

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

XOCKETS, INC.,

Plaintiff,

v.

**NVIDIA CORPORATION, MICROSOFT
CORPORATION, and RPX
CORPORATION**

Defendants.

Civil Action No. 6:24-cv-453

JURY TRIAL DEMANDED

MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

Xockets, Inc. (“Xockets”) brings this motion to enjoin NVIDIA Corporation (“NVIDIA”), Microsoft Corporation (“Microsoft”), and RPX Corporation (“RPX”) (collectively “Defendants”) from conspiring to depress the value of Xockets’ patent portfolio in violation of the United States antitrust law. Specifically, the Court should prohibit RPX, NVIDIA, and Microsoft from continuing, effectuating, or enforcing any agreement between or among each other or any other entity (other than Xockets) relating to the purchase, use or license of the technology in Xockets’ patents.

Xockets’ technology employs a groundbreaking computing architecture in the network to increase the speed of, and lower the costs for, GPU-enabled generative artificial intelligence. This technology enables the training and development of artificial intelligence which requires massive amounts of data and processing across a cloud. NVIDIA has a monopoly in GPU-enabled artificial intelligence systems. Microsoft’s dominance in the cloud space, in combination with its control over the leading generative AI models in the world, allows it to maintain and/or be in the process of creating a monopoly in GPU-enabled generative artificial intelligence platforms. NVIDIA and Microsoft have formed a cartel to create and/or maintain a monopoly in GPU-enabled generative artificial intelligence. They are being actively investigated by the Department of Justice, the Federal Trade Commission and/or the European Union.

Both NVIDIA and Microsoft rely heavily on Xockets’ patented technology, including but not limited to in the about to launch NVIDIA Blackwell GPU-enabled artificial intelligence servers. NVIDIA states that “[t]he NVIDIA Blackwell architecture *defines the next chapter in generative AI and accelerated computing with unparalleled performance, efficiency, and scale*[.]” And Microsoft and NVIDIA have announced that their “longstanding collaboration” will continue with this new architecture. Instead of acquiring a license or purchasing Xockets’ patents,

however, NVIDIA and Microsoft have simply stolen this technology without paying for it. Then, after Xockets put NVIDIA and Microsoft on notice that they were infringing and sought to negotiate with them, Microsoft and NVIDIA formed a buyers' cartel to fix the price for Xockets' highly valuable patent portfolio at far below the market rate.

The illegal buyers' cartel in this case was facilitated by RPX. RPX was formed at the request of big tech so that these companies could leverage their collective bargaining power and drive down the prices for the intellectual property they are using. For example, RPX has touted on its website that *“[i]n effect, RPX can buy ‘wholesale’ on behalf of our client network, while our clients otherwise would pay ‘retail’ if transacting on their own.”* RPX is able to achieve this because its members, including NVIDIA and Microsoft, collectively agree not to negotiate individually for patent licenses or acquisitions. This deprives sellers of intellectual property, like Xockets, from a competitive market in which to sell their technology unless they capitulate to RPX's lowball offers. RPX was touting that its business model is to form buyers' cartels.

When Xockets reached out to both NVIDIA and Microsoft about licensing or acquiring its patents, they refused to engage even though they had every incentive to seize at an opportunity to gain the first and potentially exclusive legal access to this groundbreaking technology—technology that both companies have publicly admitted is critical to their current business. Instead, it was RPX who reached out to Xockets to do a licensing deal on behalf of what it euphemistically refers to as its “members,” which it has indicated included NVIDIA and Microsoft.

This is a buyer-side price fixing conspiracy. If it occurred in any other context besides patents, the FTC and the Department of Justice would be prosecuting. Because NVIDIA and Microsoft are in the process of creating or maintaining a monopoly in GPU-enabled generative artificial intelligence, Xockets would have no choice but to accept whatever price RPX proposed

if it wanted to license its patents to these dominant entities. The Court should prohibit Defendants from continuing with this unlawful scheme.

II. FACTUAL BACKGROUND

A. Xockets' Groundbreaking Technology Is Stolen By NVIDIA and Microsoft

The advent of GPU-enabled artificial intelligence cloud computing has radically changed the computing industry. GPU-enabled artificial intelligence cloud computing requires specialized hardware and software, and the ability to manipulate massive amounts of data both within a server rack, as well as across the cloud.

Xockets' patented architecture uses innovative Data Processing Units, or DPUs, to offload, accelerate and isolate critical data-intensive tasks that would otherwise overburden GPU-enabled artificial intelligence servers. Declaration of Jason Sheasby ("Sheasby Decl.") Ex. 34 ¶ 3 (listing Xockets' patents). For example, Xockets' patents describe offloading cloud computing tasks such as security, networking, and storage operations, as well as the brokering of collective communications critical for the efficient training of large language models and related in-network computing operations used to implement machine learning/artificial intelligence (ML/AI) in the cloud. *Id.* ¶¶ 5-6. As another example, Xockets' patents describe using these offload processors to form a new cloud switching fabric that accelerates data intensive computing operations in the cloud. *Id.* ¶ 6. Xockets' patented DPU paradigm extends computing intelligence into the network, enabling the AI revolution underway in the world today. *Id.*

NVIDIA and Microsoft were both well aware that they are using Xockets' technology. In 2015, Xockets demonstrated its DPU virtual switch computing and switching architecture in its StreamSwitch product at Strata, the premier network technology conference in the world. Complaint ¶ 19. In March 2017, after a large company expressed an interest in acquiring Xockets, Xockets' Dan Alvarez reached out to Microsoft's Ulrich Homann (Corporate Vice President,

Cloud and AI) and Jim Brisimitzis (General Manager, Cloud Developer Relations) with a call for bids. *Id.* The call for bids provided an overview of Xockets’ technology and the fact that Xockets already had a large number of issued patents on the technology. Sheasby Decl. ¶ 37. In response, Mr. Homann responded that the “concept resonates and the team would like to understand in more depth.” *Id.* ¶ 38. Mr. Homann directed Xockets to interface with Saurabh Kulkarni (Director of Engineering, Cloud and AI System Technologies) and Kushagra Vaid (VP and Distinguished Engineer, Azure Infrastructure). *Id.* Ultimately, Xockets’ founder and lead inventor Dr. Dalal had a discussion with Mr. Kulkarni and Tanj Bennett (Partner SDE) on March 22, 2017, so they could “get a technical overview of key Xockets technologies in the hardware acceleration space.” *Id.* Thereafter, Mr. Kulkarni informed Dr. Dalal that he was reaching out to folks from Microsoft’s “big data and machine learning teams” in order to make an introduction. *Id.*

NVIDIA was likewise on notice of Xockets’ technology. NVIDIA began its business in the graphics market. However, users soon realized that NVIDIA’s graphics processors could be used as very high-performance server processors to perform massive technical number crunching. This led NVIDIA to begin selling more expensive processors into more lucrative markets such as cryptocurrency. NVIDIA eventually realized that it needed to move from being a component vendor to being a system designer and provider. The solution NVIDIA hit upon to enable this jump was to take Xockets’ patented technology.

Following the publication of Xockets’ patent applications and its public demonstrations of its pioneering new DPU-based architecture, NVIDIA abandoned conventional CPU and GPU-centric approaches and embraced implementing Xockets’ patented architecture by utilizing DPUs for cloud offload processing. NVIDIA’s CEO, Jensen Huang, has repeatedly touted NVIDIA’s use DPU technology that was invented by Xockets. *See, e.g.,* Sheasby Decl. ¶¶ 2-27. Microsoft has

privileged access to NVIDIA's GPU-enabled artificial intelligence servers which implement Xockets' technology. *Id.* ¶¶ 28-32. Both NVIDIA and Microsoft publicly promote Microsoft's use of the accused NVIDIA systems that copy Xockets' technology. *Id.* ¶¶ 29-35 (listing examples).

After it discovered that NVIDIA's systems relied on its patented technology, Xockets reached out to NVIDIA regarding its technology. On January 27, 2022, Dr. Dalal, communicated with NVIDIA's Brad Genereaux (Global Lead, Healthcare Alliances) and asked for an introduction "NVIDIA legal IP Counsel" in order to discuss "some very strategic IP" that "NVIDIA would be interested in acquiring." *Id.* ¶ 40. Dr. Dalal sought to present NVIDIA the opportunity to acquire exclusive rights to Xockets' patent portfolio. *Id.* After making an internal inquiry, Mr. Genereaux ultimately connected Dr. Dalal with Gady Rosenfeld on February 4, 2022. *Id.*

Mr. Rosenfeld was "leading the DPU segment in the NVIDIA field organization" at that time. *Id.* ¶ 41. Indeed, Mr. Rosenfeld's LinkedIn profile reflects that he has been NVIDIA's Vice President, DPU Business since July 2021 and remains in that role today. *Id.* Dr. Dalal and Mr. Rosenfeld had a Teams meeting on February 10, 2022 to discuss Xockets and its IP. Dr. Dalal walked Mr. Rosenfeld through exemplary claim charts and explained the nature of Xockets' patented technology. Complaint ¶ 172. Mr. Rosenfeld indicated during that meeting that the technology was "extremely interesting." *Id.* Later that same day, Dr. Dalal emailed Mr. Rosenfeld sample claim charts and a list of Xockets' then-current patent list covering breakthrough DPU technologies essential to AI. Sheasby Decl. ¶ 42. Mr. Rosenfeld told Dr. Dalal that he would discuss Xockets' patent portfolio with NVIDIA's legal department and then follow up on next steps. Complaint ¶ 173.

Attached as Exhibits 36-39 are exemplary charts showing that NVIDIA's about to launch Blackwell architecture that Microsoft is integrating into its GPU-enable AI platform uses Xockets' patented technology. Sheasby Decl. ¶ 55. Although a showing of a reasonable likelihood of infringement is not necessary for this preliminary injunction, these charts provide further corroborating evidence as to why NVIDIA and Microsoft have entered into a buyers' cartel in order to drive down pricing.

B. Defendants' Buyers' Cartel

Instead of negotiating independently for licenses to Xockets' patented technology, which NVIDIA and Microsoft have publicly admitted they rely on, NVIDIA and Microsoft chose to form a buyer's cartel to fix the price to license Xockets' portfolio. In early 2024, when Xockets was engaged in the process to sell or license its technology in light of the fact that the industry had simply taken Xockets' technology without permission, Xockets reached out to both Microsoft and NVIDIA about a potential licensing deal or sale, but received no direct response. Sheasby Decl. ¶ 43; Ex. 34 ¶¶ 7-9.

Instead, Microsoft and NVIDIA conspired to negotiate collectively through RPX only. RPX was formed by big tech funders to protect the interests of big tech companies. It was founded in 2008 and has more than 450 members. Sheasby Decl. ¶ 44. RPX's has touted its ability to obtain lower price licensing deals for its members through collective bargaining. For example, RPX's website previously stated (in language that has since been removed) that "[i]n effect, RPX can buy 'wholesale' on behalf of our client network, while our clients otherwise would pay 'retail' if transacting on their own." *Id.* ¶ 45. The RPX website also previously advertised that "RPX is often able to achieve 'wholesale' pricing terms, where we can acquire rights for our members at significantly reduced cost relative to what the NPE might charge an individual company on its

own.” *Id.* ¶ 46. RPX believes we have saved our members tens of millions of dollars through these wholesale-priced transactions.” *Id.* RPX took down this statement from its website. It is not a shock that RPX has tried to hide the nature of its operations. This is a description of an illegal buyers’ cartel.

Operating an illegal buyers’ cartel remains RPX’s business to this day. For example, RPX’s most recent 10-K filing with the SEC in 2018 explain its mission of interjecting itself as the “essential intermediary” between patent owners and RPX’s members. *Id.* RPX becomes the “essential intermediary” because its interested “members” agree amongst themselves not to negotiate individually. RPX’s current website also explains how it collaborates with its members and non-members to create anti-competitive buyers’ cartels, what it euphemistically calls “syndicated licensing transactions” *Id.* ¶ 49. RPX previously highlighted the benefits of these syndicated transactions for its clients on its website, in language that has since been removed, stating that “[o]ur clients see distinct advantages of syndicated purchasing through RPX, as we are uniquely situated to structure transactions that are ultimately less costly and deliver more value to participating clients than if any attempted individual licensing or unilateral purchasing of the portfolios.” *Id.* ¶ 50.

In 2024, after Microsoft and NVIDIA refused to negotiate independently the purchase or licensing of Xockets’ patents, RPX suddenly reached out to representatives of Xockets to discuss Xockets’ portfolio. In May 2024, RPX’s CEO, Dan McCurdy, contacted a Xockets’ representative. Sheasby Decl., Ex. 34 ¶ 9. During the conversations, Mr. McCurdy made statements to the effect that Mr. McCurdy was being directed by members who were aware of an available portfolio of intellectual property. *Id.* The Xockets portfolio was the only available portfolio that the

representatives was involved with at the time. *Id.* Mr. McCurdy indicated he would approach Xockets’ sellers agent to consider next steps. *Id.*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] NVIDIA and Microsoft formed a cartel that uses RPX as the “essential intermediary.” *See* Sheasby Decl. ¶ 46.

III. LEGAL STANDARD

In the Fifth Circuit, a plaintiff is entitled to a preliminary injunction upon a showing of “(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.” *Whirlpool Corp. v. Shenzhen Sanlida Elec. Tech. Co., Ltd.*, 80 F.4th 536, 543 (5th Cir. 2023). None of these “prerequisites has a fixed quantitative value. Rather, a sliding scale is utilized, which takes into account the intensity of each in a given calculus.” *Mock v. Garland*, 75 F.4th 563, 587 (5th Cir. 2023). Here, each of these factors clearly weigh in favor of preliminarily enjoining Defendants’ anticompetitive conduct.

IV. XOCKETS HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON ITS SHERMAN ACT SECTION 1 CONSPIRACY CLAIM

To demonstrate that its claims are likely to succeed, Xockets “need not prove that [it] is entitled to summary judgment.” *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 582 (5th Cir. 2013). Instead, Xockets only needs to “present a prima facie case.” *Id.* As courts have held in the antitrust context, “it will ordinarily be enough that the plaintiff has raised

questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.” *Brandeis Mach. & Supply Corp. v. BarberGreene Co.*, 503 F.2d 503 (6th Cir. 1974) (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2nd Cir. 1953)). That standard is satisfied here. As alleged in Xockets’ Complaint, and as demonstrated further below, Defendants have violated Section 1 by conspiring to negotiate for a license with Xockets solely on a collective basis thereby fixing a price for these patents that is far below their true market value.

Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade.” 15 U.S.C. § 1. In this case, Defendants have engaged in a classic buyer-side or monopsony price fixing conspiracy. As the Fifth Circuit has explained, “[i]n the monopsony or oligopsony price-fixing case . . . the seller faces a Hobson’s choice: he can sell into the rigged market and take the depressed price, or he can refuse to sell at all.” *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1158 (5th Cir. 1979). That is exactly the choice that Xockets faces here. RPX’s members, including NVIDIA and Microsoft, have agreed to refrain from negotiating with Xockets on an individual basis for a license to or purchase of Xockets’ patents as they would in competitive market. Instead, they have agreed to negotiate collectively through RPX only. And because NVIDIA and Microsoft, both alone, and in combination with RPX’s other members, make up virtually the entire market for licensing Xockets’ patents, Declaration of Dr. Andreas Groehn, (“Groehn Decl.”) ¶ 15, they can effectively set the price.

An agreement to “fix prices,” such as this one, “is the archetypal example” of an unlawful antitrust conspiracy. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). Indeed, one court has already held in a similar case involving RPX (*Cascades Computer Innovation LLC*

v. RPX Corp), that such conduct constitutes an antitrust violation: by “acting only through RPX, the Manufacturing Defendants could maintain a single-buyer market with the requisite market power to drive the price of Cascades’ licenses to sub-competitive levels.” *Cascades Computer Innovation LLC v. RPX Corp.*, 2013 WL 6247594, at *9 (N.D. Cal. Dec. 3, 2013). Other courts have reached similar conclusions in cases involving patent licensing monopsonies. *See, e.g., Sony Elecs., Inc. v. Soundview Techs., Inc.*, 157 F. Supp. 2d 180, 187 (D. Conn. 2001) (finding antitrust conspiracy adequately pled where plaintiff alleged that “the television manufacturers agreed on a license price, and that they engaged in a joint boycott and concerted refusal to deal.” Thus, “the rejection of Soundview’s license offer was not the result of marketplace economics.”); *Gould v. Gen. Photonics Corp.*, 1979 WL 25064, *1 (N.D. Cal. Mar. 2, 1979) (“The court finds that there are genuine issues of fact as to plaintiffs’ allegations that General Photonics and other members of the laser industry agreed to resist licensing and to coerce plaintiffs to license the conspirators on terms dictated by the group.”) (denying summary judgment)

To prove a violation of Section 1, a plaintiff must demonstrate that the defendant “(1) engaged in a conspiracy (2) that restrained trade (3) in a particular market.” *Spectators’ Commc’n Network Inc. v. Colonial Country Club*, 253 F.3d 215, 220 (5th Cir. 2001).

A. Defendants Have Conspired to Fix Prices

An antitrust conspiracy consists of “concerted action, defined as having ‘a conscious commitment to a common scheme designed to achieve an unlawful objective.’” *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 271 (5th Cir. 2008) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). Acting in concert includes situations where defendants “authorize[] [another entity] to take certain actions on their behalf, knowing that others were doing the same thing.” *See N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 357 (5th Cir. 2008). Such

“concerted action” may be shown by “either direct or circumstantial evidence.” *Golden Bridge*, 547 F.3d at 271. Here, there is both.

1. Direct Evidence of Defendants’ Conspiracy

The “direct” evidence that Defendants have engaged in a conspiracy to fix the prices for Hocketts’ patents consists of RPX’s own description of its business model. According to RPX’s securities filings, its “mission” is to “***transform the patent market*** by establishing RPX as the ***essential intermediary*** between patent owners and operating companies.” Sheasby Decl. ¶ 46. RPX achieves this goal by facilitating concerted licensing negotiations among operating companies who otherwise would be competing against each other for licenses and/or patent purchases. This allows RPX to leverage lower prices for its members. As RPX once explained on its website:

our ability to transact on behalf of a large number of companies enables us to remove risk for the patent owner, which leads to more advantageous pricing. ***In effect, RPX can buy ‘wholesale’ on behalf of our client network, while clients otherwise would pay ‘retail’ if transacting on their own.***”

Sheasby Decl. ¶ 45; (emphasis added). RPX boasts in summary, “There’s Safety in Numbers. Huge Cost Savings, Too.” Sheasby Decl. ¶ 48; This is the definition of monopsony.

RPX’s website also explains how it creates anti-competitive buyers’ cartels, what it euphemistically calls “syndicated licensing transactions”: [i]n addition to our core patent acquisition service, RPX also facilitates large-scale syndicated licensing transactions[.]” Sheasby Decl. ¶ 50. These syndicated transactions are a core part of RPX’s strategy to become an “essential intermediary.” Sheasby Decl. ¶ 46. As RPX’s 10-K filings explain, RPX “***substantively act[s] as an agent to acquire patent rights from a seller on behalf of clients***” under these buyer-cartel arrangements. Sheasby Decl. ¶ 46. These statements constitute clear evidence of a conspiracy because, absent their agreements with each other and RPX to only negotiate as a group, the

“members” could not obtain “wholesale” prices via forced patent owner negotiation with RPX. As the *Cascades* court explained when faced with a similar allegation against RPX:

Also supporting this conclusion are the alleged public statements in which RPX describes its ability to achieve “wholesale” pricing for its members, that is, pricing that is substantially lower than what companies would pay if they acted individually. (FAC ¶¶ 21–22.) ***Implicit in those statements is a proviso that wholesale pricing can be achieved through RPX but not independently.*** The allegations plausibly describe an invitation to common action, and to have RPX coordinate that action. ***If the purpose of negotiating through RPX is to achieve “wholesale” pricing, then the advantage of collective bargaining through RPX is realized only if the other Manufacturing Defendants also decide to negotiate a license through RPX.*** The evidentiary facts alleged in the FAC lend plausibility to the allegation that “RPX, by publicly stating its intention to accumulate purchaser-side market power ... has, in essence, invited each of the [M]anufacturing [D]efendants to participate in a scheme to artificially drive the price or license fee of acquiring the ‘750 [P]atent below the competitive rate.” (FAC ¶ 38(e).)

Cascades, 2013 WL 6247594, at *11 (denying motion to dismiss). Here, because the vast majority of the companies that form the market for Xockets’ patents are RPX members, including co-conspirators NVIDIA and Microsoft, RPX and its members are effectively able to destroy normal free market forces that would set licensing prices. Groehn Decl. ¶ 22; *see also N. Tex. Specialty*, 528 F.3d at 357 (“[T]he FTC reasoned that ‘it is enough that participating physicians individually authorized NTSP to take certain actions on their behalf, knowing others were doing the same thing’ . . . We agree with the Commission that the fact that physicians could reject offers by NTSP does not establish that there was no agreement on price.”).

2. Circumstantial Evidence of Defendants’ Conspiracy

There is also ample circumstantial evidence that Defendants have conspired to fix the price of Xockets’ patent portfolio below market rates. In assessing whether parallel conduct was the result of a conspiracy, courts in the Fifth Circuit consider various “plus factors,” including “(1) actions that would be against the defendants’ self-interest if the defendants were acting independently, but consistent with their self-interest if they were acting in concert; (2) a motive to

conspire; [and] (3) opportunities to conspire.” See *Acad. of Allergy & Asthma v. Superior Healthplan, Inc.*, 2022 WL 18076843, at *13 (W.D. Tex. July 14, 2022), *report and recommendation adopted*, 2022 WL 18034365 (W.D. Tex. Oct. 18, 2022). Courts also consider “the existence of an ongoing government investigation.” *Kjessler v. Zaappaaz, Inc.*, 2019 WL 3017132, at *10 (S.D. Tex. Apr. 24, 2019). Here, each of these plus factors are present.

First, despite the fact that Microsoft and NVIDIA were fully aware of Xockets’ groundbreaking technology and its value, they have, against their clear individual self-interest, repeatedly declined to negotiate over lawful access to this technology. As detailed above, Xockets introduced its revolutionary new computing architecture (the DPU) in the fall of 2015 and subsequently demonstrated its technology to Microsoft in 2016 and 2017. Section II.A, *supra*; Sheasby Decl. ¶¶ 37-38. Microsoft initially expressed interest, noting that the “concept resonates and the team would like to understand in more depth.” *Id.* ¶ 39.

Xockets also had extensive discussions with NVIDIA about its DPU technology in 2021 and 2022. *Id.* ¶¶ 39-41. NVIDIA too initially expressed interest in this technology. The head of its DPU business indicated during these discussions meeting that the technology was “extremely interesting.” Complaint ¶ 172.

The DPU has since been critical to NVIDIA’s and Microsoft’s business. NVIDIA, including its CEO Jensen Huang, has repeatedly touted the benefits of the DPU, which Xockets’ technology enables:

A lot of the data movement is done on the CPU. It makes no sense. ***You have to offload that to a data processing unit, or DPU, which is what a SmartNIC is.*** The onion, celery, and carrots – you know, the holy trinity of computing soup – is the CPU, the GPU, and the DPU. . . . A DPU is going to be programmable, it’s going to do all of that processing that you and I have already talked about, and it’s going to offload the movement of data into the granular processing of the data as it’s being transmitted and keep it from ever bothering the CPUs and GPUs and avoid redundant copies of data. ***That’s the architecture of the future.***

Sheasby Decl. ¶ 5; *see also id.* ¶¶ 2-27 and Section II.A, *supra* (detailing additional examples)

Both NVIDIA and Microsoft have refused to negotiate for a patent license from Xockets on an individual basis. Instead, they have simply stolen Xockets' technology and refused to bargain at all except collectively through RPX. In 2024, as Xockets was again exploring the sale of its highly valuable patent portfolio, Xockets reached to out to both Microsoft and NVIDIA about acquiring exclusive rights to Xockets' patents. Sheasby Decl. ¶ 43, Ex. 34 Ex. 35. Neither company even responded to these inquiries. *Id.*

Instead, it was RPX who reached out to Xockets about a potential licensing agreement on behalf of its "members" Microsoft and NVIDIA. In May of 2024, RPX's CEO, Dan McCurdy, contacted a Xockets representative to set up a meeting. Sheasby Decl., Ex. 34 ¶ 9; Ex. 35 ¶ 5. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

NVIDIA and Microsoft's refusal to respond to Xockets, coupled with RPX's sudden appearance, is strong evidence that NVIDIA and Microsoft were acting collusively through RPX, having the latter do their deal negotiation, which is exactly what RPX professes to its members is its entire purpose. If NVIDIA and Microsoft had been acting independently, their decision to forgo negotiating for rights to Xockets' patents (including exclusive rights that were on the table; Sheasby Decl. ¶ 40) makes no economic sense in a properly operating market. By negotiating individually, each would have had the opportunity to obtain a first mover advantage, which would have given them a clear competitive advantage in the market as they would be the only company

that would be able to lawfully exploit the highly valuable DPU technology. Groehn Decl. ¶¶ 27-28. Such conduct against individual self-interest raises an “inference of interdependent action.” *Golf City, Inc. v. Wilson Sporting Goods, Co.*, 555 F.2d 426, 435 (5th Cir. 1977) (“Actions against the apparent individual economic self-interest of the alleged conspirators may raise an inference of interdependent action. . . .”). As the court in *Cascades* explained:

Under these circumstances, the Manufacturing Defendants’ lack of response to Cascades’ individual, \$5 million licensing offers, notwithstanding the offers’ rebate for the first to accept, plausibly suggests the existence of an agreement among Manufacturing Defendants to refrain from dealing individually with Cascades. The allegations also support a reasonable inference that RPX coordinated responses amongst the Manufacturing Defendants in the course of acting as their negotiating agent.

Cascades, 2013 WL 6247594, at *10; *see also In re Credit Default Swaps Antitrust Litig.*, No. 13MD2476 DLC, 2014 WL 4379112, at *10 (S.D.N.Y. Sept. 4, 2014) (plaintiff had alleged “evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators” where defendants had each turned down “sizeable first-mover advantages”).

The second “plus factor” supporting an inference of a conspiracy is that Defendants had obvious “opportunities to conspire.” *Acad. of Allergy & Asthma*, 2022 WL 18076843, at *13. While “opportunity” alone is not sufficient to demonstrate a conspiracy, “the existence of an opportunity to effectuate the alleged conspiracy takes on additional weight” where, as here, it is coupled with evidence “that the parallel conduct was against the . . . Defendants’ individual self-interest.” *In re Pool Prod. Distrib. Mkt. Antitrust Litig.*, 988 F. Supp. 2d 696, 714 (E.D. La. 2013). For, example, courts have held that common membership in organizations, such as trade associations, can give rise to an inference that each member was engaged in a conspiracy because such associations can be used to coordinate anticompetitive conduct. *See, e.g., In re Cal. Bail Bond Antitrust Litig.*, 2022 WL 19975276, at *11 (N.D. Cal. Nov. 7, 2022) (SCAC raised a

suggestion of a preceding agreement based on . . . participation in trade associations that provide “opportunities to exchange information or make agreements.”).

RPX is far more than a mere trade association. It is designed for the *specific purpose of coordinating the acquisition of patents and licenses among its members*. See *In re Turkey Antitrust Litig.*, 642 F. Supp. 3d 711, 727 (N.D. Ill. 2022) (finding that allegations of trade membership evinced a conspiracy where “the trade association memberships were not in fact typical, but rather a method for facilitating cooperation”). In other words, unlike most antitrust conspiracy cases, RPX presented Microsoft and NVIDIA with a ready vehicle through which to orchestrate a buyer-cartel against Xockets and to fix prices in the market to purchase/license Xockets’ patents. This case is thus similar to *Sony Elecs. v. Soundview Techs.*, 157 F. Supp. 2d 180 (D. Conn. 2001). There, the court found the plaintiff’s conspiracy assertions were sufficient where the plaintiff had “alleged that an industry association, which markets itself as helping members ‘enhance their own competitive position in the marketplace’ and to provide ‘strength in numbers’ to ‘protect your company’s business interests’” and “that association members did not respond to its letter announcing its intention to license its patent.” *Id.* at 187. That is exactly what occurred here.

Third, RPX, Microsoft, and NVIDIA not only had the opportunity to conspire, but they also had the “motive” to do so. See *Acad. of Allergy & Asthma*, 2022 WL 18076843, at *13. As discussed above, RPX’s entire business model hinges on it being able to offer its members “wholesale” pricing by forcing patent owners to negotiate through RPX rather than through multiple potential buyers/licensees. See Sheasby Decl. ¶¶ 45-46; Groehn Decl. ¶¶ 21-22. Moreover, RPX can extract additional revenue from its members beyond their standard membership fees when it facilitates “syndicated licensing deals” the same way. Sheasby Decl. ¶

50. Thus, RPX would directly profit from an antitrust conspiracy to fix prices. *See, e.g., Alarm Detection Sys., Inc. v. Vill. of Schaumburg*, 930 F.3d 812, 828 (7th Cir. 2019) (“Profits through coordination can be relevant to whether a conspiracy is inferable; when an agreement to resist competition would increase profits, there is a potential motive to conspire.”); *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 781–82 (2d Cir. 2016) (fact that defendant would obtain “increased profits” from the conspiracy “evinced a common motive to conspire”). NVIDIA and Microsoft similarly had a motive to conspire to drive down the price of Xockets’ patent portfolio. Given the value of Xockets’ technology, if Microsoft and NVIDIA (as well as RPX’s other members) had to actually bid against each other, the price of Xockets’ portfolio would increase, and Xockets would have been able to recoup the immense benefits that its technology afforded. By conspiring, Microsoft and NVIDIA are able to keep financial benefits of Xockets’ technology to themselves for far below the price governed by normal, non-collusive market conditions. *See* Groehn Decl. ¶¶ 21-26.

As a separate opportunity to conspire, NVIDIA and Microsoft have a long-term collaboration on the implementation of DPU-based architecture for artificial intelligence. Sheasby Decl. ¶¶ 31-35. NVIDIA and Microsoft are closely linking their servers and platforms so that their dominance in each field becomes self-reinforcing. Microsoft’s offering become practically interoperable only with NVIDIA servers and vice versa so that companies desiring GPU-enabled generative AI if they chose NVIDIA are driven towards Microsoft platforms, and if they chose Microsoft platforms are driven towards NVIDIA.

The final plus factor supporting the inference of a conspiracy here is “the existence of an ongoing government investigation.” *Kjessler*, 2019 WL 3017132, at *10. NVIDIA is currently under investigation in multiple jurisdictions, including the United States, for anticompetitive

conduct, including price fixing. For example, the Department of Justice recently initiated “two separate probes into Nvidia regarding antitrust concerns.” Sheasby Decl. ¶ 52. It faces further scrutiny from antitrust regulators in Europe and Britain. *Id.*; Ex 27 (July 30, 2024 Letter to the DOJ) (“Nvidia’s anti-competitive practices have raised grave concerns about price-fixing and bundling — concerns that have already led to French antitrust enforcement action and scrutiny by regulators in the European Union and the United Kingdom.”). Moreover, France’s national competition regulator, the Autorite de la concurrence, recently issued report outlining “[t]he risk of abuse by chip providers,” specifically NVIDIA, within the generative AI industry. Sheasby Decl. ¶ 53. These include “price fixing, production restrictions, unfair contractual conditions and discriminatory behavior.” *Id.* Microsoft is also under anti-trust investigation because of its de facto control over the dominant large language artificial intelligence models in the world. *Id.* ¶ 54.

These investigations directly relate to the conspiracy at issue here as they are part of NVIDIA and Microsoft’s joint efforts to monopolize GPU-enabled artificial intelligence. NVIDIA and Microsoft have a long-standing “collaboration” in which Microsoft has gained privileged access to NVIDIA’s cloud computing technology for generative AI. Sheasby Decl. ¶ 31. NVIDIA has over 90% of the GPU-enabled AI server market, while Microsoft/OpenAI (with which Microsoft a partnership) have over 70% of the GPU-enabled AI platform market. Groehn Decl. ¶ 17. If one member of a GPU-enabled AI cartel (which represents the vast majority of the demand for Xockets’ DPU technology) controlled Xockets’ technology, the cartel would collapse because then one member that controlled Xockets’ technology would have lawful market power over the other members of the cartel. Therefore, the entities that dominate the demand for Xockets’ technology have an incentive to form a buyers’ cartel as part of their larger strategy to monopolize the GPU-enabled AI industry.

Moreover, regardless of whether the above investigations relate specifically to the monopsony conspiracy to fix prices related to Xockets' patent portfolio, they are nonetheless "probative of broadly anticompetitive conduct in the" generative AI industry. *Kjessler*, 2019 WL 3017132, at *11 (quoting *In re Generic Pharm. Pricing Antitrust Litig.*, 338 F. Supp. 3d 404, 452 (E.D. Pa. 2018)).

B. Defendants' Price Fixing Conspiracy Restrains Trade

There is also ample evidence satisfying the second element of a Section 1 conspiracy claim, i.e., Defendants' conspiracy constitutes a restraint on trade. *Network Inc.*, 253 F.3d at 220. To determine whether a conspiracy restrains trade (or, in other words, injures competition), courts apply three analytical frameworks: "per se," "quick look," and "rule of reason." *Teladoc, Inc. v. Tex. Med. Bd.*, 112 F. Supp. 3d 529, 536 (W.D. Tex. 2015); *see also Always Towing & Recovery, Inc. v. City of Milwaukee*, 2 F.4th 695, 704 (7th Cir. 2021) ("We draw on several analytical frameworks to assess whether a contract amounts to an unreasonable restraint of trade: among them, the per se, rule of reason, and quick look analyses."). Per se analysis is applicable here, but even if it were not, Defendants conduct is clearly anticompetitive under all three of these analytical frameworks.

1. Defendants' price fixing conspiracy is a per se restraint of trade

As the Supreme Court has explained, "certain agreements or practices are so 'plainly anticompetitive,' and so often 'lack . . . any redeeming virtue,' that they are conclusively presumed illegal without further examination." *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979) (internal citations omitted). Chief among these are agreements to interfere with or fix prices. "Price is the 'central nervous system of the economy' and an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face." *Nat'l Soc. of Prof'l Eng'r v.*

U.S., 435 U.S. 679, 692 (1978) (internal citations omitted). Thus, as noted above, an agreement to fix prices “is the archetypal example” of an antitrust violation. *See Catalano*, 446 U.S. at 647.

This is true with both buyer-side and seller-side price fixing conspiracies. *Vogel v. Am. Soc. of Appraisers*, 744 F.2d 598, 601 (7th Cir.1984) (“[B]uyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal per se.”); *see also Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 68 S.Ct. 996, 1005-06 (1948) (An agreement to fix prices is “condemned by the Act[] even though the price-fixing was by purchasers, and the persons specifically injured under the treble damage claim are sellers, not customers or consumers.”).

To qualify as “price fixing,” the agreement need not set forth a specific price:

Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.”

U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940). Rather, the key question is whether the agreement is designed to depress prices below market rate. *Id.* at 222 (“An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used.”).

That is precisely what Defendants have done here. As explained above, RPX’s entire business model rests on its ability to obtain lower “wholesale” licensing rates for its members by bargaining collectively on its members’ behalf—in other words, it lowers the market price by having its member act in concert through RPX. This falls squarely within the category of agreements that the Supreme Court has labeled as per se unlawful price fixing.

2. Defendants' Agreement Restrains Trade Under A Quick Look Analysis

Even if this Court were to conclude that Defendants' conduct was not unlawful per se, a "cursory examination" of Defendants' agreement demonstrates that it unduly restrains trade. XI Areeda & Hovenkamp ¶ 1911a, at 295–96 (“[A] certain class of restraints, while not unambiguously in the per se category, may require no more than cursory examination to establish that their principal or only effect is anticompetitive.”). This “quick look” approach applies where an “observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.” *N. Tex. Specialty Physicians*, 528 F.3d at 360 (quoting *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999)). A “quick look” analysis is particularly appropriate where “the challenged practices [bare] a ‘close family resemblance’ to other practices ‘that already stand[] convicted in the court of consumer welfare.’” *Realcomp II, Ltd. v. FTC.*, 635 F.3d 815, 826, n.4 (6th Cir. 2011) (quoting *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005)).

At the very least, Defendants' buyers' cartel bears a “close family resemblance” to anticompetitive price fixing scheme. It also bears all of the hallmarks of anticompetitive conduct under the quick look approach. In *Cal. Dental Ass’n*, the Supreme Court noted that “an absolute ban on competitive bidding” was obviously anticompetitive even under a “quick look.” *Cal. Dental Ass’n*, 526 U.S. at 770. That is exactly what at least RPX, Microsoft, and NVIDIA have done—i.e., eliminated competitive bids by agreeing to only negotiate collectively through RPX. The Court has also “made clear that a pure restriction on output is anticompetitive and in the absence of special circumstances, would violate the antitrust laws.” *A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239, 247–48 (3d Cir. 2001) (citing *NCAA*, 468 U.S. at 85). Here, Defendants have necessarily limited output by agreeing not to separately negotiate on an individual

basis. Indeed, as a result of this anticompetitive scheme, licenses for Xockets' portfolio have been reduced to *zero* despite their substantial value.

Defendants have thus acted “in concerted action to increase [their] bargaining power” in order to drive down the demand and price for Xockets' patents. *N. Texas Specialty Physicians*, 528 F.3d at 367-68. In *Texas Specialty Physicians*, the Fifth Circuit affirmed a finding that such conduct was anticompetitive under a “quick look” even absent any evidence it had any actual effects on the market, e.g., in the form of “higher prices.” *Id.* In contrast, here, the market effects have been dramatic. Xockets is currently unable to license its patents in the GPU-enabled AI industry, and cannot do so unless it negotiates with RPX and accepts a price far below their market rate. Groehn Decl. ¶ 25.

Because Defendants' buyer's cartel is anticompetitive under a “quick look” analysis, the burden shifts to Defendants to show that this cartel somehow has countervailing “procompetitive effects” that make competitive beneficial overall. *Id.* Defendants cannot possibly satisfy this burden. Even assuming there are any procompetitive effects of Defendants' collusive scheme, they are clearly outweighed by its detrimental ones. As Dr. Groehn demonstrates in the declaration he has submitted concurrently with this Motion, conspiracies by licensees to depress the prices paid for licenses make it difficult for innovators to obtain sufficient return on their investments. Groehn Decl. ¶¶ 30-33.

This both entrenches the position of established firms while preventing new entrants from gaining footholds into new areas technology. *Id.* This in turn will discourage innovation and harm consumers. *Id.* As Dr. Groehn explains:

This act of price fixing and creating monopsony power depresses licensing or acquisition fees for Xockets' patent portfolio to a level below market value and the value that the technology contributes. Further, it threatens to create pervasive harm to the market for the supply of innovations—extending to inventors far beyond

Xockets—in the cloud computing and artificial intelligence (AI) sectors, as inventors will anticipate that the deployment of a buyer’s cartel (RPX) will pervasively depress the returns available to them, and beyond. Diminished supply of upstream innovation will ultimately depress the quality-adjusted price and output of downstream cloud computing and AI equipment and services. It will thus ultimately reduce consumer welfare overall.

Even if RPX or the threat of using RPX is not explicitly used in any given circumstance, RPX’s mere existence increases the bargaining power of its members in negotiations with potential licensors, and thereby drives down licensing fees or prices paid for technology acquisitions. This is because it is common knowledge that RPX is always available as an option to wield against the licensor. RPX openly touts its ability to be an “essential intermediary” between patent owners and operating companies. RPX would only be “essential” if it had the cooperation of its members who refuse to negotiate deals on an individual basis. As past litigation against RPX and the academic literature has recognized, the existence of RPX has the potential to create pervasive harm to innovation that extends beyond the present case and the present inventor.

Concerted action by RPX, Microsoft and Nvidia greatly harm firms in the market for innovations supplied to cloud computing and AI service providers and equipment manufacturers. If such conduct is tolerated, then not just Xockets but other inventors who target cloud computing and AI applications can anticipate that there will be significant limits on their ability to monetize their technology in line with its value contribution. This will in the long-term reduce consumer welfare by slowing the pace of innovation and the rate of introduction of significant new products. This could also reduce quality-adjusted output and result in higher quality-adjusted prices for AI and cloud computing products and services in the future. In short, the effects of monopsony power will be felt not just in the relevant purchasing market, but in upstream markets for the supply of innovation, and ultimately in the downstream markets for the supply of products and services.

In effect, the distribution of value of patented inventions may be quite wide, but the distribution of returns that owners of these patents can realise is much narrower and “truncated” as a result of the collusive conduct, i.e., high value patents might only be able to get prices that are appropriate for low value technologies. This truncation of available returns is a strong disincentivizing signal for innovators..

Id. ¶¶ 11, 26, 31-32.

Moreover, Defendants’ conduct not only harms competition with respect to the market for

Xockets' patents, it also harms competition in the downstream markets for the market for GPU-enabled AI servers, which is controlled by NVIDIA, and the market for GPU-enabled AI platforms, which is controlled by Microsoft. As noted above, NVIDIA controls over 90% the market for GPU-enabled AI systems and Microsoft, through its partnership with Open AI, controls 70% of the market for GPU-enabled AI platforms. *Id.* ¶ 17. By driving down the costs of Xockets' patents, Microsoft and NVIDIA can continue their dominance of these markets. If successful, this will harm invocation and allow NVIDIA and Microsoft to unilaterally increase prices within these markets.

In sum, Defendants' conspiracy has no pro-competitive justification that could excuse Defendants' conduct.

3. Defendants' Conspiracy Restrains Trade Under The Rule Of Reason

Finally, Defendants' conspiracy is also an unlawful restraint of trade under a rule of reason analysis. "The rule of reason requires courts to conduct a fact-specific assessment of 'market power and market structure . . . to assess the [restraint]'s actual effect' on competition." *Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018). A plaintiff "can make this showing directly or indirectly." *Id.* at 542. Direct evidence of "anticompetitive effects" include "'proof of actual detrimental effects [on competition],' such as reduced output, increased prices, or decreased quality in the relevant market." *Id.* (internal quotations omitted). In the case of a monopsony conspiracy, where the conspiring parties are buyers not sellers, direct effects would include "restricted purchases and subcompetitive prices." *Le v. Zuffa, LLC*, 2024 WL 195994, at *3 (D. Nev. Jan. 18, 2024).

Here, the direct evidence of anticompetitive effects is clear. As noted above, Defendants' scheme has essentially eliminated all licensing activity with respect to Xockets' patents. Because NVIDIA and Microsoft have agreed not to compete for a license and can simply steal Xockets'

technology in the interim, and because RPX is forcing negotiations through itself (as opposed to its members, including NVIDIA and Microsoft), licensing output in the market for Xockets' patents has effectively been reduced to zero. The market price for Xockets' patents has also been reduced, as it is basically a take it or leave it, RPX's price or nothing from Microsoft or NVIDIA (or any of RPX's other members).

Even setting this aside, there is also ample "indirect evidence" of anticompetitive effects. Indirect evidence consists of "proof of market power plus some evidence that the challenged restraint harms competition." *Am. Express Co.*, 585 U.S. at 542. Here, the relevant market is "the market for purchase, acquisition or licensing of technology covered by Xockets' patents." Groehn Decl. ¶ 16. Defendants collectively possess power over this market. Indeed, RPX effectively controls this market as, in addition to Microsoft and NVIDIA, its members include other companies that make up any additional demand for Xockets' patented technology. *See* Sheasby Decl. ¶ 44; Groehn Decl. ¶ 19. Moreover, NVIDIA and Microsoft alone possess substantial market power. NVIDIA holds a dominant share above 90% of the GPU-enabled AI server market, and Microsoft (in combination with its partners) have over 70% of the GPU-enabled artificial intelligence platform market. Groehn Decl. ¶ 17. This makes NVIDIA and Microsoft the dominant potential purchasers of Xockets' technology, which enables NVIDIA and Microsoft's GPU-enabled artificial intelligence servers and platforms. Together, they can exert substantial leverage over the market for Xockets' technology. *See, e.g., Acad. of Allergy & Asthma*, 2017 WL 11824765, at *15 ("Market power is a necessary ingredient in every case under the Rule of Reason[,] but the existence of market power cannot be reduced to a determination of a firm's market share... even firms that lack market share may exert market power when they—either alone

or in coordination with other firms—exhibit the ‘ability to exclude other sources of supply.’”) (quoting *PSKS, Inc. v. Leegin Creative Leather Prod.*, 615 F.3d 412, 418 (5th Cir. 2010)).

There is also clear evidence that Defendants’ “restraint harms competition” within these markets. *Am. Express Co.*, 585 U.S. at 542. As discussed above, not only have Defendants effectively excluded Xockets from selling or licensing its technology unless Xockets will accept a rate that is far below the technology’s true market value, but the economic evidence demonstrates that licensor cartels, like this one, cause a host of anticompetitive harms, including discouraging innovation and entrenching dominant firms all of which ultimately harms consumers. See Section IV.B.2, *supra.*; Groehn Decl. ¶¶ 30-31. Thus, in addition to harming competition within the market for Xockets’ patents, Defendants’ buyer cartel will also harm the downstream markets for GPU-enabled AI servers and the market for GPU-enabled AI platforms, which are dominated by Microsoft and NVIDIA respectively. See Section IV.B.2, *supra.* These harms clearly outweigh any procompetitive justification for Defendants’ cartel, even assuming any such justification exists.

In sum, regardless of which framework the Court applies, there is ample prima facie evidence that Defendants’ conspiracy constitutes a restraint of trade under Section 1.

C. Defendants Have Restrained Trade in A Particular Market

The final element of a Section 1 conspiracy claim is whether Defendants have restrained trade in “a particular market.” *Network Inc.*, 253 F.3d at 220. An antitrust market generally consists of the “product” at issue and all reasonable “substitutes for it.” *Apani Sw., Inc. v. Coca-Cola Enter., Inc.*, 300 F.3d 620, 626 (5th Cir. 2002). In a “monopsony situation,” “the market is not the market of competing sellers but of competing buyers. [The] market is comprised of buyers who

are seen by sellers as being reasonably good substitutes.” *Campfield v. State Farm*, 532 F.3d 1111, 1118 (10th Cir. 2008) (quoting *Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001)).

As noted above, the market implicated by Defendants’ conspiracy is the Xockets’ Patents Market. With respect to the Xockets’ Patents Market, the “substitutes” in this market consist of all entities that purchase, acquire, or license Xockets’ technology. See Groehn Decl. ¶¶ 15-16. Microsoft and NVIDIA alone dominate this market. When combined with its other members, RPX represents essentially the entirety of the market.

The market for Xockets’ patents constitutes a viable monopsony market for Section 1 purposes. For example, in *Cascades*, the court approved the market for “purchase, acquisition or licensing of technology covered by’ all the Elbrus Patents.” *Cascades*, 2013 WL 6247594, at *14. Even outside the monopsony context, courts have held that a company’s patent portfolio can constitute its own market. See *Intell. Ventures I LLC v. Cap. One Fin. Corp.*, 99 F. Supp. 3d 610, 621 (D. Md. 2015) (holding that a “patent financial-services portfolio” constituted a viable antitrust market). Here, as explained above, Defendants have conspired to fix the prices in the market for purchase, acquisition, or license of Xockets’ patents. Thus, all three elements of a Section 1 claim have been satisfied.

V. XOCKETS HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON ITS SHERMAN ACT SECTION 2 CONSPIRACY CLAIM

Xockets will also likely succeed on its second claim under Section 2 of the Sherman Act, which makes it unlawful to “combine or conspire with any other person or persons, to monopolize [or monopsonize] any part of the trade or commerce.” 15 U.S.C. § 2. A Section 2 claim has four elements: “(1) the existence of a combination or conspiracy; (2) overt acts done in furtherance of the combination or conspiracy; (3) an effect upon a substantial amount of interstate commerce; and (4) the existence of specific intent to monopolize [or monopsonize].” *J.T. Gibbons, Inc. v.*

Crawford Fitting Co., 704 F.2d 787, 796 (5th Cir. 1983). Here, each of these elements are satisfied for many of the same reasons discussed above.

As for the first element, the standard of demonstrating the “existence of a conspiracy” under both Section 1 and Section 2 of the Sherman Act are essentially the same. *See Granddad Bread, Inc. v. Cont’l Baking Co.*, 612 F.2d 1105, 1111–12 (9th Cir. 1979) (“Although the essential elements of a Section One offense are substantially different than for a Section Two offense, when a combination or conspiracy is charged under Section Two, then a prima facie case under either section has the same prerequisite, that is, a showing of concerted action by the defendants.”); *see also Steward Health Care Sys., LLC v. Blue Cross & Blue Shield of R.I.*, 311 F. Supp. 3d 468, 503, n. 38 (D.R.I. 2018) (“[T]he Court need not separately discuss Steward’s conspiracy-to-monopolize and conspiracy-to-monopsonize claims, as the relevant analysis is the same.”). Thus, for all the reasons explained above, there is sufficient prima facie evidence demonstrating that NVIDIA, Microsoft, and RPX conspired to fix prices in the market for Xockets’ patents below the market rate.

As for the second element, Defendants have engaged in numerous acts “in furtherance of” their conspiracy. Specifically, both Microsoft and NVIDIA have refused to negotiate individually with Xockets. And in furtherance of Defendants’ conspiracy, RPX approached Xockets to acquire a license for its members, including Microsoft and NVIDIA.

As for the third element, Defendants’ conspiracy affects “a substantial amount of interstate commerce.” NVIDIA and Microsoft are two of the largest companies in the world with customers throughout the United States. The technology at issue, the DPU, enables the training and use of large language models AI, which constitutes a multi-billion-dollar industry that spans the nation and likely the globe. *See Groehn Decl.* ¶¶ 16-17. Indeed, since the introduction of Xockets’ designs,

NVIDIA's market capitalization has increased from \$170 billion to approximately \$3 trillion. Sheasby Decl. ¶ 6.

Finally, as to the fourth element, the evidence demonstrates that Defendants had “the specific intent to [monopsonize]” the market for Xockets’ patents. As demonstrated above in connection with the Section 1 claim, Defendants’ conspiracy—indeed, RPX’s very business model—depends on RPX’s ability to control, by agreement of its members, negotiations in this market and establish a single price for Microsoft and NVIDIA, as well as the rest of RPX’s members. This is because “*the advantage of collective bargaining through RPX is realized only if the [RPX’s members] also decide to negotiate a license through RPX.*” *Cascades*, 2013 WL 6247594, at *11; *see also id.* at *15 (denying motion to dismiss claim for conspiracy to monopsonize under Section 2). Similarly, “*if the purpose of negotiating through RPX is to achieve ‘wholesale’ pricing, then the advantage of collective bargaining through RPX is realized only if the other [members] also decide to negotiate a license through RPX.*” *Id.* at *11; *see also N. Tex. Specialty*, 528 F.3d at 357 (“[I]t is enough that participating physicians individually authorized NTSP to take certain actions on their behalf, knowing others were doing the same thing[.]”). That is why no RPX member (including NVIDIA and Microsoft) has individually negotiated to obtain any rights to Xockets’ undeniably valuable patent portfolio, demonstrating that Defendants not only sought to achieve a monopsony, but successfully did so.

In sum, there is prima facie evidence demonstrating that Defendants’ conduct satisfies the elements of a Section 2 claim.

VI. XOCKETS HAS SUFFERED ANTITRUST INJURY

In addition to showing that the elements of a Section 1 and Section 2 claim are satisfied, a plaintiff must also show that they have suffered an “antitrust injury.” *Dr. ’s Hosp. of Jefferson, Inc. v. Se. Med. All., Inc.*, 123 F.3d 301, 305 (5th Cir. 1997) (“Antitrust injury must be established for

the plaintiff to have standing under section 1 or section 2 of the Sherman Act.”). Antitrust injury is “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 97 S.Ct. 690, 697 (1977). Here, this test is satisfied. Xockets’ injury—namely loss revenue from the inability to sell or license its patents at a competitive price—flows directly from Defendants’ anticompetitive buyers’ cartel. *See, e.g., Sony Elecs., Inc. v. Soundview Techs., Inc.*, 281 F. Supp. 2d 399, 402 (D. Conn. 2003) (“Soundview’s inability to procure licensing agreements is plainly an ‘injury in fact to its business or property,’ and Soundview is the most directly injured person with respect to non-licensure of the ‘584 patent”) (finding antitrust injury); *Dr. ’s Hosp. of Jefferson*, 123 F.3d at 305 (“DHJ’s alleged losses and competitive disadvantage because of its exclusion from SMA fall easily within the conceptual bounds of antitrust injury.”).

VII. XOCKETS HAS SUFFERED AND WILL CONTINUE TO SUFFER IRREPARABLE INJURY

Absent an injunction prohibiting Defendants from continuing with their anticompetitive scheme to depress the market value of Xockets’ patents, Xockets will suffer irreparable injury. “An injury is irreparable if it cannot be undone through monetary remedies.” *Interox Am. v. PPG Indus., Inc.*, 736 F.2d 194, 202 (5th Cir. 1984). At the preliminary injunction stage, the movant need not show that such an injury has already materialized (although here it has). Rather, “a strong threat of injury is sufficient.” *Proofpoint, Inc. v. Boone*, 2021 WL 5194724, at *5 (W.D. Tex. Sept. 21, 2021), *report and recommendation adopted*, 2021 WL 7184208 (W.D. Tex. Nov. 4, 2021). Here, Defendants’ conduct threatens at least three irreparable harms any one of which by itself would warrant an injunction.

First, as demonstrated above, Xockets has shown harm to competition. That alone constitutes irreparable injury. *See Cal. v. Am. Stores Co.*, 492 U.S. 1301, 1304 (1989) (The

“lessening of competition ‘is precisely the kind of irreparable injury that injunctive relief under section 16 of the Clayton Act was intended to prevent.’”) (citations omitted); *see also Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022–23 (9th Cir. 2016) (“A lessening of competition constitutes an irreparable injury under our case law.”) (holding that creation of a monopsony constituted irreparable injury).

Second, an “injury to [a patentee’s] licensing program” also constitutes irreparable harm. *See Software Rsch., Inc. v. Dynatrace LLC*, 316 F. Supp. 3d 1112, 1138 (N.D. Cal. 2018) (denying defendant’s motion to dismiss plaintiff’s prayer for injunctive relief); *see also Commonwealth Sci. v. Buffalo Tech. Inc.*, 492 F. Supp. 2d 600, 604, 608 (E.D. Tex. 2007) (granting an injunction where patentee “relie[d] heavily on the ability to license its intellectual property to finance its research and development”). As discussed above, Xockets offered both Microsoft and NVIDIA the opportunity to buy or license its patents or license them. By instead stealing Xockets’ technology and then conspiring to negotiate for a license collectively through RPX, Defendants are attempting to force Xockets into an impossible choice: either agree to RPX’s demand for a lower-than-market price which will then effectively license the entire market for Xockets’ patents, or else do not agree to that, and in return receive no revenues at all, which if it continues, will eventually drive Xockets out of business. Sheasby Decl., Ex. 34, ¶ 10; *see Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174, 1179 (5th Cir. 1989) (“[P]ossibility of going out of business is irreparable harm.”); *see also id.* (“[E]conomic loss” can constitute irreparable harm where it is “so great as to threaten the existence of the movant’s business.”). In addition, Xockets has the right, depending upon the offered terms, to choose only to grant an exclusive license to the highest bidder; but Defendants’ conspiracy is essentially forcing on Xockets a grant of a license to both NVIDIA and Microsoft, as well as RPX’s other members. Thus, if left unchecked, Defendants’

conspiracy will starve Xockets out of existence and preclude it from being able to pursue its preferred business model. Sheasby Decl., Ex. 34 ¶¶ 10-11. This harm is difficult to quantify and thus irreparable. See *Universal City Studios, Inc. v. Kamar Indus., Inc.*, No. H-82-2377, 1982 WL 1278, at *8 (S.D. Tex. Sept. 20, 1982) (“[T]he threatened injury to plaintiffs’ incipient licensing program, cannot be adequately quantified and compensated in damages.”).

Finally, Xockets is currently in acquisition phase and trying to sell its business to potential investors. Sheasby Decl., Ex. 34 ¶ 12. Xockets’ inability to license its patents at fair market rights, however, has depressed the company’s value, discouraging potential buyers. *Id.* The “loss of potential [business] partners and business opportunities” is difficult to measure and thus can constitute irreparable injury. *Proofpoint, Inc.*, 2021 WL 5194724, at *5. Absent an injunction prohibiting Defendants from continuing their price fixing conspiracy, harms outlined above will continue unabated.

VIII. THE BALANCE OF EQUITIES FAVORS AN INJUNCTION

While Xockets will suffer substantial injury absent an injunction, Defendants will suffer no injury if an injunction issues. *Whirlpool Corp.*, 80 F.4th at 543 (preliminary injunction warranted where the “threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted”).

First, Xockets’ proposed injunction simply prohibits Defendants from continuing with their unlawful conspiracy. Specifically, Xockets requests that the Court prohibit Defendants from “continuing, effectuating, or enforcing any agreement between or among each other or any other entity (other than Xockets) relating to the purchase, use or license of Xockets’ technology.” It is well established that a defendant does not have a cognizable interest in continuing to violate the law. See *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021) (“Finally, the balance of equities weighs heavily in plaintiffs’ favor because the only harm to the Bar is the inability to extract mandatory

dues from the plaintiffs in violation of the First Amendment, which is really ‘no harm at all.’”); *see also Jackson v. Nat’l Football League*, 802 F. Supp. 226, 232 (D. Minn. 1992) (“[D]efendants have no justifiable interest in continuing to violate the Sherman Act by preserving an illegal status quo.”).

Second, if an injunction issues, this would at most mean that Defendants would no longer be able to operate a cartel in the GPU-enabled artificial intelligence market. Even if this could somehow be characterized as a harm, it is a “purely monetary” one that is clearly outweighed by the numerous irreparable injuries to Xockets outlined above. *Buffalo Tech. Inc.*, 492 F. Supp. 2d at 606 (“The harm Buffalo faces by an injunction is purely monetary, whereas the harm CSIRO faces if no injunction issues has far reaching effects.”); *Venture Glob. Gator Express, LLC v. Land*, 2021 WL 4290760, at *7 (E.D. La. Sept. 21, 2021), *aff’d sub nom.* No. 22-30281, 2023 WL 1965439 (5th Cir. Feb. 13, 2023) (“The harm that would result to Plaintiff if the injunction is not issued outweighs the monetary interest of Defendants.”). For each of the above reasons, the balance of hardships favors a preliminary injunction.

IX. PUBLIC INTEREST FAVORS A PRELIMINARY INJUNCTION

Finally, a preliminary injunction will not “disserve the public interest.” *Whirlpool Corp.*, 80 F.4th at 543. In fact, it will do just the opposite. For of all the reasons explained above, Defendants’ buyer cartel constitutes a substantial restraint on competition. Granting an injunction would thus “serve the public interest by assuring that competition is ‘untainted by unfair advantage.’” *Union Carbide Corp. v. UGI Corp.*, 731 F.2d 1186, 1192 (5th Cir. 1984) (affirming grant of injunction). Indeed, the very purpose of the antitrust laws are “to safeguard a strong public interest in free and open competition.” *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 692 (1975) (Douglas, J., concurring). Thus, Xockets’ Motion should be granted.

X. CONCLUSION

For all of the reasons stated above, the Court should enter the following injunction: RPX, NVIDIA, and Microsoft shall refrain from continuing, effectuating, or enforcing any agreement between or among each other or any other entity (other than Xockets) relating to the purchase, use or license of Xockets' technology.

Dated: September 5, 2024

Respectfully submitted,

/s/ Max Ciccarelli

Max Ciccarelli (SBN 00787242)

CICCARELLI LAW FIRM

100 N 6th Street, Suite 503

Waco, Texas 76701

Telephone: 214-444-8869

Email: max@ciccarellilawfirm.com

Jason G. Sheasby (*pro hac vice forthcoming*)

IRELL & MANELLA LLP

1800 Avenue of the Stars

Suite 900

Los Angeles, CA 90067

Tel.: 310.277.1010

Fax: 310.203.7199

Email: jsheasby@irell.com

Jamie H. McDole (SBN 24082049)

Lead Counsel

Phillip B. Philbin (SBN 15909020)

Michael D. Karson (SBN 24090198)

David W. Higer (SBN 24127850)

Miranda Y. Jones (SBN 24065519)

Grant Tucker (SBN 24121422)

Matthew L. Vitale (SBN 24137699)

WINSTEAD PC

2728 N. Harwood Street

Suite 500

Dallas, Texas 75201

Tel.: (214) 745-5400

Fax: (214) 745-5390

Email: jmcdole@winstead.com

pphilbin@winstead.com

mkarson@winstead.com

dhiger@winstead.com

mjones@winstead.com

gtucker@winstead.com

mvitale@winstead.com

Austin C. Teng (SBN 24093247)

Nadia E. Haghghatian (SBN 24087652)

WINSTEAD PC

600 W. 5th Street

Suite 900

Austin, Texas 78701

Tel.: (512) 370-2800

Fax: (512) 370-2850

Email: ateng@winstead.com

nhaghghatian@winstead.com

ATTORNEYS FOR XOCKETS, INC.

CERTIFICATE OF CONFERENCE

Because this Motion is being filed with the Complaint, Plaintiff does not know who will be representing Defendants, and therefore was unable to confer with Defendants' counsel. Therefore, it is presumed that this Motion may be opposed.

/s/ Max Ciccarelli

CERTIFICATE OF SERVICE

Plaintiff will cause a copy of this motion to be served on the Defendants with the service of the Complaint in this action.

/s/ Max Ciccarelli
