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

ERICSSON INC. AND TELEFONAKTIEBOLAGET LM ERICSSON, Plaintiffs, v. SAMSUNG ELECTRONICS CO. LTD., SAMSUNG ELECTRONICS AMERICA, INC., AND SAMSUNG RESEARCH AMERICA Defendants.	Civil Action No. 2:20-cv-380-JRG

BRIEF OF LAW PROFESSOR ADAM MOSSOFF AS *AMICUS CURIAE* IN SUPPORT OF ERICSSON

Adam Mossoff
Professor of Law
ANTONIN SCALIA LAW SCHOOL
George Mason University
3301 Fairfax Dr.
Arlington, VA 22201

Jeffrey A. Lamken
Rayiner I. Hashem
James A. Barta
MOLOLAMKEN LLP
600 New Hampshire Ave. N.W.
Washington, D.C. 20037
(202) 556-2000 (telephone)
(202) 556-2001 (facsimile)
jlamken@mololamken.com
rhashem@mololamken.com
jbarta@mololamken.com

Counsel for Prof. Adam Mossoff

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Adam Mossoff is a law professor who teaches and writes about patent law and policy. He specializes in patent licensing and standard essential patents, and has written about the respective patent systems in the United States of America and in the People's Republic of China. He has an interest in promoting the continuity of the interrelated legal doctrines that secure reliable and effective property rights in the inventions that drive growth in innovation economies. He has no stake in the parties or in the outcome of this case.[1]

ARGUMENT

This case began as a straightforward dispute over negotiations for a cross license of Ericsson's and Samsung's patent portfolios for mobile-communications technology. But Samsung has now transformed it into a jurisdictional dispute between U.S. and Chinese courts. This brief does not seek to repeat the parties' discussion of the legal framework governing anti-suit injunctions and international comity. Rather, it focuses on two specific insights. First, the Wuhan proceedings that Samsung brought against Ericsson illustrate a marked lack of due process and transparency, which correlates with issues in which China's economic interests are at stake. Second, this dispute raises a serious innovation policy concern about unfairly titled playing fields in the development and licensing of standardized technologies when implementers of standard essential patents (SEP), such as Samsung, file lawsuits, engage in ex parte proceedings, and receive anti-suit injunctions without any notice or participations by the innovator in a licensing dispute. Together, those developments undermine the reliable and

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than *amicus curiae* or his counsel, contributed money that was intended to fund preparing or submitting this brief.

effective property rights in innovations that have been secured under the rule of law, which has been a hallmark of the U.S. patent system and a key driver in the success of the U.S. innovation economy.

Samsung's strategy of filing a lawsuit in Wuhan, China—a jurisdiction with no direct or even proximate connections to the original contractual dispute or the infringement of Ericsson's U.S. patents—takes "direct aim at the heart of both Article III" courts "and the United States patent system." Mot. 8. While the Chinese legal system has generally improved over the past two decades, commentators and government officials have recognized that independence, transparency, and due process are not yet the norm in all cases. Those departures from these basic norms of the rule of law are evident in this case. Samsung did not serve Ericsson or provide it even informal notice of the lawsuit Samsung filed in Wuhan until after Ericsson's lawsuit was filed in this Court. Then, Samsung obtained ex parte an anti-suit injunction from the Wuhan court over the Christmas holiday, again without giving Ericsson notice or an opportunity to participate. This contrasts starkly with the notice to Samsung and the opportunity for its arguments to be heard that this Court has afforded Samsung in the expedited proceedings, despite the holiday season and the COVID-19 pandemic.

This is not the only case in which Chinese courts have failed to respect basic norms of due process. They have departed from those norms in other cases in which the Chinese government has significant domestic economic interests, such as in disputes over the fair, reasonable, and non-discriminatory (FRAND) licensing of SEPs on mobile telecommunications, like in this case. It is in China's economic interest to support its domestic high-tech companies that develop new mobile hardware by (among other things) reducing the royalty rates paid by Chinese companies for the use of patented technologies, such as 4G and 5G, created and owned by U.S.

or European companies. Indeed, the Wuhan court justified its worldwide anti-suit injunction against Ericsson by asserting that allowing a lawsuit properly filed in this Court to proceed would necessarily result in pressuring Samsung to "submit to unreasonable royalty rates" that "increase . . . operating costs." Dkt. 26-9, at 3-4. And, in other cases, Chinese courts have issued anti-suit injunctions in FRAND disputes involving domestic Chinese industrial policy interests while similarly disregarding basic norms of due process. *See, e.g., InterDigital Tech. Corp. & Ors. v. Xiaomi Corp. & Ors.* (2020) 295 CS 2020 (India) (opinion reproduced at Dkt. 11-2).

This disregard for due process combined with an institutional bias towards implementers sheds light on Samsung's decision to file a lawsuit in Wuhan—an otherwise inconvenient forum with no connection to the parties' contractual or patent dispute—and to obtain an anti-suit injunction designed to prevent this lawsuit from proceeding in this Court. If successful, Samsung's litigation tactic will provide a roadmap for other implementers of patented technologies to displace neutral adjudication of FRAND disputes in favor of fora that pursue national political and economic policies at the expense of due process. In the unique context of the licensing of SEPs, implementers are well positioned to forum shop. Owners of SEPs cannot simply file a patent infringement lawsuit when an implementer infringes their patents. Rather, SEP owners customarily first make initial license offers on FRAND terms to the implementer that set forth a royalty rate and terms of use, wait for a response, and then engage in laborious negotiations. Implementers, by contrast, can file suit immediately upon receiving an offer. Implementers thus can virtually always be first to file a lawsuit.

If this Court does not check the Wuhan court—which engaged in ex parte proceedings to claim exclusive jurisdiction over a licensing dispute in which it expressly admitted that it was

seeking to lower royalty rates—any implementer seeking a lower royalty rate could simply sue SEP owners in Wuhan first and obtain an anti-suit injunction without notice and the ability to participate in proceedings. That would create a fundamentally unbalanced playing field in favor of implementers negotiating with SEP owners like Ericsson. It would effectively prevent SEP owners suing for either contractual FRAND claims or patent infringement claims.

Samsung's tactic threatens to deny the U.S. courts their longstanding role in properly adjudicating controversies arising within their jurisdiction over U.S. patent rights. It threatens the fundamental principle of rule of law that has been the historically unique hallmark of the U.S. patent system. The consequences cannot be understated. The U.S. patent system has successfully driven the U.S. innovation economy for two centuries and has been the gold standard globally for many other jurisdictions, including, ironically, China (which has adopted many historical features of the U.S. patent system in its own reforms in recent years).

I. AN ANTI-INTERFERENCE INJUNCTION IS NEEDED TO PROMOTE FAIR ADJUDICATION AND TO PREVENT DISPLACEMENT OF U.S. JURISDICTION IN FAVOR OF AN UNRELATED FORUM RIFE WITH DUE PROCESS CONCERNS

In recent years, Chinese courts generally have made laudable strides toward independence and impartiality in adjudicating disputes solely between private parties over private rights that do not implicate or contradict China's domestic economic interests. *See* Adam Mossoff, *Institutional Design in Patent Law: Private Property Rights or Regulatory Entitlements*, 92 S. Cal. L. Rev. 921, 944 (2019). But Samsung's strategic lawsuit in Wuhan—a jurisdiction with virtually no connection to the parties or their dispute—exploits less promising features of China's judicial system. As Samsung has conceded in other cases, *see* Mot. 11, Chinese courts do not enjoy the same independence that U.S. courts have under Article III of the U.S. Constitution. They can be subject to political control and, where cases implicate Chinese industrial policy, commentators and experts have observed that court decisions can and do

correlate with existing political policies. *See* Mot. 11-12; F. Scott Kieff, *Business, Risk, & China's MCF: Modest Tools of Financial Regulation for a Time of Great Power Competition*, 88 Geo. Wash. L. Rev. 1281, 1295 (2020) ("The true risk-return calculus to doing business in China includes an account of how [the military-civil fusion] imposes obligations flowing in multiple directions among personnel in Chinese courts and agencies, national leadership, national security apparatus, and state-owned or state-championed commercial firms."); Shaomin Li & Ilan Alon, *China's Intellectual Property Rights Provocation: A Political Economy View*, 3 J. of Int'l Bus. Pol'y 60, 66 (2020) ("Since the party is above and dictates the law, the desire to strengthen IPR must be a party-led effort instead of following the rule of law.").

A. This case lies at the core of one such area of unique political and economic interest to China: technological innovation. *See CSET Translation of 13th National Five-Year Plan for the Development of Strategic Emerging Industries*, Central People's Government of the People's Republic of China at 59 (Nov. 29, 2016) (translation by CSET on Dec. 9, 2019), https://cset.georgetown.edu/research/national-13th-five-year-plan-for-the-development-of-strategic-emerging-industries/ (recognizing, among other next-generation technologies, the Internet of Things and artificial intelligence as key technologies for industrial transformation and identifying intellectual property in 4 of the 69 goals in its 13th Five-Year Plan for the Development of Strategic Emerging Industries); Bryan Clark & Dan Pratt, *Weaponizing the 5G Value Chain*, at 2 (Sep. 22, 2020), https://www.hudson.org/research/16389-weaponizing-the-5-g-value-chain ("The lead in 5G implementation belongs [not to the U.S. but] instead to China's Huawei, which exploited a combination of regulatory protection, government subsidies, and capable technology to rapidly gain one-third of the global 5G market."). More specifically, this case concerns how much companies that implement patented technologies must pay for those technologies. It

involves a determination of FRAND royalty rates for SEPs covering mobile communication technologies, such as 4G or 5G. China has strong national interests in the outcomes of such disputes. Those disputes can affect how much companies with close state ties like Huawei must pay for a license to implement SEPs in their own telecommunications systems and mobile devices.

The U.S. government has recognized China's policy of pursuing lower royalty rates to advance its own national economic policies. As one recent report explains, it is the policy in China to "force foreign companies" to accept "below-market royalty rates for licensed technology." White House Office of Trade and Mfg. Pol'y, *How China's Economic Aggression Threatens the Technologies and Intellectual Property of the United States and the World* 7, 11-12 (June 2018) (foreign companies must "make concessions such as . . . below-market royalty rates for licensed technology"). Chinese regulations force U.S. companies to "license technologies to Chinese entities . . . on non-market based terms that favor Chinese recipients." U.S. Trade Representative, *Update Concerning China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property, and Innovation* 3 (Nov. 20, 2018) ("2018 USTR Report"). And "Chinese government officials have pressured foreign companies seeking to participate in the standards-setting process to license their technology or intellectual property on unfavorable terms." U.S. Trade Representative, *2019 Report to Congress on China's WTO Compliance* 36 (Mar. 2020) ("2019 USTR Report").

These well-established and widely-recognized concerns have prompted Executive Branch action in recent years. The most well-known was the trade war with China, which was directly (though not entirely) in response to "China's unfair trade practices related to the forced transfer of American technology and intellectual property." 2018 USTR Report 5. The U.S. also filed

actions at the World Trade Organization challenging "China's discriminatory technology licensing requirements." *Id.* at 29-30. And most recently, the Executive Branch has "recommended" that U.S. courts "take into account that patent holders in China face challenges in enforcing their patents and *securing appropriate compensation for the use of their patents*." 2019 USTR Report A-33 (emphasis added). The contractual dispute between Ericsson and Samsung over the proper FRAND rate—the rates that should be paid for use of Ericsson's SEPs on Samsung mobile devices—directly implicates the concerns repeatedly and consistently recognized by the U.S. government. If the Wuhan court forces Ericsson to accept a royalty rate below that which other courts would recognize as a proper FRAND rate, that outcome benefits China's domestic economic interests. It establishes a precedent that Chinese implementers like Huawei can invoke in claiming that they, too, should pay low royalty rates for Ericsson's patent portfolio.

B. The U.S. is not alone in recognizing China's economic policy of favoring its own state-owned or state-dominated companies and implementing policies that have that effect. Last year, the German Federal Court of Justice observed that "Chinese authorities" had "forced" an owner of SEPs on telecommunications technology "to grant preferential conditions" to "a state-owned Chinese company." *Sisvel v. Haier Deutschland GmbH* [BGH] [Federal Court of Justice] 5 May 2020, 36 KZR 17, 50, 101 (Ger.), http://eplaw.org/wp-content/uploads/2020/07/DE-FCJ-Sisvel-v-Haier-English.pdf.

Similarly, this past fall, the Delhi High Court in India called out, in no uncertain terms, the same failure of the Wuhan court to apply basic due process protections in another anti-suit injunction it issued against InterDigital Technology Corporation, a U.S. telecommunications company that licenses its SEPs on mobile telecommunications technologies. *See Delhi HC Restrains Xiaomi from Enforcing Anti-Suit Injunction Order by Wuhan's Court Against Inter-*

Digital Technology Corporation, Kanooniyat (Oct. 10, 2020), https://kanooniyat.com/2020/10/delhi-hc-restrains-xiaomi-from-enforcing-anti-suit-injunction-order-by-wuhans-court-against-interdigital-technology-corporation. In that case, InterDigital had filed a patent infringement lawsuit against the Chinese smartphone manufacturer, Xiaomi, for its unauthorized use of InterDigital's SEPs covering mobile telecommunications devices. Xiaomi responded by resorting to litigation tactics strikingly similar to Samsung's. Xiaomi filed another lawsuit against InterDigital in the Wuhan court, where it requested a global determination of FRAND rates for all of InterDigital's SEPs. Mot. 5. As with Ericsson, InterDigital was given *no* notice of Xiaomi's lawsuit. Since InterDigital had no notice of the lawsuit, Xiaomi proceeded *ex parte*, and obtained from the Wuhan court an anti-suit injunction barring InterDigital from prosecuting the lawsuit it had filed in India. As in this case, InterDigital never had the opportunity to respond or to appear on its behalf before the injunction issued. Ultimately, the Delhi High Court intervened by granting an anti-interference injunction to InterDigital after the proper filings and procedures were followed for both parties. In granting InterDigital legal relief, the Dehli High Court described Xiaomi's strategic litigation tactics and the Wuhan court's ex parte proceedings as "disturbing," "less than fair, not only to the plaintiff, but also to this Court," and inconsistent with "the requirement of maintaining fairness in the proceedings." Dkt. 11-2, ¶56.

The Delhi High Court also objected to the Wuhan court's attempt to claim the power to be the sole and exclusive worldwide arbiter of all FRAND rates. It further objected to the Wuhan court's attempt to foreclose a legitimately filed lawsuit in the Indian courts by InterDigital, for infringement of Indian patents, within the country of India:

> [The] Wuhan Court has effectively rendered it impossible for the plaintiff to continue to prosecute these proceedings. The inexorable sequitur is that this Court is also divested of the opportunity of adjudicating on the dispute, brought before it by the plaintiffs, which it has, otherwise, the jurisdiction to hear and

> decide. The order of the Wuhan Court, therefore, directly negates the jurisdiction of this Court, and infringes the authority of this Court to exercise jurisdiction in accordance with the laws of this country. *It is not open to any Court to pass an order, prohibiting a court, in another country, to exercise jurisdiction lawfully vested in it.* Any such decision would amount to a negation of jurisdiction, which cannot be countenanced.

InterDigital, 295 CS 2020, ¶76 (emphasis added); *see* Dkt. 11 at 5; *see also Unwired Planet Int'l Ltd. v. Huawei Tech. Co. Ltd.*, [2020] UKSC 37, ¶90 (observing that "English courts have jurisdiction" over infringement suits involving "UK patents," may adjudicate the FRAND rate in connection with such suits, and have "no basis for declining jurisdiction" over such cases when they otherwise possess it).

This Court is not writing on a blank slate in evaluating Samsung's filings and the Wuhan court's processes and decisions over the past month. This Court should reaffirm the fundamental principle of rule of law invoked by the Delhi High Court and protect the fundamental legal norms that define proceedings in U.S. courts—transparency, fairness, and due process. Thus, as the Delhi High Court did, this Court should reject the Wuhan court's assertion of exclusive power to decide a contractual and patent infringement dispute and attempt to shut down a properly filed lawsuit in this Court.

C. The practices in the InterDigital case and in this case stand in marked contrast to how U.S. courts adjudicate patent disputes. The U.S. patent system has been tremendously successful in serving its constitutional function of promoting the useful arts. As economists and historians have recognized, stable political and legal institutions operating under the rule of law have been a key factor in that success by securing reliable and effective property rights for innovators. *See* Mossoff, *Institutional Design in Patent Law*, *supra*, at 933-936; Stephen Haber, *Patents and the Wealth of Nations*, 23 Geo. Mason L. Rev. 811, 834 (2016) (concluding from review of historical and economic evidence a "causal relationship between strong patents and

innovation"); B. Zorina Khan, *The Democratization of Invention: Patents and Copyrights in American Economic Development, 1790-1920* (Cambridge University Press, 2006). Robust protection of intellectual property rights, and predictable adjudication of patent disputes, enables the innovation that allows the economy and society to flourish. Haber, *supra*, at 811 ("There is abundant evidence from economics and history that the world's wealthy countries grew rich because they had well-developed systems of private property. Clearly defined and impartially enforced property rights were crucial to economic development . . . .").

II. IF UNCHECKED BY NORMS OF DUE PROCESS AND THE RULE OF LAW, STRATEGIC LITIGATION TACTICS BY IMPLEMENTERS WILL PROLIFERATE AND UNDERMINE THE PATENT SYSTEM'S FUNCTION OF PROMOTING INNOVATION

If left unchecked, the litigation tactics and proceedings in this case in the Wuhan court threaten to become a template for displacing dispassionate and disinterested adjudication of patent disputes that U.S. courts otherwise provide. SEP owners like Ericsson commit in the standard development process to license their patents on FRAND terms. *TCL Commc'n Tech. Holdings Ltd. v. Telefonaktiebolaget LM Ericsson*, 943 F.3d 1360, 1364 (Fed. Cir. 2019). Pursuant to this contractual commitment, they must be "prepared to offer" a license on FRAND terms to any implementer. *Id.* As a result, SEP owners like Ericsson generally must make at least one licensing offer before resorting to litigation, and generally do engage in extensive negotiations before filing any lawsuit asserting either contractual breach or patent infringement claims. *Id.* at 1364-65.

Given this legal and commercial context, the strategy employed by Samsung—upon receiving a FRAND licensing offer, filing a lawsuit without formal or informal notice in a jurisdiction that does not follow due process norms—can be done in every negotiation between an SEP owner and an implementer. That creates a fundamentally unbalanced playing field in which implementers are incentivized to hold out in FRAND negotiations for a more favorable

offer. If they fail to receive one, they play the "ace in their sleeve": They can seek an injunction and a worldwide FRAND determination from a court in a lawsuit filed without notice to the SEP owner in a jurisdiction institutionally biased in favor of lower FRAND rates. This undermines the incentives created by the U.S. patent system. It vitiates the patent bargain in which innovators risk massive R&D investments over many years in exchange for a reliable and effective property right that they can commercialize in the innovation markets created by their inventions. *See* Richard A. Epstein & Kayvan Noroozi, *Why Incentives for "Patent Holdout" Threaten to Dismantle FRAND, and Why It Matters*, 32 Berkeley Tech. L. J. 1381 (2017).

This case could not be a clearer example of this risk. Samsung offers no evidence that the Wuhan court is the best forum for adjudicating its dispute with Ericsson under the well-established legal factors relevant to making that determination. For example, Samsung cites no evidence that Wuhan is one of the parties' principal place of business, that it is the location of their business dealings, or that China has such a significant interest in this particular contractual dispute between Samsung and Ericsson that the Wuhan proceedings should take precedence over the properly filed and noticed proceedings before this Court. Dkt. 26 at 6-12. Indeed, Samsung affirmed in a separate case before another court that it was not possible for Samsung to receive a "full and fair FRAND determination" in Chinese court. Mot. 11. If this was true for Samsung to assert in this prior case, it is equally true for Ericsson in this case.

This Court should take Samsung at its word in the prior case that it is not possible for Ericsson to receive a "full and fair" hearing before the Wuhan court. It is undeniable that Ericsson had neither notice nor an opportunity to participate in the proceedings before the Wuhan court issued its anti-suit injunction. While the Chinese legal system has taken great strides in recent years in its institutional and legal reforms, this case represents exactly how its

courts can still fall woefully short of the aspirational ideals of due process and substantive fairness. A patent system can function in promoting innovation only if it is situated within a legal system that consistently follows basic norms of due process, provides neutral arbitration via a commitment to the separation of powers, and reflects at its core the rule of law. If any case represented an opportunity to reaffirm these fundamental principles, this is it.

CONCLUSION

Ericsson's motion for an anti-interference injunction should be granted.

Dated: January 5, 2021

Respectfully submitted,

/s/ Jeffrey A. Lamken

Jeffrey A. Lamken
DC Bar No. 440547
Rayiner I. Hashem
James A. Barta
MOLOLAMKEN LLP
600 New Hampshire Ave. N.W.
Washington, D.C. 20037
(202) 556-2000 (telephone)
(202) 556-2001 (facsimile)
jlamken@mololamken.com
rhashem@mololamken.com
jbarta@mololamken.com

Counsel for Prof. Adam Mossoff

Adam Mossoff
Professor of Law
ANTONIN SCALIA LAW SCHOOL
George Mason University
3301 Fairfax Dr.
Arlington, VA 22201

CERTIFICATE OF SERVICE

I hereby certify that, on the 5th day of January, 2021, I electronically filed the foregoing document by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

January 5, 2021

/s/ Jeffrey A. Lamken
Jeffrey A. Lamken