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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

IPTRONICS INC., et al.,
Plaintiffs,
v.
AVAGO TECHNOLOGIES U.S., INC., et
al.,
Defendants.

Case No. [14-cv-05647-BLF](#)

**ORDER DENYING MOTION TO
DISMISS**

[Re: ECF 43]

This is an antitrust action based upon allegedly sham patent litigation. Before the Court is the defendants' Motion to Dismiss Complaint with Prejudice. Defs.' Mot., ECF 43. The Court heard oral argument on June 11, 2015 and thereafter took the matter under submission. For the reasons stated herein, the Motion to Dismiss is DENIED.

I. BACKGROUND

On a motion to dismiss, a court may generally consider allegations contained in the pleadings, exhibits attached to or incorporated by reference into the complaint, and matters properly subject to judicial notice. 5B Wright & Miller Fed. Prac. & Proc. Civ. § 1357 (3d ed. 2004); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). The allegations in the instant complaint draw heavily from a prior proceeding before the United States International Trade Commission ("ITC"). As such, both sides have filed Requests for Judicial Notice ("RJN") of documents from the record of the ITC proceeding in connection with the briefing on the motion before the Court. *See* Defs.' RJN, ECF 41-2; Pls.' RJN, ECF 55-18. Both RJNs are GRANTED, as the ITC documents are matters of public record and neither side disputes the authenticity of the other's documents. Fed. R. Evid. 201; *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006). Of course, a number of the ITC documents

1 submitted by both sides are heavily redacted, and the parties have failed to agree to terms that
2 would allow the unredacted documents to be filed under seal with the Court. As such, many of the
3 documents are of dubious value to the Court's consideration.

4 The Court herein considers the factual allegations in the Complaint, as well as relevant
5 content from the judicially noticeable ITC documents, in ruling on the present motion.

6 **A. Factual Overview**

7 Plaintiffs are Mellanox Technologies Denmark ApS, formerly known as IPtronics A/S, and
8 its wholly-owned subsidiary IPtronics Inc. (collectively, "IPtronics"). Compl. ¶¶ 2-3, ECF 1.¹
9 Both were acquired by Mellanox Technologies Ltd. in July 2013, and IPtronics was dissolved in
10 December 2013. *Id.* ¶ 3. Defendants are Avago Technologies U.S. Inc., Avago Technologies
11 General IP (Singapore) Pte. Ltd., Avago Technologies Trading Ltd., and Avago Technologies
12 International Sales Pte. Ltd. (collectively, "Avago").²

13 Since at least June 29, 2010, Avago and IPtronics have been embroiled in litigation over
14 Avago's patents. On that date, Avago filed an action in this district alleging that IPtronics
15 infringes two Avago patents: U.S. Patent Nos. 5,359,447 (the "447 Patent") and 6,947,456 (the
16 "456 Patent"). *See Avago Techs. U.S., Inc., et al. v. IPtronics, Inc., et al.*, Case No. 5:10-CV-
17 02863-EJD (PSG), ECF 1 (filed June 29, 2010). That action was stayed in 2013 after Avago
18 petitioned the International Trade Commission ("ITC") to institute an investigation against
19 IPtronics and other respondents. The ITC action is the genesis of this lawsuit.

20 **i. The ITC Complaint**

21 On September 24, 2012, Avago filed a complaint in the ITC pursuant to 19 U.S.C. § 1337
22 asserting infringement of the '456 Patent and U.S. Patent No. 5,596,595 ("595 Patent"). *See*
23 Compl. ¶ 16; *see also* Decl. of Xavier M. Brandwajn, ECF 55-3, Exh. 2 (excerpt of ITC
24 complaint, hereinafter "ITC Compl."). The named respondents were IPtronics A/S and IPtronics

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¹ Publicly available redacted version at ECF 33.

27 ² Defendant Avago Technologies Fiber IP (Singapore) Pte. Ltd., named in the original complaint,
28 was voluntarily dismissed on February 26, 2015. ECF 35.

1 Inc. (the plaintiffs in this action); FCI USA, LLC, FCI Deutschland GmbH, and FCI SA
2 (collectively, “FCI”); and Mellanox Technologies, Inc. and Mellanox Technologies Ltd.
3 (collectively, “Mellanox”³).

4 IPtronics’ vertical cavity surface emitting laser (“VCSEL”) driver products were solely
5 accused of infringing the ’456 Patent, which is titled “Open-Loop Laser Driver having an
6 Integrated Digital Controller” and relates to “laser drivers for generating drive waveforms to drive
7 a single VCSEL or an array of VCSELs for use in an optical communications network.” Compl. ¶
8 16; *see also* Decl. of Ary Chang, ECF 41-3, Exh. 2 (ALJ’s Initial Determination in underlying ITC
9 action, hereinafter “ALJ Order”) at 14 (list of accused IPtronics products). As IPtronics explains
10 in the Complaint in this action, “VCSELs and VCSEL drivers are *components* used in transceiver
11 (i.e., a transmitter and a receiver) modules and/or active optical cables (“AOC”) to facilitate high-
12 speed, optical communication of data.” Compl. ¶ 17 (emphasis added). IPtronics’ VCSEL drivers
13 “are capable of operation with a wide range of VCSELs,” which vary from manufacturer to
14 manufacturer. *Id.* ¶¶ 17, 19. Thus, in addition to accusing IPtronics’ VCSEL drivers of infringing
15 the ’456 Patent, Avago also accused certain Mellanox and FCI transceivers and AOCs that
16 incorporated the accused IPtronics drivers. ALJ Order at 14-16, 95.

17 In the same ITC proceeding, Avago also accused Mellanox and FCI transceivers and
18 AOCs of infringing Avago’s ’595 Patent, which is titled “Current and Heat Spreading Transparent
19 Lasers for Surface-Emitting Lasers” and “generally discloses and claims a design for a top-
20 emitting . . . VCSEL.” *Id.* at 9. The patent appears to pertain only to VCSELs, as opposed to
21 VCSEL drivers, and Avago did not accuse any IPtronics products of infringing this patent.
22 Instead, Avago alleged that Mellanox and FCI products “that incorporate VCSELs manufactured
23 by ULM Photonics” infringed the ’595 Patent. ITC Compl. ¶ 123.⁴

24 _____
25 ³ Not to be confused with plaintiff in this action, Mellanox Technologies Denmark ApS, which
was known as “IPtronics A/S” until it was acquired by Mellanox Technologies Ltd.

26 ⁴ It is possible that the same Mellanox and FCI transceivers and AOCs containing VCSELs
27 accused of infringing the ’595 Patent also contained IPtronics’ VCSEL drivers accused of
28 infringing the ’456 Patent. *See* ALJ Order at 14-16 (listing Mellanox and FCI products accused of
infringing both the ’456 and ’595 Patents broken down by item number, with columns for
“VCSEL” and “Driver”). Because Avago filed only a redacted version of the ALJ’s order,

1 By regulation, the ITC requires that a patentee plead its infringement theory with
 2 specificity, including, when practicable, providing “a chart that applies each asserted independent
 3 claim of each involved U.S. patent to a representative [accused product].” 19 C.F.R. §
 4 210.12(a)(9)(viii). In support of its ’456 Patent infringement claims, Avago submitted with its
 5 ITC complaint an infringement claim chart; a declaration from its expert witness, Dr. Dennis
 6 Deppe; and IPtronics datasheets/product briefs and reference designs. Compl. ¶ 22. On the basis
 7 of Avago’s complaint and supporting documents, the Commission instituted an investigation on
 8 October 30, 2012. *Id.* ¶ 27.

9 **ii. The Investigation and the Administrative Law Judge’s Initial Determination**

10 Each claim in the ’456 Patent has two distinct limitations “requiring that the drive
 11 waveform contain ‘a negative peak portion’ and ‘at least one parameter for affecting the negative
 12 peak portion of the drive waveform.’” *Id.* ¶ 16. Due to the manner in which VCSELs interact
 13 with VCSEL drivers, and because VCSELs differ by manufacturer, IPtronics asserts that “it is not
 14 possible to determine whether a driver itself infringes without, among other things, knowing the
 15 precise VCSEL that is being driven.” *Id.* ¶ 20. According to IPtronics, Avago “should have
 16 known this as part of its pre-filing investigation.” *Id.*

17 Avago’s ITC Complaint and its assertion that the IPtronics products infringed ’456 Patent
 18 depended entirely on Dr. Deppe’s declaration, which relied upon an IPtronics product brief and an
 19 IPtronics reference design document. *Id.* ¶ 23. Dr. Deppe did not test any IPtronics product;
 20 instead, he declared that two optical eye-diagrams taken from the IPtronics reference design
 21 document showed that the waveform limitations of the ’456 Patent can be found within the
 22 IPtronics products. *Id.* ¶¶ 24-26. On March 19, 2013, Dr. Deppe was deposed as part of the ITC
 23 investigation. During the deposition, he admitted that the optical eye diagrams “*were not*
 24 *sufficient* to demonstrate the presence of a negative peak portion in the drive waveform of a
 25 VCSEL driver.” *Id.* ¶ 28 (emphasis in original).

26 Avago then brought in Frederick Miller, a second technical expert to bolster its ’456 Patent
 27

28 however, the Court is unable to confirm that hypothesis.

1 infringement case. Mr. Miller developed and conducted a series of physical tests on a small
2 number of accused IPtronics products and concluded that they infringed the '456 Patent. *Id.* ¶¶
3 30-31. This conclusion was challenged by IPtronics' expert, Dr. Michael Leby, who testified
4 that Mr. Miller's testing was "insufficient to establish that the drive waveform output by the
5 IPtronics VCSEL drivers includes a negative peak portion." *Id.* ¶ 32.

6 The Commission's independent Investigative Staff of the Office of Unfair Import
7 Investigations ("Staff") agreed with IPtronics and found Avago's evidence of infringement
8 unpersuasive with respect to the '456 Patent. *Id.* ¶ 33. The presiding Administrative Law Judge
9 ("ALJ") likewise sided with IPtronics in his Initial Determination and found that Mr. Miller's test
10 results were "unreliable and entitled to no weight." *Id.* ¶ 35; ALJ Order at 99. Indeed, the ALJ
11 went so far as to state that "Mr. Miller acknowledged that this testing was not recognized in the
12 industry, failed as many times as it succeeded, and Mr. Miller only presented selected data from
13 the tests that did 'succeed.'" ALJ Order at 100. Further debunking Avago's other evidence of
14 infringement, the ALJ noted that Avago relied upon drawings in IPtronics data sheets that were
15 "theoretical only" and that "even Avago's expert admitted that they are mere cartoons that have
16 errors." *Id.* at 103. Elsewhere in this report, the ALJ noted that "[b]oth Dr. Leby and Avago's
17 own corporate witness testified . . . that the datasheets alone are insufficient to establish whether or
18 not the claimed negative peak portion is present in the drive waveforms." *Id.* at 196; *accord*
19 Compl. ¶¶ 35-36. The ALJ therefore determined that Avago had failed to demonstrate by a
20 preponderance of the evidence that the accused IPtronics products infringed the '456 Patent and
21 concluded that no violation of the Tariff Act had occurred in connection with the importation of
22 IPtronics' accused VCSEL driver products. ALJ Order at 216, 218. The ALJ did, however, side
23 with Avago in finding that the '456 Patent was not invalid. *Id.* at 216.

24 In the same report, the ALJ found that Avago had sufficiently proven that the accused
25 Mellanox/FCI products infringed Avago's '595 Patent and that the '595 Patent was not invalid.
26 *Id.* at 216, 218. The ALJ recommended a limited exclusion order against all Respondents'
27 products that infringed the '595 Patent, as well as a cease-and-desist order against the
28 Mellanox/FCI Respondents. *Id.* at 236; *see also* Chang Decl. Exh. 3.

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iii. The Commission’s Final Order

Based on the ALJ’s recommendation, and after hearing objections from the parties, the Commission issued its final order on April 23, 2014. With respect to the ’456 Patent, the Commission affirmed the ALJ’s “infringement and domestic industry (technical prong) determinations with certain modifications in his rationale.” With respect to the ’595 Patent, the Commission likewise affirmed the ALJ’s infringement determinations with some modification. The Commission ordered relief consisting of:

- (1) A limited exclusion order prohibiting the unlicensed entry of certain optoelectronic devices for fiber optic communications, components thereof, and products containing the same covered by one or more of claims 14 and 19 of U.S. Patent No. 5,596,595 and that are manufactured abroad by or on behalf of, or imported by or on behalf of, respondents IPtronics A/S; IPtronics Inc.; FCI SA; FCI Deutschland GmbH; FCI USA, LLC; Mellanox Technologies, Ltd.; and Mellanox Technologies, Inc.; and
- (2) cease and desist orders prohibiting importing, selling, marketing, advertising, distributing, transferring (except for exportation), and soliciting U.S. agents or distributors for, optoelectronic devices for fiber optic communications, components thereof, and products containing the same covered by one or more of claims 14 and 19 of U.S. Patent No. 5,596,595 and that are manufactured abroad by or on behalf of, or imported by or on behalf of, respondents FCI USA, LLC and Mellanox Technologies, Inc.

See Chang Decl. Exh. 3.

The parties have since returned to district court and are continuing to actively litigate the patent infringement claims in *Avago Techs. U.S., Inc., et al. v. IPtronics, Inc., et al.*, Case No. 5:10-CV-02863-EJD (PSG).

B. IPtronics’ Allegations in this Lawsuit

IPtronics contends that Avago’s ITC investigation against IPtronics in connection with the ’456 Patent was a sham aimed at impeding competition and gaining monopoly power for Avago in the market for 40Gb/s or higher band rate AOCs and Transceivers, or, in the alternative, the market for the 56Gb/s InfiniBand FDR AOCs. Compl. ¶¶ 72-83. As such, IPtronics asserts a singular claim against Avago for attempted monopolization in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2.

1 Avago’s filing of an ITC complaint based upon IPtronics documents that were later
2 determined insufficient to show key limitations of the ’456 Patent demonstrates, in IPtronics’
3 view, that Avago could not reasonably have expected success on the merits. Avago’s continuing
4 prosecution of the investigation and hiring of a new expert to conduct new (and ultimately
5 rejected) testing after Dr. Deppe admitted in deposition that the drawings couldn’t show
6 infringement is further evidence that Avago’s case was meritless from the outset, according to
7 IPtronics. *See* Compl. ¶¶ 20, 22-31, 35-36, 38-39.

8 IPtronics alleges that Avago pursued the baseless ’456 Patent infringement theories in the
9 ITC with the subjective intent to harm competition and gain monopoly power. *Id.* ¶¶ 40, 75-78.
10 Avago’s conduct in the ITC moreover resembled that of a party seeking to prolong a case rather
11 than win it. IPtronics claims that Avago admitted as much during business meetings and
12 settlement negotiations among the parties in 2013. *Id.* ¶ 40-44. IPtronics also alleges that Avago
13 has engaged in a pattern of competition suppressing litigation, asserting patent infringement
14 against “every one of the entities with which they have not otherwise collaborated,” *id.* ¶ 49,
15 including Finisar Corporation, Emcore Corporation, STMicroelectronics Inc., and Cypress
16 Semiconductor Corporation, *id.* ¶¶ 50-54.

17 IPtronics asserts that Avago was ultimately successful in injuring IPtronics. After Avago
18 commenced its infringement lawsuit, companies refused to do business with IPtronics, at least in
19 part because of the ongoing litigation. Furthermore, IPtronics was purchased by Mellanox
20 Technologies, Ltd. “at a price much lower than that which it would have received absent the
21 Avago Defendants’ anticompetitive conduct.” *Id.* ¶¶ 80-81.

22 **II. LEGAL STANDARD**

23 “A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a
24 claim upon which relief can be granted ‘tests the legal sufficiency of a claim.’” *Conservation*
25 *Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d
26 729, 732 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts
27 as true all well-pleaded factual allegations and construes them in the light most favorable to the
28 plaintiff. *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). However, the

1 Court need not “accept as true allegations that contradict matters properly subject to judicial
2 notice” or “allegations that are merely conclusory, unwarranted deductions of fact, or
3 unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)
4 (internal quotation marks and citations omitted). While a complaint need not contain detailed
5 factual allegations, it “must contain sufficient factual matter, accepted as true, to ‘state a claim to
6 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*
7 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when it “allows the
8 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*
9 “[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those
10 facts is improbable, and that a recovery is very remote and unlikely.” *Twombly*, 550 U.S. at 556
11 (internal quotation marks omitted).

12 **III. DISCUSSION**

13 Avago moves to dismiss the Complaint with prejudice on the ground that its actions in the
14 ITC are absolutely immune under the *Noerr-Pennington* doctrine, which takes its name from
15 *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and
16 *Mine Workers v. Pennington*, 381 U.S. 657 (1965). *See* Defs.’ Mot., ECF 43. As more recently
17 explained in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508
18 U.S. 49 (1993) (“*PRE*”), the *Noerr-Pennington* immunity stands for the proposition that “[t]hose
19 who petition government for redress are generally immune from antitrust liability.” *Id.* at 56; *see*
20 *also White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000) (“*Noerr-Pennington* is a label for a form of
21 First Amendment protection; to say that one does not have *Noerr-Pennington* immunity is to
22 conclude that one’s petitioning activity is unprotected by the First Amendment.”). Excepted from
23 that immunity, however, are government petitions that are “a mere sham to cover . . . an attempt to
24 interfere directly with the business relationships of a competitor.” *Noerr*, 365 U.S. at 144.

25 The sham litigation exception to *Noerr-Pennington* immunity requires an antitrust plaintiff
26 to demonstrate two things: first, that the prior lawsuit upon which the antitrust case is based was
27 “objectively baseless in the sense that no reasonable litigant could realistically expect success on
28 the merits” and second, that the subjective motivation behind the prior lawsuit was to directly

1 interfere with a competitor’s business relationships. *PRE*, 508 U.S. at 60-61. “This two-tiered
2 process requires the plaintiff to disprove the challenged lawsuit’s *legal* viability before the court
3 will entertain evidence of the suit’s *economic* viability.” *Id.* at 61 (emphasis in original). In
4 addition to proving sham litigation, an antitrust plaintiff must of course still prove a substantive
5 antitrust violation. *Id.*

6 In the present motion, the parties’ narrow dispute centers on whether the allegations in the
7 Complaint can satisfy the objective prong of the *PRE* test for sham litigation. On this front, the
8 Court must address two preliminary issues in dispute: (1) whether the Court must consider the
9 entire ITC proceeding in determining the applicability of the *Noerr-Pennington* immunity, and (2)
10 whether Avago “prevailed” against IPtronics in the ITC proceeding.

11 Avago submits that the Court should consider the entire ITC action in deciding whether the
12 prior lawsuit was objectively baseless. Defs.’ Mot. 11-13. Because Avago prevailed on its ’595
13 Patent infringement claims against Mellanox and FCI and successfully defended the ’456 Patent
14 against invalidity, Avago argues that the ITC action could not have been objectively baseless as a
15 matter of law. *Id.* at 13-15; 19. IPtronics, in turn, argues that the Court may consider only the
16 portion of the ITC action pertaining to the ’456 Patent because the ’595 Patent was never asserted
17 against IPtronics. Pls.’ Opp. 9-10, 12-18, ECF 55. If the Court looks only to the ’456 Patent,
18 IPtronics unquestionably prevailed against Avago’s infringement allegations, therefore rendering
19 it more likely that Avago’s complaint was a sham to cover anticompetitive conduct. *See id.* at 7-9.

20 Under the facts of this case, the case law does not clearly favor either side’s position.
21 Avago contends that *PRE* and subsequent courts applying *PRE* all confirm that “the entire lawsuit
22 must be objectively baseless” such that “even if the plaintiff prevailed only on one of several
23 claims it asserted, the litigation in question could not, as a matter of law, be deemed objectively
24 baseless.” Defs.’ Mot. 10; *see id.* at 10 n.7 (collecting cases). That a plaintiff who prevails on
25 some claims but not others in a single lawsuit can claim the *Noerr-Pennington* immunity is the
26 dominant view in this circuit and around the country. *See, e.g., Dominant Semiconductors Sd.*
27 *Bhd. v. Osram GMBH*, 524 F.3d 1254 (Fed. Cir. 2008); *Breville Pty Ltd. v. Storebound LLC*, No.
28 12-CV-01783-JST, 2013 WL 1758742, at *8 (N.D. Cal. Apr. 24, 2013); *Meridian Project Sys.*,

1 *Inc. v. Hardin Const. Co., LLC*, 404 F. Supp. 2d 1214, 1222 (E.D. Cal. 2005). However, while
2 *PRE* states that “the lawsuit must be objectively baseless,” 508 U.S. at 60 (emphasis added),
3 neither it nor any of the cases that Avago cited provides clear guidance on how the “lawsuit” is to
4 be defined when a lawsuit involves multiple defendants. IPtronics contends that in a multi-party
5 ITC investigation wherein Avago accused different respondents’ products of infringing different
6 patents, the “lawsuit” between Avago and IPtronics concerned only the ’456 Patent—the only
7 patent that Avago asserted against IPtronics. As IPtronics aptly notes, none of the cases that
8 Avago cited in its papers precludes this parsing of the ITC action. *See* Pls.’ Opp. 12-16. Avago
9 offers nothing more compelling in its reply brief.

10 The Court concludes that in determining the applicability of *Noerr-Pennington* immunity
11 in this action, the *PRE* analysis may be applied solely to the ’456 Patent infringement claims
12 against IPtronics, which constituted Avago’s “lawsuit” against IPtronics. Based upon the
13 unredacted information before the Court, it appears that the ’595 Patent infringement claims and
14 accused products in the ITC action were severable from the ’456 Patent infringement claims and
15 accused products. In other words, Avago could have filed a separate complaint against IPtronics
16 and Mellanox/FCI concerning the products that infringed only the ’456 Patent.⁵ Assuming as true
17 the assertion that Avago had no reasonable basis for accusing IPtronics, that Avago chose to join
18 its frivolous claims against IPtronics to an otherwise valid lawsuit against other defendants should
19 not preclude IPtronics from invoking the Sherman Act. As the Ninth Circuit has explained,
20 “[b]ecause the *Noerr-Pennington* doctrine grows out of the Petition Clause, its reach extends only
21 so far as necessary to steer the Sherman Act clear of violating the First Amendment.” *Freeman v.*
22 *Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005). “Immunity thus applies only to what
23 may fairly be described as petitions, not to litigation conduct generally.” *Id.* Characterizing the
24 portion of Avago’s ITC complaint accusing IPtronics products of infringing the ’456 Patent as a

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26 ⁵ As already noted, the Court cannot tell whether the Mellanox/FCI products accused of infringing
27 the ’456 Patent overlapped with the products accused of infringing the ’595 Patent. To the extent
28 there was overlap, the rules of the ITC may preclude a separate complaint, though that issue is not
before the Court. Moreover, it is probable that Avago’s primary concern in the ITC action was
with excluding Mellanox/FCI transceivers and AOCs, and less with excluding IPtronics’ VCSEL
drivers, which are only one component of the accused Mellanox/FCI products.

1 separate “petition” to the Commission does not “do violence to the concept,” as both Avago and
2 the Commission treated the ’456 Patent and ’595 Patent issues as separate and distinct. *See id.* To
3 hold otherwise would allow a patentee to engage in anticompetitive behavior by simply joining all
4 of its competitors in one lawsuit though it had meritorious claims against only one.

5 Regardless of how the ITC action is parsed, it is a basic premise of the *Noerr-Pennington*
6 doctrine that “[a] winning lawsuit is by definition a reasonable effort at petitioning for redress and
7 therefore not a sham.” *PRE*, 508 U.S. at 60 n.5. Here, Avago contends that it prevailed against
8 IPtronics in the ITC because the commission entered a limited exclusion order against IPtronics.
9 Defs.’ Reply 2-4, ECF 56. IPtronics urges the Court to look past the wording of the exclusion
10 order, which it contends applies only to Mellanox and FCI, and to look at the ALJ’s determination,
11 affirmed by the Commission, that Avago failed to prove that IPtronics’ accused products infringed
12 the ’456 Patent. Pls.’ Opp. 10-12. The Commission’s final order is indeed clear in affirming the
13 ALJ’s initial determination, with some modification to the reasoning, that the accused IPtronics
14 products did not infringe the ’456 Patent. *See* Chang Decl. Exh. 3. Curiously enough, however,
15 the final order does include IPtronics in a limited exclusion order against:

16 certain optoelectronic devices for fiber optic communications,
17 components thereof, and products containing the same covered by
18 one or more of claims 14 and 19 of U.S. Patent No. 5,596,595 and
19 that are manufactured abroad by or on behalf of, or imported by or
 on behalf of, respondents IPtronics A/S; IPtronics Inc.; FCI SA; FCI
 Deutschland GmbH; FCI USA, LLC; Mellanox Technologies, Ltd.;
 and Mellanox Technologies, Inc.

20 *See id.* It is not immediately apparent from the final order why IPtronics is listed as a respondent
21 in connection with the ’595 Patent because it is undisputed that Avago did not accused IPtronics
22 products of infringing the ’595 Patent. Nor is the Court able or inclined to probe the
23 Commission’s reasoning on a motion to dismiss. It is sufficient at this stage that the mere
24 inexplicable inclusion of IPtronics in the Commission’s exclusion order does not controvert the
25 allegations in the Complaint, nor the ALJ’s initial determination and the Commission’s final order
26 itself, all of which indicate that Avago did not successfully convince anyone that the accused
27 IPtronics products infringed the ’456 Patent. Thus, the Court cannot hold at this stage in the
28 proceeding that Avago prevailed against IPtronics or that the ITC action was not a sham by virtue

1 of such a victory.

2 Having determined that the *PRE* test applies only to the '456 Patent infringement "lawsuit"
3 between Avago and IPtronics and that Avago did not prevail against IPtronics in that suit, the
4 Court next turns to the allegations in the Complaint to determine whether IPtronics adequately
5 alleges that Avago's ITC complaint against it was objectively baseless. A lawsuit is objectively
6 baseless if "no reasonable litigant could realistically expect success on the merits." *PRE*, 508 U.S.
7 at 60. Put differently, "[t]he existence of probable cause to institute legal proceedings precludes a
8 finding that an antitrust defendant has engaged in sham litigation," and "[p]robable cause to
9 institute civil proceedings requires no more than a 'reasonabl[e] belie[f] that there is a chance that
10 [a] claim may be held valid upon adjudication.'" *Id.* at 62-63 (alteration in original) (quoting
11 *Hubbard v. Beatty & Hyde, Inc.*, 343 Mass. 258, 262 (1961)).

12 Avago argues that the allegations fail to demonstrate objective baselessness for four
13 principle reasons: (1) the ITC authorized an investigation based upon its complaint; (2) Avago
14 successfully defended the validity of the '456 Patent; (3) Avago presented "substantial evidence"
15 of infringement to the ALJ; and (4) IPtronics did not seek summary adjudication on the '456
16 Patent infringement claims. Defs.' Mot. 15-22; Defs.' Reply 5, 10-14. The Court finds all of
17 these arguments insufficient to defeat IPtronics' well-pleaded allegations that, when taken as true,
18 establish that Avago's suit lacked legal viability.

19 First, Avago has presented no controlling authority holding that the ITC's decision to
20 institute an investigation is, by itself, sufficient to shield an ITC complainant from antitrust
21 liability. Indeed, at least one court has found that even an ALJ's initial determination of
22 infringement, though evidence that the ITC action is not a sham, "does not conclusively establish
23 that the action is not a sham." *Mitsubishi Heavy Indus., Ltd. v. Gen. Co.*, 720 F. Supp. 2d 1061,
24 1066 (W.D. Ark. 2010) (citing *Boulware v. State of Nevada, Dep't of Human Res.*, 960 F.2d 793,
25 798 (9th Cir. 1992), for proposition that "initial success in a trial court is a factor to be considered
26 in determining whether litigation is sham but is not dispositive"). To be sure, the Commission
27 requires significantly more supporting information to be filed with an ITC complaint and reviews
28 complainants' filings for compliance with its rules. *See* 19 C.F.R. § 210.10, 210.12. That the

1 Commission determined that Avago had complied with its filing requirements and voted to
2 institute an investigation, however, says nothing of the actual merits of the infringement theory
3 asserted against IPtronics.⁶ Moreover, the Court agrees with IPtronics that this argument elides
4 the gravamen of IPtronics' baselessness allegations: that Avago argued a theory of infringement in
5 its complaint based upon evidence that it quickly had to abandon once its own expert admitted that
6 the evidence was insufficient to demonstrate infringement. *See* Pls.' Opp. 20-21. The ITC's
7 decision to institute an investigation based upon representations that Avago's expert later retracted
8 can hardly serve to insulate Avago from antitrust liability.

9 Second, and for similar reasons, Avago's success in defending the '456 Patent against
10 invalidity is also unavailing. IPtronics is not asserting that Avago's ITC complaint was
11 objectively baseless because Avago's patent was invalid. Were that the basis for IPtronics' sham
12 litigation claim, the Commission's conclusion that the '456 Patent is not invalid would certainly
13 be relevant. *See, e.g., Sandisk Corp. v. STMicroelectronics, Inc.*, No. C 04-4379JF(RS), 2008 WL
14 4615605, at *10 (N.D. Cal. Oct. 17, 2008). Because IPtronics' claim for sham litigation here rests
15 on Avago's lack of any probable cause to assert that IPtronics' products infringed the '456 Patent
16 in the first place—particularly with respect to the two waveform limitations of that patent—
17 Avago's success on invalidity is irrelevant.

18 Third, this Court is ill-equipped on a motion to dismiss to evaluate the substantiality of
19 Avago's evidence of infringement before the ITC. It is enough at this stage that IPtronics has
20 alleged that Avago filed a complaint based upon documents later admitted to be insufficient to
21 prove infringement and that it pressed those infringement claims using documents and new expert
22 evidence that the ALJ also found insufficient to show what Avago claimed. Those allegations are
23 not controverted by the judicially noticeable documents and are sufficient, when taken as true, to
24 establish that Avago could not reasonably have expected success on its patent infringement claims
25 against IPtronics.

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28 ⁶ The Commission's published notice of institution of an investigation typically states that the
Commission has made no decision on the merits.

1 Fourth, and finally, the fact that IPtronics did not pursue summary adjudication of
2 infringement is also not an appropriate issue to take up on a motion to dismiss. There may be any
3 number of reasons why a party chooses not to seek summary judgment on even baseless claims,
4 and the Court declines to hold that IPtronics' litigation strategy should be used against it to shield
5 Avago from antitrust liability.

6 In sum, the Court finds that IPtronics' allegations of objective baselessness are sufficiently
7 well-pleaded to circumvent Avago's claim to *Noerr-Pennington* immunity at this stage. This is
8 not to say that it is smooth sailing for IPtronics from this point forward, as the arguments by
9 Avago that this Court rejected on a motion to dismiss may gain more traction on a more fully
10 developed record. At a minimum, Avago's arguments demonstrate that there may be significant
11 challenges to IPtronics' ability to prove objective baselessness down the road.⁷ Furthermore, to
12 this point, neither side has addressed the pending patent infringement lawsuit in this district, in
13 which Avago continues to accuse IPtronics of infringing the '496 Patent. If Avago prevails on
14 infringement in that suit, IPtronics' antitrust claims could be mooted.⁸ See *PRE*, 508 U.S. at 60
15 n.5. However weak Avago may believe IPtronics' claims to be on the merits, the Complaint is
16 well-pleaded and IPtronics must be afforded an opportunity to test its allegations of objective
17 baselessness on the merits. *Twombly*, 550 U.S. at 556.

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23 ⁷ Avago has not challenged by way of this motion the sufficiency of IPtronics' allegations of
24 subjective intent and of attempted monopolization in violation of Section 2 of the Sherman Act.
25 As such, the Court does not consider Avago's subject intent to restrain competition through
26 litigation, nor whether the IPtronics VCSEL driver products accused in the allegedly baseless ITC
27 action fall within the relevant market, which IPtronics alleges to be "the market for 40Gb/s or
higher band rate Quad (4-channel) Small Form-factor Pluggable ('QSFP') short-reach InfiniBand
Active Optical Cables and Transceivers ('AOC' market)" or, in the alternative, "the market for the
QSFP 56Gb/s short-reach InfiniBand FDR AOC segment of [the AOC] market ('InfiniBand'
market)." Compl. ¶ 57.

28 ⁸ The Court makes no determination at this point whether a verdict for Avago in the patent
infringement case would have any impact on IPtronics' antitrust claims in this action.


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IV. ORDER

For the foregoing reasons, Avago's Motion to Dismiss is DENIED.

IT IS SO ORDERED.

Dated: August 25, 2015


BETH LABSON FREEMAN
United States District Judge