No. 20-11032

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CONTINENTAL AUTOMOTIVE SYSTEMS, INC.,

Plaintiff-Appellant,

v.

AVANCI, LLC ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
THE HONORABLE BARBARA M. G. LYNN, CHIEF DISTRICT JUDGE
CASE NO. 3:19-CV-02933-M

BRIEF OF FAIR STANDARDS ALLIANCE A.S.B.L. AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

Continental Automotive Systems, Inc. v. Avanci, LLC et al.
Case No. 20-11032

The undersigned counsel of record certifies that, in addition to the persons and entities identified in Continental Automotive Systems, Inc.'s Certificate, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Amicus Curiae

Fair Standards Alliance a.s.b.l. ("FSA")

FSA has no parent corporation. No publicly held company has any ownership interest in FSA.

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Pursuant to Federal Rule of Appellate Procedure 29, Fair Standards Alliance a.s.b.l. respectfully submits this brief amicus curiae in support of Plaintiff-Appellant Continental Automotive Systems, Inc. ("Continental") and reversal. All parties consented to this filing.[1]

IDENTITY AND INTEREST OF AMICI CURIAE

Amicus curiae Fair Standards Alliance a.s.b.l. ("FSA") is a non-profit association of over forty-five companies dedicated to promoting a transparent and sustainable licensing framework for standard-essential patents ("SEPs"). The FSA aims to foster widespread adoption of standardized technology to spur creativity, innovation, and job creation while also preventing abusive licensing practices that harm industry and consumers.

The FSA's membership comprises a diverse range of technology stakeholders ranging from small- and medium-sized enterprises to multinational corporations. These firms hail from a variety of industries, including the automotive, telecommunications, broadcasting, semiconductor, and communications infrastructure sectors. Annually, FSA members generate about $2 trillion in revenue; spend more than $150 billion on

[1] No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund the preparation or submission of this brief, and no person or entity—other than the amicus and its counsel—authored the brief or made a monetary contribution to its preparation or submission.

research, development and innovation; and employ more than three million people worldwide.

While the FSA has no personal interest in the outcome of this appeal,[2] it is well placed to comment on the case. Its members participate in standard-setting activities that run the gamut from wireless telephony to computer interfaces to autonomous vehicles. They hold hundreds of thousands of patents, including many thousands of SEPs. Members both license their SEPs pursuant to the rules of various standard-setting organizations ("SSOs") and license other patent holders' SEPs to create innovative products and services. And FSA members purchase standard-implementing components and sub-components for use in many of the products that they design and manufacture.

This range of experience informs the FSA's mission, most notably in ensuring the availability of all SEPs via a direct license on fair, reasonable, and nondiscriminatory ("FRAND") terms. The FSA advocates for SEP royalties that reflect the value of the underlying inventions, not the exclusivity (and potential overcharge) attributable to inclusion in a technology standard or aggregation with other intellectual property rights.

[2] The positions presented in this brief are those of the FSA and do not necessarily reflect the detailed individual corporate positions of each member. While Continental is one of many FSA members, it had no role in the authoring of this brief, in whole or in part, and it did not contribute money intended to fund its preparation or submission, as noted above.

The FSA also discourages harmful abuses of SEP exclusivity, including the pursuit of injunctions except in limited circumstances, refusals to license, and demands for supracompetitive royalties.[3]

This case implicates many of these issues and a host of important antitrust concerns. Although the FSA takes no position on the ultimate merits of the case, it believes the district court erred when it ruled that:

- A patent holder's deception of SSOs and resulting breaches of FRAND obligations cannot violate Section 2 of the Sherman Act, 15 U.S.C. § 2;
- SEP holders' coordinated refusal to license entire segments of an industry did not state a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1; and
- A component supplier like Continental lacks antitrust standing.

If affirmed, the district court's holdings would excuse and embolden anticompetitive conduct by SEP holders while adversely affecting innovation and economic activity in technology and product markets. The FSA has an organizational interest in the reasoned application of the an-

[3] The FSA maintains an overview of its key principles and a collection of its position papers on these and other SEP-related issues on its website: https://fair-standards.org.

titrust laws to SEP licensing. It submits this brief amicus curiae to underscore how the district court's opinion deviates from settled antitrust principles and will result in real world harm to industry.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court's order reflects a deeply flawed understanding of how the antitrust laws interact with standard-setting activities, including the nature of competition over, and the legal principles applicable to, standardized technologies. Those technologies navigate an inherent tension between the collaboration needed to set standards and the requirements of lawful competition. For decades, the antitrust laws have established the guardrails for acceptable conduct in the standard-setting context, curbing the most serious concerted and unilateral abuses while preserving the procompetitive benefits of standardization.

The district court's dismissal order strikes at the heart of those safeguards. Discarding over a decade of settled precedent—including *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007), and *Research in Motion Ltd. v. Motorola, Inc.*, 644 F. Supp. 2d 788 (N.D. Tex. 2008) ("*RIM*")—the district court held that the intentional deception of an SSO cannot violate the Sherman Act, even if that deception results in the acquisition of monopoly power through means other than skill, industry, and foresight. That holding ignores core principles of Sherman Act Section 2 and, if affirmed, will result in real world harms. The district court also made a number of other errors. It adopted a vague and unsupported definition of injury to competition. It misapplied the legal standard under Federal Rule of Civil Procedure 12(b)(6). And it confused the tests for antitrust standing under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26.

Each of these legal errors threatens to upset the careful balance sustaining the efficacy of standardization on the one hand, and protection of the competitive process on the other. The FSA respectfully submits this brief amicus curiae to apprise the Court of its concerns, and to urge the Court to reverse the opinion below.

ARGUMENT

I. Standard Setting and FRAND Promises Implicate the Antitrust Laws, Including Section 2 of the Sherman Act.

1. Interoperability standards harmonize interactions between networked products. They reduce transaction costs and harness the benefits of scale economies. A successful standard can create markets and benefit consumers. Nat'l Research Council, *Patent Challenges for Standard-Setting in the Global Economy: Lessons from Information and Communications Technology* 15, 53 (Keith Maskus & Stephen A. Merrill eds., 2013). Standards, for example, govern and enable nearly every piece of interactive technology—from cellular phones to computers—and the standardization process drives advances in product interoperability, substitution, and price competition. *See TCL Commc'n Tech. Holdings Ltd. v. Telefonaktiebolaget LM Ericsson*, 943 F.3d 1360, 1364 (Fed. Cir. 2019);

United States v. Anthem, Inc., 236 F. Supp. 3d 171, 198 (D.D.C.), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017).

But every rose has its thorn, and the standardization process is no exception. *See Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982) (the standardization process "can be rife with opportunities for anticompetitive activity"). In selecting proprietary technologies for adoption as an industry standard, SSOs effectively clear the field of technological competition. *See* Herbert J. Hovenkamp, *FRAND and Antitrust*, 105 CORNELL L. REV. 1683, 1691-92 (2020) ("Ex ante, a patent may offer one of many alternative technological paths to a certain goal. However, ex post, after a standard has been adopted and others have developed their technologies in reliance, the range of acceptable alternatives can decrease dramatically."). Firms begin to invest in efforts to develop products that implement the standard, effectively "locking-in" the proprietary technologies selected by the SSOs. *See* Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2016 (2007) (explaining the near impossibility of designing around an adopted standard).

The result is guaranteed demand for the incorporated technology and stymied (and in many cases outright eliminated) demand for competing technologies. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 & n.5 (1988) ("Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products," and may "exclude rival producers"); *see* PHILLIP E. AREEDA & HERBERT HOVENKAMP, 3 ANTITRUST LAW ¶ 709d2 (4th ed. 2016). For obvious reasons, the standardization process cannot be easily undone. *See In re Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Third Party United States Federal Trade Commission's Statement on the Public Interest at 2, Inv. No. 337-TA-752 (I.T.C. June 6, 2012) (noting high switching costs and infeasibility of deviations from standard "unless all or most other participants in the industry agree to do so in compatible ways"). As a consequence, standardization positions the owners of adopted technologies as market "gatekeepers." Unchecked, these gatekeepers can charge unreasonable prices for licenses to standard-essential technology or refuse to license altogether, eliminating competition in downstream markets. *See RIM*, 644 F. Supp. at 794.

Most SSOs seek to mitigate these anticompetitive risks. For example, SSOs routinely require participants to abide by "disclosure rules [that] specify when and how members or participants should inform the SSO that they believe they own patents that might be essential to the standard when it is finalized." Nat'l Research Council, *supra* page 5, at 71. These disclosures protect against "patent 'ambush,'" a situation "in which SSO participants are not forthcoming about their patents" during standard setting and "then announce their patent ownership" to participants with "a demand for very high royalties" post standardization. Hovenkamp, *FRAND and Antitrust*, *supra* page 6, at 1732.

SSOs also regularly refuse to adopt proprietary "technology into a standard unless [they] can obtain a declaration from the patent holder agreeing to either license free of charge or on [F]RAND terms." *Microsoft Corp. v. Motorola, Inc.*, 864 F. Supp. 2d 1023, 1032 (W.D. Wash. 2012); *see also* Jorge L. Contreras, *A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust Through a Historical Lens*, 80 ANTITRUST L.J. 39 (2015) (explaining the history of FRAND licensing as an antitrust remedy). Those FRAND commitments require SEP holders to grant licenses to any willing licensee on fair, reasonable, and non-discriminatory terms; SEP holders cannot price discriminate, take unjustified price increases, or refuse to deal based on a potential licensee's position in the distribution chain. *See Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1031 (9th Cir. 2015); *Apple Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 913-14 (N.D. Ill. 2012) (Posner, J., sitting by designation), *aff'd in part and rev'd in part on other grounds*, 757 F.3d 1286, 1331-32 (Fed. Cir. 2014).

2. In *Broadcom,* the U.S. Court of Appeals for the Third Circuit explained why Sherman Act Section 2 reaches fraudulent FRAND commitments in particular. In that case, the district court dismissed allegations that Qualcomm monopolized technology markets by making false

FRAND promises during the standard-setting process, and then repudiating those promises after the SSO adopted its technology. 501 F.3d at 304. The lower court held that Qualcomm's alleged deception "was of no moment under antitrust law, . . . because no matter which company's patented technology ultimately was chosen, the adoption of a standard would have eliminated competition." *Id.* at 305. Critically, the district court thought Qualcomm possessed "a legally-sanctioned monopoly in its patented technology" that "conferred the right to exclude competition and set the terms by which that technology was distributed." *Id.*

The Third Circuit reversed. It explained that a patent holder's exclusionary rights "confer[] a lawful monopoly over the claimed invention," but not *all* technologies that compete to serve a given purpose. *Id.* at 314. To the contrary, patented technologies often compete with other patented and non-proprietary technologies, such that an individual patent's "value is limited when alternative technologies exist." *Id.* (citing *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 10 n.8 (1958) ("Often the patent is limited to a unique form or improvement of the product and the economic power resulting from the patent privileges is slight.")). For example, a fire extinguisher patent would not confer any right to exclude water hoses from the market, even though each technology serves the same core purpose.

The Third Circuit held that Broadcom adequately alleged that Qualcomm's false FRAND commitments played a key role in ensuring that the relevant SSOs selected its patents for adoption into the standard. *Id.*

That act was anticompetitive because it harmed the competitive process. *Id.* at 313. Even had it faced no competition from other technologies, Qualcomm's technology "still would not have been selected by the relevant S[S]Os absent a FRAND commitment." *Id.* at 316. Simply put, a standards-entrenched monopoly is never inevitable and abuses of the standard-setting process can violate Section 2.[4]

3. Here, the district court rejected *Broadcom*'s premises. It held that regardless of circumstance, "[i]t is not anticompetitive for an SEP holder to violate its FRAND obligations." ROA.6694. It concluded that deception of an SSO can never "constitute[] the type of anticompetitive conduct required to support a § 2 claim." ROA.6695. And it broke with other courts—including one in its own district—in concluding that the accumulation of market power in the hands of SEP holders is a natural, inevitable, and necessary consequence of standardization, regardless of how a patent holder abuses the standardization process. ROA.6693 ("An SEP holder may obtain additional monopoly power through inclusion in a standard. This additional market power is inevitable as a very frequent

[4] *See also* Hovenkamp, *FRAND and Antitrust*, *supra* page 6, at 1708 ("Conditionally refusing to license a FRAND-encumbered patent when the relevant agreement requires licensing is clearly a breach of contract, but it can also be an antitrust violation when the conditions are met."); *id.* at 1686, 1696, 1727-28.

consequence of standard setting, and is necessary to achieve the benefits served by the standard, including procompetitive benefits.”).

II. Deceptive FRAND Commitments Are Actionable Under Section 2 of the Sherman Act.

1. The district court’s sweeping holdings—and the assumptions upon which they rest—do not square with settled Section 2 law. Nor do they comport with FSA members’ experience in developing standards, licensing their SEPs, taking licenses to others’ SEPs, and manufacturing products that use SEPs. From the FSA’s perspective, the antitrust laws and their remedies play a critical role in safeguarding the welfare-enhancing aspects of standardization. *Broadcom* shaped a generation of standard setting, and established norms that promote transparency and merits-based competition at SSOs and beyond. FSA is deeply concerned that the district court’s order, if left intact, will undermine settled antitrust principles and upend the careful balance between the procompetitive and anticompetitive aspects of standardization.[5]

Federal courts have long recognized that the willful acquisition of monopoly power by means other than “skill, foresight and industry” violates Section 2 of the Sherman Act. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) (Hand, J.); *see Verizon Commc’ns*

[5] This brief does not address whether a defendant violates Section 2 by opportunistically breaching its FRAND commitments once its technology is locked in to a standard. While FSA believes that Section 2 can reach that conduct, this appeal does not present that issue.

Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (Section 2 prohibits "the willful acquisition or maintenance of [monopoly] power" that does not reflect "growth or development as a consequence of a superior product, business acumen, or historic accident"). This includes the use of deceptive conduct to exclude rivals and harm the competitive process. In *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, for example, the Supreme Court held that a plaintiff's attempt to enforce a patent that it obtained on the basis of fraudulent statements to the U.S. Patent and Trade Office is actionable under Section 2. 382 U.S. 172, 174 (1965). In *Conwood Co. v. United States Tobacco Co.*, a monopolist's provision of misleading information to retailers—in an effort to dupe them into discontinuing a competitor's product—harmed the competitive process. 290 F.3d 768, 783 (6th Cir. 2002). And in *United States v. Microsoft Corp.*, Microsoft injured competition when it deceived applications developers into writing software that would only function on Windows. 253 F.3d 34, 76-77 (D.C. Cir. 2001). In each case, the defendant's use of deception to bias the competitive process against established and nascent rivals was squarely within the ambit of Section 2.

Broadcom stands for the same principle. The Third Circuit recognized that "a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms," along with the "S[S]O's reliance on that promise when including the technology in a standard, and []the patent holder's subsequent breach of that promise" violates Section 2. 501 F.3d at 314.[6] That holding acknowledges that when a patent holder willfully interferes with the "structural protections" safeguarding standard setting, it biases the competitive process. *Id.* at 312, 314. The patent holder excludes putative rivals through means other than skill, foresight, and industry while positioning itself to extract supra-FRAND royalties. *See id.* at 314. That behavior impedes the very purpose of standardization: widespread adoption of the standardized technology. *See id.*

It also meets the definition of anticompetitive conduct the district court itself cited: "[i]t 'tends to impair the opportunities of rivals' and 'does not further competition on the merits or does so in an unnecessarily restrictive way.'" ROA.6692 (quoting *Retractable Techs., Inc. v. Becton Dickinson & Co.*, 842 F.3d 883, 891-92 (5th Cir. 2016)). Indeed, when assessing intentionally false FRAND commitments, it is difficult to conjure up any "rational business purpose other than [their] adverse effects on

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[6] Other courts have followed *Broadcom* in recognizing that the intentional deception of an SSO can give rise to a Section 2 claim. *See, e.g.*, *Amphastar Pharm. v. Momenta Pharm.*, 850 F.3d 52, 57 n.4 (1st Cir. 2017) (noting "that intentional deception of an SSO may, at least in some circumstances, constitute an antitrust violation") (citing *Broadcom*, 501 F.3d at 314); *RIM*, 644 F. Supp. 2d at 795-96 ("This court finds the reasoning in *Broadcom* persuasive and joins the Third Circuit in concluding that these FRAND commitments are intended as a 'bulwark' against the unlawful accumulation of monopoly power that antitrust laws are designed to prevent.").

competitors." ROA.6692 (quoting *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 522 (5th Cir. 1999)).

2. The district court rejected *Broadcom* and its progeny and ruled as a matter of law that claims premised on "deception of an SSO" are not cognizable under Section 2 of the Sherman Act. ROA.6695-96. The district court's holding traces back to a fundamental misunderstanding of the law applicable to, and the nature of competition within, technology markets. It assumed that patents confer lawful monopolies in those markets. *See* ROA.6693 ("A patent holder, of course, has a lawful monopoly to license its patent. . . . An SEP holder may obtain additional market power through inclusion in a standard."). That assumption undergirded its conclusion that "[i]t is not anticompetitive for an SEP holder to violate its FRAND obligations." ROA.6694 ("A lawful monopolist's 'charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.'") (quoting *Trinko*, 540 U.S. at 407).

Starting from that flawed premise, the district court went on to assert (i) that a patent holder can lawfully "obtain *additional* monopoly power through inclusion in a standard"; (ii) that "[t]his additional market power is inevitable as a very frequent consequence of standard setting"; (iii) that monopoly power "is necessary to achieve the benefits served by the standard, including procompetitive benefits"; and (iv) that an SEP holder may lawfully exercise this power to charge monopoly prices and "use price discrimination to maximize the patent's value." ROA.6693-94 (emphasis added). It warned that a contrary holding would disincentivize patent holders from participating in standard setting. ROA.6694.

But the Supreme Court jettisoned the foundation of the district court's analysis—the "'patent equals market power' presumption"—nearly fifteen years ago. *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 44-46 (2006) ("Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. Today, we reach the same conclusion . . . ."). And for good reason: patented technologies often compete to offer different paths to the same goal. *See* Hovenkamp, *FRAND and Antitrust*, *supra* page 6, at 1691-92.

The FSA can attest that this competition between patented technologies is a signal feature of the standard-setting process. *See* Brief of Amicus Curiae Fair Standards Alliance at 4-5, *FTC v. Qualcomm Inc.*, Case No. 19-16122 (9th Cir. Nov. 29, 2019), ECF No. 175 ("SSOs typically include, and in this case do include, competitors at various positions along the value-chain. Before an SSO adopts a standard, technologies compete for inclusion into the standard."); *see also Broadcom*, 501 F.3d at 313 ("During the critical competitive period that precedes adoption of a standard . . . , technologies compete in discrete areas, such as cost and performance characteristics."). Part of the benefit of standardization is the transparent, merits-based competition between different technologies that it enables.

In contrast to the district court, *Broadcom* appropriately recognizes that patents do not necessarily confer monopoly power; that alternative technologies often "compet[e] to become the standard"; and that a patent holder's deception during this competitive period "may confer an unfair advantage and bias the competitive process in favor of that technology's inclusion in the standard." 501 F.3d at 313. Deceptive non-disclosures of patents and false FRAND promises "obscur[e] the costs of including proprietary technology in a standard and increas[e] the likelihood that patent rights *will confer monopoly power on the patent holder*" through means unrelated to business acumen or technical prowess. *Id.* at 314 (emphasis added).

3. The district court offered two additional justifications for its holdings. First, it reasoned that a patent holder's deception of an SSO, even if it led to higher prices for SEP licenses, "has no particular tendency to exclude rivals and diminish competition." ROA.6695 (quoting *Rambus Inc. v. FTC*, 522 F.3d 456, 464 (D.C. Cir. 2008)). Second, it posited that "[e]ven if such deception . . . also excluded Defendants' competitors from being included in the standard, such harms to competitors, rather than to the competitive process itself, are not anticompetitive." ROA.6695-96 (citing *Microsoft*, 253 F.3d at 58 and *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998)).

The district court's vague but exceedingly narrow formulation of "harm to the competitive process" finds no support in the cases it cites.

The *Rambus* court declined to reach the issue that Continental's Section 2 claim presents: whether the relevant SSOs would have conferred monopoly power on the patent holder but for Defendants' allegedly deceptive FRAND commitments. 522 F.3d at 463 (assuming without deciding that if a "more complete disclosure would have caused JEDEC to adopt a different (open, non-proprietary) standard, then [Rambus's] *failure to disclose harmed competition and would support a monopolization claim*") (emphasis added). Moreover, the *Rambus* court—like the district court here—fell into the trap of assuming that a valid patent necessarily confers monopoly power on its holder, and proceeded to analyze the defendant's conduct within the prism of an "otherwise lawful monopol[y]." *Id.* at 466.

Microsoft directly undercuts the district court's myopic approach to harm to competition. That court explicitly held that Microsoft's conduct—deceiving software developers into writing applications that would only function on Microsoft's operating system—produced an anticompetitive effect and violated Section 2. 253 F.3d at 76-77 ("Microsoft intended to deceive Java developers, and predicted that the effect of its actions would be to generate Windows-dependent Java applications that their developers believed would be cross-platform. . . . [W]e conclude this conduct is exclusionary, in violation of § 2 of the Sherman Act.").

There is no material difference between duping software developers into writing applications that function only on one operating system, and deceiving SSOs into clearing away all competitors and adopting one's patents into an industry standard. Each course of conduct excludes rivals and yokes companies to the defendant's technology "in a manner not attributable either to the superiority of the [technology] or to the acumen of its makers." *See id.* at 77. The *Microsoft* court did not even identify a specific consumer harm attributable to the deception of the software developers, whereas the district court here acknowledged that Defendants' deception likely would enable them to extract higher prices from customers. *See* ROA.6695.

Similarly, the district court misinterpreted *NYNEX* to hold that the exclusion of competitors does not injure competition. ROA.6696. In *NYNEX*, the plaintiff alleged a kickback scheme in which a local phone company and one of its service providers deceived a regulator, charged higher prices to consumers, and shared the spoils. 525 U.S. at 132. Discon—a competitor of the service provider—refused to participate in the gambit and went out of business as a result. *Id.* The Court assessed this scheme, which it characterized as a vertical group boycott, under Section 1 of the Sherman Act. *Id.* at 135.

The Court explained that although the scheme harmed consumers, their injury "flowed not so much from a less competitive market for removal services, as from the exercise of market power that is *lawfully* in the hands of a monopolist, namely, [the telephone company], combined with a deception worked upon the regulatory agency that prevented the agency from controlling [the telephone company's] exercise of its monopoly power." *Id.* at 136. The Court pointed to indicia of actual or potential competition among service providers in support of its conclusion that Discon failed to allege harm to competition. *Id.* at 139.

Yet the *NYNEX* Court did *not* exempt from the ambit of the antitrust laws anticompetitive conduct directed at competitors. *Cf.* ROA.6695-96. Nor did it countenance actual or would-be monopolists excluding their rivals, especially through deception. As the Court has made clear in subsequent cases, conduct "seek[ing] to prevent the risk of competition" from rivals may "constitute[] [a] relevant anticompetitive harm." *FTC v. Actavis, Inc.*, 570 U.S. 136, 157 (2013).

NYNEX is inapposite for another reason: the Court never even assessed harm in the allegedly monopolized market. The monopolist telephone company directed its conduct at a supplier, *not* at a rival. 525 U.S. at 133 (assessing standards of proof of anticompetitive effects "where a single buyer favors one seller over another"). Unlike the Section 2 allegations in this case, the scheme in *NYNEX* did not implicate the monopolist's competitive position in its own market.

* * * * *

If affirmed, the district court's opinion will upset the settled expectations of firms, like FSA's members, that participate in SSOs, license SEPs, and take licenses to SEPs. Industry relies on the antitrust laws—and well-reasoned federal-court interpretations of those laws—to define the bounds of acceptable behavior during and after standardization. And as another district court in the Northern District of Texas recognized, the antitrust-law interest in setting those bounds is at least commensurate with the interest in incentivizing standard setting in the first place. *See RIM*, 644 F. Supp. 2d at 796 ("Both the Third Circuit, in *Broadcom*, and the Supreme Court, in *Allied Tube*, have stated that standards, without the proper safeguards, are inherently anticompetitive. It follows that when an entity side-steps these safeguards in an effort to return the standard to its natural anti-competitive state, anti-competitive effects are inevitable.").

The district court's mistaken and crabbed view of monopolization claims conflicts with well-settled law, and risks harm to industry and consumers alike. As disputes over the licensing of wireless SEPs proliferate, and increasing numbers of devices and products incorporate standardized components, the antitrust laws must continue to police the unlawful acquisition of monopoly power through SSOs. This Court should vacate the portion of the district court's order discussing Section 2, and recognize the role that the antitrust laws play in curbing the "inherently anticompetitive" aspects of standard setting. *See id.*

III. Self-Serving Contractual Language Does Not Excuse Well-Pleaded Allegations of Conspiracy.

According to Continental's complaint, Defendants agreed to boycott entire segments of the automotive industry by refusing to license SEPs to anyone but automobile OEMs. ROA.1730-32, ROA.1743-44. When Continental, a component manufacturer, sought a license from each Defendant, it allegedly was "met with either refusals to offer a direct license, or no response whatsoever." ROA.1697; *see* ROA.1735-40. The district court dismissed those allegations because it found that the Avanci pooling agreement at issue "allows the Licensor Defendants to independently license the SEPs outside of the platform," and that path to a license was not "illusory or unrealistic." ROA.6691.

When "evaluating a motion to dismiss under Rule 12(b)(6), a court must accept all well-pleaded facts as true and view those facts in the light most favorable to the plaintiff." *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 803 n.44 (5th Cir. 2011) (quotations and brackets omitted). Courts cannot "look behind" allegations, "independently assess the likelihood that the plaintiff will be able to prove them at trial," or deny them "the force to which [they are] entitled at [an] early stage of the litigation." *Id.* In the FRAND context, this means courts cannot dismiss well-pleaded allegations of boycott agreements and resulting refusals to license simply because a patent pooling agreement contains generic and self-serving language about licensing. *Compare* ROA.6690-91 (dismissal order) *with* ROA.1730-31, ROA.1735-40 (relevant portions of First Amended Complaint).

Any other approach would elevate form over substance. It would allow SEP holders to "avoid liability for anticompetitive" licensing boycotts "simply by structuring" their pooling agreements to permit bilateral licensing in theory, no matter what other terms are contained in the agreement or how the SEP holders behave in practice. *FTC v. AbbVie, Inc.*, 976 F.3d 327, 358 (3d Cir. 2020). It would also break from settled law, which requires far more from patent pools: licenses outside a patent pool must be "realistic[ally]" available. *United Tel. Co. of Mo. v. Johnson Publ'g Co.*, 855 F.2d 604, 612 (8th Cir. 1988); *Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers*, 744 F.2d 917, 925 (2d Cir. 1984).

The district court's approach in this case has real world implications. When SEP holders are allowed to boycott entire segments of an industry, they create security and supply chain vulnerabilities. Every sale of an unlicensed supplier's product is incomplete and potentially subject to injunction and unknown royalties. OEM customers are left to negotiate licenses to hundreds of components from scores of SEP holders governed by multiple standards, even though OEMs often have less familiarity with the component technology at issue and less visibility into the relevant intellectual property markets. The result is inefficiency, increased prices, and distrust of technologies that would otherwise bring tremendous benefits to consumers. It also undermines innovation as well as confidence in standard-setting activities and FRAND promises more generally; companies are hesitant to invest in the development of products and services for which they may face significant legal exposure despite the good-faith licensing efforts of suppliers throughout their complicated and many-tiered supply chains.

The district court's ruling—allowing SEP holders to boycott entire segments of an industry as long as a patent pooling agreement provides for theoretical supplier licensing—will harm innovation, slow the adoption of existing standards, and reduce incentives for new standard-setting activities. Consumers and businesses that benefit from those inventions will suffer as a result.[7]

IV. The District Court Misinterpreted Antitrust Standing Requirements.

The complaint alleged that Defendants refused to license component suppliers and, as a result, Continental suffered harm. ROA.1697, ROA.1698-99, ROA.1734-40, ROA.1741. Although Continental sought injunctive relief, the district court held that Continental lacked antitrust

[7] For additional information on the harms caused by SEP patent pools that refuse to license any willing licensee, or whose members refuse to license on a bilateral basis, *see* Fair Standards Alliance, Statement re U.S. Department of Justice Business Review Letter on Avanci's 5G Patent Pool (Sept. 1, 2020), https://fair-standards.org/wp-content/uploads/2020/09/200901-FSA-Statement-re-Avanci-BRL.pdf; Fair Standards Alliance, Patent Pools and Licensing Platforms in SEP Licensing (Nov. 6, 2019), https://fair-standards.org/wp-content/uploads/2019/11/191104_FSA_Position_Patent_Pools.pdf; Fair Standards Alliance Position Paper: Competitive and Industry Harms Related to Refusals to License SEPs and Other Forms of "Level Discrimination" in SEP Licensing (Dec. 2, 2020), https://fair-standards.org/2020/12/02/competitive-and-industry-harms-related-to-refusals-to-license-seps-and-other-forms-of-level-discrimination-in-sep-licensing/.

standing because it did not suffer "actual or imminent" antitrust injury and was not a proper plaintiff to bring suit. ROA.6680, ROA.6686-89. This was error.

"[I]n order to seek injunctive relief under § 16, a private plaintiff need only allege threatened loss or damage of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 113 (1986) (quotations omitted). It need not prove it is the "proper plaintiff" beyond suffering antitrust injury because "[t]he Supreme Court . . . has also held that this factor is not relevant to claims for injunctive relief." *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 814 (N.D. Ill. 2017) (discussing *Cargill*, 479 U.S. at 111 nn.5-6); *see In re Rail Freight Fuel Surcharge Antitrust Litig.*, 593 F. Supp. 2d 29, 41-42 (D.D.C. 2008); *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 140 (D.D.C. 2000).

Here, the district court acknowledged Continental was at risk of the "potential" injury of paying for artificially inflated SEP licenses as a result of Defendants' conduct and Continental's indemnity clauses. ROA.6680. Nothing more was required to establish antitrust standing under Section 16 of the Clayton Act. *See, e.g.*, *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1235 (9th Cir. 1998) ("[A]n antitrust plaintiff seeking injunctive relief need only show a threatened injury, not an actual one.").

Imposing additional antitrust standing requirements would undermine key safeguards against anticompetitive conduct in the FRAND context. In FSA's experience, suppliers are often most familiar with the components and closest to the related intellectual property rights that may read on them. Suppliers need licenses to take advantage of scale economies and to keep costs down. When deprived of those licenses, they generally can sell components risk free only to OEMs that have themselves taken a license, which undermines supplier incentives to create new products or seek out new customers. Suppliers' injuries are real and they are well positioned to bring suit. OEMs, on the other hand, expect suppliers to sell fully licensed components.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order dismissing Continental's complaint with prejudice and remand the case for further proceedings.

Dated: February 16, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2021, I electronically filed the foregoing Brief of Fair Standards Alliance a.s.b.l. as Amicus Curiae in Support of Plaintiff-Appellant and Reversal with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. I certify that all interested parties in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Dated: February 16, 2021

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FED. R. APP. P. 29(a)(5) and FED. R. APP. P. 32(a)(7)(B) because it contains 5,692 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f) and 5TH CIR. R. 32.2.

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 and 14-point Century Schoolbook font.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Dated: February 16, 2021

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