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21 **IN THE UNITED STATES DISTRICT COURT**
22 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

23 NETGEAR, INC.,
24 Plaintiff,
25 v.
26 HUAWEI TECHNOLOGIES CO.,
27 LTD.,
28 Defendant.

Case No. 2:24-cv-00824-AB (AJRx)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
ITS MOTION FOR
ANTI-ENFORCEMENT INJUNCTION
OR, ALTERNATIVELY, ENTRY OF
INTERIM LICENSE**

Hearing: Jan. 24, 2025

Time: 10:00 AM

Place: 350 West First Street
Courtroom 7B
Los Angeles, CA 90012

Jud. Officer: Hon. Andre Birotte Jr.

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1 **I. INTRODUCTION**

2 Plaintiff Netgear, Inc. (“Netgear”) filed this lawsuit approximately ten months
3 ago to force Defendant Huawei Technologies Co., Ltd. (“Huawei”) to honor its
4 commitment to license its standard essential patents (“SEPs”). Indeed, Huawei has
5 pledged to license its Wi-Fi SEPs on reasonable and non-discriminatory (“RAND”)¹
6 terms. RAND pledges are critical to the development of technological standards and
7 create a contractual obligation that can be relied upon by implementers like Netgear.
8 Netgear has subsequently filed a Motion to Bifurcate, requesting that the Court
9 expedite the consideration of a single critical issue looming between the parties in
10 ongoing disputes around the world—what are the proper terms for the RAND license
11 that Huawei is contractually obligated to provide to Netgear for Huawei’s Wi-Fi
12 SEPs?

13 Defendant Huawei’s conduct does not reflect a company willing to honor its
14 contractual obligation to provide a license to Netgear with RAND terms. Rather than
15 provide such a license, starting in 2022, Huawei launched a worldwide blitzkrieg of
16 infringement cases against Netgear in Germany, the Unified Patent Court (“UPC”)
17 and China. Among those cases are multiple patent infringement suits in the UPC in
18 2023 and multiple patent infringement suits in Germany in 2024. Decisions in two of
19 these cases are anticipated in December of 2024 with an injunction potentially issuing
20 in December 2024 or January 2025 if the decision is adverse to Netgear. Similarly,
21 injunctions in the remaining two cases are anticipated in April or May of 2025 if a
22 ruling adverse to Netgear is handed down. Huawei also filed two infringement
23 actions against Netgear in China. As part of those proceedings, Huawei sought
24 injunctions and received injunction orders that have not been enforced from the court
25 in China on June 7, 2024.

26 Huawei’s strategy is not new. U.S. and foreign courts have seen this tactic

27
28 ¹ RAND and FRAND are generally used interchangeably. *See Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1031 n.2 (9th Cir. 2015) (“*Microsoft III*”).

1 before in the standards context and have issued anti-suit injunctions to protect their
2 proceedings from foreign injunctive interference. The anti-suit injunctions in cases
3 like *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872 (9th Circ. 2012) (“*Microsoft II*”)
4 are properly tailored to the threat: they prevent an SEP holder only from pursuing
5 injunctive relief, only based on SEPs, and only while the RAND contractual
6 interpretation claims are being resolved.

7 Netgear respectfully requests that the Court enjoin Defendant Huawei from
8 seeking or enforcing injunctions obtained through proceedings in foreign courts
9 which would enjoin the manufacturing or sale of Netgear Wi-Fi capable products
10 based on SEPs that are subject to the worldwide licensing claims already at issue in
11 this case. The SEPs at issue in Huawei’s German, UPC and China actions are subject
12 to Huawei’s contractual obligation to the IEEE to provide worldwide licenses to these
13 and all of Huawei’s IEEE Wi-Fi SEPs on a RAND basis to companies like Netgear.
14 As a result, the worldwide dispute between the parties is contractual in nature and
15 will be resolved with a payment of money once RAND license terms are determined.
16 Moreover, the question of the appropriate RAND terms between these parties is
17 already before this Court through Netgear’s breach of contract claim. There is no
18 proper basis for Huawei to seek injunctive relief for Wi-Fi SEPs, which threaten
19 significant fines, criminal penalties and significant business disruption, before the
20 proper amount and terms of a RAND license are resolved by this Court. Because
21 Huawei’s foreign injunctions threaten the Court’s ability to resolve the contractual
22 dispute between the parties and risk harm to Netgear, Huawei should be enjoined
23 from enforcing such an injunction (or seeking more) until the RAND license issues
24 are resolved.

25 In the event that an anti-enforcement injunction is not available, Netgear
26 respectfully seeks an interim license to allow the parties to continue with negotiations
27 and garner this Court’s assistance in determining RAND terms without the risk of
28

1 further escalating disputes in these foreign jurisdictions. Huawei made a RAND
2 commitment to IEEE and has not complied with that commitment’s obligation to
3 provide Netgear with a RAND license. As the Federal Circuit recently recognized in
4 *Telefonaktiebolaget LM Ericsson v. Lenovo (United States), Inc.*, 120 F.4th 864 (Fed.
5 Cir. 2024), if the policy concerns underlying FRAND commitments, parties should
6 not be entitled to spring injunctive relief in various venues against a party without
7 having first complied with its obligations. Entry of an interim license until a final
8 RAND determination will compensate Huawei, will be subject to adjustment after
9 final terms are determined, and will provide both parties with the safeguards
10 necessary to focus on the core task of complying with Huawei’s contractual
11 obligations.²

12 **II. FACTUAL BACKGROUND**

13 This case arises from Huawei’s anticompetitive behavior that resulted, among
14 other things, in a contractual licensing dispute between Huawei and Netgear related
15 to the proper terms for a global patent license for Huawei’s IEEE Wi-Fi SEPs.
16 Netgear brought suit in this Court to seek relief from Huawei’s anticompetitive
17 tactics. Huawei and Netgear have been unable to agree on what constitutes RAND
18 terms. Currently pending is Netgear’s Motion to Bifurcate and Request for RAND
19 Determination Consistent with Huawei’s Contractual Obligation (“Motion to
20 Bifurcate”) (Dkt. 113, 114). Through this motion, Netgear, a willing licensee, seeks
21 this Court’s assistance in preventing Huawei from enforcing injunctions based on a
22 finding of infringement of Huawei’s Wi-Fi SEPs while this Court determines the
23 terms of a RAND license or, alternatively, requests that this Court enter an interim
24

25 ² Durin _____ Huawei did not
26 oppose _____
27 Ex. 8 at 9. Huawei opposed _____
28 _____ Huawei’s position runs afoul of its contractual obligation to provide Netgear
a worldwide license on RAND terms, not just an interim license based on U.S.
SEPs and products.

1 license to Huawei’s Wi-Fi SEPs.

2 **A. Netgear’s Motion to Seeking This Court’s Assistance In**
 3 **Determining the Terms of a Global RAND License**

4 Through its Motion to Bifurcate filed on November 15, 2024 (Dkt. 113, 114),
 5 Netgear seeks this Court’s assistance in determining the terms of a global patent
 6 license to Huawei’s SEPs that are RAND-encumbered under Huawei’s Letters of
 7 Assurance (“LOAs”) to IEEE for the 802.11 standards (Wi-Fi 6 (802.11ax) and pre-
 8 Wi-Fi 6 (802.11ac)), which concerns wireless local area network (“WLAN”)
 9 communication. Netgear’s Motion to Bifurcate details Huawei’s contractual RAND
 10 obligation that arises out of its relationship with, and LOAs to, IEEE, an international
 11 standard-setting organization (“SSO”). *See* Dkt. 114; *see also* Dkt. 115-1.

12 **B. Huawei’s Contractual Obligation to License Its IEEE Wi-Fi SEP**
 13 **Portfolio on RAND Terms**

14 Huawei does not dispute that it is contractually obligated to license its SEPs
 15 on RAND terms. Compl. (Dkt. 10-5) at ¶74. In fact, Huawei has made an irrevocable
 16 guarantee to the IEEE on multiple occasions to grant RAND licenses to its SEPs,
 17 including through the LOAs described in Table 1 below:

18
 19 **TABLE 1**

Standard No.	LOA Date	Huawei’s Commitment
802.11n/s/u	6 Jan 2007	“The Patent Holder will grant a license under reasonable rates to an unrestricted number of applicants on a worldwide, non-discriminatory basis with reasonable terms and conditions to comply with the [Proposed] IEEE Standard.”
802.11i/ac/ah/ai	13 Aug 2013	“The Submitter will grant a license under reasonable rates to an unrestricted number of applicants on a worldwide basis with reasonable terms and conditions that are demonstrably free of unfair discrimination.”

802.11ax/aj	25 Jul 2019	“The Submitter will grant a license under reasonable rates to an unrestricted number of applicants on a worldwide basis with reasonable terms and conditions that are demonstrably free of unfair discrimination.”
802.11-1997, 802.11-1999, 802.11-2007, 802.11-2012, 802.11-2016	25 Jul 2019	“The Submitter will grant a license under reasonable rates to an unrestricted number of applicants on a worldwide basis with reasonable terms and conditions that are demonstrably free of unfair discrimination.”

Compl. at ¶ 74; *see also* ¶¶ 72-73, 75-85; Dkt. 1-1, 1-2, 1-4, and 1-5.

Further, Huawei sent these commitments to IEEE in the United States and IEEE is a not for profit organization incorporated in the state of New York. *See* Dkt. 1-1, 1-2, 1-4, and 1-5 (LOAs sent to IEEE in New Jersey) and (<https://www.ieee.org/about/tax-corp-info.html#:~:text=IEEE%20is%20a%20not%20for,for%20US%20income%20tax%20purposes>) (last visited Dec. 3, 2024). All of this further makes the United States an appropriate venue for resolution of the parties’ breach of contract dispute.

C. Huawei Seeks Injunctions Outside the U.S. Against Netgear

Rather than provide the contractually obligated worldwide RAND license to Netgear, Huawei improperly and aggressively pursued patent litigation and injunctions throughout the world. *See, e.g.*, Compl. at ¶¶ 111, 118, 119, 127, 134-37. On March 2, 2022, before providing Netgear with any licensing offer, Huawei filed two patent infringement proceedings in Germany seeking injunctive relief against Netgear. *Id*; Dkt. 115-2 (Declaration of Dr. Stephan Dorn (“Dorn Decl.”)) at ¶¶ 3, 11. Huawei was unsuccessful in one of those cases and appealed, while the other case was stayed pending nullity proceedings. Dorn Decl. at ¶¶ 3, 11. Huawei then filed two additional patent infringement suits in the Unified Patent Court in 2023 and an additional two patent infringement suits in Germany in 2024. *Id*. Decisions in two of these cases are anticipated in December of 2024 with an injunction potentially issuing

1 in December 2024 or January 2025 if a decision is adverse to Netgear. *Id.* Similarly,
2 injunctions in the remaining two cases are anticipated in April or May of 2025 if a
3 ruling adverse to Netgear is handed down. *Id.* In Germany and the UPC, an injunction
4 is typically entered immediately after a finding of patent infringement. *Id.* at ¶6.
5 Further, in one of the cases pending in Germany, an injunction is could be imminent
6 as that court and the same panel of judges have already found that one of Netgear’s
7 competitors infringed the same patent and entered an injunction. *Id.* at ¶8.

8 On March 2, 2022, Huawei filed two infringement proceedings in China. Dkt.
9 115-3 (Declaration of Hongbin Zhang (“Zhang Decl.”)) at ¶3. Huawei sought
10 injunctions and received injunction orders from the court in China on June 7, 2024.
11 *Id.* at ¶¶4-6; *see also id.* at Ex. A at 17-18; *id.* at Ex. B at 16-17. Netgear appealed
12 those decisions. *Id.* at ¶8.

13 Notwithstanding its worldwide litigation campaign, Huawei has never asked
14 any Court to determine RAND terms or a RAND royalty rate. Dkt. 115-2 (Dorn
15 Decl.) at ¶10; Dkt. 115-3 (Zhang Decl.) at ¶14. As such, this is the first court asked
16 to determine Huawei’s contractual obligation in a manner that could fully resolve the
17 parties’ disputes. And this Court is the appropriate authority to issue any anti-
18 enforcement injunction or, alternatively, enter an interim license.

19 **III. LEGAL STANDARDS**

20 A district court may enjoin a party from prosecuting a foreign action. *Microsoft*
21 *II*, 696 F.3d at 880-81. “Courts derive the ability to enter an anti-suit injunction from
22 their equitable powers. Such injunctions allow the court to restrain a party subject to
23 its jurisdiction from proceeding in a foreign court in circumstances that are unjust.”
24 *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 989 (9th Cir. 2006).

25 Anti-suit, or anti-enforcement, injunctions³ are appropriate when a party’s

26 _____
27 ³ The law applicable to anti-suit injunctions and anti-enforcement injunctions is the
28 same. Netgear seeks an anti-enforcement injunction (which seeks only to preclude

1 foreign actions “frustrate [] this court’s ability to adjudicate issues properly before
2 it” or when “[w]ithout the issuance of an anti-suit injunction, the integrity of the
3 action before this court will be lessened.” *Microsoft Corp. v. Motorola, Inc.*, 871 F.
4 Supp. 2d 1089, 1100 (W.D. Wash. 2012) (“*Microsoft I*”), *aff’d*, 696 F.3d 872 (9th
5 Cir. 2012). The Ninth Circuit emphasizes that district courts have “a duty to protect”
6 their “legitimately conferred jurisdiction to the extent necessary to provide full justice
7 to litigants.” *Gallo*, 446 F.3d at 995, the Ninth Circuit affirmed the district court’s
8 issuance of an anti-suit injunction to protect its ability to resolve a global FRAND
9 licensing dispute. The district court had enjoined Motorola from pursuing claims in
10 Germany that were motivated by an attempt to “pressure” Microsoft to enter into an
11 unfair license “before the [domestic] litigation is complete.” *Microsoft II*, 696 F.3d
12 at 886. Netgear seeks the same kind of limited relief.

13 The Ninth Circuit applies a three-part inquiry as part of its “liberal approach” to
14 granting anti-suit injunction motions. *See Quaak v. Klynveld Peat Marwick Goerdeler*
15 *Bedrijfsrevisoren*, 361 F.3d 11, 17 (1st Cir. 2004) (the Fifth and Ninth Circuits follow
16 the “liberal approach”). First, the Court determines “‘whether or not the parties and
17 the issues are the same’ in both the domestic and foreign actions, ‘and whether or not
18 the first action is dispositive of the action to be enjoined.’” *Microsoft II*, 696 F.3d at
19 881 (quoting *Gallo*, 446 F.3d at 991). Second, the Court determines “whether at least
20 one of the so-called ‘*Unterweser* factors’ applies.” *Id.* And, third, it assesses “whether
21 the injunction’s ‘impact on comity is tolerable.’” *Id.* An anti-suit injunction, if
22 granted, “enjoins the claimant, not the foreign court.” *Gallo*, 446 F.3d at 989.

23 **IV. THE PARTIES AND ISSUES ARE FUNCTIONALLY THE SAME**

24 **A. The Parties Are Functionally the Same**

25 The parties to Huawei’s actions here and in Germany, the UPC and China are

26
27 enforcement of an injunction) whereas an anti-suit injunction is broader and can
28 seek to stop ongoing and/or further litigation.

1 the same for purposes of an anti-suit injunction because both involve Huawei,
2 Netgear, and/or a Netgear affiliate. “Perfect identity of parties is not required....
3 Rather, it suffices that the parties be affiliated in such a way that their interests
4 coincide.” *Microsoft I*, 871 F. Supp. 2d at 1098. Here, it is undisputed that (i) Huawei
5 Technologies Co., Ltd. and Netgear, Inc. are the parties to this action and (ii) the
6 same entities or a Netgear affiliate are the parties to Huawei’s foreign actions.
7 *Compare* Compl. at 1, with Dkt. 115-2 (Dorn Decl.) at ¶3 (identifying the parties as
8 Netgear and Huawei) and Dkt. 115-3 at (Zhang Decl.) at ¶2 (identifying the parties
9 as Huawei and the Netgear affiliate operating in China). The parties are therefore
10 functionally the same. *See Microsoft I*, 871 F. Supp. 2d at 1098.

11 **B. The Issues Are Functionally the Same**

12 The primary issue in the cases in Germany and China—the availability of
13 injunctive relief on Huawei’s RAND-encumbered foreign SEPs—is also at issue here
14 because Huawei’s global Wi-Fi SEP portfolio, including the patents at issue in each of
15 the Huawei foreign cases, are at issue here as a result of Netgear’s breach of contract
16 claim and pending Motion to Bifurcate, which seeks a RAND determination that would
17 satisfy both parties’ contractual obligations (Dkt. 113, 114). Huawei does not dispute
18 that it has contractual RAND obligations for its global portfolio of Wi-Fi SEPs as a result
19 of the commitments created by the LOAs Huawei submitted to IEEE to obtain
20 essentiality recognition for its Wi-Fi patents. Huawei’s contractual obligations
21 undoubtedly obligate Huawei to provide a license to Netgear on RAND terms, making
22 the breach of contract claim in this case functionally identical to the claims in Huawei’s
23 foreign patent infringement actions. As such, functional identity of issues under the
24 Ninth Circuit’s standard is easily met. *Applied Med. Distribution Corp. v. Surgical Co.*
25 *BV*, 587 F.3d 909, 914-15 (9th Cir. 2009) (treating a Belgian statutory claim as
26 functionally the same as a breach of contract claim); *InterDigital Tech. Corp. v.*
27 *Pegatron Corp.*, No. 15-CV-02584-LHK, 2015 WL 3958257, at *5 (N.D. Cal. June 29,

1 2015).

2 The Ninth Circuit’s *Microsoft* decision is instructive because the facts there are
3 similar to the situation here. *Microsoft II*, 696 F.3d at 883. Motorola (like Huawei
4 here)⁴ had sent a series of pre-litigation letters offering Microsoft a license under a
5 worldwide portfolio of SEPs on terms Microsoft considered too high to be RAND. *Id.*
6 at 877-78. In response, Microsoft (like Netgear here) filed a declaratory judgment
7 action in the Western District of Washington asserting Motorola breached its
8 contractual obligation to license the patents on RAND terms. *Id.* at 878. With the
9 breach of contract case pending, Motorola sought injunctions in Germany based on
10 infringement of European SEPs that fell within the contractual scope of the portfolios
11 being litigated in the Washington action. *Id.* at 879. The German court issued an order
12 finding infringement and confirming an injunction would issue after appellate review.
13 *Id.* Three weeks before review of the injunction was complete, Microsoft moved for
14 an anti-suit injunction to bar Motorola from enforcing the German injunction. *Id.* at
15 880. Microsoft asserted the anti-suit injunction was warranted because the U.S. district
16 court’s resolution of the contract claims would decide the question of the availability
17 of injunctive relief and thereby ultimately dispose of the German action. *See*
18 Declaration of Christina Ondrick (“Ondrick Decl.”) concurrently filed herewith, Ex. 1
19 (Microsoft’s Mot. for TRO and PI, Mar. 28, 2012, Dkt. 210) at 21 (“[The requested
20 injunction] will bar injunctive relief...”); *see also id.* at Ex. 2 (Microsoft’s Reply in
21 Supp. of Mot. for TRO and PI, Apr. 9, 2012, Dkt. 257) at 11. The district court agreed.
22 *Microsoft II*, 696 F.3d at 883.

23 Rejecting Motorola’s argument that the issues were not the same because a U.S.
24 action could not resolve a dispute involving the infringement of German patents under
25 German law, the district court concluded the U.S. breach of contract claims squarely

26 _____
27 ⁴ The difference, here, is that Huawei sued for patent infringement seeking
28 injunctions before providing a RAND offer. And, when Huawei finally provided an
offer, it was un-RAND. *See, e.g.,* Compl. at ¶¶ 112-137.

1 presented the key overlapping issue of whether injunctive relief was an appropriate
2 remedy for infringement of Motorola’s SEPs and therefore could fully resolve the
3 German action. *Microsoft I*, 871 F. Supp. 2d at 1099; Ondrick Decl. at Ex. 3 (Def.’s
4 Opp’n to Microsoft’s Mot. for TRO and PI, Apr. 6, 2012, Dkt. 244) at 14-18; *Microsoft*
5 *II*, 696 at 883. The Ninth Circuit affirmed, agreeing the state contract claims would
6 “resolve” the German action because Motorola was obligated to license the asserted
7 European patents on RAND terms and they fell within the worldwide license offer at
8 the heart of the contract claim. *Microsoft II*, 696 F.3d at 883.

9 Huawei’s foreign patent infringement actions against Netgear implicate the same
10 contractual question concerning the availability of injunctive relief for RAND-
11 encumbered SEPs that Netgear has asked this Court to resolve.

12 **V. MULTIPLE UNTERWESER FACTORS APPLY**

13 The Court also must consider whether at least one of *Unterweser* factors apply.
14 *Microsoft II*, 696 F.3d at 881. Multiple factors here support the requested anti-
15 enforcement injunction. Injunctive relief entered by either German, Chinese or UPC
16 courts will frustrate U.S. antitrust law, are vexatious and oppressive, and prejudice
17 multiple equitable considerations. Any one of these factors alone “may justify a
18 foreign anti-suit injunction...” *Id.* at 882 n.9.

19 **A. Huawei’s Enforcement of Injunctions Elsewhere Violates U.S.**
20 **Antitrust Law and Will Frustrate Both U.S. Policy and the Other**
21 **Equitable Considerations**

22 Pursuing injunctive relief against a willing manufacturer is anticompetitive,
23 inconsistent with contractual RAND obligations, and risks harming downstream
24 consumers, thus frustrating domestic policy and other equitable considerations
25 (*Unterweser* factors 1 and 4).

26 Huawei itself pointed these risks out in litigation in which *it faced* the prospect
27 of injunctive relief on SEPs:

1 [A] *consensus* is rapidly emerging among regulatory bodies and the
2 federal courts that, when there is a dispute as to the FRAND rate for
3 declared-essential patents, the accused infringer must be given the
4 opportunity to accept a FRAND rate determined by a court or arbitrator,
5 and that opportunity must be given before the patentholder can seek
6 *injunctive relief*.

7 Ondrick Decl. Ex. 4 ((*InterDigital Commc'ns, Inc. v. Huawei Tech. Co., Ltd.*, No.
8 1:13-cv-00008-RGA, Dkt. 17 (D. Del. Feb. 11, 2013) (Huawei's Op. Br. in Supp. of
9 Mot. for Expedited Disc. and Expedited Trial on FRAND Countercls.)) at 1 (emphasis
10 added). Huawei is correct a "consensus" has emerged, and is now firmly established
11 in the U.S., that using requests for injunctive relief as a bargaining tool for SEP
12 licensing is improper.

13 Recently, the Federal Circuit in *Telefonaktiebolaget LM Ericsson v. Lenovo*
14 (*United States, Inc.*, 120 F.4th 864 (Fed. Cir. 2024) solidified this concept
15 conclusively by holding that an SEP holder's (such as Huawei's) breach of its
16 contractual FRAND commitment *precludes* it from seeking injunctive relief. *Id.* at
17 876. The Federal Circuit explained that "a party that has made an ETSI FRAND
18 commitment must have complied with the commitment's obligation to negotiate in
19 good faith over a license to its SEPs *before* it pursues injunctive relief based on those
20 SEPs." *Id.* (emphasis added). Guided by the Ninth Circuit's ruling in *Microsoft*, the
21 Federal Circuit clarified in *Ericsson* that an SEP holder's compliance with its
22 FRAND commitments is a *prerequisite* for *seeking* injunctive relief. *Id.* Here,
23 Huawei's RAND commitment based on its obligation to IEEE is to *grant* a
24 worldwide license on RAND terms to Netgear and is precluded from seeking
25 injunctive relief because of its failure on this front. *See, e.g.*, Dkt. 1-1, 1-2, 1-4, 1-5
26 (Huawei's LOA's to IEEE).

27 Huawei's pursuit of injunctions on its SEPs in courts throughout the world is a
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1 blatant attempt to renege on its contractual RAND commitments. By pursuing and
2 attempting to enforce the injunctions in China and Germany, Huawei seeks to wield
3 its holdup power against willing licensees to force supracompetitive royalty rates that
4 are neither reasonable nor non-discriminatory. This conduct not only runs directly
5 afoul of the Federal Circuit’s recent guidance in *Ericsson*, but it offends domestic
6 policy and numerous equitable considerations. Indeed, as explained by the Federal
7 Circuit in *Ericsson*, the bulk of precedent provides that if a RAND commitment means
8 “anything of substance,” it must mean that an SEP holder who makes such a
9 commitment “cannot just spring” injunctive actions against other standard
10 implementers without complying with the standard of conduct required by the
11 commitment. *Ericsson*, 120 F.4th at 886.

12 Under these circumstances, Huawei’s global litigation warfare campaign,
13 designed to obtain injunctions against Netgear products under patents that both parties
14 agree must be licensed, makes no sense and is contrary to U.S. policy. *See, e.g., id.*;
15 *Microsoft II*, 696 F.3d at 884 (“Implicit in such a sweeping promise [made to
16 standards-setting organizations] is, at least arguably, a guarantee that the patent-holder
17 will not take steps to keep would-be users from using the patented material, such as
18 seeking an injunction, but will instead proffer licenses consistent with the
19 commitment made.”); *Realtek Semiconductor Corp. v. LSI Corp.*, 946 F. Supp. 2d
20 998, 1006-07 (N.D. Cal. 2013) (“In promising to license on RAND terms, defendants
21 here admit that monetary damages, namely a RAND royalty, would be adequate
22 compensation for any injury it has suffered as a result of Realtek’s allegedly
23 infringing conduct.”).

24 **B. Huawei’s Conduct Threatens This Court’s Jurisdiction (Factor 2)**

25 “[O]ne clear policy that all federal courts recognize—even those which have
26 been loath to interfere with foreign proceedings—is the need to protect the court’s own
27 jurisdiction.” *Zygna, Inc. v. Vostu USA, Inc.*, No. 11-CV-02959-EJD, 2011 WL
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1 3516164, at *3 (N.D. Cal. Aug. 11, 2011). Courts have therefore repeatedly found
2 foreign litigation to frustrate domestic policy when defendants seek to use foreign
3 litigation to evade contractual obligations or compliance with U.S. law. *See, e.g.,*
4 *Quaak*, 361 F.3d at 20; *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d
5 909, 927 (D.C. Cir. 1984) (“Injunctions are most often necessary to protect the
6 jurisdiction of the enjoining court, or to prevent the litigant’s evasion of the important
7 public policies of the forum.”).

8 Here, there can be no dispute that Huawei’s SEPs at issue in the foreign
9 injunction requests are subject to contractual RAND licensing obligations imposed by
10 the IEEE commitment. Beyond this, Netgear has presented the court with a breach of
11 contract claim and seeks bifurcation and prompt resolution of the RAND contractual
12 obligations. Under such circumstances, the only rational reason for Huawei’s not
13 agreeing with Netgear’s proposal for determination of RAND licensing terms and
14 driving forward with injunction requests is to bludgeon Netgear into submission so
15 that it is forced to accept Huawei’s supracompetitive licensing demands rather than
16 resolving the contractual dispute through this Court. Indeed, given that Netgear and
17 Huawei are not significant competitors in the marketplace, no other possible purpose
18 could be served by Huawei’s insistence on driving forward with foreign injunction
19 proceedings.

20 Courts have previously recognized, in connection with RAND licensing
21 disputes, that “[foreign] injunctions would likely force [the prospective licensee] to
22 accept [the patentee’s] licensing terms, before any court has an opportunity to
23 adjudicate the parties’ breach of contract claims.” *Huawei Technologies Co., Ltd. v.*
24 *Samsung Electronics, Co., Ltd.*, No. 3:16-CV-02787-WHO, WL 1784065, at *10
25 (N.D. Cal. April 13, 2018); *see also Microsoft II*, 696 F.3d at 886 (foreign action
26 seeking injunction against product sales “compromise[d] the court’s ability to reach
27 a just result in the case before it free of external pressure on Microsoft to enter into a
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1 ‘holdup’ settlement before the litigation is complete”). Huawei’s bullying tactics
2 threaten the jurisdiction of this Court over Netgear’s contractual claims because
3 injunctions throughout Germany and China undoubtedly impact the ability to
4 determine a worldwide RAND license.

5 **C. Huawei’s Foreign Injunctions Actions Are Vexatious and**
6 **Oppressive (Factor 3)**

7 Litigation is vexatious when it is “without reasonable or probable cause or
8 excuse; harassing [or] annoying.” *Microsoft II*, 696 F.3d at 886 (quoting *Black’s Law*
9 *Dictionary* 1701 (9th ed. 2009)). The Federal Circuit’s recent ruling in the *Ericsson*
10 case, discussing the earlier *Microsoft* opinion, is again instructive. There, as here, after
11 the district court’s adjudication of the contract dispute was underway, Ericsson sought
12 and obtained foreign injunctions to exclude Lenovo from significant international
13 markets and threatened it with significant penalties throughout the world. *Ericsson*,
14 120 F.4th at 868.

15 The same vexatious and oppressive conduct exists here and militates in favor
16 of granting Netgear’s motion. *See* Ondrick Decl. Ex. 5 (Declaration of Kay
17 Berkowitz) at ¶¶1-13 (harm suffered should German injunctions be entered).
18 Moreover, the vexatious conduct is further confirmed here by the fact that Netgear
19 and Huawei are not significant competitors in the marketplace, largely because
20 Huawei faces regulatory bans in the United States and elsewhere. *Id.* at ¶¶14-15. And
21 any injury suffered by Huawei while the licensing dispute is being resolved can easily
22 be compensated by money damages. Indeed, Netgear has filed a Motion to Bifurcate
23 with this Court seeking an expedited hearing that will resolve and address any injury
24 suffered by Huawei—but Huawei refuses to join in the request for expedited
25 resolution of the contractual dispute.

26 Thus, because Huawei’s foreign injunctive relief serves no purpose other than
27 to harass Netgear and cause unnecessary expense, the suits seeking foreign
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1 injunctions are vexatious and oppressive. *Microsoft II*, 696 F.3d at 886; *Ganpat v.*
2 *Eastern Pacific Shipping PTE, Ltd.*, 66 F.4th 578, 582-83 (5th Cir. 2023).

3 **VI. THE REQUESTED ANTI-ENFORCEMENT INJUNCTION WOULD**
4 **NOT HAVE AN INTOLERABLE IMPACT ON COMITY**

5 The last step in determining whether an anti-suit injunction is warranted is to
6 assess whether the injunction’s “impact on comity is tolerable.” *Gallo*, 446 F.3d at
7 991. “Comity is ‘the recognition which one nation allows within its territory to the
8 legislative, executive or judicial acts of another nation, having due regard both to
9 international duty and convenience....’” *Id.* at 994 (quoting *Hilton v. Guyot*, 159 U.S.
10 113, 164 (1895)). The Ninth Circuit has held repeatedly that private contractual
11 disputes have little, if any, impact on comity. *See, e.g., Microsoft II*, 696 F.3d at 887
12 (“[C]omity is less likely to be threatened in the context of a private contractual dispute
13 than in a dispute implicating public international law or government litigants.”). In
14 contrast, the Ninth Circuit has recognized that allowing a private party to proceed with
15 duplicative lawsuits in multiple jurisdictions may itself have an intolerable impact on
16 comity. *See Applied Med.*, 587 F.3d at 921; *Gallo*, 446 F.3d at 994-995. The presence
17 of antitrust claims does not change that result. *See InterDigital*, 2015 WL 3958257, at
18 *8.

19 Here, the requested anti-enforcement injunction would have no impact on
20 comity. This is a private commercial dispute between two corporations and does not
21 implicate any foreign governments. Netgear has asked this Court to promptly resolve
22 a global contractual dispute concerning the parties’ RAND licensing obligations and
23 their ability to obtain injunctive relief on SEPs declared essential to IEEE (a U.S.
24 based organization), which will obviate the SEP injunction actions Huawei has
25 launched throughout the world. Netgear requests very focused and limited relief that
26 does not bar German, Chinese or UPC courts from taking any specific actions, but
27 rather asks only that the Court restrain Huawei from taking specific further actions—
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1 namely enforcing an injunction order—that would undermine this Court’s ability to
2 resolve the gateway contractual RAND questions this Court has been asked to resolve.
3 Huawei is a private party in a contractual dispute with another private party, Netgear,
4 and this case “deals with enforcing a contract and giving effect to substantive rights.”
5 *Gallo*, 446 F.3d at 994. Huawei would remain free to pursue litigation and seek
6 damages for infringement of its foreign patents while this action is pending.

7 As noted in *Microsoft*, there is widespread agreement by the courts that an “anti-
8 suit injunction in the service of ‘enforcing a contract’ between private parties does not
9 ‘breach norms of comity....’” *Microsoft II*, 696 at 888 (quoting *Gallo*, 446 F.3d at
10 994). While it is true that the order in which suits are filed may be relevant to the
11 determination, the requested relief here relates to a private contractual dispute, has no
12 consequence on international relations, and thus does not “breach norms of comity.”
13 *Microsoft II*, 696 F.3d at 888. More critically, the requested relief here is highly
14 focused, does not prevent Huawei’s foreign proceedings from moving forward on the
15 merits, and thus is “no broader than necessary to avoid the harm on which the
16 injunction is predicated.” *Id.* at 887 (citing *Laker Airways*, 731 F.2d at 933 n.81). Thus,
17 there is no demonstrable threat to international comity from the narrowly tailored
18 injunction requested here.

19 **VII. IN THE ALTERNATIVE, THE COURT SHOULD ISSUE AN**
20 **INTERIM LICENSE UNTIL A MINI-TRIAL CAN ESTABLISH**
21 **RAND LICENSING TERMS**

22 As discussed above, this case involves a contractual dispute between the
23 parties regarding the terms of a RAND license for certain SEPs held by Defendant
24 Huawei. Huawei contends, and Netgear does not dispute for purposes of resolution
25 of this Motion, the patents identified by Huawei are standard essential for IEEE Wi-
26 Fi standards. While the parties are engaged in negotiations over the terms of a RAND
27 license, they have been unable to reach an agreement.

1 In the absence of an agreed-upon rate, as noted above, Huawei has commenced
2 and advanced litigation in multiple jurisdictions, including Germany and China.
3 These foreign litigations bring with them the risk of injunctive relief, a remedy that
4 runs counter to Huawei’s contractual obligation to provide a RAND license to
5 Netgear so that products practicing the standard may be released without the fear of
6 exorbitant demands or economic bullying in the form of threats of injunction. Netgear
7 above proposes a solution to rectify the injustice created by Huawei’s breach, an anti-
8 enforcement injunction that allows the parties to focus on the RAND license that
9 Huawei must provide to Netgear. But in the event that such an anti-enforcement
10 injunction prohibiting enforcement of foreign injunctions is not obtained, Netgear
11 respectfully seeks an interim license to allow the parties to continue with negotiations
12 and garner this Court’s assistance to determine RAND terms without the risk of
13 further escalating disputes in these foreign jurisdictions. Setting an interim license
14 will enable the parties to proceed with a hearing focused solely on the establishment
15 of the final RAND terms, thus simplifying and expediting the resolution of this matter
16 while also preventing the irreparable harm that Netgear would encounter if such
17 injunctive relief is obtained and enforced.

18 **A. The Court Has the Authority to Set an Interim License Terms**

19 This Court has broad discretion to set interim relief in cases involving
20 contractual obligations to license SEPs on FRAND terms. The Ninth Circuit in
21 *Microsoft* recognized the power of district courts to determine royalty rates to
22 facilitate the resolution of RAND disputes. *Microsoft Corp. v. Motorola, Inc.*, 795
23 F.3d 1024, 1040 (9th Cir. 2015) (“*Microsoft III*”). An interim license does exactly
24 that. Moreover, if an anti-enforcement injunction does not exist, an interim license
25 makes particular sense in light of the purpose of the RAND commitment, which is to
26 encourage widespread adoption of the standard. That purpose would be substantially
27 defeated if adopting the standard would expose implementers like Netgear to bad faith

1 injunctive relief claims that contravene contractual obligations to provide a license on
2 RAND terms. The very purpose of the RAND agreement is to promote adoption of a
3 standard by decreasing the risk of hold-up. *See generally* Mark A. Lemley, *Ten Things*
4 *to Do About Patent Holdup of Standards (And One Not To)*, 48 B.C. L.Rev. 149 (2007).

5 The Court’s authority to set interim licensing terms was emphasized by the
6 Federal Circuit’s recent rulings in *Ericsson*. Recognizing the policy issues involved with
7 forcing an implementer to face injunctive relief when an SEP holder has breached
8 contractual obligations to a standards body, the Court noted that “[g]iven the SEP-
9 related concerns underlying the FRAND commitment, if the FRAND commitment
10 means anything of substance, it must mean that an SEP holder that has made such a
11 commitment cannot just spring injunctive actions” without “having first complied with
12 *some* standard of conduct.” *Ericsson*, 120 F.4th at 876. That standard of conduct here
13 is the one imposed by Huawei’s RAND commitment to provide worldwide RAND
14 license terms to implementers practicing its WiFi SEP patents. The establishment of
15 an interim license will lessen the prejudice caused by Huawei’s breach of contractual
16 obligations in an effort to extort supracompetitive rates from Netgear. Indeed,
17 Huawei’s refusal to agree to the setting of interim license terms demonstrates further
18 intent to induce hold-up, *i.e.*, to pressure Netgear into accepting a higher RAND rate
19 than is objectively merited, and thereby to frustrate the purpose of the contractual
20 obligation created by IEEE standards by not proffering a license and instead trying
21 to keep Netgear from using certain SEPs. *See Microsoft I*, 696 F.3d at 884.

22 Other courts that have spoken on this issue have viewed the issue similarly.
23 *See, e.g. Unwired Planet Int’l v Huawei Techs, Co.*, [2020] UKSC 37, [72] (U.K.
24 Supreme Court observing that “the operation of the ETSI regime requires the SEP
25 owner to offer a FRAND license ... as [a] precondition of the grant of an injunction.”)
26 (decision attached to Ondrick Decl. as Ex. 7); *Realtek Semiconductor*, 946 F. Supp.
27 2d at 1008 (holding that SEP holders “breached their contractual obligations ... by
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1 seeking injunctive relief against [the implementer] before offering [it] a license”).

2 Further, at least one court has granted an interim license to address the
3 concerns presented here. *See Panasonic Holdings Corporation v Xiaomi Technology*
4 *UK Limited*, [2024] EWCA (Civ) 1143 (decision attached to Ondrick Decl. as Ex. 6).
5 In discussing the fact that Xiaomi had offered, like Netgear here, to enter into an
6 interim license pending a FRAND license terms determination and Panasonic’s (like
7 Huawei’s here) refusal to agree to the determination of an interim license, the court
8 noted “[a]ny rational SEP holder in the position of Panasonic would want to be paid
9 sooner rather than later.” *Id.* at [84]. It concluded: “Panasonic’s reluctance is only
10 explicable on the basis that it is seeking to compel Xiaomi to accept terms more
11 favourable to Panasonic than the Patents Court would order.” *Id.*

12 If for some reason an anti-enforcement injunction is not entered here or is
13 overturned by an anti-anti suit injunction, the Court should enter an order providing
14 interim license terms to preserve the *status quo* and to hold Huawei to the contractual
15 obligation that it committed to in order to have its patents declared standard essential
16 by the IEEE. Absent such relief, Huawei will be allowed to (1) obtain standard
17 recognition for its IEEE Wi-Fi SEPs fraudulently; by (2) violating contractual
18 obligations to *provide* worldwide RAND license terms to Netgear; and (3) use the
19 exclusionary power of the injunctions granted by the German courts, Chinese courts
20 and/or the UPC to try to force Netgear to pay more than this Court would order. As
21 observed in the *Panasonic* case, Huawei’s conduct is indefensible, and this Court
22 should take action to prevent the indefensible conduct. Enforcing the implied
23 covenant of good faith and fair dealing in commercial contracts through tort-like
24 remedies, including interim licenses to protect the *status quo*, is appropriate where,
25 as here, the contract is “characterized by elements of public interest.” *See* Matthew
26 J. Barrett, Note, “Contort”: *Tortious Breach of the Implied Covenant of Good Faith*
27 *and Fair Dealing in Noninsurance, Commercial Contracts—Its Existence and*

1 *Desirability*, 60 Notre Dame L. Rev. 510, 518, 528 n. 104 (1985)

2 **B. An Interim License is Necessary to Avoid Prejudice to Both**
3 **Parties**

4 The absence of an interim license presents a significant risk of harm to both
5 parties. Netgear faces the prospect of continued litigation in Germany, China and
6 UPC concerning the same SEPs, which could lead to contradictory rulings,
7 unnecessary costs, and delays in resolving the underlying RAND dispute. Huawei,
8 on the other hand, risks having its patents used without a license in a scenario where
9 an interim license has been proposed.

10 Setting interim license terms would provide the parties with a clear framework
11 under which they can continue to operate while they litigate issues directly pertinent
12 to the establishment of final RAND terms. Not only would this result in clear contract
13 interpretation resulting in a remedy that comports with Huawei's contractual
14 obligation to provide Netgear with a worldwide RAND license, but it would focus
15 on the primary issue of dispute between these parties in a manner not influenced by
16 the significant unfair pressure added to the process by injunctive relief.

17 **C. Huawei's Proposed Interim License Provides Reasonable and**
18 **Non-Discriminatory Terms Pending Resolution to the Court's**
19 **RAND Determination**

20 During the meet and confer process, Netgear offered to pay a lump sum interim
21 license payment of [REDACTED] to Huawei for past use and estimated potential use
22 through the projected hearing date where the U.S. court can determine RAND terms.
23 Moreover, Netgear proposed that if the Court-determined RAND terms ultimately
24 differ from the lump sum interim license payment, then the parties would rectify the
25 difference to make the parties whole based on this Court's determination.

26 Huawei's lump sum payment accounts for a significant Qualcomm exhaustion
27 issue that reduces by [REDACTED] the amount of worldwide products subject
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1 to the lump sum worldwide license. The exhaustion-based reduction results in
2 [REDACTED] Netgear products subject to the lump sum
3 license. Netgear's calculation leading to the offer of [REDACTED] lump sum is attached
4 to the Ondrick Decl. at Ex. 9. As for the rate applied in calculating the lump sum,
5 Netgear has informed Huawei [REDACTED]
6 [REDACTED] consistent with the lump sum
7 interim license proposed here. *See* Ondrick Decl. Ex. 8 at 7. Patent aggregators
8 collect and manage a pool of Wi-Fi patents from various owners, including but not
9 limited to Huawei, allowing companies to license a wide range of purportedly
10 essential Wi-Fi 6 patents through a single agreement with the aggregator instead of
11 negotiating with each individual patent holder separately, essentially acting as a one-
12 stop shop for Wi-Fi patent licensing. Each of the Huawei Wi-Fi 6 patents implicated
13 in the potential worldwide license between Netgear and Huawei is included in the
14 aggregator license, plus many additional Wi-Fi SEPs. Ondrick Decl. Ex. 8 at 7.
15 Huawei's patents make up approximately half of the patents in the pool, thus
16 providing a fair calculus for discounting the amount to be offered to the aggregator
17 in a manner that ultimately yields a lump sum paid-up interim license. The outcome
18 of this calculation, shown in Ex. 9 attached to the Ondrick Declaration, confirms the
19 reasonableness of Netgear's [REDACTED] lump sum offer to Huawei. This results in a
20 reasonable and non-discriminatory interim worldwide license that can be adjusted as
21 necessary once the Court determines final RAND terms.

22 In contrast to the reasonable and non-discriminatory terms proposed by
23 Netgear for the nominal damages suffered here, Huawei continued its unreasonable
24 negotiation tactics during the meet and confer regarding this issue. Rather than treat
25 the discussions seriously as would a willing licensor, Huawei offered [REDACTED]
26 [REDACTED] that
27 Huawei established some time ago. Indeed, Huawei provided Netgear with a [REDACTED]

1 [REDACTED] that had previously been proposed to
2 Netgear and rejected. Ondrick Decl as Ex. 6, 9. Huawei's [REDACTED] does
3 not come close to providing RAND terms because the proposed rates are
4 supracompetitive, inconsistent with other licenses entered into by Huawei and
5 significantly exceeding industry norms, fails to address critical terms such as the
6 number of units of past sales implicated by the license. Making matters worse, the
7 Huawei's proposal seeks to extract [REDACTED]
8 despite Huawei including such patents in comparable licenses without additional
9 charge. *See, e.g.*, [https://www.huawei.com/en/news/2021/12/buffalo-huawei-wi-fi-](https://www.huawei.com/en/news/2021/12/buffalo-huawei-wi-fi-6-licence-patents)
10 [6-licence-patents](https://www.huawei.com/en/news/2021/12/buffalo-huawei-wi-fi-6-licence-patents) (last visited Dec. 3, 2024) (press release with Buffalo license only
11 pertaining to Wi-Fi 6 only). Huawei's proposal confirms and continues a pattern of
12 unreasonable and discriminatory proposed terms, all based on the "gun to the head"
13 threat of injunctive relief unless an unfair rate is agreed to by Netgear.

14 Only Netgear's proposed interim license terms provide specific factual and
15 evidentiary support confirming the reasonable nature of the interim license. The
16 Court should adopt Netgear's proposed RAND terms in an interim license and
17 establish a schedule focused on determining the final RAND terms for a license
18 between Netgear and Huawei.⁵

19 **VIII. CONCLUSION**

20 For the foregoing reasons, Huawei respectfully requests this Court to grant the
21 motion for an injunction and enter an order barring Huawei from seeking or enforcing
22 injunctive relief in Germany, the UPC or China during the pendency of the
23 proceedings here in California.

24 In the alternative, if for some reason an anti-enforcement injunction is not
25 entered, Netgear respectfully requests that this Court set an interim license for the

26 _____
27 ⁵ Issues of comity are not implicated here, as with the anti-enforcement motion,
28 because the issues here involve a global agreement between Netgear and Huawei
and the interpretation of that contract.

1 global SEPs at issue in this RAND dispute. Setting an interim license will enable the
2 parties to proceed to a hearing focused solely on establishing the final RAND terms
3 and ultimately will render moot the ongoing litigation in Germany and China.
4

5 Dated: December 4, 2024

Respectfully submitted,
6 SPENCER FANE LLP

7
8 By: /s/ Blair M. Jacobs

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Local Rule 7-3 Attestation

This motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on November 18, 2024 and which continued in correspondence through December 3, 2024.

Dated: December 4, 2024

Respectfully submitted,
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Local Rule 11-6.2 Attestation

The undersigned, counsel of record for Huawei Technologies Co., Ltd., certifies that this brief is no more than 25 pages in length, which complies with the page limit set by court order dated March 14, 2024. Dkt. 41.

Dated: December 4, 2024

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on the date signed below, I caused the foregoing document to be served on the following individuals via CM/ECF at the following email addresses:

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