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IN THE SUPREME COURT OF THE STATE OF DELAWARE

LG ELECTRONICS, INC. Plaintiff Below, Appellant, v. INTERDIGITAL COMMUNICATIONS, INC., INTERDIGITAL TECHNOLOGY CORPORATION, and IPR LICENSING, INC., Defendants Below, Appellees.	)	**REDACTED** No. 475,2014 ON APPEAL FROM C.A. NO. 9747-VCL IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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Dated: December 1, 2014

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TABLE OF ABBREVIATIONS

Table of Common Abbreviations Used in This Brief	
Abbreviation	**Description**
AB	InterDigital's Answering Brief, filed on Nov. 12, 2014
InterDigital	Appellees InterDigital Technology Corporation, IPR Licensing, Inc., and InterDigital Communications, Inc.
LG	Appellant LG Electronics, Inc.
NDA	May 9, 2012 Agreement Governing Confidential Settlement Communications, between LG and InterDigital
OB	LG's Opening Brief, filed on October 13, 2014
PLA	Wireless Patent License Agreement between InterDigital Group and LG Electronics Inc. (effective on January 1, 2006)
Settlement Communications	*See* Section 1 of NDA
Tribunal	Arbitration Tribunal constituted under the American Arbitration Association's ICDR Rules and Article V of the PLA

[redacted]

ARGUMENT

I. THE PROPER STANDARD OF REVIEW IS *DE NOVO*

The proper standard for reviewing the Court of Chancery's decision is *de novo*, not abuse of discretion, as InterDigital repeatedly asserts. [*See* AB at 9, 20, 32.] The issue here is not whether the Court of Chancery properly exercised its discretion under *McWane;*[1] instead, the issue is whether *McWane* applies in the first place such that the Court of Chancery could exercise any discretion. This precise question at bar—whether *McWane* applies—is a question of law subject to *de novo* review. *SIGA Techs. Inc. v. PharmAthene*, Inc., 67 A.3d 330, 341 (Del. 2013) (explaining that "whether or not an equitable remedy exists or is applied using the correct standards is an issue of law and reviewed de novo"); *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 416 (Del. 2010) (explaining that "we review *de novo* the legal principles applied in reaching" an otherwise discretionary decision).

Separately, according to InterDigital, the question of whether "substantive arbitrability [is] a threshold question in applying *McWane*" is subject to an abuse of discretion review. [AB at 20.] But the proper interaction between Delaware arbitrability law and *McWane*—and, thus, the correct legal framework for analyzing this dispute—is and must be decided as a matter of law. There is no

[1] *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281 (Del. 1970)

[redacted]

authority supporting the proposition that judges have discretion to decide which legal test to apply to a given dispute. Were this choice left to each individual judge's discretion as InterDigital asserts, then whether a dispute was subject to arbitration would depend not on the parties' contracts and the application of Delaware law, but on the proclivities of the particular judge hearing the case. That undesirable result contravenes public policy and this Court's consistent precedent that determining the correct legal standard is an issue of law, not of discretion. *SIGA*, 67 A.3d at 341. This Court should therefore apply a *de novo* standard of review.

[redacted].

II. LG'S CLAIMS ARE NOT ARBITRABLE

InterDigital's Answering Brief confirms what LG stated in its Opening Brief: it is undisputed that the NDA—the only agreement on which LG relies for its claim for breach of contract—does not contain a clear expression of intent to arbitrate disputes for breach of the NDA. [*See* AB at 28 ("InterDigital has not argued that the NDA contains a mandatory arbitration provision . . . .").]

Based on that undisputed fact, there is no need for any further analysis. This Court has clearly held that "[a] party cannot be forced to arbitrate the merits of a dispute . . . in the absence of a clear expression of such intent in a valid agreement." *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006). Absent that clear expression of intent, a party "has a right to have the merits of [a] dispute adjudicated *ab initio* in a court of competent jurisdiction." *IDMS Props.-First, Inc. v. P.W. Scott Assocs.*, 748 A.2d 389, 391 (Del. 2000). Thus, because the NDA undisputedly does not contain a clear expression of intent to arbitrate, LG "has a right to have the merits" of its claim for breach "adjudicated *ab initio* in a court of competent jurisdiction," *id.*, and the Court of Chancery erred by conducting a *McWane* analysis and dismissing in favor of arbitration.

The arguments set forth in InterDigital's brief—addressed in turn, below—do not provide any basis for departing from this Court's clear jurisprudence that a dispute is only arbitrable through the express consent of the parties.

A. The PLA's Arbitration Provision Is Inapplicable

InterDigital's argument that the PLA's arbitration provision encompasses LG's NDA claim as an evidentiary dispute, [AB 21-28], is flawed for two reasons. First, LG did not raise an evidentiary dispute in the Court of Chancery; LG instead raised a claim for breach of contract. Thus, the PLA's grant of authority to the Tribunal to resolve evidentiary disputes is not implicated. Second, even if the PLA's arbitration provision could encompass the NDA, Section 9 of the NDA expressly grants LG the right to seek enforcement of the NDA in a court of law.

1. LG has not raised an evidentiary dispute and, thus, the PLA is not implicated by LG's claim for breach of contract

InterDigital's argument that LG's claim falls within the Tribunal's power to decide evidentiary disputes under the PLA is premised on InterDigital's erroneous characterization of LG's claim as raising "discovery and admissibility disputes." [AB at 28-29.] LG's Chancery Complaint does not raise any discovery or admissibility dispute and does not ask the Court of Chancery to make any discovery or admissibility determination. Rather, LG asked the Court of Chancery to find that "InterDigital has breached the NDA." [A-25.] Resolving that breach of contract claim is a predicate to any evidentiary matter regarding the use of Settlement Communications, because there would be no evidentiary matter to address if InterDigital had not breached the NDA.

Both InterDigital and the Court of Chancery fail to acknowledge or

[redacted].

appreciate the important distinction between, on the one hand, InterDigital's obligations under the NDA and, on the other hand, the Tribunal's consideration of Settlement Communications as an evidentiary matter. The NDA governs InterDigital—not the Tribunal—and determines what InterDigital is allowed to do with the Settlement Communications. Separately, procedural rules of evidence govern whether the Tribunal can admit any Settlement Communications submitted by InterDigital into the record of the arbitration proceeding. Thus, the breach of contract dispute is a substantive issue focused on InterDigital's breach of the NDA, and does not fall within the PLA's provision allowing for arbitral determination of evidentiary matters.

2. The judicial carve-out contained in Section 9 gives LG the right to seek judicial enforcement of the NDA

InterDigital's argument that the PLA's arbitration provision encompasses the NDA dispute is legally specious, because it ignores the NDA's express grant of the right to bring a claim for judicial enforcement. [A-30 at § 9.] That is, even if the PLA's arbitration provision could encompass the NDA dispute (it does not), the judicial carve-out in Section 9, which allows LG to have the NDA [redacted] [*id.*], precludes dismissal in favor of arbitration.

The Court of Chancery's decision in *Medicis Pharmaceutical Corp. v. Anacor Pharmaceuticals. Inc.*, 2013 WL 4509652 (Del. Ch. 2013), is instructive on this point. [*See* OB at 20-21.] In that case, although the agreement at issue

[redacted]

called for arbitration of disputes "arising under this Agreement," the Court of Chancery held that, because the agreement also had a judicial carve-out granting "the right to institute judicial proceedings . . . in order to enforce the instituting Party's rights hereunder," the plaintiff had the right to seek judicial enforcement of the agreement. *Id.* at *12. The court refused to dismiss in favor of arbitration even though—as here—the arbitration was filed first. *Id.* at *10. *Medicis* demonstrates the principle that, even when an arbitration provision might otherwise encompass a dispute, a court cannot dismiss a legal action to resolve that dispute if the parties have included a carve-out allowing for judicial resolution of that dispute.

The existence of the judicial carve-out in the NDA distinguishes this case from those cited by InterDigital to suggest that courts should not intervene in disputes arising in arbitration. [*See* AB at 23.] None of the agreements at issue in those cases contain a carve-out expressly allowing the aggrieved party to seek judicial resolution of its claim, as there is here. [*Compare* A-30 at § 9 *with* cases cited at AB at 23-26.] *Medicis* is the only case cited by either party in which a court considered a judicial carve-out like the one in Section 9 of the NDA, and its reasoning should be adopted by this Court as Delaware law.

InterDigital tries to distinguish *Medicis* by asserting that "the parties [here] never agreed that they could bring a simultaneous judicial action for any purpose," [AB at 27-28], but that is not correct. By its plain language, the NDA applies

[redacted][2] [*Id.*] Because the NDA allows for an enforcement action to proceed in any forum having jurisdiction, it gives the aggrieved party—in this case LG—the right to choose the forum. Because LG chose to enforce the NDA in the Court of Chancery, it cannot be required to have the dispute resolved by arbitration.

Similarly, InterDigital cites a number of cases to suggest that the PLA's arbitration provision empowers the Tribunal to address the NDA breach of contract dispute. But they are inapposite, because none of them—with the exception of *TrustMark Insurance Co. v. John Hancock Life Insurance Co.*, 631 F.3d 869 (7th

[2] For the same reason, InterDigital's statement that "[t]here is nothing that entitles LG to some forum separate from the Tribunal," [AB at 22], is incorrect. The NDA guarantees LG the right to choose *any* forum having personal jurisdiction over InterDigital. Here, the Court of Chancery has personal jurisdiction over InterDigital, and that is LG's chosen forum.

[redacted].

Cir. 2011)—held that an arbitration tribunal has the power to resolve disputes arising under an agreement separate from the contract containing the arbitration provision.[3] *TrustMark*—which is InterDigital's closest case—is inapplicable here, because that court expressly found that the broad arbitration clause covered "all disputes arising out of the original dispute." *TrustMark*, 631 F.3d at 874. In contrast, the narrow arbitration clause in the PLA here only covers disputes arising under the contract in which the arbitration provision is found. [A-63 at § 5.2.]

Moreover, the reasoning of the Superior Court in *Vituli v. Carrols Corp.*, 2013 WL 2423091 (Del. Super. Mar. 28, 2013), counsels against reading *TrustMark* so broadly that any arbitration clause can encompass disputes arising out of a separate contract lacking an arbitration clause. In *Vituli*, the court refused to find that defendant company's "general arbitration clause" compelled arbitration of a dispute arising under a separate contract without an arbitration provision. *Id.* at *1-2. As the court explained, it could not "find[] a case where arbitration was compelled despite a contract's complete lack of arbitration clause or reference to arbitration. Even if such a case exists, it stands against the host of arbitrability

[3] InterDigital also cites *Williams Natural Gas Co. v. Amoco Prod. Co.*, 1991 WL 236919, at *1-2 (Del. Super.) for the proposition that an arbitration tribunal can consider disputes arising under a separate agreement. [AB at 26.] But *Williams* has nothing to do with arbitration. In *Williams* the Superior Court—not an arbitration tribunal—considered the effect of a confidentiality agreement between the parties. *Williams* has no relevance to whether an arbitration tribunal empowered to consider disputes arising under one agreement can also consider disputes arising under a separate agreement containing no arbitration provision.

[redacted]

cases that all turn on some mention in the contract at issue." *Id.* at *2. Here, it is undisputed that there is no arbitration clause in the contract at issue—the NDA. Thus, requiring arbitration of LG's claim for breach of the NDA would "stand[] against the host of arbitrability cases," *id.*, and this Court's settled precedent.

B. The NDA's Reference to "Tribunal" Does Not Mandate Arbitration of LG's Claims

InterDigital raises a red herring by arguing that the NDA does not *foreclose* arbitration because "[t]he reference to a 'tribunal' in the NDA's dispute resolution clause includes an arbitration." [AB at 29.] The relevant question is not whether arbitration is *foreclosed*. The relevant question is whether arbitration is *required*. Whether or not LG could *choose* to arbitrate its NDA dispute in a proceeding involving an unrelated contract is irrelevant because LG did not choose to do so. LG chose to have [redacted]—a right expressly granted to LG by Section 9 of the NDA. [A-30 at § 9.]

C. LG Did Not Agree to Have the Tribunal Resolve the NDA Dispute

LG did not consent to have the Tribunal resolve the NDA dispute, as InterDigital argues. [AB at 30-31.] InterDigital's brief misrepresents the arbitration proceedings by erroneously stating that "[a]fter LG raised the NDA dispute in the Arbitration, the parties briefed the applicability of the NDA, and the

[redacted]

Tribunal issued a ruling on May 8, 2013."[4] [AB at 5.]

First, LG did not "raise[] the NDA dispute in the arbitration." [*Id.*] Rather, in its April 19, 2013 Arbitration Brief, LG informed the Tribunal that it would not be relying on parol evidence because the parties had mutually agreed in the NDA that they could not rely on such evidence in any proceeding. [A-214-215.] When LG informed the Tribunal of the NDA, LG was not raising a dispute—LG did not even know there was a dispute to raise. At that time, InterDigital had not yet signaled its intent to breach the NDA or asserted that it had a different interpretation of the NDA. LG's Arbitration Brief merely informed the Tribunal about the reason why LG would not submit any parol evidence. It was *InterDigital* which then raised a dispute with the Tribunal in its May 1, 2013 letter, asking for [redacted] [A-34.]

Second, InterDigital's assertion that the parties "briefed the applicability of the NDA," [AB at 5], distorts the record by omitting that LG's brief expressly asked the Tribunal *not* to rule on the applicability of the NDA, because the Tribunal lacked authority to address this dispute as LG had not agreed to arbitrate the dispute. [A-48-49.] InterDigital's further assertion that LG is attempting to

[4] InterDigital raised the same argument before the Court of Chancery which expressly rejected it, finding that while "LG made a point of stating it had not included any [prohibited] information in its brief," it was "InterDigital [that] asked the Tribunal to rule on whether the NDA applied to pre-NDA communications." [Op. at 2-3.] The Court of Chancery further noted that "the Tribunal ruled that *InterDigital's* request was 'premature.'" [*Id.* at 3 (emphasis added).] The Court should reject InterDigital's attempt to resurrect an already-rejected argument.

[redacted].

"rescind its decision to arbitrate after having received unfavorable rulings from the Tribunal," [AB at 31], simply does not withstand scrutiny—as LG unambiguously and forcefully asked the Tribunal *not* to address the NDA, before the Tribunal expressed any opinion regarding that agreement.

Finally, the Tribunal did not "issue a ruling on May 8, 2013." [AB at 5.] Instead, on that date, the Tribunal *declined* to rule on the issue by stating that any ruling would be premature and that, if it ever did make a ruling, it would rule only on the evidentiary issue [redacted].[5] [A-98.] At that time, a contractual breach of the NDA had not yet occurred and the Tribunal refused to rule upon InterDigital's request that the Tribunal bless InterDigital's anticipated breach. LG should not be deprived of its chosen forum merely because InterDigital improperly tried to get the Tribunal's pre-approval for its breach.

[5] Due to the Court of Chancery's dismissal and refusal to resolve the NDA dispute, the Tribunal has now issued a decision regarding the NDA. Nonetheless, InterDigital's repeated references to and reliance on that decision is improper. [*See* AB at 7, 8, 9, 11, 19, 35.] That decision is not part of the record on appeal, because it was not part of the record below. *See Sup. Ct. R.* 9(a) ("An appeal shall be heard on the original papers and exhibits which shall constitute the record on appeal.") Moreover, that decision is irrelevant. The Court of Chancery's decision did not rest on the Tribunal's ruling, which issued more than two months *after* the Court of Chancery's decision. Thus, the Tribunal's decision has no bearing on whether the Court of Chancery committed reversible error. This Court should disregard InterDigital's impermissible references to the Tribunal's decision. Moreover, the Tribunal's decision crystallizes the practical effects of the Court of Chancery's legal error. In light of the Court of Chancery's dismissal, the Tribunal required [redacted] LG was thus both deprived of its chosen forum and then left with no forum in which to raise its claim for breach of contract.

[redacted].

D. The Question of Substantive Arbitrability Was for the Court of Chancery to Decide

InterDigital incorrectly argues that the Court of Chancery did not need to address substantive arbitrability, because substantive arbitrability was a question for the Tribunal. [AB at 30.] Under Delaware law, courts decide substantive arbitrability unless the agreement at issue "clearly and unmistakably" submits that question to arbitration. *See, e.g., Israel Discount Bank of New York v. First State Depository Co., LLC*, 2012 WL 4459802, at *5 (Del. Ch. Sep. 27, 2012). "Clearly and unmistakably" submitting the question to arbitration requires, at least, that the contract at issue "generally provides for arbitration of all disputes." *Id.* Here, the contract at issue—the NDA—does not contains an arbitration provision and, thus, does not "generally provide[] for arbitration of all disputes." *Id.* As a result, the question of substantive arbitrability was for the Court of Chancery to decide.

InterDigital's reliance on the arbitration provision of the PLA is unwarranted, [AB at 30], because the only agreement on which LG relies for its claim for breach of contract is the NDA—*not* the PLA. As the Court of Chancery found, "the parties also agree that the specific matter at issue in this case arises out of the NDA, which does not contain an arbitration provision." [Op. at 5.]

E. *McWane* Does Not Apply to Arbitration Proceedings

Because whether LG must arbitrate its claims under the NDA is an issue of substantive arbitrability, *McWane* is inapplicable. [OB at 10-12; 29-30.] In its

[redacted]

undue reliance on *McWane*, InterDigital incorrectly asserts—as did the Court of Chancery—that "there is not 'a principled distinction between a first-filed action in a court in another jurisdiction and a first-filed arbitration.'" [AB at 10 (quoting Op. at 6).] But there is a very good—even dispositive—distinction between the two: whereas a party can be subject to jurisdiction in another court without agreeing to that jurisdiction, a party cannot be subject to arbitration without a clear expression of intent to arbitrate. Conversely, if a party *does* give a clear expression of intent to arbitrate a dispute, that dispute *must* be arbitrated. As a result, when it comes to arbitration, the order of filing does not matter: *without* an agreement to arbitrate a given dispute, that dispute *cannot* be arbitrated, regardless of whether the arbitration is first or second filed. *Cf. Medicis*, 2013 WL 4509652, at *10 (Del. Ch.) (explaining that the court "[d]id not find . . . that the order of filing is dispositive" of the arbitrability of a dispute). *McWane* has no place in the analysis.

InterDigital's argument that *Medicis* "is not instructive" because "there is no discussion of *McWane*," is misleading. [AB at 13.] Although *Medicis* does not mention *McWane* by name, the court's analysis alludes to *McWane*, and rejects its relevance. Specifically, the defendant in *Medicis* raised the *McWane* doctrine by arguing that the "first-filed status of its arbitration demand" supported its motion to dismiss in favor of arbitration. 2013 WL 4509652 at *10. The court, however, explained that the order of filing was not dispositive because, like here, the parties'

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agreement for possible judicial resolution of the dispute showed that there was no clear intent to arbitrate. *Id.* Thus, even if *Medicis* does not mention *McWane* by name, its reasons for disregarding the first-filed status of the arbitration are equally applicable in this case or in any other case involving a first-filed arbitration.

As a separate angle of attack, InterDigital argues that *Medicis* is inapplicable because "the PLA does not provide a carve-out for simultaneous judicial proceedings." [AB at 14.] This argument ignores that the NDA—the agreement underlying LG's claims—*does* contain such a carve-out, expressly allowing the LG to have the NDA [redacted] [A-30 at § 9.]

Further, that arbitrations may be viewed as prior actions for the purposes of issue and claim preclusion, [AB at 11-12], does not provide any basis for applying *McWane* to first-filed arbitrations. When it comes to preclusion, there can never be a final arbitration award capable of preclusive effect without an express consent to arbitrate the given dispute in the first place. Thus, the preclusive effect of a consented-to arbitration against those consenting parties does not, by any stretch of the imagination, suggest that parties should ever be subject to arbitration without their express consent.

[redacted].

III. EVEN IF *MCWANE* APPLIED, DISMISSAL WAS IMPROPER BECAUSE THE COURT OF CHANCERY CANNOT DO PROMPT AND COMPLETE JUSTICE

As set forth in LG's Opening Brief, *McWane* cannot apply because the Tribunal is unable to provide prompt and complete justice for two reasons: (1) while the Tribunal can address evidentiary disputes regarding InterDigital's use of parol evidence, it cannot address the underlying breach of contract that forms the predicate to any evidentiary dispute, [OB at 16-17, 30]; and (2) the Tribunal cannot provide complete relief, because it cannot enjoin InterDigital's disclosure of Settlement Communications outside the Arbitration, [*id.*].

First, regarding the Arbitration Tribunal's inability to address InterDigital's breach of the NDA, InterDigital ignores LG's actual argument by improperly asserting that "a declaratory judgment that InterDigital cannot use certain evidence is functionally equivalent to the relief that the Court of Chancery found could be granted by the Tribunal." [AB at 17.] Contrary to InterDigital's argument, LG is not seeking a declaration "that InterDigital cannot use certain evidence." [*Id.*] LG is instead seeking a declaration "that InterDigital has breached the NDA," [A-25], which for the reasons discussed above and in LG's opening brief at pages 16-17, is not a trivial distinction. InterDigital largely ignores LG's arguments on this point.

While it ignored LG's key point on this issue, InterDigital only addresses LG's argument that a declaration of breach "could also be relevant to a possible

petition to vacate any future arbitration award." [AB at 18 (quoting OB at 30).] Contrary to InterDigital's assertion, this argument does not, however, "make[] clear LG's goal of interfering with the Tribunal even before it has had rendered its decision." [AB at 18.] Rather, it demonstrates LG's recognition that, if the Tribunal's decision is based on improper evidence, LG would have the right to challenge that decision *after* it is rendered.

Second, as to the Tribunal's inability to enjoin InterDigital's disclosure of Settlement Communications outside the Arbitration, InterDigital only contends that LG's requested relief is somehow unripe. This is a legally untenable position. Notably, InterDigital and LG agree that LG has asserted only a single claim in the Court of Chancery—one for InterDigital's breach of the NDA by using Settlement Communications in the Arbitration—and that claim is ripe. [*See* AB at 15.] Thus, the issue is not whether LG's *claim* is ripe, but whether one form of *relief* that LG requests—an injunction against future disclosure of Settlement Communications—is ripe. As explained in LG's Opening Brief, there is no legal precedent requiring that the ripeness doctrine applies to forms of relief, [OB at 31-32], and InterDigital has not provided any such authority. Indeed, because "injunctions are a form of relief, not a cause of action,"[6] courts generally address the availability of an

[6] This is true even when, as here, the request for injunctive relief is pled as a separate count. *Quadrant Structured Prods. v. Vertin*, 2014 WL 5099428, at *36 (Del. Ch. Oct. 1, 2014).

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injunction only "after deciding the merits of [the] claims." *Quadrant Structured Prods. v. Vertin*, 2014 WL 5099428, at *36 (Del. Ch. Oct. 1, 2014). Even if there were a separate ripeness requirement for LG's requested relief, that request is now ripe for the reasons described in LG's Opening Brief. [OB at 30-34.]

Further, injunctions are proper where there is a "pattern of conduct" giving rise to "a reasonable apprehension of risk of future breaches," *Thorpe v. Cerbco, Inc.*, 1996 WL 560173, at *4 (Del. Ch. Sept. 13, 1996)—a point the Court of Chancery acknowledged and that InterDigital concedes, [Op. at 19; AB at 15]. As described in LG's Opening Brief, a reasonable apprehension that InterDigital may—and likely will—disclose Settlement Communications in the future arises from the facts that (1) InterDigital has already breached the NDA; (2) InterDigital does not view the NDA as prohibiting disclosure of Settlement Communications occurring prior to the NDA's execution; and (3) the parties are engaged in litigation in the Delaware District Court involving similar issues for which Settlement Communications may be relevant. [OB at 32-33.] InterDigital's response that those facts allow only a "conjecture that InterDigital *may* do so again," [AB at 16], confuses the requirement for "reasonable apprehension" with a requirement for certainty. Although there is no *certainty* that InterDigital will again improperly disclose Settlement Communications in the future, InterDigital's ongoing disclosure in the pending arbitration proceeding, as well as InterDigital's

[redacted].

opportunity and motive to do so again, provides at least a *reasonable* apprehension of risk of future breaches.

InterDigital attempts to obfuscate this issue by contending that there is no "pattern of conduct" giving rise to a reasonable apprehension of future breaches because "the only alleged breach occurred in the arbitration" and "a single alleged breach does not create a pattern." [AB at 16.] But the law does not require a pattern of *breaches*—only a pattern of *conduct*. Here, even if there has been only one *breach*, there has been extensive *conduct* showing that InterDigital will likely disclose Settlement Communications again in the future, including InterDigital's (1) request that the Tribunal bless its use of Settlement Communications; (2) use of Settlement Communications even when the Tribunal did not offer its blessing; (3) assertion in the Tribunal that the NDA does not prohibit its use of Settlement Communications; and (4) argument in this action that the NDA does not prohibit its use of Settlement Communications. That pattern of conduct, coupled with the pending District Court litigation, creates a "reasonable apprehension of risk" that InterDigital will disclose Settlement Communications again in the future.[7]

Additionally, as LG argued in its Opening Brief, it is common for courts to

[7] To the extent InterDigital is arguing—or the Court of Chancery was holding—that there is no pattern of conduct because some facts showing that pattern were not alleged in the Complaint, that is also legally erroneous. The availability of an injunction is based on what "the evidence establishes," *Thorpe*, 1996 WL 560173 at *4, not on what is pled in the complaint. A party need only plead facts giving rise to a cause of action, not to a particular form of relief. *See Chaffin v. GNI Croup, Inc.*, 1999 WL 721569, at *7 (Del. Ch. Sept. 3, 1999).

[redacted].

issue injunctions against future breaches of confidentiality obligations, and InterDigital's attempts to distinguish the cases cited by LG fall flat. InterDigital argues that *eCommerce Indus., Inc. v. MWA, Inc.*, 2013 WL 5621678, at *52 (Del. Ch. Sept. 30, 2013), is somehow distinguishable because, unlike the defendant there, InterDigital has not disclosed confidential information "throughout the industry." [AB at 17 (citing *eCommerce*, 2013 WL 5621678 at * 18).] But there is no suggestion in *eCommerce* that the dissemination of information "throughout the industry" played any part in the court's decision to enjoin future breaches. Although the *eCommerce* court does not explain its precise reasons for enjoining future breaches, the more likely facts influencing that decision were that the defendant had "not attempted to cure its breach" or "provided any reasonable assurances that it intend[ed] to cure its breach." *eCommerce*, 2013 WL 5621678. Likewise, here, InterDigital has not attempted to cure its breach or provided assurances that it will cure its breach. To the contrary, InterDigital continues to insist that it has the right to disclose the disputed Settlement Communications.

InterDigital's attempt to distinguish *Venoco, Inc. v. Eson*, 2002 WL 1288703 (Del. Ch. June 7, 2002), is even further off the mark. InterDigital asserts that *Venoco* is "inapposite" because "there are no facts supporting an attempt or intent by InterDigital to facilitate disclosure to the public." [AB at 17.] But the *Venoco* court's injunction against future disclosure of confidential information had nothing

[redacted].

to do with any "disclosure to the public." In fact, the confidential information in *Venoco* was disclosed to only a single individual, and the court never mentions or even hints at any disclosure to the public. *Venoco*, 2002 WL 1288703 at *3, 6. InterDigital's arguments simply do not provide any reason to deviate from the common practice—illustrated in *eCommerce* and *Venoco*—of enjoining against future breaches of confidentiality obligations.

CONCLUSION

For the foregoing reasons, and for the reasons expressed in LG's Opening Brief, LG respectfully requests that this Court reverse the Court of Chancery's decision dismissing LG's claims in favor of arbitration, vacate its order of dismissal, and remand for further proceedings.

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