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19 UNITED STATES DISTRICT COURT
 20 NORTHERN DISTRICT OF CALIFORNIA

21 CONTINENTAL AUTOMOTIVE
 22 SYSTEMS, INC.,

23 Plaintiff,

24 v.

26 AVANCI, LLC, et al.,

27 Defendants.

Case No. 5:19-cv-02520-NC

**CONTINENTAL’S MOTION FOR
 ANTI-SUIT INJUNCTION**

Hearing Date: July 31, 2019

Time: 1:00 p.m.

Place: Courtroom 5

Judge: Hon. Nathanael Cousins

PUBLIC REDACTED VERSION

1 TO THE COURT, DEFENDANTS AVANCI, LLC, AVANCI PLATFORM
2 INTERNATIONAL LIMITED, NOKIA CORPORATION, NOKIA OF AMERICA
3 CORPORATION, NOKIA SOLUTIONS AND NETWORKS US LLC, NOKIA
4 SOLUTIONS AND NETWORKS OY, NOKIA TECHNOLOGIES OY,
5 CONVERSANT WIRELESS LICENSING SARL, OPTIS UP HOLDINGS, LLC,
6 OPTIS CELLULAR TECHNOLOGY, LLC, OPTIS WIRELESS TECHNOLOGY,
7 LLC (COLLECTIVELY, “DEFENDANTS”), AND THEIR COUNSEL OF
8 RECORD:

9 PLEASE TAKE NOTICE that on July 31, 2019 at 1:00 p.m., or as soon
10 thereafter as the matter may be heard, in the courtroom of the Honorable Nathanael
11 M. Cousins, located at 280 South 1st Street, San Jose, California 95113, Plaintiff
12 Continental Automotive Systems, Inc. (“Continental”) respectfully requests that this
13 Court enjoin Defendants Nokia Solutions and Networks Oy, Nokia Technologies
14 Oy, and any related entities (collectively, “Nokia”) from prosecuting the patent
15 infringement actions filed in Germany against Continental’s customer, Daimler AG
16 (the “German Actions”). The German Actions are more specifically identified as
17 follows:

- 18 • *Nokia Solutions and Networks Oy v. Daimler AG*, First Munich
19 Regional Court, Patent Division, No. 21 O 3889/19.
- 20 • *Nokia Technologies Oy v. Daimler AG*, First Munich Regional Court,
21 Patent Division, No. 7 O 3890/19.
- 22 • *Nokia Technologies Oy v. Daimler AG*, First Munich Regional Court,
23 Patent Division, No. 21 O 3891/19.
- 24 • *Nokia Technologies Oy v. Daimler AG*, Düsseldorf Regional Court,
25 Patent Division, No. 4a O 26/19.
- 26 • *Nokia Technologies Oy v. Daimler AG*, Düsseldorf Regional Court,
27 Patent Division, No. 4a O 27/19.

28

- 1 • *Nokia Technologies Oy v. Daimler AG*, Düsseldorf Regional Court,
2 Patent Division, No. 4c O 17/19.
- 3 • *Nokia Technologies Oy v. Daimler AG*, Mannheim Regional Court,
4 Patent Division, No. 2 O 37/19.
- 5 • *Nokia Technologies Oy v. Daimler AG*, Mannheim Regional Court,
6 Patent Division, No. 2 O 36/19.
- 7 • *Nokia Solutions and Networks Oy v. Daimler AG*, Mannheim Regional
8 Court, Patent Division, No. 2 O 35/19.
- 9 • *Nokia Solutions and Networks Oy v. Daimler AG*, Mannheim Regional
10 Court, Patent Division, No. 2 O 34/19.

11 In addition, Continental seeks an order enjoining Defendants from instituting
12 against Continental or any of its customers (or their subsidiaries or affiliates) any
13 action alleging infringement of their global 2G, 3G and 4G SEPs during the
14 pendency of the FRAND proceeding in this Court, or from acting in concert with
15 anyone to institute such an action.

16 This motion is based on this notice of motion and supporting memorandum of
17 points and authorities, the supporting declarations of Matthew W. Holder and Dr.
18 Frank-Erich Hufnagel, the accompanying exhibits, reply briefing in further support
19 of this motion and supporting declarations and accompanying exhibits, as well as
20 other written or oral argument that Continental may present to the Court.

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1 Dated: June 11, 2019

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SHEPPARD, MULLIN, RICHTER & HAMPTON
LLP

By /s/ Matthew W. Holder
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1 **I. INTRODUCTION**

2 Plaintiff Continental Automotive Systems, Inc. (“Continental”) is a leading
3 supplier of telematics control units (“TCUs”) for cars which incorporate 2G, 3G,
4 and/or 4G cellular communications. Continental filed this lawsuit after Defendants
5 refused to grant Continental a direct license to their standard essential patents
6 (“SEPs”) for the relevant standards, despite being bound by commitments to license
7 their SEPs on fair, reasonable, and non-discriminatory (“FRAND”) terms to
8 implementers like Continental. Instead, Defendants—both individually and through
9 the “licensing platform” Avanci—have conspired to demand non-FRAND royalties
10 from Continental’s customers, which are the automotive vehicle manufacturers
11 (“OEMs”). Continental, in turn, risks bearing the financial burden of the inflated
12 royalties in the form of indemnity demands to Continental by the OEMs.

13 With respect to Nokia, Continental tried for more than a year to obtain a
14 direct license to Nokia’s cellular SEPs. In violation of its FRAND obligation, Nokia
15 refused to consider a direct license to Continental and instead insisted on licensing
16 only OEMs, such as Continental’s customer Daimler AG (“Daimler”), [REDACTED]
17 [REDACTED]. Once it became clear
18 that Nokia would not reconsider its improper policy, Daimler and some of its
19 suppliers, including Continental, individually asked the European Commission to
20 investigate Nokia’s refusal to directly license anyone other than OEMs. Yet rather
21 than adjust course and comply with its FRAND obligation, Nokia instead doubled-
22 down on its efforts to hold-up the OEMs by filing ten retaliatory patent infringement
23 lawsuits against Daimler in Germany. Each suit alleges that Daimler’s vehicles
24 infringe one of Nokia’s SEPs based on inclusion of a TCU which includes cellular
25 functionality. Then, almost simultaneous with Continental’s filing of this lawsuit,
26 Nokia expanded the German lawsuits to also request injunctive relief against
27 Daimler’s products (which, by extension, would also have the practical effect, in
28 economic terms, of enjoining Continental’s ability to further supply Daimler).

1 Nokia’s lawsuits against Daimler are clearly not intended as a comprehensive
2 adjudication of the FRAND terms and conditions of a license to Nokia’s SEPs,
3 because Nokia claims it holds up to 20% of 3G and 4G SEPs, and yet the lawsuits
4 cover only a handful of alleged SEPs. Rather, the purpose of Nokia’s German
5 lawsuits is to pressure Daimler to accept a license on non-FRAND terms by using
6 the threat of an injunction to stop automobile production, and the financial burden of
7 litigating Nokia’s scattershot infringement actions.

8 Nokia’s German lawsuits are an attempt to force Daimler and other OEMs to
9 accept non-FRAND licenses before this Court has an opportunity to adjudicate the
10 case on the merits, and thus should be enjoined. Nokia’s stated policy of only
11 licensing at the OEM level is directly contrary to Ninth Circuit precedent, which
12 states that SEP owners are required “to license . . . all comers on [FRAND] terms,”
13 *Microsoft Corp. v. Motorola Inc.*, 696 F.3d 872, 876 (9th Cir. 2012) (“*Microsoft I*”),
14 and “cannot refuse a license to a manufacturer who commits to paying the RAND
15 rate.” *Microsoft Corp. v. Motorola Inc.*, 795 F.3d 1024, 1031 (9th Cir. 2015)
16 (“*Microsoft II*”). In a recent decision in this district, Judge Lucy H. Koh likewise
17 concluded that the FRAND commitment “require[s] Qualcomm to license its SEPs
18 to rival modem chip suppliers,” and also that Qualcomm (one of the founders of
19 Defendant Avanci) instituted the unlawful practice of only licensing OEMs
20 “because Qualcomm determined that it was far more lucrative” to license OEMs
21 rather than suppliers. *FTC v. Qualcomm*, No. 17-CV-00220-LHK, 2019 WL
22 2206013, at *75-81 (N.D. Cal. May 21, 2019). Notably, Judge Koh’s decision also
23 addressed the fact that Nokia “followed Qualcomm’s lead and refuse[s] to license
24 modem chip suppliers because it is more lucrative to license only OEMs,” despite
25 Nokia making prior statements to the European Commission that the FRAND
26 commitment establishes an “unequivocal” obligation to license to component
27 suppliers. *Id.* at *79. Nokia now seeks to use burdensome patent infringement
28 litigation to pressure Daimler and other OEMs to quickly sign license agreements

1 before this Court can enter an injunction that Nokia “must make exhaustive SEP
2 licenses available” on FRAND terms to Continental, similar to the relief granted by
3 Judge Koh in the *FTC v. Qualcomm* matter. *Id.* at *138.

4 Nokia’s decision to seek injunctive relief in at least eight of the German
5 Actions, and thereby acutely increase the pressure on Daimler and other OEMs to
6 accede to Nokia’s unfair royalty demands, is also directly contrary to U.S. policy.
7 Under well-established case law, it is inappropriate for a SEP-holder to seek
8 injunctive relief on FRAND-encumbered patents against a willing licensee like
9 Continental. The Ninth Circuit has previously upheld an anti-suit injunction in
10 similar situations because “injunctive relief against infringement is arguably a
11 remedy inconsistent with the [FRAND] licensing commitment.” *Microsoft I*, 696
12 F.3d at 885; *see also Realtek Semiconductor Corp. v. LSI Corp.*, 946 F. Supp. 2d
13 998, 1006–08 (N.D. Cal. 2013). When Nokia previously litigated against
14 Qualcomm (and before Nokia exited the handset business), it similarly
15 acknowledged that the “effects of an injunction itself could be devastating and
16 irreparable,” with the potential to “substantially distort royalty negotiations, as
17 patent holders may seek unreasonable royalties through the mere threat of lawsuits
18 and injunctions thus practically holding hostage the entire revenue stream and
19 profits of the target company’s relevant business.” (Decl. of Matthew W. Holder,
20 Ex. 1 at ¶ 34.) Yet now, unburdened by the need to obtain SEP licenses for its own
21 user equipment, Nokia is engaging in the very same tactics it previously contended
22 were breaches of the FRAND commitment. Moreover, Nokia’s requests for
23 injunctive relief against Daimler based on the incorporation of Continental’s TCUs
24 are, in economic terms, effectively requests for injunctive relief against Continental
25 in direct violation of Nokia’s FRAND obligations not to seek injunctive relief
26 against a willing licensee.

27 Continental is a willing licensee, as evidenced by its sincere but ultimately
28 futile efforts to obtain a direct license from Nokia, and the subsequent filing of the

1 present action to adjudicate the FRAND terms of a license with Nokia and the other
2 Defendants. In contrast to Nokia’s piecemeal infringement litigation in Germany,
3 Continental’s complaint here is intended to fully resolve the dispute between
4 Continental, its customers, and Nokia by making clear that Continental is entitled to
5 a direct license, and determining the FRAND royalty rates for a license to Nokia’s
6 entire cellular SEP portfolio. Nokia’s numerous infringement lawsuits against
7 Daimler interfere with the Court’s ability to reach a just result in this case by
8 exerting undue pressure on Daimler to accept “a super-monopoly royalty” under
9 threat of injunction. (Holder Decl., Ex. 1 at ¶ 34.) This, in turn, exerts undue
10 pressure on Continental, as OEMs typically demand indemnity of such licensing
11 costs as a condition of purchasing any TCUs from suppliers like Continental.

12 Accordingly, Continental respectfully requests that the Court temporarily
13 enjoin Nokia from prosecuting its lawsuits in Germany against Daimler until the
14 FRAND issues are finally resolved in this case. Likewise, because the other
15 Defendants should not be permitted to do what Nokia has already done, Continental
16 further requests that the Court enjoin Defendants from filing additional actions
17 against Continental or its customers alleging infringement of the SEPs at issue in
18 this litigation, or otherwise acting in concert with anyone else to file or pursue
19 additional such actions, while the FRAND action here remains pending.

20 **II. FACTUAL BACKGROUND**

21 **A. The Nature and Risks of Standardization**

22 Avanci’s Members own alleged standard-essential patents that are subject to
23 the obligations of various standard-setting organizations (“SSOs”) relevant to this
24 action—the European Telecommunications Standards Institute (“ETSI”), the
25 Alliance for Telecommunications Industry Solutions (“ATIS”), and the
26 Telecommunications Industry Association (“TIA”). (Dkt. 1, ¶¶ 80–94.) These
27 SSOs have been involved in standardizing numerous 2G, 3G, and 4G cellular
28 technologies. (Dkt. 1, ¶¶ 64–70.) The development of technology standards such as

1 those at issue in this litigation has many benefits, including for companies who
2 participate in standardization, companies who manufacture products compliant with
3 the standards, consumers, and society as a whole.

4 Along with the many advantages of standardization, however, the
5 incorporation of technology into a standard also carries the risk that SEP owners
6 will engage in anti-competitive behavior. *See Microsoft II*, 795 F.3d at 1030–31.
7 As the Ninth Circuit has recognized, once a standard becomes widely adopted, SEP
8 holders obtain substantial leverage over manufacturers of standard-compliant
9 products and can abuse that leverage by demanding more for a license than the
10 patented technology would be worth had it not been adopted by the SSO. *See id.* at
11 1031. The tactic of withholding a license unless and until a manufacturer agrees to
12 pay an unduly high royalty rate for an SEP is referred to as “hold-up.” *Id.*; *Ericsson,*
13 *Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1209 (Fed. Cir. 2014).

14 To mitigate the risk that SEP holders will extract more than the fair value of
15 their patented technology, SSOs require SEP holders to declare potentially essential
16 patents and commit to license those patents on FRAND terms and conditions. For
17 example, the ETSI IPR Policy requires SEP owners to commit to provide
18 “irrevocable licenses on fair, reasonable and nondiscriminatory (‘FRAND’) terms
19 and conditions.” (Holder Decl., Ex. 14 at § 6.1.) The TIA policy requires any SEP
20 holder that wishes to monetize its essential patents to commit to license SEPs “to all
21 applicants under terms and conditions that are reasonable and non-
22 discriminatory . . . to the extent necessary for the practice of . . . the Standard.” (*Id.*,
23 Ex. 15 at § 3.1.1(2)(a).) The ATIS policy requires SEP holders to commit that a
24 license “will be made available . . . to the applicants desiring to utilize the license
25 for the purpose of implementing the standard . . . under reasonable terms and
26 conditions that are demonstrably free of any unfair discrimination.” (*Id.*, Ex. 16.)

27 Avanci’s Members have directly declared many of their patents as essential,
28 or are successors-in-interest to patents that were directly declared essential to the

1 2G, 3G, and 4G telecommunications standards established by the above SSOs.
2 (Dkt. 1, ¶¶ 80–94.) Therefore, Avanci’s Members are bound to license their patents
3 consistent with the SSO’s policies. (*See id.*) According to these policies, owners of
4 intellectual property that may be considered essential to a particular standard or
5 technical specification are contractually bound to grant irrevocable licenses to third
6 parties on FRAND terms and conditions. (Dkt. 1, ¶¶ 71–79.)

7 Unfortunately, the mere existence of the FRAND commitment alone, without
8 judicial enforcement, does not protect against the efforts of some SEP owners to act
9 in an anti-competitive manner. As the Federal Trade Commission has explained,
10 SEP owners seeking to inappropriately exploit value added by virtue of
11 standardization (as opposed to the value of their patents) “may have especially
12 severe consequences for innovation and competition in the context of standardized
13 technology.” (Holder Decl., Ex. 17 at p. 22.) This pursuit of overcompensation
14 would raise the price to consumers or even “threaten to undermine the collaborative
15 innovation that can result from the standard setting process.” (*Id.*, p. 28.)

16 Courts and commentators also have recognized that “injunctive relief against
17 infringement is arguably a remedy inconsistent with the [FRAND] licensing
18 commitment.” *Microsoft I*, 696 F.3d at 885; *Realtek v. LSI*, 946 F. Supp. 2d at
19 1006–08; Holder Decl., Ex. 18 at pp. 6-7 (“Patent holders should not generally be
20 allowed to obtain injunctions in the presence of a FRAND commitment. As a
21 matter of economics, injunctions are inimical to some of the fundamental objectives
22 of FRAND, such as fostering broad licensing of SEPs and adoption of the
23 standard.”). This inconsistency arises from a recognition that the mere threat of
24 injunctive relief gives the SEP owner additional power to hold up implementers.
25 *Microsoft I*, 696 F.3d at 886 (the threat of injunctive relief “compromis[es] the
26 court’s ability to reach a just result in the case before it free of external pressure on
27 [the accused infringer] to enter into a ‘holdup’ settlement before the litigation is
28 complete”); Holder Decl., Ex. 18 at p. 7 (“An injunction provides a means for a

1 patent holder to exercise the additional market power gained by inclusion of a patent
2 in a standard, and the threat of an injunction places at risk the investment and
3 ongoing profits of firms using the standard. This allows the patent holder to engage
4 in hold-up and ask for payment in excess of the *ex ante* value of the patent.”).

5 **B. Nokia’s Prior Advocacy on the Issues Addressed in This Motion**

6 Importantly, Nokia itself has acknowledged in a prior statement before the
7 European Commission that “the FRAND commitment is fundamentally about
8 ensuring access to patented technology in standards and avoiding anti-competitive
9 effects.” (Holder Decl., Ex. 2 at p. 1.) According to Nokia, “[t]o be fully effective,
10 a FRAND commitment has to be both *meaningful and binding*.” (*Id.* (emphasis
11 added).) As Nokia explained at the time, “it would *not make sense* if it was
12 possible for an essential patent owner *to obtain an injunction against anyone*
13 *prepared to take a license* on FRAND terms” (*Id.* (emphasis added).)

14 Similarly, in 2014—amid concerns that Nokia would “abuse its position” as a
15 SEP owner after divesting its handset business to Microsoft—Nokia reaffirmed its
16 FRAND obligation and outlined the very limited circumstances under which it
17 believed injunctive relief appropriate:

18 Nokia confirms its support for a principle that, subject to
19 reciprocity, injunctions with SEPs should not be enforced to
20 prevent the implementation of a standard subject to FRAND
21 undertakings, unless a patent holder has made a FRAND
22 license available and the prospective licensee has been
23 unwilling to enter into such FRAND license or to comply with
24 its terms.

25 (*Id.*, Ex. 3 at p. 2.)

26 Indeed, Nokia argued fervently against the availability of injunctive relief on
27 SEPs in an earlier dispute with Qualcomm. In that case, when it was in the position
28 of the prospective licensee, Nokia advocated that Qualcomm, by virtue of its

1 FRAND declarations for patents it had declared essential to the ETSI standards,
2 “gave up the remedy of an injunction in the event of a dispute with Nokia over the
3 amount of a FRAND royalty.” (*Id.*, Ex. 4 at pp. 1–2.) As Nokia admitted, a SEP
4 owner “using the threat of injunctions against a willing licensee to gain leverage in
5 its demand for excessive royalty rates” is exactly the type of hold-up that the
6 “voluntary FRAND contracts were designed to preclude.” (*Id.*, Ex. 1 at ¶ 79.)

7 **C. The Dispute Between the Parties**

8 1. Continental sought a direct license to Nokia’s SEPs.

9 Continental is one of the leading providers of TCUs to OEMs in the
10 automotive industry. (Dkt. 1, ¶¶ 1, 17–18.) No later than early 2017, Defendants
11 began targeting certain Continental customers, asserting that their connected cars
12 practice the cellular standards covered by Defendants’ alleged SEPs, and insisting
13 that they pay excessive royalty rates in return for a license. (*See id.*, ¶¶ 128–141.)
14 But in the automotive industry, intellectual property licenses have historically been
15 handled by the suppliers of the relevant components (given, for example, that there
16 are hundreds, if not thousands, of separate components which are incorporated into
17 the vehicle). As the parties responsible for implementing the technology,
18 component suppliers are in a much better position than OEMs to determine whether
19 or not a given component practices a patented technology. As the supplier of TCUs
20 to Daimler and a willing licensee, Continental attempted to negotiate with each
21 Defendant in a good-faith effort to obtain FRAND licenses to all relevant SEPs, but
22 was continually rebuffed by Avanci and various of its members. (*See id.*) Rather,
23 Defendants insist they are only willing to grant direct licenses to OEMs, and refuse
24 to grant direct licenses to any other parties in the supply chain.

25 With respect to Nokia, Continental sent a letter to Nokia in October 2017,
26 which specifically referenced the fact that Nokia had approached Daimler,
27 confirmed that Continental is a willing licensee, and sought to negotiate a license
28 covering Continental’s products. (Holder Decl., Ex. 8.) In addition, Continental

1 requested further information regarding Nokia's portfolio, as well as claim charts, so
2 that it could examine whether Nokia's patents were truly essential, and whether it
3 would indeed require a license from Nokia for its products. (*See id.*)

4 Despite Nokia's FRAND obligation to license its SEPs, Nokia refused to
5 directly license Continental. Rather, when it responded to Continental in November
6 2017, Nokia stated that its policy is [REDACTED]

7 [REDACTED]
8 [REDACTED] (*Id.*, Ex. 9 (emphasis added).) Instead of a direct license, Nokia
9 proposed an alternative model in which [REDACTED]

10 [REDACTED]
11 [REDACTED] (*Id.*)

12 Throughout 2018 and into 2019, Continental and its affiliates continually
13 attempted to negotiate a direct license with Nokia. However, Nokia refused to
14 consider a direct license to suppliers. (*See id.*, Ex. 10.) In an October 2018 letter,
15 Continental expressed its concern regarding Nokia's offer, including the lack of a
16 direct license to Continental. (*See id.*, Ex. 11.) In December 2018, Continental sent
17 another letter to Nokia explaining in detail why Nokia's position is inconsistent with
18 its FRAND obligations and also contradicts Nokia's own prior position that it had
19 outlined to the European Commission in earlier proceedings. (*See id.*, Ex. 12.)
20 Continental urged Nokia to reconsider and asked Nokia to submit a license offer.
21 Nokia finally replied in April 2019, [REDACTED]

22 [REDACTED]. (Decl. of Dr. Frank-Erich
23 Hufnagel, Ex. 6 at pp. 5–6.) Continental responded on May 7, 2019, to further
24 explain why Nokia's proposal was not FRAND, and why Continental both needed,
25 and was entitled to, a direct FRAND license. (Holder Decl., Ex. 13.)

26 2. Daimler and others filed complaints with the European Commission
27 regarding Nokia's refusal to license suppliers.

28 After years of Nokia refusing to engage in direct licensing discussions with

1 Daimler’s suppliers of TCUs and insisting, contrary to its FRAND obligation, that it
2 will only directly license at the OEM level, Daimler filed a complaint against Nokia
3 with the European Commission Directorate-General for Competition in November
4 2018, wherein Daimler asked for an investigation of Nokia’s SEP licensing practices
5 in the automotive industry. (Hufnagel Decl., ¶¶ 2–4, Ex. 1.) Daimler noted that
6 “[f]air and non-discriminatory access to these standards for *all users* of the essential
7 patents for telecommunications standards is a key prerequisite for the development
8 of new products and services for connected driving.” (*Id.* (emphasis added).)

9 Daimler’s complaint was followed by similar individual complaints from
10 some of Daimler’s Tier-1 suppliers, including Continental, Bury, and Valeo, as well
11 as chipmaker Gemalto. (*Id.*, ¶ 5, Ex. 2.) Continental’s complaint to the European
12 Commission related directly to Nokia’s refusal to license SEPs for mobile
13 telecommunication standards on FRAND terms to any supplier of automotive
14 components seeking a license, including Continental and its supply chain. (*See id.*)

15 3. Nokia then filed retaliatory infringement lawsuits against Daimler.

16 Rather than adjust course and offer direct FRAND licenses to Daimler’s
17 suppliers, Nokia further exacerbated the dispute by filing a wide array of retaliatory
18 patent infringement lawsuits intended to pressure Daimler into taking a non-FRAND
19 license. On March 20, 2019, Nokia filed ten patent infringement suits against
20 Daimler in Germany: three each in Munich and Düsseldorf, and four in Mannheim
21 (collectively, the “German Actions”). (*See id.*, ¶ 6.) All of the patents asserted
22 against Daimler in the German Actions were declared by Nokia to ETSI, and thus
23 are subject to the FRAND obligation. (*See id.*, ¶¶ 9, 15, 20, 25, 30, 36, 41, 45, 50,
24 55, Exs. 4, 8, 11, 14, 19, 22, 24, 27, 30.) Nokia’s complaints against Daimler also
25 claim that the asserted patents are essential to the 3G and 4G standards. (*See, e.g.,*
26 *id.*, ¶¶ 8–9; Ex. 3 §§ II, V.) Nokia’s German Actions expressly concern Daimler
27 vehicles with TCUs, including those supplied by Continental:

28 This complaint is challenging Defendant’s *automobiles*

1 manufactured, imported, exported, offered or sold, whether
 2 directly or indirectly, by Defendant, which are (i) ***compliant***
 3 ***with one or more of the following standards: GSM/GPRS***
 4 ***standard, UMTS standard, CDMA standard and/or LTE***
 5 ***standard*** (as promulgated by ETSI, 3GPP, TTA or 3GPP2
 6 standard developing organizations) to which the patent in suit
 7 with the asserted claims is essential; and (ii) ***incorporating***
 8 ***components*** (such as telematics control units, wireless modules
 9 or other network access devices) from ***Continental AG***

10 (*Id.*, ¶ 8; Ex. 3 at § III (emphasis added).)

11 In each of the German Actions, Nokia pursues (1) claims for information and
 12 rendering of account as to the extent of the infringing activities for the relevant
 13 patent at issue (including, *e.g.*, requests to disclose the quantities of products
 14 manufactured or sold, the names of customers and suppliers, and costs and profits),
 15 (2) a motion for a declaratory judgment holding Daimler liable to pay damages for
 16 the infringing activities, (3) an order requiring Daimler to pay the costs of the
 17 proceedings, and (4) to declare a judgment provisionally enforceable against
 18 security. (*See id.*, ¶¶ 10, 16, 21, 26, 31, 37, 42, 46, 51, 56.) In eight of the German
 19 Actions, Nokia has already expanded its original complaint to include a request for
 20 injunctive relief against Daimler’s products incorporating Continental TCUs. (*See*
 21 *id.*, ¶¶ 17, 22, 27, 32, 38, 47, 52, 57; Exs. 9, 12, 15, 17, 20, 25, 28, 31.) Nokia added
 22 these requests for injunctive relief very close in time to when Continental filed the
 23 current action seeking a FRAND license to the wireless SEPs of Nokia and all
 24 Avanci Members.¹ These requests for injunctive relief are clearly directed not
 25 toward protecting any of Nokia’s rights, but rather toward pressuring Daimler to
 26

27 ¹ Nokia’s injunction requests were made on May 8, two days before Continental
 28 filed this action, and were served on Daimler on May 15 and May 28, after
 Continental filed and served this action. (Hufnagel Decl., ¶¶ 17, 22, 27, 32, 38, 47,
 52, 57; Exs. 9, 12, 15, 17, 20, 25, 28, 31.)

1 accept a license on non-FRAND terms. In none of the German Actions does Nokia
2 request that the court adjudicate and impose a global FRAND license between the
3 parties, as Continental does here.

4 Continental's interests are further intertwined in the outcome of Nokia's
5 German Actions because Daimler asserts that Continental is contractually obligated
6 to indemnify Daimler for allegations of infringement related to Continental's
7 products. (Holder Decl., Ex. 7.) In fact, no later than August 7, 2017, Continental
8 received an indemnification request from Daimler regarding license requests
9 Daimler received from Nokia (and others) regarding its cellular patent portfolio.
10 (*See id.*) Therefore, Continental may be liable for the damages Nokia seeks to
11 obtain from Daimler in the German Actions.

12 Moreover, on May 17, 2019, Daimler served Continental and its relevant
13 subsidiaries with a formal Third Party Notice of the dispute in Docket No. 7 O
14 3890/19, which permit Continental to participate in the proceeding as an intervenor.
15 (Hufnagel Decl., ¶ 11, Ex. 5.) Under German law, Daimler is only entitled to file a
16 Third Party Notice against any third party against which it "believes to be able to
17 raise indemnification claims . . . in case of a negative outcome of the proceedings."
18 (*Id.*, ¶ 11.) A Third Party Notice is only appropriate where a third party has a
19 legitimate legal interest in the outcome of the litigation. (*See id.*) On May 31, 2019,
20 Continental formally intervened in the above-stated German Action pursuant to the
21 Third Party Notice received from Daimler. (*See id.*, ¶ 12, Ex. 6.)

22 4. Continental filed the present action against Nokia and the other
23 Defendants to resolve the global dispute between the parties.

24 On May 10, 2019, Continental initiated this litigation ("the California
25 Action") because Defendants' collusive agreement to refuse licenses to Continental
26 and other suppliers on FRAND terms breaches Defendants' FRAND commitments
27 and constitutes anticompetitive conduct, and also because the royalties demanded by
28 Defendants are far higher than what should be considered FRAND. (Dkt. 1, ¶¶ 8–

1 15.) Continental asks the court to “[a]djudge and decree that Continental and other
2 suppliers in the automotive supply chain are entitled to a license from Defendants”
3 for all relevant SEPs, and to “set the FRAND terms and conditions” of the license.
4 (Dkt. 1, Prayer For Relief D-E.)

5 In contrast to Nokia’s piecemeal patent infringement lawsuits, this litigation is
6 intended to broadly resolve all disputed issues between Continental on the one hand,
7 and Nokia and Defendants on the other hand, related to Defendants’ wireless SEPs.
8 Indeed, an adjudication on the merits here in this action that Nokia and Defendants
9 are required to license suppliers like Continental on FRAND terms will demonstrate
10 why it was improper for Nokia to sue Daimler in the first place.

11 **III. APPLICABLE LEGAL STANDARD**

12 This Court has the power to enjoin parties from proceeding with an action in
13 the courts of a foreign country. *See Microsoft I*, 696 F.3d at 880–81; *E. & J. Gallo*
14 *Winery v. Andina Licores S.A.*, 446 F.3d 984, 989 (9th Cir. 2006) (“*Gallo*”). “Courts
15 derive the ability to enter an anti-suit injunction from their equitable powers. Such
16 injunctions allow the court to restrain a party subject to its jurisdiction from
17 proceeding in a foreign court in circumstances that are unjust.” *Gallo*, 446 F.3d at
18 989. Anti-suit injunctions are appropriate when a party’s foreign actions “frustrate[]
19 this court’s ability to adjudicate issues properly before it” or when “[w]ithout the
20 issuance of an anti-suit injunction, the integrity of the action before this court will be
21 lessened.” *Microsoft Corp. v. Motorola, Inc.*, 871 F. Supp. 2d 1089, 1100 (W.D.
22 Wash. 2012), *aff’d*, 696 F.3d 872 (9th Cir. 2012). The Ninth Circuit emphasizes
23 that district courts have “a duty to protect their legitimately conferred jurisdiction to
24 the extent necessary to provide full justice to litigants.” *Gallo*, 446 F.3d at 995.
25 Anti-suit injunctions can properly extend to all “other persons who are in active
26 concert or participation with” the parties addressed in the motion. Fed. R. Civ. P.
27 65(d)(2)(C); *T-Jat Sys. 2006 Ltd. v. Amdocs Software Sys. Ltd.*, Case No. 13-CV-
28 5356, 2013 WL 6409476, at *4 (S.D.N.Y. Dec. 9, 2013) (enjoining “Respondents . .

1 . and all other persons who are in active concert or participation with Respondents’
2 from prosecuting any action in Israel”).

3 In *Microsoft I*, the Ninth Circuit used a three-part test to evaluate the propriety
4 of an anti-suit injunction in a case similar to this one (*i.e.*, a case involving a global
5 FRAND dispute). See *Microsoft I*, 696 F.3d at 881. Under that test, the court
6 should first determine “whether or not the parties and the issues are the same” in
7 both actions, and whether the current action is dispositive of the action to be
8 enjoined. *Id.* at 881, citing *Gallo*, 446 F.3d at 991 (citations omitted); see also
9 *Applied Med. Distrib. Corp. v. Surgical Co. BV*, 587 F.3d 909, 914–15 (9th Cir.
10 2009) (“*Applied Medical*”) (explaining the first step of the *Gallo* test is a “functional
11 inquiry concerning dispositiveness,” not a requirement that the claims be identical).
12 Second, the court should determine whether at least one of the “*Unterweser* factors”
13 applies, asking whether the litigation to be enjoined would “(1) frustrate a policy of
14 the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the
15 issuing court’s *in rem* or *quasi in rem* jurisdiction; or (4) where the proceedings
16 prejudice other equitable considerations.” *Microsoft I*, 696 F.3d at 881-82; *In re*
17 *Unterweser Reederei, GmbH*, 428 F.2d 888, 890 (5th Cir. 1970) (“*Unterweser*”).
18 Finally, the court should assess whether the proposed injunction’s impact on comity
19 is tolerable. See *Microsoft I*, 696 F.3d at 881. “Comity is less likely to be
20 threatened in the context of a private contractual dispute than in a dispute
21 implicating public international law or government litigants.” *Id.* at 887.

22 A request for an anti-suit injunction is evaluated only under the *Gallo* test, not
23 the traditional four factor test for a preliminary injunction. See *Microsoft I*, 696
24 F.3d at 881 (addressing only the *Gallo* factors); *Applied*, 587 F.3d at 913 (same); see
25 also *Huawei Techs., Co. v. Samsung Elecs. Co.*, Case No. 3:16-CV-02787-WHO,
26 2018 WL 1784065, *4 (N.D. Cal. Apr. 13, 2018) (“*Huawei*”) (“The Ninth Circuit’s
27 analysis [in *Microsoft*] convinces me that I need only focus on the three-part inquiry
28 under *Gallo*. . .”).

1 **IV. NOKIA AND THE OTHER DEFENDANTS SHOULD BE ENJOINED**
2 **FROM PURSUING SEP INFRINGEMENT CLAIMS AGAINST**
3 **CONTINENTAL AND ITS CUSTOMERS.**

4 **A. The Parties and Issues Are Functionally the Same.**

5 “The threshold consideration for a foreign anti-suit injunction is whether or
6 not the parties and the issues are the same in both the domestic and foreign actions,
7 and whether or not the first action is dispositive of the action to be enjoined. The
8 consideration should be approached functionally, not in a technical or formal sense,
9 but in the sense that all the issues in the foreign action can be resolved in the local
10 action.” *Huawei*, 2018 WL 1784065 at *6 (internal citations and quotations
11 omitted). Continental, as a manufacturer of the allegedly infringing products, is the
12 real party-in-interest in any patent infringement lawsuits filed by Defendants against
13 Continental’s customers (*e.g.*, Nokia’s pending actions against Daimler in
14 Germany). Moreover, the relief sought by Continental in this action—namely, that
15 the Court “set the FRAND terms and conditions that Continental is entitled to under
16 Defendants’ obligations to the relevant SSOs . . . for a license to Defendants’ 2G,
17 3G, and 4G SEPs”—would resolve any patent infringement claims relating to
18 Defendants’ SEPs against Continental and its customers. (Dkt. 1, pp. 63–64.)

19 1. Continental, as a manufacturer of the accused products, is the
20 real party-in-interest.

21 “Perfect identity of parties is not required for an anti-suit injunction.” *Zynga,*
22 *Inc. v. Vostu USA, Inc.*, 816 F. Supp. 2d 824, 828 (N.D. Cal. 2011). Rather, the
23 relevant inquiry is whether the parties are “affiliated in such a way that their
24 interests coincide.” *Id.*; *see also Gilbane Fed. v. United Infrastructure Projects*
25 *Fzco*, Case No. 14-cv-03254-VC, 2014 WL 4950011, at *5 (N.D. Cal. Sep. 24,
26 2014) (finding identity of the parties where their “interests are practically identical
27 and are well represented by each other”). In any lawsuit filed by a Defendant in this
28 action targeting Continental products purchased and installed by a Continental

1 customer, Continental’s interests align with its customer’s interests such that the
2 “same parties” requirement is satisfied.

3 In particular, the parties in Nokia’s German Actions are either the same as
4 those in this lawsuit, or are functionally the same. The complaints against Daimler
5 in Germany were filed by Nokia Technologies Oy and Nokia Solutions and
6 Networks Oy. (Hufnagel Decl., ¶¶ 7, 13, 18, 23, 28, 33, 39, 43, 48, 53; Exs. 3, 7,
7 10, 13, 16, 18, 21, 23, 26, 29.) Both are defendants to this action. Even though the
8 complaints in Germany target products which come from Tier 1 suppliers like
9 Continental, Nokia initially listed Continental’s customer Daimler AG as the sole
10 defendant. But in accordance with German procedures, Daimler thereafter served
11 Continental with a Third Party Notice of the dispute in at least one of the cases, and
12 Continental now has joined that case as an intervenor. (*Id.*, ¶¶ 11–12, Exs. 5, 6.)
13 Daimler’s notice recognizes Continental’s legal interest in the German Actions, and
14 the alignment of Continental’s interests with Daimler’s interests in those suits.

15 Separate and apart from the fact that Continental has intervened in one of the
16 German Actions, Continental’s status as the real party-in-interest in the German
17 Actions is further demonstrated by the fact that under the “customer suit exception,”
18 federal courts regularly enjoin patentees from litigating first-filed lawsuits against
19 the customer of a manufacturer when there is a separate proceeding involving the
20 manufacturer. *See In re Nintendo of Am., Inc.*, 756 F.3d 1363, 1365 (Fed. Cir.
21 2014); *Katz v. Lear Siegler, Inc.*, 909 F.2d 1459, 1464 (Fed. Cir. 1990). “The
22 customer suit exception is based on the manufacturer’s presumed greater interest in
23 defending its actions against charges of patent infringement; and to guard against
24 possibility of abuse.” *Kahn v. General Motors Corp.*, 889 F.2d 1078, 1081 (Fed.
25 Cir. 1989). “At the root of the preference for a manufacturer’s declaratory judgment
26 action is the recognition that, in reality, the manufacturer is the true defendant in the
27 customer suit.” *Codex Corp. v. Milgo Electronic Corp.*, 553 F.2d 735, 737–38 (1st
28 Cir. 1977). As recognized in *Codex*, “it is a simple fact of life that a manufacturer

1 must protect its customers, either as a matter of contract, or good business, or in
2 order to avoid the damaging impact of an adverse ruling against its products.” *Id.* at
3 738. The “guiding principles” of the customer suit exception are “efficiency and
4 judicial economy.” *Spread Spectrum Screening LLC v. Eastman Kodak Co.*, 657
5 F.3d 1349, 1357 (Fed. Cir. 2011).

6 The rationale underlying the customer suit exception is equally applicable
7 here. In any instance where Defendants file suit for patent infringement targeting
8 Continental’s products (as Nokia has already done vis-à-vis Daimler in the German
9 Actions), Continental is the functional defendant in that lawsuit regardless of
10 whether it is a named party. In addition to the business need to protect its
11 customers, recognized repeatedly by the federal courts in the “customer suit
12 exception” line of cases, Continental has also received requests for indemnification
13 from its customers related to Defendants’ infringement allegations related to the
14 SEPs at issue in this litigation. (*See, e.g.*, Holder Decl., Ex. 7.) Under similar
15 circumstances, courts have recognized that a manufacturer and customer are in
16 privity based on an indemnification obligation “because they share the same interest
17 in the unfettered use of” an allegedly infringing product and the manufacturer
18 “adequately represent[s] this interest.” *In re Personalweb Techs., LLC Patent Litig.*,
19 Case No. 18-md-02834-BLF, 2019 WL 1455332, at *8 (N.D. Cal. April 2, 2019)
20 (finding Amazon and its customers were privies based on their indemnity
21 agreement). Moreover, resolving Defendants’ claims against Continental’s products
22 through this litigation, rather than individually litigating the issue in a piecemeal
23 fashion against different customers in any number of jurisdictions, certainly
24 promotes efficiency and judicial economy. *See Spread Spectrum Screening LLC*,
25 657 F.3d at 1357.

26 For the above reasons, the interests of Continental and its customers in
27 defending against patent infringement claims which target Continental’s products
28 are sufficiently aligned, such that the identity of parties requirement for granting an

1 anti-suit injunction is satisfied.

2 2. This lawsuit is dispositive of the actions to be enjoined.

3 In deciding whether to issue an anti-suit injunction, the Ninth Circuit has
4 explained that a court should assess “whether the issues are the same not in a
5 technical or formal sense, but [rather] in the sense that all the issues in the foreign
6 action . . . can be resolved in the local action.” *Microsoft I*, 696 F.3d at 882–83
7 (citations omitted). In *Microsoft I*, the Ninth Circuit affirmed the anti-suit injunction
8 issued by the district court, agreeing that Microsoft’s RAND claim was capable of
9 resolving Motorola’s infringement claim in Germany because Motorola’s licensing
10 offers included the German patents and Motorola promised to license those German
11 patents on RAND terms. *See id.* at 883–84; *see also Medtronic, Inc. v. Catalyst*
12 *Research Corp.*, 518 F. Supp. 946 (D. Minn. 1981), *aff’d*, 664 F.2d 660 (8th Cir.
13 1981) (issuing an anti-suit injunction against the enforcement of foreign patents
14 based on a contract between the parties not to enforce the patents).

15 Indeed, several other courts have recognized the propriety of resolving
16 FRAND licensing disputes between two parties first, rather than allowing piecemeal
17 infringement suits on individual SEPs. In *TCL v. Ericsson*, the court granted an
18 anti-suit injunction to prevent Ericsson from pursuing foreign patent claims on
19 individual SEPs that were the subject of the court’s global FRAND determination
20 because “the [domestic] FRAND action should resolve [the parties’] global
21 licensing dispute.” *TCL Communication Technology Holdings, Ltd. v.*
22 *Telefonaktienbolaget LM Ericsson*, No. 8:14-cv-00341-JVS-DFM, Dkt. 279-1 at 5
23 (C.D. Cal. June 29, 2015). Similarly, in *Huawei*, the court found that the parties’
24 competing breach of contract claims based on the alleged failure to abide by their
25 respective FRAND commitments to ETSI controlled the disputes between the
26 parties and dictated that the action Samsung filed in California was “dispositive of
27 Huawei’s Chinese actions.” *Huawei*, 2018 WL 1784065 at *7-8.

28 Like the cases discussed above, Continental’s complaint against Defendants

1 alleges that Defendants have breached their contractual commitments to the relevant
2 SSOs, including ETSI, TIA, and/or ATIS, by refusing to license their alleged 2G,
3 3G, and/or 4G SEPs to Continental. (Dkt. 1, Prayer For Relief D–G.) Continental
4 asks this Court to declare that “Continental and other suppliers in the automotive
5 supply chain are entitled to a license from Defendants” for all 2G, 3G, and 4G SEPs
6 and to “set the FRAND terms and conditions that Continental is entitled to under
7 Defendants’ obligations to the relevant SSOs.” (*Id.* at Prayer For Relief D, E.)
8 Continental seeks a worldwide license to Defendants’ SEPs, consistent with
9 Defendant Avanci’s representations that the “Avanci license covers *the entire*
10 essential 2G, 3G and 4G patent portfolio” of its members. (Holder Decl., Ex. 19
11 (emphasis added).) Nokia’s patent infringement claims in the German Actions
12 against Daimler, based on its use of Continental’s products, likewise relate to
13 patents which are allegedly essential to the 2G, 3G, and/or 4G standards, and which
14 are subject to declarations that Nokia will license the patents on FRAND terms.
15 (*See, e.g.*, Hufnagel Decl. ¶¶ 8–9; Ex. 3 §§ II, V.) Nokia’s infringement claims stem
16 from the implementation of these standards by the TCUs incorporated into
17 Daimler’s vehicles. (*Id.*)

18 Given the above facts, the California Action is capable of resolving the issues
19 in the German Actions. Indeed, if this Court determines that Nokia is obligated to
20 license its 2G, 3G, and 4G SEPs to Continental in the first instance, and sets the
21 FRAND terms and conditions of the license, then Nokia’s (and any other
22 Defendant’s) infringement claims against all Continental products—whether sold to
23 Daimler or any other of Continental’s customers—will be mooted. Once this Court
24 enters the requested declaratory judgment and injunction, Continental’s sales to its
25 customers will be licensed and Defendants’ patent rights exhausted. *See Quanta*
26 *Computer, Inc. v. LG Electronics, Inc.*, 553 U.S. 617, 625 (2008) (“The
27 longstanding doctrine of patent exhaustion provides that the initial authorized sale of
28 a patented item terminates all patent rights to that item.”). As in *Microsoft* and

1 *Huawei*, “the availability of injunctive relief for [Nokia’s] SEPs depends on the
2 breach of contract claims” at issue in the California Action. *Huawei*, 2018 WL
3 1784065 at *12; *Microsoft I*, 696 F.3d at 883. Accordingly, the issues in the
4 California Action are functionally the same as the issues in the German Actions, and
5 an anti-suit injunction is appropriate against Nokia and the other Defendants, in
6 order to prevent them from doing what Nokia has already improperly done in
7 Germany.

8 **B. Multiple *Unterweser* Factors Justify an Anti-Suit Injunction.**

9 The second step of the framework followed in *Microsoft* is to determine if any
10 of the *Unterweser* factors apply. Importantly, *only one* factor needs to apply for
11 injunctive relief to be appropriate. *See Gallo*, 446 F.3d at 991. Here, multiple
12 *Unterweser* factors support the requested anti-suit injunction. Nokia’s German
13 actions are vexatious and oppressive, will frustrate U.S. law and policy, and
14 prejudice multiple equitable considerations.

15 1. Nokia’s German Actions frustrate important U.S. policies.

16 Courts have repeatedly found foreign litigation to frustrate domestic policy
17 when defendants seek to use the foreign litigation to evade contractual obligations or
18 compliance with U.S. law. *See Quaak v. Klynveld Peat Marwick Goerdeler*
19 *Bedrijfsrevisoren*, 361 F.3d 11, 20 (1st Cir. 2004); *Laker Airways Ltd. v. Sabena,*
20 *Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984) (“Injunctions are most
21 often necessary to protect the jurisdiction of the enjoining court, or to prevent the
22 litigant’s evasion of the important public policies of the forum.”). Nokia’s German
23 Actions implicate several important policies.

24 First, this Court should grant Continental’s motion because Nokia’s filing of
25 the German Actions against Daimler is a direct extension of Defendants’ breach of
26 contract and anticompetitive behavior. Continental’s breach of contract and
27 antitrust claims arise of out Defendants collectively “refusing to offer individual
28 fully exhaustive direct FRAND licenses to suppliers in the automotive supply chain

1 in order to preserve Avanci’s ability to extract supra-competitive prices at the OEM
2 level.” (Dkt. 1, pp. 45–46, 48–50.) Ninth Circuit precedent clearly states that Nokia
3 cannot refuse to license Continental, which is willing to pay a FRAND royalty rate.
4 *See Microsoft II*, 795 F.3d at 1031. In the *FTC v. Qualcomm* case, Judge Koh also
5 recently determined that the policy of Qualcomm (again, one of the founders of
6 Avanci) to license only at the OEM level was inconsistent with Qualcomm’s
7 FRAND obligation and U.S. antitrust law. *See FTC v. Qualcomm*, 2019 WL
8 2206013, at *75-81. Moreover, Judge Koh’s decision specifically identified Nokia
9 (as well as Ericsson, another Avanci founder) as copying Qualcomm’s
10 anticompetitive conduct by “refus[ing] to license modem chip suppliers because it is
11 more lucrative to license only OEMs.” *Id.* An anti-suit injunction is proper in this
12 case where Nokia is “attempting to escape application of the antitrust laws to [its]
13 conduct” by using the German Actions to pressure Continental’s customer to accept
14 non-FRAND terms, all while trying to avoid or otherwise delay an adjudication by
15 this Court that its refusal to license Continental is a breach of FRAND and in
16 violation of U.S. antitrust law. *See Laker Airways*, 731 F.2d at 932.

17 Second, Nokia seeks injunctive relief against Daimler in the German Actions,
18 and yet the Ninth Circuit, several regulatory bodies, and prominent economists all
19 have declared that seeking injunctive relief against a willing licensee is antithetical
20 to a FRAND commitment. *See, e.g., Microsoft I*, 696 F.3d at 885 (upholding order
21 preventing enforcement of German injunction, because injunctive relief was
22 inconsistent with the contractual RAND obligation); *Apple v. Motorola*, 757 F.3d
23 1286, 1332 (Fed. Cir. 2014); Holder Decl., Ex. 18 at pp. 6–7 (“As a matter of
24 economics, injunctions are inimical to some of the fundamental objectives of
25 FRAND, such as fostering broad licensing of SEPs and adoption of the standard.”).
26 In *Huawei*, the district court granted a motion for anti-suit injunction in view of the
27 important policy of preserving the “court’s ability to determine the propriety of
28 injunctive relief.” *Huawei*, at *17.

1 In previous litigation against Qualcomm, Nokia itself took the position that a
2 SEP owner “is not entitled to an injunction or exclusion order that could prevent
3 implementation of the standard—except in extraordinary circumstances, such as
4 where the manufacturer refuses to pay judicially determined FRAND compensation
5 for the actual infringement of a valid essential patent.” (Holder Decl., Ex. 5 at pp.
6 1–2.) Here, Continental has clearly demonstrated that it is a willing licensee by first
7 seeking a license from Nokia and the other Defendants, and then by initiating the
8 present litigation to adjudicate the terms of a SEP license. None of the
9 extraordinary circumstances which may justify an exclusion order vis-à-vis the
10 practice of SEPs are present in this case. Nokia should not be permitted to
11 circumvent the policy against enjoining a willing licensee in SEP cases by seeking
12 injunctions against Continental’s downstream customer in a foreign country,
13 especially when the alleged infringement relates to a single component in a product
14 (the car) that otherwise incorporates countless other technologies, and is obviously
15 not fundamentally based on the use of the cellular standards.

16 In short, preventing SEP holders from abusing their dominant position by
17 using injunctive relief to force a settlement of claims on non-FRAND terms, all
18 while refusing to license a willing manufacturer further upstream in the supply
19 chain, is exactly in line with U.S. law and policy.

20 2. Nokia’s German Actions are vexatious and oppressive.

21 An anti-suit injunction is also appropriate under the *Unterweser* factors
22 because Nokia’s litigation is vexatious and oppressive to Continental, and interferes
23 with this Court’s ability to reach a just result free of external pressure on the parties
24 or Daimler to enter into a “hold-up” settlement before the litigation is complete.

25 In *Microsoft*, the court found that Motorola’s actions raised concerns of
26 “duplicative and vexatious litigation,” which were “heightened by the fact that
27 Motorola’s commitments to the ITU involved approximately 100 Motorola owned
28 patents, yet Motorola invoked the German Action implicating only two . . . of these

1 patents and sought injunctive relief in Germany before this court could adjudicate
2 that precise issue.” *Microsoft I*, 696 F.3d at 886. Nokia has similarly chosen to file
3 piecemeal infringement actions against Daimler in an effort to force it to sign a non-
4 FRAND license. Nokia filed the German Actions, including the requests for
5 injunctive relief, *after* Daimler and Continental filed complaints with the European
6 Commission and put Nokia on notice that its refusal to license Continental was a
7 breach of its FRAND obligation. (Hufnagel Decl., ¶¶ 2–6.) Nokia then added the
8 requests for injunctive relief at approximately the same time Continental filed and
9 served the present action, and maintains these requests despite the ability of this
10 Court to resolve the global licensing dispute between the parties on the merits.

11 Nokia is aware that the “effects of an injunction itself could be devastating
12 and irreparable,” and the mere threat of an injunction can “substantially distort
13 royalty negotiations,” because it previously argued exactly that in its prior litigation
14 against Qualcomm. (Holder Decl., Ex 1 at ¶ 34.) This “substantial distortion” of
15 royalty negotiations is precisely what Nokia wants here—it is using the threat of
16 injunctive relief to pressure Continental’s customer Daimler to capitulate before this
17 Court has the opportunity to reach a just result on the merits. The risk of distortion
18 is even greater in this case because Nokia seeks injunctions to exclude entire
19 vehicles from the market (with retail prices almost always well in excess of
20 \$30,000), based on their inclusion of a TCU which is obviously tangential to the
21 overall functionality of the vehicle.

22 3. Nokia’s German Actions present a risk of inconsistent
23 judgments.

24 In *Microsoft*, the district court also found that injunctive relief was
25 appropriate because allowing Motorola to continue the foreign litigation posed a risk
26 of inconsistent judgments. *See Microsoft*, 871 F. Supp. 2d at 1100. Nokia’s
27 German Actions likewise present a significant risk of inconsistent judgments.

28 A finding by this Court that Defendants, including Nokia, breached their

1 FRAND obligation by failing to offer Continental a license on FRAND terms and
2 conditions would be inherently inconsistent with a German court issuing an
3 injunction against Daimler’s vehicles based on their inclusion of a Continental TCU
4 implementing the cellular standards. The present action also seeks to adjudicate the
5 FRAND terms and conditions of a license to all of Nokia’s SEPs for the relevant
6 standards (as well as to all of the SEPs licensed by Avanci, of which Nokia is a
7 member). In contrast, the German courts may set royalty rates for a handful of
8 patents which represent a fraction of Nokia’s portfolio, which Nokia says “exceeds
9 20%” of all 3G and 4G SEPs. (Hufnagel Decl., Ex. 3 at p. 34.)

10 Any of the factors discussed above, by itself, “may justify a foreign anti-suit
11 injunction.” *Microsoft I*, 696 F.3d at 882 n.9. Because multiple *Unterweser* factors
12 apply here, Continental’s request for an anti-suit injunction is especially appropriate.

13 **C. The Impact of an Injunction on Comity Is Tolerable.**

14 The final step of the *Gallo* analysis is to address whether the injunction’s
15 “impact on comity is tolerable.” *Gallo*, 446 F.3d at 991. “Comity is the
16 ‘recognition which one nation allows within its territory to the legislative, executive
17 or judicial acts of another nation, having due regard both to international duty and
18 convenience, and to the rights of its own citizens, or of other persons who are under
19 the protection of its laws.’” *Gallo*, 446 F.3d at 994, citations omitted. Comity is
20 “neither a matter of absolute obligation . . . nor of mere courtesy and good will.” *Id.*

21 The Court need not “calculate the precise quantum of the injunction’s
22 interference with comity,” but rather need only determine “whether any such
23 interference is so great as to be intolerable.” *Microsoft*, 696 F.3d at 886. The Ninth
24 Circuit has made clear that private contractual disputes like this case have little, if
25 any, impact on comity. *See id.* at 887 (“[C]omity is less likely to be threatened in
26 the context of a private contractual dispute than in a dispute implicating public
27 international law or government litigants.”). In *Gallo*, the Ninth Circuit held that the
28 fact the foreign suit was filed first “makes no difference as to the propriety of an

1 anti-suit injunction.” *Gallo*, 446 F.3d at 994. This is particularly true when the
2 competing actions are between private parties and do not directly involve a
3 governmental interest or a matter of international law. *See id.*

4 The anti-suit injunction requested by Continental would have little impact on
5 comity. This is a private commercial dispute between corporations based on the
6 contractual promise made by Nokia and the other Defendants to license their SEPs
7 to implementers like Continental on FRAND terms and conditions. The purpose of
8 the present lawsuit is to enforce Defendants’ obligation to license their SEPs to
9 Continental, obtain a ruling that Defendants’ demanded royalty rates are not
10 FRAND, and establish the FRAND terms and conditions for a license to
11 Defendants’ SEPs. The requested anti-suit injunction merely prevents Nokia from
12 continuing its campaign of harassment against Continental and its customers in an
13 attempt to capture *supra*-FRAND royalty rates, while affording this Court the
14 opportunity to adjudicate Defendants’ obligations under their FRAND commitments
15 without the risk of inconsistent, piecemeal judgments in a foreign court.

16 **V. CONCLUSION**

17 For the reasons set forth herein, Continental respectfully requests that this
18 Court grant its motion for an anti-suit injunction and enter an order temporarily
19 barring Nokia and any related entities from prosecuting the German Actions against
20 Daimler. Further, Continental requests an order prohibiting Defendants from filing,
21 or acting in concert with anyone else to file, any action against Continental or any of
22 its customers (or subsidiaries or affiliates) alleging infringement of their global 2G,
23 3G and 4G SEPs during the pendency of the FRAND proceeding in this Court. The
24 other Defendants should not be permitted to do in the future what Nokia has already
25 improperly done in Germany.

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