES MANAGEMENT, LLC, INVENTION INVESTMENT FUND I, L.P.,

Third-Party Defendants-Appellees,

v.

CAPITAL ONE FINANCIAL CORPORATION, CAPITAL ONE BANK (USA), NATIONAL ASSOCIATION, CAPITAL ONE, NATIONAL ASSOCIATION,

Defendants/Third-Party Plaintiffs-Appellants.

Appeal from the United States District Court for the District of Maryland in No. 8:14-cv-111-PWG, Judge Paul W. Grimm.

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September 25, 2018

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CERTIFICATE OF INTEREST

Counsel for Appellants certifies the following:

1. Full Name of Party represented by me:

   Capital One Financial Corporation;
   Capital One Bank (USA), National Association; and
   Capital One, National Association.

2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:

   N/A.

3. Parent corporations and publicly held companies that own 10 percent or more of stock in the party:

   Capital One Financial Corporation, a publicly held company, is the parent corporation of—and owns more than 10% of the stock of—Capital One Bank (USA), National Association and Capital One, National Association.

   Capital One Financial Corporation has no parent corporation and no publicly held corporation owns more than 10% of its stock.

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 (and who have not or will not enter an appearance in this case) are:

   Latham & Watkins LLP (asterisk denotes no longer with the firm): Clement Naples, Jeffrey G. Homrig, *Ethan Y. Park, *Katherine M. Schon, *Kristopher Davis, *Michelle P. Woodhouse, Patricia Young, *Elizabeth V. Johnson, *Kerry J. Dingle, Marguerite M. Sullivan, *Peter O. Schmidt, *William H. Rawson, *Jessica E. Phillips, *Alicia Jovais, *Blake E. Stafford.

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   Kramon & Graham PA: Andrew J. Graham, James P. Ulwick.

Kirkland & Ellis LLP: Brent P. Ray, David W. Higer, Joel Merkin, Kenneth R. Adamo, Kristina Hendricks, Megan M. New, Ryan M. Hubbard, *Vishesh Narayen.

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).

None.

September 25, 2018	*/s/ J. Scott Ballenger*
Date	Signature of counsel
	J. Scott Ballenger
	Printed name of counsel

TABLE OF CONTENTS

Page

CONFIDENTIAL MATERIAL OMITTED

The material omitted is subject to a protective order entered by the district court and describes confidential business information related to Appellees' patent acquisitions.

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

INTRODUCTION

The district court incorrectly granted summary judgment on two narrow grounds—*Noerr* immunity and issue preclusion. To reverse, this Court need only correct these two erroneous holdings. And IV knows it, which is why it devotes so much effort to alternative arguments that the district court squarely rejected.

1. *Noerr* does not shield IV's patent acquisitions, regardless of their subsequent assertion against the banking industry. *Noerr* has no application to Section 7 of the Clayton Act, as the nation's antitrust enforcers and leading antitrust scholar explained in response to the district court's decision. Opening Br. 27-30; Gov't Br. 11-21. Likewise, *Noerr* does not preclude the application of Section 2 of the Sherman Act to IV's non-government petitioning conduct. Indeed, for the same reason that patent acquisitions tending to create a monopoly can violate Section 7, they can equally violate Section 2. Even if IV's petitioning conduct were somehow "integral" to Capital One's Section 2 claim, as IV urges, IV's pattern of litigation without regard to the merits falls within an exception to *Noerr*.

2. Issue preclusion cannot attach to the Virginia court's 2013 order, which dismissed Capital One's claims "for several reasons" beyond market definition. The black-letter law of the Fourth Circuit (as recognized by this Court) is that issue preclusion does not attach to a dismissal that rests on multiple grounds. In addition, the market definitions alleged in Virginia and Maryland are not "identical" as issue

preclusion requires. The Virginia market comprised all technologies enabling certain commercial banking business processes owned by any company (not just IV), whereas the market here is limited to IV's financial services portfolio.

The Court should reverse the district court on these two bases.

While the Court need not address IV's arguments on market definition, market power, or anticompetitive conduct, IV is wrong on them as well. IV's conduct is anticompetitive under a long line of decisions. *See infra* § IV.B. And, contrary to its narrative (IV Br. 1-7), IV is not a patent broker providing new technologies or engaging in merit-based patent licensing. IV is the world's largest patent aggregator with a business model predicated on identifying a target industry and acquiring thousands of low-cost patents directed at a target industry to create a portfolio it contends is unavoidable. Opening Br. 5-6. To hide its acquisitions, IV employs a network of shell companies and ensures that prospective licensees cannot identify—much less evaluate—its full patent holdings. *Id.* at 10. Its self-confessed goal is monopoly, which allows it to seek hundreds of millions of dollars for a time-limited license to a portfolio which remains, to IV's targets, largely a black box. *Id.* at 5. The whole point of IV's strategy is to render the actual inventive value of its patents (if any) irrelevant. While IV tells this Court that the scale of its patent aggregation is irrelevant—a "large number of nonsubstitutes [patents] is no more ... a threat to competition[] than a small collection"—its own documents champion the "power of massive patent aggregation" to obtain "market power." *Compare* IV Br. 54, *with* Appx111492 (emphasis omitted) *and* Appx112394.

Abundant evidence—including IV's own documents, its executives' testimony, and expert analysis by Professor Fiona Scott Morton, the DOJ's former chief economist—shows that IV's Counterstatement of the Case is deeply flawed and that there are genuine questions of material fact on all substantive elements of Capital One's claims. *See* Appx60 (This evidence presents a "case [ready] to proceed to trial.").

ARGUMENT

I. *NOERR* HAS NO BEARING ON CAPITAL ONE'S CLAIMS

The district court erred in granting summary judgment to IV based on *Noerr*. The DOJ and FTC explained in their *amicus* brief that this erroneous holding "would significantly hinder both private and government enforcement of Sherman Act Section 2 and Clayton Act Section 7." Gov't Br. 20.

A. Patent Acquisitions And Concealment Involve No Petitioning

Section 7 of the Clayton Act addresses acquisitions, including of intellectual property, that tend to substantially lessen competition or create a monopoly. Acquiring patents involves no petitioning of the government, which means that *Noerr* is not implicated. Gov. Br. 20; Opening Br. 1, 21-22, 25-30. As the agencies explain, the "district court's decision raises particularly stark concerns in the context of Section 7," Gov't Br. 16, as "enforcement of Section 7 ... does not run afoul of *Noerr-Pennington* protection," *id.* at 20. Leading antitrust scholar Professor Herbert Hovenkamp, who co-authored the antitrust treatise that IV relies on elsewhere in its Brief, authored an article similarly criticizing the district court's application of *Noerr*. Appx200924-200958 (Herbert Hovenkamp, *Prophylactic Merger Policy*, ___ Hastings L.J. (forthcoming 2018)). IV responds to these critiques by attacking the critics—charging the government with "rewrit[ing]" the district court's opinion and misunderstanding *Noerr*'s application to non-competitors, IV Br. 17, 47, and Professor Hovenkamp with "mak[ing] a series of stunning misstatements about this case," *id.* at 58 n.9. The district court erred in applying *Noerr* to the Section 7 claim and, as the *amici* indicate, this is an important issue with consequences beyond this case. *See* Gov't Br. 20-21.

Noerr, likewise, does not attach to Capital One's claim under Section 2 of the Sherman Act. IV realized unlawful monopoly power through a multi-pronged scheme. It analyzed the financial-services industry, acquired thousands of patents that it could claim read on banking processes, concealed its acquisitions and ownership behind some 2,000 shell companies, and finally—having built a purportedly unavoidable portfolio—filed as many lawsuits as necessary to attempt to force banks to pay hundreds of millions of dollars apiece.

Noerr has no application to that course of conduct, except arguably to the last piece. As a matter of law, even *Noerr*-protected litigation would not shield IV against a monopolization claim directed at the pre-petitioning conduct. *See, e.g.*, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 505-07 (1988) (*Noerr* does not reach "commercial activity that has traditionally had its validity determined by the antitrust laws themselves"); *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962) (*Noerr* "is plainly inapposite" to "private commercial activity"). Upon acquiring patents that tend to create a monopoly (regardless of any later litigation), IV not only violated Section 7, it unlawfully acquired monopoly power in violation of Section 2. Opening Br. 30-39.[1] A firm that built an unlawful patent monopoly cannot retroactively immunize its patent acquisitions by later filing suit. *See, e.g.*, *Amphastar Pharm. Inc. v. Momenta Pharm., Inc.*, 850 F.3d 52, 57 (1st Cir. 2017) ("The mere existence of a lawsuit does not retroactively immunize prior anticompetitive conduct."); Gov't Br. 10 ("*Noerr-Pennington* does not protect non-petitioning conduct that is not incidental to petitioning, even if both are part of the same course of conduct.").

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[1] To the extent that IV argues that its patent acquisitions and concealment could not harm competition, Capital One disproves that contention below. *Infra* § IV.B.

B. The Fact That IV Uses Litigation To Attempt To Monetize Its Acquired Patent Monopoly Is Irrelevant

Despite the settled law that patent acquisitions and concealment are not protected conduct, IV claims protection under *Noerr* for its entire course of conduct. In IV's view, Capital One made litigation "an integral part of its claim," arguing that monopolists gain nothing from just acquiring and concealing patents. IV Br. 14.

That argument lured the lower court into error. *Every* patent-related antitrust violation depends on the threat or fact of an infringement lawsuit to produce the harm made possible by the anticompetitive conduct. But that does not immunize patent acquisitions from antitrust scrutiny. As the government explains, "protected petitioning activity may be part of a larger anticompetitive, and hence unlawful, course of conduct." Gov't Br. 14. And, critically, "*Noerr-Pennington* does not protect anticompetitive patent acquisitions from antitrust liability simply because the patent holder subsequently engages in protected litigation activity." *Id.* at 21.

IV argues that, because a patentee can only monetize its holdings through threatened or actual litigation, its patent acquisitions and concealment are meaningless by themselves and *Noerr* immunity must extend to the acquisitions. IV Br. 14. If that were true, however, the DOJ and FTC would have no role in reviewing acquisitions of patents—but they do, Gov't Br. 18—and even the most obvious antitrust violation involving patent acquisitions would be immune from scrutiny. As the Supreme Court recently reaffirmed, anticompetitive agreements involving patents are actionable without regard to the subsequent assertion (or non-assertion) of those patents. *FTC v. Actavis, Inc.*, 570 U.S. 136, 149 (2013) (citing with approval *United States v. Singer Mfg. Co.*, 374 U.S. 174, 197 (1963)). Indeed, "the Court has struck down overly restrictive patent licensing agreements—irrespective of whether those agreements produced supra-patent-permitted revenues." *Id.* at 150. That could not be the law if IV's view were correct.

IV's patent aggregation gave rise to a portfolio designed to be unavoidable. Concealment of IV's patent holdings frustrated any effort to assess IV's patents or design around them. As the DOJ's former chief antitrust economist explained, that non-petitioning conduct harmed competition. *See, e.g.*, Appx103617-103618. Such conduct violates Section 2.

IV is left to criticize Capital One for pleading and evincing the role of litigation in IV's overall scheme to achieve a patent-licensing monopoly. But IV's use of litigation as a "HAMMER," a "strategic tool," and a "[f]orcing function[] [to] help close licensing deals" contextualizes the full anticompetitive plan. Appx111444; Appx111800. As the DOJ and FTC explain, "although protected litigation activity cannot itself be the antitrust violation, that activity may be used to show other things, such as intent." Gov't Br. 13 (citation omitted). Similarly, "once the antitrust violation is established on other grounds, the costs of defending against litigation can be incorporated in an award of damages." *Id.*; *see also* Opening Br. 36 n.8.

These points are dispositive. Patent acquisitions and concealment receive full antitrust scrutiny regardless of subsequent petitioning. But the Court should not ignore the last prong of IV's conduct—its myriad lawsuits, which form part of IV's larger anticompetitive scheme that this Court should view holistically under Section 2. *See, e.g.*, *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1263 (9th Cir. 1982) ("When ... the petitioning activity is but a part of a larger overall scheme to restrain trade, there is no overall immunity."). Even meritorious lawsuits can be consistent with an actionable overall anticompetitive scheme. Opening Br. 35-39 (citing cases).

In short, *Noerr* provides no basis for granting IV summary judgment.

C. By Filing 16 Lawsuits Against Banks—And Not Winning A Single One—IV Engaged In A Series of Claims "Without Regard To The Merits"

Noerr poses no obstacle to a trial on Capital One's claims. But even if litigation were "integral" to those claims—which it is not—this Court should still reverse and remand. A jury could reasonably find that IV's litigation was anticompetitive and without regard to the merits.

IV's use of litigation against the financial services industry falls within the sham exception to *Noerr*. IV built a patent-licensing monopoly directed at the banking industry. To monetize that monopoly, IV sued not just Capital One but over a dozen other banks. IV has not won any of its 16 lawsuits. There are, at the very least, fact questions whether IV's "purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims and thus is within the 'mere sham' exception announced in *Noerr*." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973) (summarizing the holding of *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972)). Not winning on a single claim in any patent asserted in its 16 litigations against banks is "the hallmark of insubstantial claims," *id.*, brought "without regard to the merits and for the purpose of [violating the law]," *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27*, 728 F.3d 354, 365 (4th Cir. 2013) (alteration in original) (citation omitted). *See also* Opening Br. 48-50.

Yet IV insists that the "objectively baseless" standard of *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* ("*PREI*"), 508 U.S. 49 (1993), applies, rather than the holistic approach of *Trucking Unlimited*. The courts that have addressed the question, however, are virtually unanimous in declining to extend *PREI* to a situation in which a firm brings a "series" of cases. *See Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 179-80 (3d Cir. 2015); *Waugh Chapel*, 728 F.3d at 364; *PrimeTime 24 Joint Venture v. Nat'l Broad. Co.*, 219 F.3d 92, 101 (2d Cir. 2000); *USS-POSCO Indus. v. Contra Costa Cty. Bldg. & Constr. Trades Council*, 31 F.3d 800, 810-11 (9th Cir. 1994).

IV says nothing about the Fourth Circuit's *Waugh Chapel* opinion let alone *Hanover 3201* or *PrimeTime*. It implies, however, that the Third, Fourth, and Second Circuits did not take "a careful look" at the rule they adopted, and describes *USS-POSCO* as "[m]istaken" and "unsound." IV Br. 61-63. That conflicts with the views of the FTC in its *Noerr* report. *See* Appx110081-110086.[2] IV pushes a view expressed only in the First Circuit case *Puerto Rico Telephone*—a decision distinguishable on the facts and in which the two-judge concurring opinion states that the court "does not hold that the 'objectively baseless' requirement" from *PREI* "necessarily applies to each and every case involving a pattern of petitioning." *Puerto Rico Tel. Co. v. San Juan Cable LLC*, 874 F.3d 767, 773 (1st Cir. 2017) (Barron, J., concurring), *cert. denied*, 138 S. Ct. 1597 (2018); Opening Br. 42 n.9.

IV makes two additional arguments.

1. IV argues that there is no sham exception when a monopolist sues its customer. IV Br. 46-48. In *PREI*—where a firm allegedly harmed competition by

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[2] As the FTC's *Noerr* report notes, in *USS-POSCO* the Ninth Circuit explicitly answered in the affirmative the question "'[w]hether litigation that is not objectively baseless can still constitute "sham litigation" sufficient to eliminate ... *Noerr-Pennington* immunity.'" Appx110085 (alterations in original) (emphasis and citation omitted). That answers IV's references to the Virginia court's exceptional case order. IV Br. 41-42.

suing its rival—the Supreme Court defined a "sham" as including "'an attempt to interfere *directly* with the business relationships of a competitor." 508 U.S. at 60-61 (citation omitted). IV and the court below take that to mean that a firm may use "the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon," (*id.* at 61 (citation omitted)) against anyone but "competitor[s]." This creates an artificial distinction between patent suits targeting competitors versus customers (who are preferred antitrust plaintiffs) or others. For this reason, the DOJ and FTC explained that the district "court misread *Professional Real Estate Investors*, 508 U.S. at 60-61, to mean that the subjective prong of the sham-litigation exception can be satisfied only if the antitrust defendant sues a competitor." Gov't Br. 11 n.4; Opening Br. 50-51 (citing cases).

2. IV also argues that *Trucking Unlimited* cannot apply because IV has only sued Capital One twice. IV Br. 64-66. But how many times IV has sued Capital One is not the right question. IV has achieved a patent-licensing monopoly in which banks—not simply Capital One—are the relevant customers. Because IV has filed 16 unavailing lawsuits against banks (including two lawsuits on ten unrelated patents against Capital One), it has certainly initiated "a series of legal proceedings."

The record contains ample evidence that those lawsuits, evaluated collectively, represent an abuse of the legal process. IV never prevailed on a single asserted patent, and the evidence supports a finding that it filed suit without regard to the merits. IV does not deny launching its 16 lawsuits "with the intention to induce the execution of a license to a large group of patents," which were not themselves in suit. IV Br. 44. It therefore admits to using the lawsuits to obtain something other than "favorable government action," *id.* (citation omitted)—namely a license to its overall portfolio.

IV asks the Court to ignore all of its banking cases other than the two against Capital One under *ERBE Elektromedizin GmbH v. Canady Technology LLC* ("*ERBE*"), 629 F.3d 1278 (Fed. Cir. 2010). IV Br. 64-65 (relying on *ERBE*, 629 F.3d at 1292). But that decision disregarded lawsuits that did not involve an effort to harm competition. By contrast, IV expressly used its lawsuits against banks to attempt to convince banks, including Capital One, that if it failed to take a license to IV's "deep portfolio," IV's threat of endless litigation based on that portfolio was credible.

In short, the district court erred in concluding that *Noerr* insulates IV's anticompetitive conduct from antitrust scrutiny. Indeed, the district court's holding "would significantly hinder" antitrust enforcement in this area. Gov't Br. 20. Accordingly, the district court's summary judgment on this basis should be reversed.

II. ISSUE PRECLUSION DOES NOT APPLY AS A MATTER OF LAW

Alternative grounds for a decision mean that none is "critical and necessary" and, hence, none is preclusive. That is Fourth Circuit law, which controls here. *TecSec, Inc. v. Int'l Bus. Machs. Corp.*, 731 F.3d 1336, 1341 (Fed. Cir. 2013). The Virginia court dismissed Capital One's antitrust counterclaims "for several reasons" beyond market definition, Appx200268, which ends the analysis. Contrary to IV's suggestion (IV Br. 27), the Fourth Circuit does not apply a different rule in defensive preclusion cases.

Preclusion can also only attach to issues that are truly "identical." The market alleged in Virginia expressly differs from the one pleaded here and confirmed by Professor Scott Morton.

A. Market Definition Was Not "Critical And Necessary" To The Prior Decision

IV argues that issue preclusion reaches alternative determinations in defensive preclusion situations. IV Br. 27-28. That is not Fourth Circuit law. The Fourth Circuit has held repeatedly that, "when issue preclusion is considered in the context of two separate litigations" and "a judgment in the prior case is supported by either of two findings, neither finding can be found essential to the judgment." *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 328 (4th Cir. 2004); *see also Tuttle v. Arlington Cty. Sch. Bd.*, 195 F.3d 698, 704 (4th Cir. 1999); *C.B. Marchant Co. v. E. Foods, Inc.*, 756 F.2d 317, 319 (4th Cir. 1985). Those precedents recognize that any different rule incentivizes unnecessary and unproductive appeals. Opening Br. 53. And this Court has held that, under Fourth Circuit law, defensive issue preclusion does not apply "where the court in the prior suit has determined two issues, either of which could independently support the result." *TecSec*, 731 F.3d at 1343 (citation omitted). Fourth Circuit precedent rejects the First Restatement of Judgments rule that IV argues for (IV Br. 30-31) with cases applying Third Circuit law.

Nor does the Fourth Circuit draw any distinction between offensive and defensive issue preclusion in this respect. IV attacks straw men by insisting that the distinction between offensive and defensive preclusion is well established. It is, but that distinction makes no difference to this rule—in Fourth Circuit precedent or in the Restatements. Neither the First or Second Restatement of Judgments distinguishes between offensive and defensive preclusion when considering alternative grounds, and the reason for the Second Restatement rule—avoiding needless appeals in the first case—is the same however the second case might arise. Opening Br. 56. *Parklane Hosiery Co. v. Shore* distinguishes between offensive and defensive preclusion only in recognizing that courts have "broad discretion" to decide not to apply offensive preclusion at all, for equitable reasons. 439 U.S. 322, 331-32 (1979); *see also Microsoft*, 355 F.3d at 326. That distinction does not help IV.

The Fourth Circuit's *en banc* decision in *Lisa Lee Mines* involved defensive preclusion, just like this case. *Lisa Lee Mines (Terrilynne Coal Co.) v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 86 F.3d 1358, 1362 (4th Cir. 1996) (en banc). The *en banc* court looked to issue preclusion for "background principles" in interpreting the black lung regulation at issue. *Id.* The court, again citing the Second Restatement, explained that issue preclusion would not attach to either of the alternative grounds barring the claimant's prior claim. The court explained that, in the defensive preclusion context, a contrary rule would require losing plaintiffs to file "a meaningless appeal" on every ground of their denial to avoid preclusion. *Id*. at 1363. That *en banc* ruling, which IV does not cite, confirms that the Fourth Circuit has adopted the Second Restatement's view on alternative determinations, and applies that rule to defensive preclusion cases such as this one.

IV's only contrary argument is based on *Ritter v. Mt. St. Mary's College*, 814 F.2d 986 (4th Cir. 1987). But subsequent Fourth Circuit precedent makes clear, as IV now acknowledges (IV Br. 27), that *Ritter* applied an entirely different judicial doctrine—law of the case—that applies only within a single lawsuit. *Microsoft*, 355 F.3d at 328. IV asks this Court to ignore the Fourth Circuit's rationales for its decisions in this area. This Court has already refused to apply *Ritter*'s "law of the case principle" in a case governed by Fourth Circuit law and involving a claim of defensive issue preclusion from the outcome of a prior litigation. *See TecSec*, 731

F.3d at 1344. This Court held that, under Fourth Circuit law, defensive issue preclusion did not apply because "where the court in the prior suit has determined two issues, either of which could independently support the result, then neither determination is considered essential to the judgment." *Id.* at 1343 (quoting *Ritter*, 814 F.2d at 993). Capital One's Opening Brief (at 51, 56) cited *TecSec*, but IV ignores it because it has no answer. Even this Court's decision applying Third Circuit law that IV relies upon, *United Access Technologies, LLC v. CenturyTel Broadband Services LLC*, confirms that the Fourth Circuit follows the Second Restatement. *See* 778 F.3d 1327, 1333 n.2 (Fed. Cir. 2015); *see also, e.g., Phil-Insul Corp. v. Airlite Plastics Co.*, 854 F.3d 1344, 1357 n.2 (Fed. Cir. 2017) (same).

Finally, IV argues that this case falls into an exception recognized in Illustration 16 of the Second Restatement. As a threshold matter, the Fourth Circuit has spoken clearly: an issue that was merely one of several alternative grounds for a judgment carries no preclusive effect. Illustration 16 is not the law, as IV cites no case from any Circuit (Fourth or otherwise) applying Illustration 16, nor is Capital One aware of any. Regardless, Illustration 16 makes the narrow point that a party cannot relitigate the exact same ultimate issue it lost before (there, whether he was entitled to interest on the same promissory note previously litigated) merely because he lost for several reasons. IV tries to bring this case within that exception by claiming that the Virginia court already decided the "issue[s]" of IV's "liability for monopolization and attempt to monopolize." IV Br. 32-33 (quotation marks omitted). But the ultimate issues at stake here are not exactly the same as those resolved in Virginia. This case involves different allegations of market definition and market power, *see infra* § II.B., additional patent acquisitions since the Virginia litigation, *see infra* § III, and an entirely different procedural posture. That is why IV argues issue preclusion on discrete issues (e.g., market definition) that it wrongly contends were the same before. Treating this case as analogous to Illustration 16 would cause the Illustration to swallow the Second Restatement's (and Fourth Circuit's) general rule.[3]

B. Different Relevant Markets Were Pleaded And Then Shown In Virginia And Maryland, So The Issues Are Not "Identical"

Issue preclusion does not attach here for another reason: Capital One alleged—and its expert analysis ultimately proved—a different relevant market in Maryland than the market dismissed on the pleadings in Virginia. Under Fourth Circuit law, issue preclusion "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding

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[3] IV also cites (IV Br. 33) a passage from Wright & Miller, which argues that Illustration 16 is "elusive[]" and proposes that it "would be far better to explain the result by a rule that preclusion is available so long as each and any of the findings that were independently sufficient to dispose of the first action would also be independently sufficient to dispose of the second action." 18 Charles A. Wright et al., *Federal Practice and Procedure* § 4421 (3d ed. 2018 Westlaw). If read as broadly as IV desires, it would conflict with Fourth Circuit law and the Second Restatement rule.

and where the controlling facts and applicable legal rules remain unchanged." *United States v. Cty. of Arlington*, 669 F.2d 925, 935 (4th Cir. 1982) (citation omitted).

In Virginia, Capital One alleged a market for:

> technology enabling business processes common throughout the commercial banking industry in the United States.

Appx100086. That market comprised all technologies, including patents that read on banks' business processes owned by anyone—not just those owned by IV. *Id.* (IV is the "sole licensor of ... a large number of [these] patents."). The Virginia market, therefore, also included patents owned by other banks and many other entities beyond just IV.

In Maryland, by contrast, Capital One alleged a market for:

> IV's financial-services portfolio.

Appx100489, Appx108729. In her expert report, Professor Scott Morton concluded that IV's 7,700+ patent portfolio of financial services patents constitutes a relevant market. Appx103861; *see also* Appx103611-103613. That market excludes the non-IV-owned patents that the Virginia market included, and rests on a completely different concept of the relevant market for antitrust purposes.

IV reframes what Capital One alleged in Virginia by focusing entirely on a statement by counsel at argument that resulted in dicta in the Virginia court's opinion. The Virginia court observed that, "as best as the Court can discern, Capital One's proposed technology market equates to IV's 'portfolio of 3,500 or more patents that [IV] alleges cover widely used financial and retail banking services.'" Appx200264-200265. That single sentence, which refers to a market definition that Capital One did not allege, brief or develop in that litigation, was not "essential to the judgment" granting a 12(b)(6) dismissal of the complaint that Capital One actually filed, and cannot be the subject of issue preclusion. Restatement (Second) of Judgments § 27 & cmt. h.

On IV's motion to dismiss, the Virginia court only needed to decide whether Capital One had pleaded a plausible market for "technology enabling business processes common throughout the commercial banking industry in the United States," Appx100086, within the four corners of the pleading. Argument of counsel cannot alter a complaint and accordingly cannot expand the preclusive effect of a 12(b)(6) dismissal. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 449 (4th Cir. 2011) (district court erred in relying on new factual allegations raised at oral argument). The Virginia Court's order in response to Capital One's Rule 59 motion made clear that its dismissal applied only to the claims actually pleaded. Appx200278-200279.

The Virginia court also dismissed Capital One's antitrust claims because it understood Capital One to allege a market defined entirely by litigation avoidance and not any commercial need for the license itself. Appx200266. The Maryland court recognized that Capital One responded directly to that criticism by alleging here a market defined by a "business necessity ... not only to avoid litigation but also to continue to provide the online services [Capital One] already offer[s] without paying the cost-prohibitive licensing fees to the Intellectual Ventures companies—the only source of such licenses." Appx103387. The markets cannot be identical when Capital One here supplied the exact allegation the Virginia court thought was lacking. IV offers no defense of the actual basis of the decision below: the district court's holding that Capital One failed to prove that business necessity allegation, because it has not in fact yet taken a license from IV. Capital One explained in its Opening Brief (at 58-59) that the district court confused proof standards with issue preclusion, and effectively blamed Capital One for failing to capitulate to demands that it contends are unlawful.

III. IV'S SEPARATE PRECLUSION ARGUMENTS RELATED TO CAPITAL ONE'S SECTION 7 CLAIM ARE BASELESS

IV urges that claim preclusion forecloses Capital One's Section 7 claim for anticompetitive patent acquisitions. IV Br. 67-68. IV contends that "[n]o patents were acquired by any Appellee after Capital One's original counterclaims were filed." *Id.* at 68. IV's own documents and testimony contradict that claim.

The only evidence IV cites to support that claim comes from Mr. Detkin, one of IV's founders, who declared that "[t]here were no acquisitions of patents or patent applications with capital provided by IIF I and IIF II after September 11, 2013." Appx103415. It may be true that no capital provided by IIF I or IIF 2 was used to acquire patents after September 11, 2013, but the record evidence demonstrates that the entity that controls all IV companies, Appellee Intellectual Ventures Management, LLC ("IV Management"), acquired or directed the acquisition of many patents after September 11, 2013. IV formed its Invention Investment Fund III, LP ("IIF 3") in late 2013. Appx111670. That entity, which Appellee IV Management controls, [redacted] to [redacted] in the first [redacted] of [redacted] alone. Appx111676.[4] For instance, IV's co-founder, Nathan Myhrvold, characterized one acquisition as "a fairly large transaction" that involved a "bunch of patents" that would be "fairly called [redacted]" [redacted]. Appx107177 (233:1-8); *see also* Appx107982 (160:15-19); Appx112059 (Tab 1, rows 1376, 1400).[5]

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[4] IV's co-founder, Nathan Myhrvold, testified that IV Management is "the overall management company" for IV. Appx107122-107123 (16:18-17:13). IV Management has an explicit "'control' position" in its Invention Investment Funds, according to IV's official diligence documentation for investors. Appx111675; *see also* Appx107946 (14:10-21) (confirming that "there is an [redacted] of [redacted] all funds" and that IV's "Global Licensing" department represents all funds, including IIF 3).

[5] IV's argument about Appellees' not acquiring patents is not the complete picture given that IV admittedly uses shell companies ("acquisition entities") to buy patents. IV Br. 3 ("Many so-called 'shells' made multi-million dollar acquisitions with capital provided by the Funds."); *see also* Appx103415. Under basic principal-agent law, Appellees cannot deny responsibility for the patent acquisitions they directed through such shell companies.

Such acquisitions were part of IV's business model and part of what it told its targets. For instance, IV told Capital One "[w]e're continuing to acquire patents all the time." Appx102931 (183:24-25). IV also observes that the "value [of its financial services portfolio] offered to banks was not based entirely on current use of patented technology. … [A] license to future-acquired patents ... are among the other asserted benefits presented." IV Br. 5.

Finally, IV argues that issue preclusion attaches to the Section 7 question whether its patent acquisitions harmed competition. *Id.* at 21. IV conflates two separate elements of a Section 7 claim—a relevant market and anticompetitive acquisitions. Having found that Capital One had sufficiently pleaded neither, the Virginia court's dismissal did not depend on either alone. Issue preclusion cannot apply. *See supra* § II.A. Moreover, the issues here and in Virginia are again not "identical." The Virginia court dismissed the claim because Capital One had not identified specific patents that IV had acquired in violation of Section 7. Appx200272-200273. Capital One did so in its Maryland pleading and its experts provided unchallenged evidence regarding such acquisitions. Appx100502-100503; Appx108742; Appx101289-101298; Appx104797. Finally, as explained above, IV has acquired further financial services patents since the Virginia pleading, so issue preclusion cannot apply.

IV. CAPITAL ONE'S ANTITRUST CLAIMS HAVE POWERFUL EVIDENTIARY AND LEGAL SUPPORT

The two issues necessary for reversal of the district court's summary judgment decision are addressed above. Notwithstanding those errors, IV seeks affirmance on alternate grounds relating to the merits of Capital One's claims. IV's arguments rely on incorrect assertions and contradict the district court's finding that Capital One's claims present triable issues. Appx60.

A. IV's Admissions Speak To Its Anticompetitive Scheme

IV argues that its patent acquisitions could not harm competition in a relevant market. IV Br. 48-55. The district court, however, correctly recognized that Capital One put forth a triable case on the merits. Appx60.

IV acquired thousands of patents to create market power by targeting existing technologies that banks had already commercialized. *Cf. SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1205 (2d Cir. 1981) ("Surely, a § 2 violation will have occurred where, for example, the dominant competitor in a market acquires a ... patented invention [that] already had been commercialized successfully" where the acquisition "will afford him monopoly power").

IV's own documents show that IV sought to leverage the "power of massive patent aggregation" to "build-up market power." Appx111492 (emphasis omitted); Appx112394. IV also targeted long-established technologies that banks could not readily abandon—including industry standards, Appx104694-104696—and then acquired patents to fill "gaps" as part of a "product development process" to create a portfolio that banks, according to IV, cannot avoid. Appx107855 (206:17-207:11); Appx107827 (93:9-13); Appx107956 (54:3-14, 55:1-6); Appx107971 (114:23-115:18); Appx107869 (262:15-264:15).

IV did not seek valuable patents that offered novel solutions for banks, but instead aggregated "poor quality financial services related patents." Appx112408. To prevent banks from evaluating IV's financial-services patents on the merits or redesigning processes to avoid claimed infringement, IV obscured its patent holdings by using shell companies and refusing to disclose its complete portfolio. Appx108074 (78:7-18); Appx107958 (63:25-64:15); Appx112105.

IV's Brief does not grapple with these admissions—or Capital One's experts' opinions addressing IV's conduct (Appx103610-103627, Appx103636-103643, Appx103805-103822, Appx103899-103913, Appx103920-103921, Appx104082-104084)—which support Capital One's antitrust claims and, at the very least, create jury questions that foreclose summary judgment.

B. IV Has Engaged In Classic Anticompetitive Behavior

IV urges that its patent acquisitions and concealment were "unquestionably not illegal." IV Br. 48. IV is wrong.

1. Creating A Monopoly Through Patent Acquisitions That Target Existing Commercialized Technologies Is Anticompetitive

IV argues that, because the patents it acquired were not substitutes, that its patent acquisitions are "not worthy of antitrust notice" and have "no competitive significance." IV Br. 52, 57.

That argument is contrary to law (*Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 420, 423-25 (10th Cir. 1952); *SCM*, 645 F.2d at 1206) and creates a factual dispute with the expert opinions of Professor Scott Morton (Appx103610-103627; Appx103636-103643; Appx103805-103822). It would suggest that a dominant firm could acquire non-substitute patents reading on its only competitors' products and force them out of the market.

Antitrust prohibitions on the aggregation and concealment of non-substitute IP rights are far better established than IV acknowledges. In bringing many patents or copyrights under one roof, a firm can achieve market power (as IV's business documents admit). That is why performing-rights organizations, which combine non-substitute musical copyrights across musical genres, have operated under antitrust consent decrees for decades. *See, e.g.*, *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.* ("*BMI*"), 441 U.S. 1, 10-12 (1979).

Antitrust becomes particularly concerned when an IP aggregator creates a purportedly unavoidable portfolio and eliminates direct licensing opportunities—exactly what IV has done. *Compare, e.g.*, *BMI*, 441 U.S. at 24, *with Radio Music*

License Comm., Inc. v. SESAC, Inc. ("*RMLC*"), 29 F. Supp. 3d 487, 501 (E.D. Pa. 2014). There would be no antitrust case here if IV had acquired non-exclusive rights to license the relevant patents on behalf of the patentees IV originally approached. *See, e.g.*, Appx200951-200953 (Hovenkamp, *Prophylactic Merger Policy*) ("The problem of anticompetitive patent or other IP acquisitions can often be best addressed by insisting that IP acquisitions that would otherwise violate §7 be limited to nonexclusive licenses.")). In that situation, banks could negotiate a blanket license with IV or negotiate directly with the underlying patentees for individual licenses as needed. Such licensing can protect competition by ensuring "a real choice" in "obtaining individual licenses." *BMI*, 441 U.S. at 24; *see* Appx200946-200947.

IV's business plan, however, demanded monopoly profits. Appx103621, Appx103626; Appx103721; Appx103878; Opening Br. 5-6. Setting out to create an unavoidable portfolio, it extinguished any opportunity for direct licensing by purchasing the relevant patents outright. Appx103621; Appx103637-103638; Appx103824-103827; Opening Br. 5-8. Further, it ensures that no prospective licensee can identify the full extent of its holdings. Appx103614-103616; Appx103706; Appx103817, Appx103827-103830; Opening Br. 8-10. That conduct is similarly anticompetitive because it prevents a competitive response by licensees facing excessive royalty demands. *RMLC*, 29 F. Supp. 3d at 501-02 (a copyright aggregator's "lack of transparency exacerbates the exclusionary nature of its conduct"); Appx103621.

In taking these steps, IV ensured that it alone could wield a purportedly unavoidable portfolio and that its targets could not evaluate, design around, or seek alternative licenses, as Professor Scott Morton testified. Appx102540 (294:18-295:10); Appx102544 (310:10-312:22). In short, IV has created a monopolistic licensing position and its conduct—which the lower court found "concerning from an antitrust perspective," Appx59—brings it squarely within established antitrust prohibitions.

2. <u>The Evidence Amply Supports The Relevant Portfolio Market</u>

The relevant market is IV's financial services portfolio. No other market accurately captures the substitutes available for the product that IV actually sells (its portfolio license), the effects of IV's patent aggregation conduct, and the competitive conditions surrounding banks' licensing negotiations with IV.

The district court rightly found that this proposed relevant market is reasonable and enjoys factual and legal support. Appx57-59; Appx103611-103613; Appx107956 (54:3-14, 55:1-6); Appx107971 (114:23-115:18); Appx107869 (262:15-264:15). In doing so, it observed that, "[w]here the facts are hotly disputed, as here, defining [the] relevant market is 'generally a question for the trier of fact.'" Appx54 (quoting ABA Section of Antitrust Law, *Antitrust Law Developments* 627-

30 (ABA 8th ed. 2017)); *accord Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992) ("[P]roper market definition ... can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." (citation omitted)).

IV's entire effort to assail the relevant market attacks a straw man. IV proceeds as if it sold individual patent licenses, such that there would be a relevant market for each such license and its substitutes. The record, however, makes clear that the relevant product is a license to IV's financial services portfolio. The district court agreed. Appx59 ("Capital One has cited abundant facts that a jury reasonably could conclude supports its contention that IV does, in fact, market its patents as a portfolio, rather than a collection of individual patents relating to a number of discrete technology markets[.]").

The first step in defining the relevant market is to identify the product sold. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."). When the relevant product is an IP portfolio license, a factfinder must identify reasonable substitutes for that license. Such substitutes might include other licenses that offer freedom to practice the technologies claimed by the relevant IP portfolio. Substitutes may also include reasonably interchangeable product or process designs to which customers (i.e., prospective licensees) could turn to avoid the relevant IP portfolio. Capital One's expert undertook precisely that analysis and determined that IV's financial services portfolio is a relevant market. Appx103611-103614; Appx103736-103739; Appx103861-103877.

In IV's view, however, there can never be a relevant market limited to an IP portfolio comprised of non-substitutes. But numerous cases have held just that, and IV fails to cite (let alone distinguish) them. *See, e.g.*, *BMI*, 441 U.S. at 21-22 ("The blanket license is composed of the individual compositions plus the aggregating service. … [I]t is, to some extent, a different product."); *Meredith Corp. v. SESAC LLC*, 1 F. Supp. 3d 180, 218 (S.D.N.Y. 2014) (relevant market is "the market for television-performance rights to works within SESAC's repertory").

IV's position also contradicts black letter law. Three months ago, the Supreme Court held that courts "should 'combin[e]' different products or services into 'a single market' when 'that combination reflects commercial realities.'" *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018) (alteration in original) (citation omitted). IV's insistence that patent-by-patent substitution controls market definition—without regard to the manner in which IV actually licenses its patents and, hence, what factors discipline IV's pricing power—is wrong. *See also* Rehearing Br. for Amicus Curiae FTC at 8, *Mylan Pharm. Inc. v. Warner Chilcott PLC*, No. 15-2236 (3d Cir. Oct. 19, 2016), 2016 WL 6137296 ("Interchangeability is relevant to market definition, but it does not end the analysis. The critical question is whether interchangeability disciplines prices. Where it does not, the relevant market must exclude even functionally interchangeable products." (citation omitted)). Defining a market around each one of IV's thousands of patents would answer the wrong question, shedding no light on what actually limits IV's ability to raise the price of its portfolio license.[6]

IV's argument is a plea for antitrust immunity, which this Court—like others before it—should reject. *See, e.g.*, *SESAC*, 1 F. Supp. 3d at 220 (denying copyright aggregator's summary judgment motion, finding alleged market limited to aggregator's IP portfolio to be a triable question, and observing that the aggregator's "bid to define the market as at the level of each [copyright] would place [the aggregator's] blanket license outside the scope of the antitrust laws.").

The district court properly found that a jury should decide whether IV's financial services portfolio is a relevant market.

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[6] The district court also insightfully observed that, since IV designated *nine* PhDs to support its infringement claims on the five patents at issue in the Maryland case, "imagine the scope of the analysis Capital One would have to conduct (and cost it would have to incur) in order to determine whether the technologies it had acquired before IV approached it with its licensing demands infringed the thousands of patents in IV's portfolio (assuming the information needed to do so was fully available to it, and not concealed as Capital One contends)." Appx57 n.9.

CONCLUSION

This Court should reverse the district court's grant of summary judgment and remand the case for trial.

Dated: September 25, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2018, I electronically filed the foregoing Reply Brief for Appellants with the United States Court of Appeals for the Federal Circuit through the Court's CM/ECF system. All parties are represented by registered CM/ECF users and will be served by the CM/ECF system. Pursuant to agreement, the confidential version of the foregoing was also served on counsel for all parties by electronic mail.

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CERTIFICATE OF COMPLIANCE WITH RULE 32

Pursuant to Fed. Cir. R. 28(a)(13) and Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitations of Fed. Cir. R. 32(a) because it contains 6,990 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief was prepared using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: September 25, 2018

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CERTIFICATE OF COMPLIANCE WITH RULE 28(d)

I hereby certify that this brief complies with the limitations set forth in Fed. Cir. R. 28(d) and contains 15 words (including numbers) marked as confidential.

Dated: September 25, 2018

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