

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON,

Plaintiff,

v.

LANDMARK TECHNOLOGY A, LLC,

Defendant.

Case No. 2:21-cv-00728-RSM

**DEFENDANT LANDMARK
TECHNOLOGY A, LLC'S MOTION TO
DISMISS UNDER RULE 12(b)(6) OR, IN
THE ALTERNATIVE, TO STRIKE
UNDER RULE 12(f)**

NOTE ON MOTION CALENDAR:
Friday, April 8, 2022

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Defendant Landmark Technology A, LLC (“Landmark”) owns the exclusive right to enforce U.S. Patent No. 7,010,508 (the ’508 Patent). The ’508 Patent remains valid after several federal court actions challenging it, repeated reexamination by the U. S. Patent and Trademark Office, and post-issuance review before the Patent Trial and Appeal Board.

The Washington Patent Troll Prevention Act, RCW Ch. 19.350 (the “Act”) prohibits bad-faith assertions of patent infringement. It attempts to regulate when and how a patent holder may send prelitigation correspondence and compels the patent holder to express certain content in demand letters. But because prelitigation correspondence to accused patent infringers is protected speech, a state law regulating it is unconstitutional unless it is narrowly tailored to achieve a compelling governmental interest. The Court should declare the Act unconstitutional because it prohibits prelitigation speech protected under the Petition Clause of the First Amendment, without a sufficiently compelling state interest. The Act is also unconstitutional under the Washington Constitution because it imposes prior restraints on protected speech.

Additionally, the Act is preempted because it conflicts with federal law. The federal standard for bad-faith patent-infringement assertions requires a showing of both objective baselessness and subjective bad faith proven by clear-and-convincing evidence. In conflict with federal law, the Act imposes liability by preponderance of the evidence without requiring either objective baselessness or subjective bad faith. For example, under the Act, a finding of bad faith can be based on a demand letter that fails to include certain information. Bad-faith evidence under the Act also includes not responding to certain questions from the target of a demand letter. Neither of those amounts to objective baselessness or indicates subjective bad faith.

Through this action, the State of Washington seeks an order prohibiting Landmark from exercising valid patent rights in federal court and from notifying infringers about the ’508 Patent. The State also seeks restitution on behalf of Washington companies that received letters from Landmark accusing them of infringing the ’508 Patent, even though neither a court nor the Patent Office has found that the asserted claims lacked merit.

1 In addition to the Act being unconstitutional and preempted, the State’s specific claims
 2 against Landmark fail for two reasons. First, the State seeks to impose liability for prelitigation
 3 demand letters which are entitled to immunity under the *Noerr-Pennington* doctrine. Second,
 4 Landmark’s alleged conduct—sending letters that identify a patent, the accused infringing
 5 project, and propose a license—is expressly exempted from the Act.

6 Should the Court not dismiss the Complaint, the Court should strike three prejudicial
 7 allegations and requests for relief that have no legal basis. First, the Court should strike the
 8 allegations that the ’508 Patent is invalid. Those allegations are incredibly prejudicial because
 9 they go to the heart of bad faith. Yet, they are indisputably false because under federal law, the
 10 ’508 Patent is presumed valid. Second, the Court should strike the request to enjoin Landmark
 11 from asserting the ’508 Patent because that would be an unlawful prior restraint and exceed relief
 12 authorized under the Washington Consumer Protection Act, RCW Ch. 19.86 (“CPA”). Third,
 13 the Court should strike the restitution request because it exceeds what the CPA authorizes.

14 FACTS

15 A. The ’508 Patent has been reviewed and affirmed valid several times.

16 Landmark is the exclusive licensee of the ’508 Patent, titled “Automated multimedia data
 17 processing network,” which issued in 2006. (Defendant Landmark Technology A, LLC’s Request
 18 for Judicial Notice in Support of Its Motion to Dismiss Under Rule 12(b)(6) or, in the Alternative,
 19 to Strike under Rule 12(f) (“RJN”), ¶ 1, Att. A, U.S. Patent No. 7,010,508 B1.) The ’508 Patent
 20 claims a system for automatically processing and analyzing information presented via remote
 21 inquiries and transmitting data in response to those inquiries. A preferred embodiment described
 22 in the ’508 Patent relates to automating the process of screening loan applications by means of
 23 information sent between a financial institution, credit-reporting bureaus, and at least one
 24 terminal or “station.” (’508 Patent, 1:47–2:11.) The claims are not limited to that embodiment but
 25 cover a variety of remote transactions that involve processing a plurality of transactions,
 26 transmitting and receiving remotely input information, and interactively directing components of
 27 the terminal or “station.” (’508 Patent, Claim 1.)
 28

1 The '508 Patent was granted following a rigorous examination at the United States Patent
 2 and Trademark Office ("Patent Office"). Over ten years, it was repeatedly amended and refined
 3 in response to scrutiny from a patent examiner and the Board of Patent Appeals and
 4 Interferences. (*See* RJN, ¶ 2, Att. B, public record listing the '508 Patent prosecution history.)

5 Following issuance, the '508 Patent was subject to repeated further examination. In 2013,
 6 an alleged infringer sought a Covered Business Method (CBM) review of the '508 Patent. To
 7 obtain a review, a party petitions for it and if there is a likelihood that just one claim could be
 8 invalid, the Patent Trial and Appeal Board grants the petition and begins the review. Here, the
 9 Board granted the petition on the narrow premise that the patent may not meet the definiteness
 10 requirement of 35 U.S.C. § 112. *Ebay Enter., Inc. v. Lockwood* ("*Ebay Enter. P*"), No. CBM2014-
 11 00025, 2014 WL 2150045, at *14 (P.T.A.B. May 20, 2014) (RJN, ¶ 3, Att. C.). But then, after the
 12 patent owner filed extensive briefing on the merits (RJN, ¶ 4, Att. D), supported by expert
 13 testimony that had not been permitted at the time the Board granted the petition (RJN, ¶ 5,
 14 Att. E), the alleged infringer chose to settle rather than proceed with the review. *Ebay Enter., Inc.*
 15 *& Ebay, Inc. v. Lockwood*, No. CBM2014-00025, 2014 WL 5338969, at *1 (P.T.A.B. Oct. 14, 2014)
 16 (RJN, ¶ 6, Att. F.). No decision regarding validity was reached. *Id.*

17 Also in 2013, in response to a request by an anonymous third party, the Patent Office
 18 instituted an *ex parte* reexamination of the '508 patent. At the beginning of reexamination, the
 19 Patent Office confirmed in two separate office actions that claims 1–7 and 16–17 are valid. (RJN,
 20 ¶ 7, Att. G, Feb. 20, 2013 Office Action in Ex Parte Reexamination at 2, 102; RJN, Att. H, July 31,
 21 2013 Office Action in Ex Parte Reexamination at 1, 142.) Then in 2017, following reexamination,
 22 the Patent Office issued a reexamination certificate confirming, again, the validity of claims 1–7
 23 and 16–17. (RJN, ¶ 9, Att. J., Ex Parte Reexamination Certificate (issued Jun. 29, 2017).)

24 In affirming the reexamination, the Federal Circuit held that while the '508 Patent describes
 25 the invention in the context of applying for a loan, the claim scope is broader. *In re Lockwood*, 679
 26 F. App'x 1021, 1023 (Fed. Cir. 2017). Specifically, claims 1–7 and 16–17 cover systems for
 27 applying for and receiving products and services using a network of remote terminals. ('508
 28 Patent, 1:64–67.) The claims describe accessing dynamic data from remote systems over a

1 network connection and using backward and forward chaining to drive interactions between a
2 user and a service provider. (*Id.* at 7:4–13, 8:43–46.)

3 Dozens of accused infringers have sought to invalidate the '508 Patent. A list of now-
4 concluded federal lawsuits in which an accused '508 Patent infringer filed a counterclaim,
5 declaratory-relief claim, or affirmative defense seeking to invalidate the '508 Patent is included on
6 Landmark's contemporaneously filed request for judicial notice. (RJN, ¶ 10.) None succeeded.

7 **B. The Complaint seeks relief based on Landmark sending prelitigation notice letters to**
8 **Washington companies, allegedly in bad faith.**

9 The Complaint alleges “bad faith assertions of patent infringement” in violation of the Act.
10 (Compl. (Dkt. 1-1) ¶ 1.4.) The State alleges that Landmark has enforced the '508 Patent by
11 sending letters to two Washington businesses notifying them of Landmark's patent rights (*See id.*
12 ¶¶ 4.10, 4.20), entering into patent license agreements with four Washington businesses (*id.*
13 ¶ 4.100), and suing five Washington companies for infringement of the '508 patent (*id.* ¶ 4.97).
14 The State cites as bad faith that Landmark (1) sent demand letters without factual allegations
15 relating to the specific target company webpages that it alleges infringes (*id.* ¶ 4.3); and (2) sent
16 demand letters accusing webpages of infringement that are unrelated to loans, loan processing, or
17 credit reporting (*id.* ¶ 4.109).

18 The Complaint seeks a permanent injunction enjoining Landmark from “taking any actions
19 to enforce the '508 patent, including issuing demand letters and/or filing patent infringement
20 lawsuits.” (*Id.* ¶ 7.1.)

21 The Complaint also seeks an award of civil penalties and three forms of restitution under
22 the CPA: (1) “all amounts paid to [Landmark] by target companies”; (2) “all amounts incurred
23 by target companies responding to, or defending against, [Landmark's] unlawful demands”; and
24 (3) “all money and/or property acquired by [Landmark] as a result of its unlawful acts.” (Compl.
25 ¶¶ 7.2, 7.3.)
26
27
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ARGUMENT

I. Request to Dismiss for Failure to State a Claim Under Rule 12(b)(6)

A complaint can be dismissed for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Dismissal is proper when “based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990); *see also* Fed. R. Civ. P. 8(a)(2). While considering a Rule 12(b)(6) motion, the court accepts all facts alleged in the complaint as true and makes all inferences in the light most favorable to the non-moving party. *Baker v. Riverside Cnty. Off. of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009) (citations omitted). The court is not required, however, to accept as true a “legal conclusion couched as a factual allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Generally, a court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion to dismiss. *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001) (citations omitted). The Ninth Circuit, however, carves out certain exceptions to this rule. First, the court may consider documents appended or attached to the complaint. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Second, a court may consider “documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading[.]” *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), overruled on other grounds by *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). Third, a court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment. *See Miles, Inc. v. Scripps Clinic & Research Found.*, 951 F.2d 361 (9th Cir. 1991) (district court did not abuse discretion in judicially noticing a patent when ruling on a motion to dismiss); *see also* Fed. R. Evid. 201.

The Court should dismiss the State’s claims because they lack a cognizable legal theory and fail to allege sufficient facts.

A. The Act is an unconstitutional restriction on protected speech and the right to petition.

The First Amendment prohibits the government from restricting expression based on its message, subject matter, or content. *United States v. Alvarez*, 567 U.S. 709, 716 (2012) (citing *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002)); U.S. Const. amend. I. A law restricting the content of communication is reviewed for strict scrutiny and unconstitutional unless it is narrowly tailored to serve compelling state interests. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015); *see also Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988) (First Amendment protections enforceable against state laws under the Fourteenth Amendment). Under strict scrutiny, the Act is unconstitutional because it infringes on protected prelitigation speech yet does not use the least-restrictive means to achieve a sufficiently compelling interest.

1. The Act restricts prelitigation speech protected under the Petition Clause.

By restricting prelitigation activity, the Act directly implicates rights secured under the First Amendment’s Petition Clause. Prelitigation demand letters are protected speech despite proposing a commercial transaction, such as a prelitigation settlement, and are not themselves commercial speech. *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 935 (9th Cir. 2006). Content-based restrictions on protected speech “are presumptively invalid.” *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). The Act imposes liability for prelitigation “assertions” of patent rights in various forms of communication. RCW § 19.350.010(3). Thus, it is unconstitutional unless the State can show that it is narrowly tailored to achieve a compelling government interest.

2. The Act’s restriction of First-Amendment rights is not justified by a sufficiently compelling state interest.

A statute attempting to restrict or burden First Amendment rights must be narrowly drawn to serve a compelling interest. *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983). The State’s stated interest for the Act is to “protect Washington’s economy from abusive and bad faith assertions of patent infringement.” RCW § 19.350.005. The content restrictions in the Act are not narrowly tailored to that interest.

1 Here, the content restrictions and the State’s interest are insufficiently connected and
2 could be achieved by other, more benign means. For example, requiring a patent holder to state
3 the “name and address of the patent owner or owners or assignee or assignees...” does little to
4 probe the merits of an infringement assertion. Nor does it bear on whether a claim is made in
5 subjective bad faith, much less impact on the State’s economy. In many cases, an exclusive
6 licensee is enforcing the patent—as with Landmark—so ownership is irrelevant to bad faith. Also,
7 ownership and assignment information is usually available on the Patent Office website.

8 In *Riley*, the Supreme Court struck down a statute compelling disclosure of certain financial
9 information in charitable solicitations. 487 U.S. 781. After considering the state’s interests in
10 informing donors of how charitable contributions are spent, the Court found the disclosure
11 requirements hampered both speech and legitimate efforts to fundraise. *Id.* at 799. Numerous
12 “more benign and narrowly tailored options are available.” *Id.* at 800. For example, even absent
13 the requirement, interested donors were free both to inquire about this information and to refuse
14 to donate (*id.* at 799); the state could publish other disclosures (*id.* at 800); or it could enforce
15 antifraud laws to prohibit fundraising based on false statements. *Id.*

16 Here, as in *Riley*, recipients of patent notice communications are free both to ask for more
17 information and to decline to engage with a patent enforcer. If a patent owner sends a fraudulent
18 demand letter, the State could conceivably enforce its antifraud laws to obtain relief.

19 If, as stated in the Act, a patent enforcer fails to provide information requested by the
20 recipient of a demand letter within a reasonable time, there is little to suggest that the recipient
21 suffers from the costs to investigate and defend against infringement claims. Either the patent
22 enforcer is no longer pursuing the claim or there is little risk in declining to license, litigate, or
23 otherwise respond to such communications.

24 In *Alvarez*, the federal government passed a “stolen valor” statute to restrict and punish
25 anyone falsely claiming to have been awarded military awards of honor or valor. 567 U.S. 709. The
26 Court held the statute unconstitutional because the government failed to show a link between the
27 Government’s claimed “interest in protecting the integrity of the military honors system and the
28 act’s restriction on the false claims of liars....” *Id.* at 725. Considering that the Supreme Court

found the First Amendment does not permit outlawing counterfeit awards of valor, to a greater extent the Act here is unconstitutional because it prohibits a patent holder from sending letters with truthful statements if the letters also fail to contain required speech.

3. The Act is also unconstitutional under the Washington Constitution because it imposes prior restraints on protected speech.

The Washington Constitution categorically forbids prior restraints on protected written, spoken, and published speech. *Ino Ino, Inc. v. City of Bellevue*, 132 Wash.2d 103, 117 (1997), amended, 943 P.2d 1358 (1997); *Forbes v. Pierce Cnty.*, 5 Wash. App. 2d 423, 438 (2018). Prior restraints are “official restrictions imposed upon speech or other forms of expression in advance of actual publication.” *State v. Noah*, 103 Wash. App. 29, 41 (2000), as amended on reconsideration (Oct. 30, 2000). Prior restraints prohibit future speech rather than punish speech that has already occurred. *Bradburn v. N. Cent. Reg’l Library Dist.*, 168 Wash.2d 789, 800 (2010). “More specifically, a prior restraint is any government action that tends to suppress or interfere with protected expression before it is ultimately punished through civil or criminal sanctions in a court of law.” *Forbes*, 5 Wash. App. 2d at 438.

Regardless of the subject matter, written material is considered “pure speech” for purposes of a constitutional analysis. *World Wide Video, Inc. v. City of Tukwila*, 117 Wash.2d 382, 388 (1991). Absent a finding of obscenity, the prior-restraint prohibition applies to written material. *See Bitts, Inc. v. City of Seattle*, 86 Wash.2d 395, 396 (1976); *see also Spokane Arcade v. City of Spokane*, 92 Wash. App. 1004 (1998). Because of Washington’s prior-restraint prohibition, the State can only punish “post-publication” speech. *Id.* at 440.

Here, the Act asserts a prior restraint against protected speech by restricting communications asserting patent infringement. *See* RCW § 19.350.010(3). The “bad faith” qualifier does not salvage the Act’s unconstitutional prior restraint. For example, evidence of bad faith under the Act includes an assertion of infringement where a court in another matter found that separate matter to be without merit. RCW § 19.350.020(2)(f). But infringement is analyzed on a case-by-case basis. So, another court finding of no infringement is not dispositive as to a claim against a different accused infringer.

1 In short, the Act constitutes a “classic prior restraint.” *See State v. Coe*, 101 Wash.2d 364,
 2 373 (1984). It prohibits Landmark from sending notice letters to accused infringers. Thus, the
 3 Court should find the Act unconstitutional.

4 **B. The Act is preempted because it conflicts with federal patent law.**

5 The Supremacy Clause of the United States Constitution states that the “Constitution, and
 6 the Laws of the United States ... shall be the supreme Law of the Land.” U.S. Const. art. VI, cl. 2.
 7 Federal preemption of state law takes three forms: express preemption, field preemption, and
 8 conflict preemption. *See, e.g., English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990). In conflict
 9 preemption, state law is preempted where it “stands as an obstacle to the accomplishment and
 10 execution of the full purposes and objectives of Congress.” *Id.* (quotation marks omitted). State
 11 laws that directly conflict with federal patent law are preempted. *See Ultra-Precision Mfg., Ltd. v.*
 12 *Ford Motor Co.*, 411 F.3d 1369, 1377 (Fed. Cir. 2005).

13 State-law regulation of patent assertions are preempted except where the infringement
 14 assertion is shown by clear-and-convincing evidence to be both objectively baseless and made in
 15 subjective bad faith. *Globetrotter Software, Inc. v. Elan Computer Grp., Inc.*, 362 F.3d 1367, 1374
 16 (Fed. Cir. 2004); *Golan v. Pingel Enter., Inc.*, 310 F.3d 1360, 1371 (Fed. Cir. 2002) (federal
 17 standards requires clear-and-convincing evidence). Publication and enforcement of patent rights
 18 is central to the federal patent scheme, because patents “would be of little value if infringers of
 19 them could not be notified of the consequences of infringement, or proceeded against in the
 20 courts.” *800 Adept, Inc. v. Murex Sec., Ltd.*, 539 F.3d 1354, 1369 (Fed. Cir. 2008); *Virtue v.*
 21 *Creamery Package Mfg. Co.*, 227 U.S. 8, 37–38 (1913). Thus, a patent owner’s rights necessarily
 22 include “threatening alleged infringers with suit.” *Concrete Unlimited, Inc. v. Cementcraft, Inc.*, 776
 23 F.2d 1537, 1538 (Fed. Cir. 1985).

24 Because bad faith under federal patent law “includes separate objective and subjective
 25 components,” *Dominant Semiconductors Sdn. Bhd. v. OSRAM GmbH*, 524 F.3d 1254, 1260 (Fed.
 26 Cir. 2008), determining whether a patent holder acted in bad faith involves a two-step inquiry.
 27 First, the plaintiff must show that the infringement allegations were “objectively baseless,”
 28 meaning that “no reasonable litigant could realistically expect success on the merits.” *See GP*

1 *Indus. v. Eran Indus.*, 500 F.3d 1369, 1374 (Fed. Cir. 2007) (quotation marks omitted). Second,
 2 even if a plaintiff shows objective baselessness, it then must also present evidence that the patent
 3 holder acted in subjective bad faith. *See 800 Adept*, 539 F.3d at 1370.

4 Courts have consistently required other states' patent-assertion regulations to require both
 5 objective baselessness and subjective bad faith to survive preemption. *See, e.g., Landmark Tech.,*
 6 *LLC v. Azure Farms, Inc.*, No. 3:18-CV-1568-JR, 2019 WL 3763762, at *6 (D. Or. June 26, 2019)
 7 ("Therefore, to avoid preemption in the case at bar, defendant must allege bad faith including
 8 that the infringement claim is 'objectively baseless in the sense that no reasonable litigant could
 9 realistically expect success on the merits.'"); *Puritan Med. Prod. Co. LLC v. Copan Italia S.p.A.*,
 10 188 A.3d 853, 859, 862-63 (Me. 2018) (both objective baselessness and subjective bad faith
 11 required to survive preemption); *Summer Infant (USA), Inc. v. TOMY Int'l, Inc.*, No. CV 17-
 12 549MSM, 2019 WL 5540224, at *2-3 (D.R.I. Oct. 25, 2019); *Shoflo, LLC v. TSE Servs., LLC*,
 13 No. 6:16-cv-1955-Orl-40TBS, 2017 WL 10080141, at *7 (M.D. Fla. July 12, 2017), *adopted*, 2017
 14 WL 10080150 (M.D. Fla. Aug. 1, 2017) (federal bad-faith standard preempts state from passing
 15 any law that conflicts with federal patent law).

16 As with those other state laws, for the Act to survive preemption its scope would need to be
 17 limited to objectively baseless claims made in subjective bad faith. But as enacted, it far exceeds
 18 those boundaries. For example, nothing in the Act requires a plaintiff to prove that the patent
 19 holder's allegation of patent infringement was objectively baseless. *See* RCW § 19.350.020. And it
 20 attempts to artificially constrain and replace the Federal Circuit's two-part "bad faith" standard
 21 with a list of factors created by state lawmakers. *Id.* Finally, the Act imposes liability for violations
 22 without requiring application of the Federal Circuit's clear-and-convincing-evidence standard.
 23 *See Golan*, 310 F.3d at 1371.

24 It is possible to imagine a case where a plaintiff satisfies both the two-part inquiry required
 25 by federal law and the Act's unitary bad-faith requirement by clear-and-convincing evidence. But
 26 more often, a plaintiff will only satisfy the state standard with a mere preponderance of evidence
 27 since that's all it requires. And that more likely scenario—where a plaintiff proves a violation of
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the Act that would not satisfy the more stringent federal law test—conflicts with federal patent law. Thus, the Act is preempted by federal law and the Court should declare it void.

C. The State’s claims fail because Landmark’s prelitigation notice letters are immune under *Noerr-Pennington* and the sole exception does not apply.

Under the *Noerr-Pennington* doctrine, all forms of petitions to the government, including prelitigation activity, are immunized from liability. *Sosa*, 437 F.3d at 931 (citing *E. R.R. Presidents’ Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965)). The State’s claims are based on (1) Landmark’s transmission of notice letters to alleged infringers of the ’508 Patent. (Compl. ¶¶ 4.1–4.2, ¶ 4.10–4.96), (2) bringing suit to enforce the ’508 Patent (*id.* ¶¶ 4.97–4.99), and (3) licensing the ’508 Patent (*id.* ¶¶ 4.100). These activities are protected under the Petition Clause. *See Sosa*, 437 F.3d at 938; *Rock River Commc’ns, Inc. v. Universal Music Grp.*, 745 F.3d 343, 351 (9th Cir. 2014).

The only exception to *Noerr-Pennington* is the sham exception, under which petitioning activity is not immunized if it is both objectively baseless and in subjective bad faith. *Prof’l Real Estate Invs. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60–61 (1993). A heightened pleading standard applies to state-law claims that seek to impose liability on conduct protected under *Noerr-Pennington*. *Kottle v. Nw. Kidney Centers*, 146 F.3d 1056, 1063 (9th Cir. 1998) (affirming Rule 12(b)(6) dismissal of state-law claims arising from conduct protected under *Noerr-Pennington*). A plaintiff must include allegations of specific activities that bring the conduct into the *Noerr-Pennington* exception. *Prof’l Real Estate Invs.*, 508 U.S. at 60 (1993); *Or. Nat. Res. Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991). The plaintiff must explain “exactly why” the conduct qualifies for the sham exception and why the alleged conduct is not protected. *Mercer Publ’g Inc. v. Smart Cookie, Inc., LLC*, Nos. C12-0188JLR and C12-0550JLR, 2012 WL 12863934 (W.D. Wash. Jul. 25, 2012). The State fails to plead sufficient factual allegations to demonstrate either objective baselessness or subjective bad faith as required to avoid *Noerr-Pennington* immunity.

1. The Complaint fails to allege sufficient facts to show objective baselessness.

The first sham exception prong—objective baselessness—is met only if “no reasonable litigant could realistically expect success on the merits.” *Prof’l Real Estate Invs.*, 508 U.S. at 60.

1 The Complaint seeks to impose liability for conduct that fails to meet this standard.

2 The Act does not require a court to first evaluate objective baselessness. Instead, it permits
 3 a bad-faith finding when certain information—such as the name and address of the patent
 4 owner—isn’t included in a patent-infringement notice letter. *See* RCW § 19.350.020(2)(a). This
 5 factor, and others, have nothing to do with whether a patent enforcer could realistically expect
 6 success on the merits of a subsequent infringement suit. Yet its omission could be used as the
 7 basis of a bad-faith violation. As another example, the court may consider whether a patent holder
 8 previously filed a suit based on equivalent assertions which were found to be without merit. *See*
 9 RCW § 19.350.020(2)(f). But patent assertions as they pertain to one alleged infringer may have
 10 different applicability and merit depending on another infringer’s product and processes.

11 Judge Robart previously considered a complaint for violation of the CPA based on
 12 allegations that the defendant sent cease-and-desist letters to multiple recipients making identical
 13 false accusations of intellectual property infringement. *Mercer Publ’g*, 2012 WL 12863934 at *1.
 14 The court dismissed the complaint for failure to demonstrate objective baselessness under the
 15 heightened pleading standard. *Id.* at *4. Allegations of multiple identical cease-and-desist letters
 16 containing false claims of infringement “may constitute evidence of an alleged ulterior
 17 purpose...” but are not allegations “that suggest that the accused conduct is objectively
 18 baseless.” *Id.* Other courts have dismissed complaints at the pleading stage because allegations of
 19 false accusations of patent infringement are not enough to establish the accusations “were so
 20 unreasonable as to be objectively baseless.” *Matthews Int’l Corp. v. Biosafe Eng’g, LLC*, 695 F.3d
 21 1322, 1326, 1332 (Fed. Cir. 2012). The State’s allegations that Landmark sent identical patent
 22 notice letters to multiple recipients accusing them of patent infringement (Compl. ¶¶ 4.1–4.96)
 23 are identical to the allegations in *Mercer Publishing*. For the same reason Judge Robart dismissed
 24 that case, the Court should dismiss the State’s claims here.

25 The State’s primary allegation in support of objective baselessness is a conclusion that the
 26 ’508 Patent is invalid (Compl. ¶¶ 1.2, 4.104, 5.13, 6.9). But the patent is presumed valid under
 27 U.S.C. § 282(a). The evidentiary burden to demonstrate invalidity rests on the party seeking to
 28 prove invalidity. *Takeda Chem. Indus. v. Alphapharm Pty., Ltd.*, 492 F.3d 1350, 1355 (Fed. Cir.

2007). This burden requires clear and convincing evidence. *Id.* “[I]t will be a rare case in which a patentee’s assertion of its patent in the face of a claim of invalidity will be so unreasonable as to support a claim that the patentee has engaged in sham litigation.” *Tyco Healthcare Grp. LP v. Mut. Pharm. Co., Inc.*, 762 F.3d 1338 (Fed. Cir. 2014); see also *Judkins v. HT Window Fashion Corp.*, 529 F.3d 1334, 1342 (Fed. Cir. 2008) (where the status of a patent “is open to reasonable debate” a court cannot conclude the patentee’s infringement assertions were objectively unreasonable).

The State alleges Landmark asserted the ’508 Patent against companies in industries that are not loan-processing related. (Compl. ¶¶ 1.2; 4.108–4.109.) But a patent’s claims are not limited to the preferred embodiment. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1323 (Fed. Cir. 2005) (en banc). As the Federal Circuit explained, the ’508 Patent’s claims aren’t limited to loan processing but are broader. *In re Lockwood*, 679 F. App’x at 1023. The ’508 Patent expressly states that the claimed “system as described could be applied to other forms of transactions” (’508 Patent, 5:59–60); they cover the kinds of applications against which they have been asserted, such as systems including websites with log-in pages that require remote processing of information from multiple data sources and directing responsive sequences. (’508 Patent, Claim 1.)

The State next claims, without any factual support, that Landmark “fail[ed] to conduct analysis comparing patent claims to target companies’ products, services, or technology before making demands” (Compl. ¶ 5.9) and “fail[ed] to engage in reasonable analysis to establish a reasonable, good faith basis for believing target companies were infringing.” (*Id.* ¶ 5.11.) These unsupported conclusory allegations are insufficient to strip Landmark of *Noerr–Pennington* protection. *See Or. Nat. Res. Council*, 944 F.2d at 535. Like the insufficient bare allegations in *Mercer Publishing* that an IP owner “failed to produce evidence of infringement,” these do not meet the heightened pleading bar and should be dismissed. *See* 2012 WL 12863934 at *4.

Nor can the State rely on the volume of Landmark’s letters to establish a “pattern” that would qualify as objectively unreasonable behavior. Considering a similar argument, the Seventh Circuit recently explained, “We, too, find ‘little logic’ in concluding a petitioner loses the right to file an objectively reasonable petition merely because it chooses to exercise that right more than

once in the course of pursuing its desired outcome.” *U.S. Futures Exch., L.L.C. v. Bd. of Trade of the City of Chicago, Inc.*, 953 F.3d 955, 964–65 (7th Cir. 2020).

Finally, the State alleges that recipients of Landmark’s notice letters file declaratory-judgment actions and that cases involving the ’508 Patent settle. (Compl. ¶¶ 4.98–4.99.) But these allegations don’t show objective baselessness because declaratory-judgment actions and settlements are common in good-faith cases. *See Site Update Sols., LLC v. Accor N. Am., Inc.*, No. 5:11-CV-3306-PSG, 2015 WL 581175, at *13 (N.D. Cal. Feb. 11, 2015) (“[P]atent holders with meritorious arguments may reasonably seek settlements far below the cost of defense...In fact, evidence suggests that it is not uncommon for cases to settle below the average cost of defense.”), *aff’d sub nom. Site Update Sols., LLC v. CBS Corp.*, 639 F. App’x 634 (Fed. Cir. 2016).

There are no factual allegations that show Landmark’s notice letters assert claims about which no reasonable litigant could reasonably expect success. To the contrary, the ’508 Patent has withstood extensive scrutiny from Patent Office examiners, the Board of Patent Appeals and Interferences, and from the Patent Trial and Appeal Board. The ’508 Patent review included an initial prosecution and repeated post-grant examinations. Reexamination serves to resolve validity disputes without the expense of litigation and “strengthen confidence in patents whose validity [is] clouded.” *In re Recreative Techs. Corp.*, 83 F.3d 1394, 1396 (Fed. Cir. 1996). These many reviews resulted in the surviving valid claims being reaffirmed time and again as valid. Courts have recognized that claims confirmed as valid in reexamination carry a “rather formidable presumption of validity.” *In re Laughlin Prod., Inc.*, 265 F. Supp. 2d 525, 529 (E.D. Pa. 2003); *Custom Accessories, Inc. v. Jeffrey-Allan Indus., Inc.*, 807 F.2d 944, 961 (Fed. Cir. 1986). As a matter of law, the State could never prove under these circumstances that “no reasonable litigant could realistically expect success on the merits.” *See Prof’l Real Estate Invs.*, 508 U.S. at 60. So, the State could never satisfy the first prong of the test.

2. The Complaint fails to allege sufficient facts to show subjective bad faith.

The second prong—a party’s “subjective bad faith”—is only considered if the challenged conduct has been demonstrated to be objectively meritless. *See Prof’l Real Estate Invs.*, 508 U.S. at 57. Because the State hasn’t demonstrated objective baselessness, the Court need not consider

1 the subjectivity prong of the sham-exception analysis. *See Theme Promotions, Inc. v. News Am.*
 2 *Mktg. FSI*, 546 F.3d 991, 1008 (9th Cir. 2008).

3 The subjectivity prong turns on whether a party is using the petitioning process—not its
 4 outcome—as a weapon. *Theme Promotions*, 546 F.3d at 1007 (citing *Prof'l Real Estate Invs.*, 508
 5 U.S. at 60–61). Examples of subjectively baseless use of the petition right include, for example,
 6 driving competitors out of businesses, harassing and embarrassing actual and potential purchasers
 7 of a property, bribing officials to secure contracts; or to deny others free and unlimited access to
 8 administrative or judicial tribunals. *Pennington*, 381 U.S. at 670; *Amarel v. Connell*, 102 F.3d 1494,
 9 1519–20 (9th Cir. 1996); *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512 (1972).

10 There's no requirement under the Act that a court assess subjective bad faith. But this
 11 assessment is essential to evaluating the sham exception. *Prof'l Real Estate Invs.*, 508 U.S. at 61;
 12 *see also BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 534 (2002) (“As long as a plaintiff’s purpose
 13 is to stop conduct he reasonably believes is illegal, petitioning is genuine both objectively and
 14 subjectively.”) (emphasis in original). Like the claims dismissed in *State v. TVI, Inc.*, 18 Wash.
 15 App. 2d 805, 824 (2021), and *Wa. League for Increased Transparency & Ethics v. Fox News*, 19 Wash.
 16 App. 2d 1006 (2021), the Act contains no element of intent or subjective bad faith. Nothing in the
 17 Act calls for evaluating the whether the purpose of the prelitigation conduct is to take advantage
 18 of the process, not the outcome.

19 Landmark’s purpose in asserting the ’508 Patent was to enforce its federal patent rights.
 20 The State cannot plead a subversive illegal purpose, such as to interfere with competitors’
 21 business, or to harass, bribe, or interfere with the businesses of other entities. As the exclusive
 22 licensee of the ’508 Patent, Landmark is entitled to enforce it. The purpose of the conduct
 23 Landmark was engaged in was precisely the purpose for which the judicial process is used.
 24 Landmark provided notice of a patent-infringement claim to potential infringers, as required by
 25 the Patent Act, 35 U.S.C. § 287. Landmark is entitled under federal law to sue and seek license
 26 fees from those making use of the technology claimed in the ’508 Patent.

27 The Act imposes liability without the required two-step objective and subjective
 28 baselessness analysis. So, it is not sufficiently narrow to permit the breathing room required by

the First Amendment. U.S. Const. amend. I. And even if the Act was lawful, the State cannot meet the heightened pleading standard for Landmark's conduct. The Court should dismiss the Complaint because it seeks to impose liability for activity immunized under *Noerr-Pennington*.

D. The State's claims fail either because Landmark's notice letters are exempted from the Act, or because the claims are preempted by federal law.

The Act's savings clause states that its provisions do not apply to "a demand letter or civil action that includes a claim for relief arising under...35 U.S.C. Sec. 287." RCW § 19.350.020(6). The Act's legislative history confirms that the Washington Legislature intended to exempt patent-notice letters under Section 287(a): "Demands [sic] letters or assertions of patent infringement that arise under certain federal statutes are exempt. Exempted demand letters include those that relate to ... limitations on damages, markings, and notice." (RJN, ¶ 11, Att. K, WASH. STATE HOUSE OF REPRESENTATIVES, JUDICIARY COMM., HOUSE BILL ANALYSIS OF SSB 5059, Wash. 108-64, at 3 (2015).)

Here, because Landmark's notice letters assert federal patent rights under Section 287(a), they either qualify for the savings clause, or if not, then the State's claims against Landmark are preempted because they conflict with federal law.

1. Landmark's letters are excluded from the Act under the savings clause because they assert federal patent rights by providing actual notice to accused infringers under Section 287(a).

Landmark's notice letters are exempt from the Act because they were sent to provide notice under Section 287 as is required to exercise certain federal patent rights. Section 287(a) provides that infringement damages are only available after providing actual notice to the accused infringer or constructive notice through marking a patented article. *Monsanto Co. v. Bowman*, 657 F.3d 1341, 1348 (Fed. Cir. 2011), aff'd, 569 U.S. 278 (2013). To qualify as actual notice, a letter must be sufficiently specific to support an objective understanding that the recipient may infringe. *Funai Elec. Co. v. Daewoo Elecs. Corp.*, 616 F.3d 1357, 1373 (Fed. Cir. 2010) (citing *Gart v. Logitech, Inc.*, 254 F.3d 1334, 1346 (Fed. Cir. 2001)). The letter must communicate a charge of infringement of specific patents by a specific product or group of products. *Funai Elec.*, 616 F.3d at 1737 (citing

1 *Amsted Indus. Inc. v. Buckeye Steel Castings Co.*, 24 F.3d 178, 187 (Fed. Cir. 1994)). Actual notice is
 2 satisfied where required information is provided in separate letters. *Gart*, 254 F.3d at 1346.

3 Here, the State’s allegations confirm that Landmark’s notice letters satisfy the
 4 Section 287(a) standard. (See Compl. ¶¶ 4.4, 4.6.) The letters communicate a charge of
 5 infringement of a specific patent by a specific product. *See Funai Elec.*, 616 F.3d at 1737. The
 6 Complaint includes as an example “Form demand letter A.” It identifies Landmark, the ’508
 7 patent, and the accused product. (Compl. ¶ 4.4) The Complaint’s allegation of “Form demand
 8 letter B” shows a second letter following up on initial notice, again identifying the ’508 patent and
 9 the accused product. (*Id.* ¶ 4.6) And “Form demand letter C” is also a follow-up letter,
 10 requesting a response to the earlier letter. (*Id.* ¶ 4.8) Thus, Landmark’s alleged letters provided
 11 sufficient specificity under Section 287(a) by identifying its patent and the accused product. As a
 12 result, Landmark became entitled to additional federal patent rights under Section 287(a).

13 The Act, including the savings clause, was intended to avoid “interfering with federal law”
 14 which would result in preemption. *See* RCW § 19.350.005. This is why the Act disclaims any
 15 application to demand letters sent under 35 U.S.C. § 287. *See* RCW § 19.350.020(6). But that is
 16 precisely the application the State is seeking here. Indeed, the bulk of the Complaint concerns
 17 itself with the number, timing, and content of demand letters it alleges Landmark sent.
 18 (*See* Complaint ¶¶ 4.1–4.96.) Thus, the RCW § 19.350.020(6) savings clause excludes notice
 19 letters like Landmark’s, and the State fails to state a claim for violations of the Act.

20
 21 **2. To the extent the Act imposes liability for patent-notice letters like those sent by
 Landmark, it is preempted because it conflicts with Section 287.**

22 Should the court adopt a construction of the savings clause which doesn’t exclude
 23 Landmark’s alleged letters, it is preempted because it conflicts with Section 287(a). Section
 24 287(a) serves three key purposes in support of the federal patent-law regime: “it gives patentees
 25 the incentive to mark their product and, thus, place the world on notice of the existence of a
 26 patent, avoids innocent infringement, and aids the public in identifying patented articles.” *Inline*
 27 *Connection Corp. v. AOL Time Warner Inc.*, 465 F. Supp. 2d 312, 316 (D. Del. 2006) (citing *Nike,*
 28 *Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1443 (Fed. Cir. 1998)); *see also Zenith Elecs. Corp. v.*

Exzec, Inc., 182 F.3d 1340, 1353 (Fed. Cir. 1999) (“privileged right of a patentee to notify the public of its patent rights is statutorily rooted in the patent laws at 35 U.S.C. § 287.”).

The State cannot have it both ways. Either letters sent under 35 U.S.C. § 287 are exempt from the Act—in which case the law does not apply to Landmark’s alleged activity—or the Act conflicts with (and is preempted by) the federal law. *See Shoflo*, 2017 WL 10080141, at *5 (analyzing similar issue under Florida’s analog to Washington’s Act¹); *see also ThermoLife Int’l LLC v. NeoGenis Labs Inc.*, No. CV-18-02980-PHX-DWL, 2020 WL 6395442, at *14 (D. Ariz. Nov. 2, 2020) (applying same principle to Arizona state law on tortious interference when applied to patent demand letters).

Separately, because violations of the Act are subject to mandatory civil penalties under the CPA—*see* RCW § 19.350.030 (violations of the Act are enforceable via the CPA); RCW § 19.86.140, para. 3 (imposing mandatory per-violation \$7,500 civil penalty)—should the Court determine that the savings clause—or any other aspect of the Act which forbids or requires particular conduct—is too vague to determine whether particular conduct is a violation, then it fails to comply with constitutional due process and is void. *See F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). (*See* also Compl. ¶ 7.3 (requesting \$7,500 in civil penalties for each violation of the Act and/or CPA.)

3. The State does not plead facts that plausibly establish either the objective baselessness or subjective bad faith requirements to survive federal preemption.

A state-law claim challenging patent-enforcement activity is preempted and must be dismissed under Rule 12(b)(6) where it fails to plead both objective baselessness and subjective baselessness. *Matthews*, 695 F.3d at 1332. The Complaint fails to plead sufficient facts for either. Instead, the State relies on a conclusory assertion that “the foregoing allegations demonstrate that [Landmark] made assertions of patent infringement that were, in the first place, objectively baseless, and in the second place, made in subjective bad faith.” (Compl. at ¶ 5.12.) This mere

¹ The two state statutes are both called the Patent Troll Prevention Act and are substantively similar. Compare Fla. Stat. § 501.993 with RCW § 19.350.020.

recitation of the standard is insufficient on its face under *Iqbal*. 556 U.S. at 681 (a “formulaic recitation of the elements” is insufficient).

Perhaps realizing this, the State further alleges that “[Landmark’s] misrepresentations regarding the scope and value of the ‘508 patent are objectively baseless and the ‘508 patent’s invalidity likewise renders [Landmark’s] infringement assertions objectively baseless.” (Compl. ¶ 5.12) In addition to being conclusory, this allegation is objectively false. There is no truth to the claim that Landmark’s ‘508 patent is invalid. To the contrary, its current validity is indisputable under federal law and has been confirmed by reexamination. 35 U.S.C. § 282(a).

And with respect to “subjective bad faith,” the State offers no direction as to which of the “foregoing allegations” it is referring to. But a review of the State’s allegations of “bad faith” under the Act finds a laundry list of conclusory allegations that are untethered from supporting facts. (*See* Compl. ¶ 5.9.) Instead, the State focuses on the alleged use of form letters containing “identical infringement allegations” and generalized allegations of “false, misleading or deceptive statements.” (*Id.*) These are elements of bad faith under the Act. But they do not meet the federal standard for subjective bad faith: “a threshold showing of incorrectness or falsity, or disregard for either, is required to find bad faith in the communication of information about the existence or pendency of patent rights.” *Mikohn Gaming Corp. v. Acres Gaming, Inc.*, 165 F.3d 891, 897 (Fed. Cir. 1998). The State never alleges that particular facts in any of the alleged letters is incorrect or false and so, by definition, its Complaint fails to meet the Federal Circuit’s requirements for stating a claim under the “subjective bad faith” standard.

Thus, regardless of whether the savings clause applies or whether the entire Act is preempted, the State’s Complaint must be dismissed because it fails to plead facts sufficient to show that Landmark’s conduct was objectively baseless or done in subjective bad faith as required to survive preemption.

II. Request to Strike Under Rule 12(f)

The Court may strike from a pleading any redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ. P. 12(f). The purpose of Rule 12(f) is “to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues

prior to trial....” *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). A court may strike allegations that create a serious risk of prejudice and confusion of issues. *Fantasy v. Fogarty*, 984 F.2d 1524, 1528 (9th Cir. 1993) (abrogated on other grounds). A court may also strike requested relief that a plaintiff does not have a right to obtain. *Shabaz v. Polo Ralph Lauren Grp.*, 586 F. Supp. 2d 1205 (C.D. Cal. 2008) (“When legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.”) (quoting *Nat’l R. R. Passenger Corp. v. Nat’l Ass’n of R. R. Passengers*, 414 U.S. 453 (1974)).

The Complaint contains repeated false allegations that the ’508 Patent is “invalid” and seeks an award of restitution far in excess of that authorized by the CPA. There is no legal basis for this material in the Complaint. It is highly prejudicial and should be stricken under Rule 12(f).

A. The Complaint’s repeated claim that the ’508 Patent is invalid should be stricken because it is indisputably false, has no legal basis, and poses a substantial risk of prejudice to Landmark.

The Complaint includes multiple allegations that the ’508 Patent is invalid. (Compl. ¶ 1.2 (“In other words, [the ’508 patent] is invalid.”); ¶ 5.13 (“...the ’508 patent’s invalidity likewise renders [Landmark]’s infringement assertions objectively baseless”); ¶ 6.9 (“...with respect to objective baselessness, ... the ’508 patent is invalid.”). The Court may readily determine these allegations are false as a matter of law because under federal law, the ’508 Patent is entitled to a presumption of validity, further enhanced by the reexamination of the Patent Office. 35 U.S.C. § 282(a); *Laughlin Prod.*, 265 F. Supp. 2d at 529; *Custom Accessories*, 807 F.2d at 961.

The State relies for its errant conclusion of the ’508 Patent’s invalidity on a preliminary evaluation by the Patent Trial and Appeal Board (PTAB) in an adversarial proceeding called a Covered Business Method (CBM) Review. CBM Reviews were limited to a subset of patents and could only proceed if a patent was first determined not to be directed toward a “technological invention.” See 35 U.S.C. § 321 note. But determining whether a patent includes a “technological invention” does not determine patent validity. See, e.g., *Dish Network Corp. v. Customedia Techs., L.L.C.*, No. IPR2017-00638, 2017 WL 3058028, *3, n.4 (P.T.A.B. July 18, 2017). Nor is there a requirement that a patent be “technological” to be a valid patent. *Bilski v. Kappos*, 561 U.S. 593,

607 (2010). In its CBM Review of the '508 Patent, the PTAB explicitly stated it did not address validity issues of novelty or obviousness. *Ebay Enter. I*, 2014 WL 2150045, *13–14.

The State's false allegation that the '508 Patent is invalid poses a serious risk of prejudice to Landmark, as it goes to the heart of the State's claim that Landmark is asserting the '508 Patent in bad faith. (*See, e.g.*, Compl. ¶ 5.13 (“... the '508 patent's invalidity likewise renders [Landmark]'s infringement assertions objectively baseless”).) Alleging that Landmark is asserting an invalid patent could support a showing of bad faith, and there does not appear to be any other plausible factual allegation of objective baselessness in the Complaint. Allowing these untrue allegations to remain in the Complaint would create a serious risk of prejudice to Landmark in this matter. The Court should strike them.

B. The State's request that Landmark be enjoined from asserting the '508 Patent should be stricken because it calls for an unlawful prior restraint and because it exceeds relief authorized under the CPA.

The State requests several forms of relief in its Complaint, including for injunctive “relief enjoining [Landmark] from taking any actions to enforce the '508 patent, including issuing demand letters and/or filing patent infringement lawsuits.” (Compl. ¶ 7.1.) The State's request for this injunctive relief should be stricken because it constitutes an invalid prior restraint and because it goes well beyond the relief permitted by the relevant statute.

First, the State's request for injunctive relief preventing Landmark from enforcing the '508 Patent constitutes an invalid prior restraint. A prior restraint is a content-based restriction on speech prior to its occurrence. *Alexander v. U.S.*, 509 U.S. 544, 550 (1993). Enjoining a lawsuit constitutes a prior restraint. *BE & K Constr.*, 536 U.S. at 529.

A prior restraint on First Amendment activities is treated with greater skepticism than after-the-fact penalties. *Id.* (citing *Alexander*, 509 U.S. at 553–54). They are “the most serious and the least tolerable infringement on First Amendment rights.” *Neb. Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976). Any prior restraint bears “a heavy presumption against its constitutional validity.” *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). Prior restraints that provide not for punishment “but for suppression,” cannot stand. *Near v. State of Minn. ex rel. Olson*, 283 U.S. 697, 715 (1931).

Here, the State asks this Court to completely enjoin Landmark from enforcing the '508 Patent in Washington. This injunction is designed not to punish specific bad acts but to suppress Landmark's future petitioning activity. This blanket injunction bears no regard for the merits of any future assertion of the '508 Patent. But any prior restraint must, at the very least, assure prompt judicial review with a "minimal restriction" of First Amendment rights necessary under the circumstances. *Se. Promotions*, 420 U.S. at 562. Preventing a patent holder from engaging in petitioning activity, whether through prelitigation communications or litigation itself, is extreme and draconian. It certainly doesn't meet with the "minimal restriction" test that applies to prior restraints. The Court should reject the State's request for this unlawful relief.

Second, the State's request for injunctive relief preventing Landmark from enforcing the '508 Patent in the State exceeds the relief available under the Consumer Protection Act. The CPA permits limited injunctions of activity that is prohibited by the Act or declared to be unlawful. RCW § 19.86.080(1) (permitting injunctions to "restrain and prevent the doing of any act herein prohibited or declared to be unlawful."). Thus, if the State were entirely successful on its claims, it would be entitled to enjoin "bad faith" prelitigation assertions of the '508 Patent. But the State's request for an injunction seeks to enjoin much more.

The State's requested injunction would also prohibit the filing of lawsuits asserting the '508 Patent. But the Act's definition of "assertions" expressly excludes those made in litigation. RCW § 19.350.010(1)(d). Because the State lacks statutory authority for the injunctive relief requested in Paragraph 7.1, the Contract should strike this requested relief.

C. The State's request for restitution that exceeds the scope authorized under the Consumer Protection Act should be stricken.

The State seeks three forms of restitution: (1) "all amounts paid to [Landmark] by target companies"; (2) "all amounts incurred by target companies responding to, or defending against, [Landmark's] unlawful demands"; and (3) "all money and/or property acquired by [Landmark] as a result of its unlawful acts." But restitution under the CPA is limited to amounts the State can prove were paid to Landmark by specific consumers harmed by a CPA violation.

1 In *State v. Comcast Cable Communications Management, LLC*, the State brought an action
 2 against Comcast alleging violations of the CPA arising from imposing cable subscriptions on
 3 consumers without their consent or adequate product disclosures. 16 Wash. App. 2d 664, 686
 4 (2021). The court issued a verdict for the State but did not award all of the requested restitution.

5 On appeal, the State argued that the award should not have been limited to the roughly
 6 20,000 specific harmed consumers subscribed without consent, compared with the roughly
 7 80,000 who Comcast failed to prove at trial paid for subscriptions. The State claimed that “it
 8 needed to establish only that Comcast had acquired unlawful gains” and not that the consumers
 9 actually paid Comcast for unlawful subscriptions. *Id.* at 685. The State sought to rely on a federal
 10 decision construing the FTC’s available remedies, under which the government was only
 11 required to show that “the amount it seeks in restitution reasonably approximates the defendant’s
 12 unjust gains.” *Id.* (quoting *F.T.C. v. Commerce Planet, Inc.*, 815 F.3d 593, 603 (9th Cir. 2016)). The
 13 court rejected the State’s request for all of Comcast’s alleged “unlawful gains,” holding that a
 14 restitutionary award under the CPA requires the State to prove that “a defendant has unlawfully
 15 acquired property belonging to a consumer.” *Comcast*, 16 Wash. App. 2d at 684 (citing *State v.*
 16 *Ralph Williams’ North West Chrysler Plymouth, Inc.*, 87 Wash.2d 298, 321 (1976).

17 Thus, under *Comcast*, restitution here would be limited to specific payments that the State
 18 can identify at trial as Landmark having unlawfully acquired from consumers arising from
 19 particular violations of the CPA. There does not appear to be any basis for it to seek recovery of
 20 any inflicted costs or other amounts, as those would not have been “unlawfully acquired property
 21 belonging to a consumer.” *Comcast*, 16 Wash. App. 2d at 684. Thus, the references to requests for
 22 “restitution” for amounts that consumers did not pay to Landmark should be stricken.

23 CONCLUSION

24 The State’s claims against Landmark arise from allegedly unlawful patent-assertion letters
 25 which are constitutionally protected speech and central to federal patent law. The Act is both
 26 unconstitutional and preempted by federal law. Similarly, patent-assertion letters are entitled to
 27 immunity under the *Noerr-Pennington* doctrine and the sole exception doesn’t apply. Also, the
 28 Complaint’s factual allegations don’t even support a claimed violation of the Act, as the alleged

1 patent-notice letters were sent under 35 U.S.C. § 287, which is expressly excluded from the Act.
 2 Finally, even if the State's claims weren't legally barred, the Complaint fails to plead sufficient
 3 facts to overcome *Noerr-Pennington* immunity or survive federal preemption. The Complaint
 4 should be dismissed with prejudice under Rule 12(b)(6).

5 In the alternative, in support of its conclusion that the notice letters were objectively
 6 baseless—one of the requirements for the State's claims to fall within the *Noerr-Pennington* sham
 7 exception and to avoid federal preemption—the Complaint alleges that the '508 Patent is invalid.
 8 This is as false as it is prejudicial, as federal patent law provides a presumption of validity and the
 9 '508 Patent has survived multiple reexaminations by the Patent Office. These allegations should
 10 be stricken under Rule 12(f) as well as the unauthorized, unconstitutional request for an
 11 injunction against enforcing the '508 Patent in Washington and the excessive restitution request.

12
 13 Dated: March 4, 2022

Respectfully submitted,

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Certificate of Service

I hereby certify under penalty of perjury under the laws of the United States that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: March 4, 2022

s/ Derek Linke
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