

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**
Southern Division

INTELLECTUAL VENTURES I LLC,
et al.,

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Plaintiffs/Counter-Defendants,

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Case No.: PWG-14-111

v.

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CAPITAL ONE FINANCIAL CORP.,
et al.,

*
*

**Defendants/Counterclaimants/
Third-Party Plaintiffs,**

*

v.

*

**INTELLECTUAL VENTURES
MANAGEMENT, LLC, et al.,**

*
*

**Third-Party Defendants/
Joined Counter-Defendants.**

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MEMORANDUM OPINION

The litigation history between the Intellectual Ventures companies (Plaintiffs, Counter-Defendants, Third-Party Defendants, and Joined Counter-Defendants to this action; collectively referred to as “IV”) and the Capital One companies (Defendants, Counterclaimants, and Third-Party Plaintiffs in this action; collectively referred to as “Capital One”) is protracted, beginning with a patent infringement action that Intellectual Ventures I, LLC and Intellectual Ventures II, LLC (together, “IV I and II”) filed in the Eastern District of Virginia on June 19, 2013. In that case, as well as in this patent infringement action that IV I and II filed on January 15, 2014, Capital One brought antitrust counterclaims. The Virginia court dismissed Capital One’s

antitrust claims for failure to state a claim, and IV now seeks summary judgment on very similar claims. ECF No. 656. Because *Noerr–Pennington* immunity and collateral estoppel both bar Capital One’s antitrust claims, I will grant IV’s motion.

Procedural Background

IV I and II filed suit in this Court, alleging that Capital One infringed five of their patents. Compl., ECF No. 1. IV I and II ultimately voluntarily withdrew one patent infringement claim and proceeded with the others. ECF Nos. 80, 81. The parties engaged in extensive discovery and agreed to referral to a Special Master highly experienced in patent law, jointly selected by the parties and appointed pursuant to Fed. R. Civ. P. 53. ECF Nos. 134, 136, 143. He oversaw additional discovery, following which the parties extensively briefed the patent infringement claims. ECF Nos. 147, 147-1, 169, 169-1, 227, 246, 297, 300, 303. The Special Master issued two reports and recommendations, ECF Nos. 298 and 315, in which he ruled in favor of IV with respect to two of its patents, United States Patent Nos. 7,984,081 and 6,546,002 (“the ’081 Patent” and “the ’002 Patent”), and in favor of Capital One on the claims related to United States Patent Nos. 6,314,409 and 6,715,084 (“the ’409 Patent” and “the ’084 Patent”). Both parties challenged the Special Master’s rulings adverse to them, and further briefing ensued. ECF Nos. 307, 311, 312, 313, 319, 324, 325, 330, 335, 336, 344.

After reviewing the Special Master’s reports and recommendations and the parties’ extensive briefs, I overruled the Special Master with respect to the ’081 Patent and the ’002 Patent, finding that they were unenforceable. ECF Nos. 377, 378. I also ruled that collateral estoppel applied regarding the ’409 Patent and the ’084 Patent, barring IV from bringing claims against Capital One for infringement of those patents. ECF No. 382. The net effect of my ruling was that each of the patents that IV claimed Capital One had infringed was unenforceable, two

patents because I concluded that they were invalid pursuant to 35 U.S.C. § 101, and two patents because the United States District Court for the Southern District of New York in *Intellectual Ventures v. JPMC*, Case No. 13-3777-AKH, 2015 WL 1941331 (S.D.N.Y. Apr. 29, 2015), concluded that they were invalid, and issue preclusion barred me from reaching a different conclusion. On those grounds, I entered summary judgment in Capital One's favor on those four remaining patent infringement claims. ECF Nos. 378, 382. And, finding no just reason for delay, I entered a final judgment in favor of Capital One on the patent infringement claims, making that order immediately appealable. ECF No. 387. The Federal Circuit affirmed my rulings, *Intellectual Ventures I LLC v. Capital One Fin. Corp.*, 850 F.3d 1332 (Fed. Cir. 2017), thereby ending the patent infringement claims against Capital One.

Meanwhile, Capital One had sought leave to file three antitrust counterclaims, claiming monopolization and attempted monopolization, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, and unlawful asset acquisition, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, as part of its Third Amended Answer, Defenses, and Counterclaims. ECF No. 106. IV I and II opposed the motion. ECF No. 118. I granted Capital One leave to file its counterclaims, ECF Nos. 194, 195, which it did, ECF No. 196; *see also* Fourth Amended Answer, Defenses, and Counterclaims, ECF Nos. 438 (redacted), 439 (sealed). It also filed a Third Party Complaint against additional Intellectual Ventures companies: Invention Investment Fund II, LLC; Intellectual Ventures Management, LLC; Invention Investment Fund I, L.P. ECF Nos. 228 (sealed), 230 (redacted). Capital One alleges that IV has tried, without success, to license to Capital One its extensive patent portfolio, which includes the patents that IV has sued Capital One, in this suit and the Virginia suit, for infringing. Capital One believes that IV's repeated claims against it are actionable under antitrust law.

I denied IV's motions to dismiss the counterclaims and Third Party Complaint, ECF Nos. 225, 296, finding that Capital One had pled them sufficiently to proceed to discovery. ECF No. 328. After another round of extensive (and expensive) discovery regarding liability on the antitrust counterclaims, I attended a tutorial involving the economic experts that the parties had identified. ECF No. 651. Also in attendance was the court technical advisor, Professor John M. de Figueiredo of Duke University Law and Business Schools, whose appointment the parties had confirmed on a status conference call, and who assisted the court in evaluating the economic evidence. ECF Nos. 606, 608.¹ At the close of discovery, IV filed the pending Motion for Summary Judgment, which the parties fully briefed.² In support of their positions, the parties jointly submitted a 13,344 page Joint Record, comprising 286 exhibits in sixteen, 3-inch binders. Having reviewed the parties' memoranda and exhibits, I now rule.

¹ Unlike expert witnesses appointed under Rule 706, technical advisors are appointed under the court's inherent authority, and they do not testify at trial (and are not deposed or subject to cross examination). Joe S. Cecil & Thomas E. Willging, *Court-Appointed Experts in Reference Manual on Scientific Evidence* 527, 531 (Fed. Judicial Ctr. 1994). Accordingly, Professor de Figueiredo did not provide his independent opinion on the issues, but instead helped me understand the parties' experts' methodology, any assumptions underlying the experts' opinions, and how the methodology applies to the facts of this case. Thus, the purpose of the technical expert was to assist me in understanding the economic issues in this litigation and to enhance my ability to make an informed ruling on the pending motion. In this regard, Professor de Figueiredo's assistance was invaluable.

² The parties fully briefed the motion. ECF Nos. 657 (sealed opening brief), 668 (redacted opening brief), 662 (redacted opposition), 664 (sealed opposition), 669 (sealed reply), 671 (redacted reply). A hearing is not necessary. *See* Loc. R. 105.6.

Also pending are motions to seal the opening brief and opposition. ECF Nos. 658, 665. I have considered the motions and other filings in this case, included redacted versions of the sealed documents, and in the interest of protecting confidential, proprietary, trade secret, and/or commercially sensitive information, I will grant the motions to seal.

Intellectual Ventures also has filed objections to the Joint Record Exhibits, ECF No. 674 (redacted), 675 (sealed), as well as a motion to seal its objections, ECF No. 676. Its motion to seal is granted for the same reasons that the summary judgment briefings are sealed. However, the objections are overruled. And, although I relied on the sealed briefings for this Memorandum Opinion, its contents do not justify sealing it, because the public's interest in a public ruling outweighs the parties' interest in sealing information related to this case.

Parties' Arguments

The essence of Capital One's antitrust claim is that IV is a "patent troll,"³ and not just any patent troll, but a veritable Dovregubben.⁴ Capital One asserts that IV's business practice is to acquire a vast portfolio of thousands of patents that purportedly deal with technology essential to the types of services offered by commercial banks (such as ATM transactions, mobile banking, on-line banking, and credit card transactions). It then employs an aggressive marketing scheme whereby it makes an "offer" for banks to license (Capital One really would prefer to say "extorts" banks to license) its entire portfolio for a period of years at a jaw-droppingly high price. But, Capital One insists, when the banks ask for details about the patents covered in the portfolio in order to determine whether their services infringe them, IV refuses to disclose sufficient information to enable them to make an intelligent decision about whether they should agree to the license. And, if the bank balks at licensing the entire portfolio at IV's take-it-or-leave-it price, IV then threatens to file a patent infringement claim against the bank regarding only a few of the patents in the portfolio. Adding insult to injury, IV then makes it clear that should it lose the patent infringement case, it will simply file another (and if needed, another, and so on) regarding a different set of its patents, until the prospect of endless high-cost litigation forces the bank to capitulate and license the entire portfolio.⁵

³ A "patent troll" is an individual or company "who acquires by purchase or application to the Patent and Trademark Office a patent that he uses not to protect an invention but to obtain a license fee from, or legal judgment against, an alleged infringer." *Carhart v. Carhart-Halaska Int'l, LLC*, 788 F.3d 687, 691 (7th Cir. 2015). "Patent trolls are also known [as] 'patent assertion entities' (PAEs), [and] 'non-practicing entities' (NPEs)." *In re Packard*, 751 F.3d 1307, 1325 (Fed. Cir. 2014).

⁴ Dovregubben was the Troll King in Henrik Ibsen's 1867 play *Peer Gynt*.

⁵ Capital One is not the first to make these claims about IV's business practices. *E.g.*, Robin Feldman & Tom Ewing, *The Giants Among Us*, 2012 *Stan. Tech. L. Rev.* 1, 2–15 (2012).

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