

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

**Civil Action No. 9:13-cv-80567-DMM
(Consolidated for Pretrial)**

ZENITH ELECTRONICS LLC, PANASONIC
CORPORATION, U.S. PHILIPS CORPORATION,
and THE TRUSTEES OF COLUMBIA
UNIVERSITY IN THE CITY OF NEW YORK,

Plaintiffs,

v.

CRAIG ELECTRONICS INC.,

Defendant.

Civil Action No. 9:13-cv-80567-DMM

JURY TRIAL DEMANDED

ZENITH ELECTRONICS LLC, PANASONIC
CORPORATION, U.S. PHILIPS CORPORATION,
and THE TRUSTEES OF COLUMBIA
UNIVERSITY IN THE CITY OF NEW YORK,

Plaintiffs,

v.

CURTIS INTERNATIONAL LTD.,

Defendant.

Civil Action No. 9:13-cv-80568-DMM

JURY TRIAL DEMANDED

ZENITH ELECTRONICS LLC, PANASONIC
CORPORATION, U.S. PHILIPS CORPORATION,
and THE TRUSTEES OF COLUMBIA
UNIVERSITY IN THE CITY OF NEW YORK,

Plaintiffs,

v.

VIEWSONIC CORPORATION (alternatively
named VIEWSONIC DISPLAY CO.),

Defendant.

Civil Action No. 9:13-cv-80570-DMM

JURY TRIAL DEMANDED

VIEWSONIC CORPORATION,

*Counter-Claimant and Third
Party Claimant,*

v.

ZENITH ELECTRONICS LLC, PANASONIC
CORPORATION, U.S. PHILIPS CORPORATION,
THE TRUSTEES OF THE COLUMBIA
UNIVERSITY IN THE CITY OF NEW YORK,

Counter-Defendants,

and

MPEG LA, LLC,

Third Party Defendant.

Civil Action No. 9:13-cv-80570-DMM

JURY TRIAL DEMANDED

**PLAINTIFFS' AND THIRD PARTY DEFENDANT'S
MOTION TO DISMISS COUNTS FIRST THROUGH
FOURTH OF VIEWSONIC CORPORATION'S
COUNTERCLAIMS AND THIRD-PARTY CLAIM AND
INCORPORATED MEMORANDUM OF LAW**

(Case No. 9:13-cv-80570-DMM Only)

(Continued next page)

Plaintiffs Zenith Electronics LLC, Panasonic Corporation, U.S. Philips Corporation and The Trustees of Columbia University in the City of New York, and Third Party Defendant MPEG LA, LLC, by their undersigned counsel, hereby move to dismiss Counts First through Fourth of ViewSonic Corporation's Counterclaims and Third Party Claim pursuant to Fed. R. Civ. P. 12(b)(6), with prejudice and without leave to amend, on the grounds that they fail to state facts sufficient to state plausible and non-conclusory claims for relief.¹

INTRODUCTION

Defendant ViewSonic's antitrust, contract and promissory estoppel Counterclaims suffer from every deficiency that the Supreme Court condemned in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and therefore they must be dismissed. Mere incantation of formulaic antitrust words and rote recitation of phrases devoid of factual heft cannot magically transform a routine patent infringement claim into an antitrust or contract/estoppel case. In addition, ViewSonic lacks antitrust standing and its antitrust claims are barred by the statute of limitations. Finally, ViewSonic's repeated use of the word "FRAND" cannot obscure the uncontested fact that ViewSonic refuses to pay the same royalty to practice the ATSC Standard that hundreds of licensees have paid since the pool's inception, including its current competitors. What is fair, reasonable and nondiscriminatory ("FRAND") will be decided in the damages phase of Plaintiffs' infringement case. As such, ViewSonic's feeble attempts to dress its unilateral refusal to pay what everyone pays in antitrust, contract and estoppel clothing should be soundly rejected.

¹ In lieu of answering, Plaintiffs and Third Party Defendant submit this motion to dismiss ViewSonic's Counterclaims, in part. *Beaulieu v. Bd. of Trustees of Univ. of West Florida*, Case No. 3:07cv30, 2007 WL 2020161, *2 (N.D. Fla. July 9, 2007) ("[A] party need not file an answer while a partial motion to dismiss is pending.") To the extent an answer to ViewSonic's remaining Counterclaims and Third Party Claim is required at this time notwithstanding the filing of this motion, Plaintiffs and Third Party Defendant deny the allegations and liability, and respectfully request that the time to answer the remaining allegations be suspended until the Court renders a decision on this motion.

BACKGROUND²

I. THE ATSC STANDARD

The Advanced Television Systems Committee Standard (“ATSC Standard”) defines the standards for the transmission and reception of Digital Television (“DTV”). (Compl. at ¶¶ 15-16; Answer at ¶¶ 15-16; CC at ¶¶ 34, 38). The origins of the ATSC Standard trace back to 1987 when the Federal Communications Commission (“FCC”) formed the Advisory Committee on Advanced Television Service (“Advisory Committee”) to assist the agency in gathering information on advanced television systems. (CC at ¶ 36). After studying various proposals, the FCC formed the “Digital HDTV Grand Alliance” to develop and recommend a technical proposal. (CC at ¶ 37). In 1996, the FCC adopted the ATSC Standard for DTV broadcasts in the U.S. (CC at ¶ 38; Compl. at ¶ 16; Answer at ¶ 16). The International Telecommunications Union (“ITU”), the Advanced Television Systems Committee (“ATSC”), and each organization’s members participated in the selection and adoption of the ATSC Standard. (CC at ¶ 35). Today, FCC rules require broadcasters to transmit DTV signals in compliance with the ATSC Standard, and require DTV receivers (*e.g.*, television sets) to be equipped with DTV tuners for receiving, decoding and presenting such DTV signals in compliance with the ATSC Standard. (CC at ¶ 38; Compl. at ¶ 16; Answer at ¶ 16).

II. PARTIES

Defendant and Counterclaimant ViewSonic Corporation (“ViewSonic”) manufactures and sells televisions that comply with the ATSC Standard throughout the United States. (Compl. at ¶¶ 18-19; Answer at ¶¶ 18-19; CC at ¶ 56). ViewSonic does not allege that it is or was a member of, or participated in the ITU or ATSC.

² The facts described herein are either alleged in ViewSonic’s Counterclaim (“CC”) [DE 66], admitted in ViewSonic’s Answer [DE 66], or a matter of public record. Plaintiffs’ Complaint for patent infringement is referred to as “Compl.” [DE 1]. Recognizing that they are required to do so for purposes of this motion, Plaintiffs and Third Party Defendant treat the well-pleaded allegations of fact in the Counterclaims and Third Party Claim as true for purposes of this motion. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Plaintiffs and Third Party Defendant dispute and deny many of the allegations made by ViewSonic, and deny the remaining counterclaims and third party claim brought by ViewSonic, for purposes other than this motion.

Plaintiffs Zenith Electronics LLC (“Zenith”), Panasonic Corporation (“Panasonic”), U.S. Philips Corporation (“Philips”) and The Trustees of Columbia University in the City of New York (“Columbia”) respectively own by assignment the following patents: U.S. Patent No. 5,802,107 (Zenith); U.S. Patent No. 5,629,958 (Zenith); U.S. Patent No. Reissue 42,643 (Panasonic); U.S. Patent No. 5,684,541 (Philips); and U.S. Patent No. 8,115,873 (Columbia). (CC at ¶ 19-28). These patents are essential patents for practicing the ATSC Standard. (CC at ¶ 51). Zenith and a predecessor of Philips were members of the Grand Alliance which helped establish the ATSC Standard. (CC at ¶ 37). Philips, Zenith and Panasonic (alleged by ViewSonic collectively as the “Manufacturing Plaintiffs”) (CC at ¶ 43) also allegedly manufacture and sell television sets which comply with the ATSC Standard in competition with, among others, ViewSonic. (CC at ¶ 56).³

Third Party Defendant MPEG LA LLC (“MPEG LA”) administers a pool of essential patents for practicing the ATSC Standard (the “ATSC Pool”), which includes Zenith, Panasonic, Philips and Columbia’s patents. (CC at ¶¶ 1, 10, 50, 52). The ATSC Pool also includes more than 100 other U.S. and many foreign patents. (CC at ¶ 52).⁴ An ATSC Pool license issued by MPEG LA provides the licensee with rights to the patents in the pool which in turn are essential for implementing the ATSC Standard. (Compl. at ¶ 25; CC at ¶¶ 50-52). In short, MPEG LA offers a “one-stop license” as a convenience to users who would like to acquire patent rights from multiple parties in a single transaction. As admitted by ViewSonic, the royalty for an ATSC Pool license offered by MPEG LA is, and has been since the pool’s inception, \$5.00 for each ATSC receiver product. (CC at ¶ 53).⁵

The MPEG LA license, however, is non-exclusive and does not preclude any potential licensee from negotiating a bilateral license with any patent holder for the patentee’s portfolio of essential patents. (CC at ¶ 59). Accordingly, the patents in suit (CC at ¶ 29) can be licensed directly from Zenith, Panasonic, Philips and Columbia.

³ The Counterclaim provides no supporting allegations.

⁴ See <http://www.mpegla.com/main/programs/ATSC/Pages/PatentList.aspx>, for a complete list of the patents in the ATSC Pool.

⁵ See also <http://www.mpegla.com/main/programs/ATSC/Pages/Agreement.aspx>.

III. PROCEDURAL HISTORY

On June 4, 2013, Zenith, Panasonic, Philips and Columbia filed a complaint for damages, under the patent laws of the United States, alleging that ViewSonic infringed five patents that are essential for practicing the ATSC Standard. (Compl. at ¶¶ 10-14, 17, 21). The Complaint alleges, and ViewSonic admits, that it sells, advertises and imports products that comply with the ATSC Standard and therefore, as alleged by the Complaint, ViewSonic's ATSC products are covered by claims of, perform the methods claimed in, and/or are made by the process claim in the patents in suit. (Compl. at ¶¶ 18-21; Answer at ¶¶ 18-19). ViewSonic also acknowledges that MPEG LA offered it the ATSC Pool license, but that ViewSonic refused it. (Compl. at ¶¶ 29-30; Answer at ¶¶ 29-30; CC at ¶ 58).

On November 22, 2013, ViewSonic filed an Answer, Affirmative Defenses, Counterclaims and Third-Party Claims. On December 13, 2013, ViewSonic filed an Amended Answer, Affirmative Defenses, Counterclaims and Third Party Claim, which did not amend the Counterclaims or Third Party Claim. ViewSonic's counterclaims are premised on the purported failure of Zenith, Panasonic, Philips and MPEG LA to license the patents in suit on FRAND terms. (CC at ¶¶ 59, 63, 67). Based on that alleged failure, ViewSonic avers that Zenith and Philips have monopolized the market for ATSC compatible televisions in violation of Section 2 of the Sherman Act. (CC ¶¶ at 83-90). The Counterclaim further alleges that the refusal to offer FRAND licenses is part of a conspiracy among Zenith, Panasonic, Philips and MPEG LA to fix prices in the ATSC compatible television market in violation of Section 1 of the Sherman Act. (CC at ¶¶ 91-99). Finally, ViewSonic also claims that Zenith, Panasonic and Philips, by allegedly failing to offer FRAND terms, are liable for breach of contract (CC at ¶¶ 100-104) or promissory estoppel (CC at ¶¶ 105-111).

ARGUMENT

I. ViewSonic Has Failed To Plead Facts Supporting Its Antitrust Counterclaims And Therefore They Must Be Dismissed

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must allege facts sufficient "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Supreme Court (and the Eleventh Circuit) has directed that a complaint must be dismissed that does not contain sufficient "factual matter, accepted as true, to

“state a claim to relief that is plausible on its face.” *Am. Dental Ass’n v. Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010) (quoting *Twombly*, 550 U.S. at 570); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Plausibility is the key, as the well-pled allegations must nudge the claim across the line from conceivable to plausible.” *Jacobs v. Tempur-Pedic Int’l, Inc.*, 626 F.3d 1327, 1333 (11th Cir. 2010) (internal quotation marks and citations omitted). A plausible claim “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 958 (11th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555). The elements of a claim must be alleged in more than vague and conclusory terms: a complaint must contain enough factual “heft” to “sho[w] that the pleader is entitled to relief.” *Twombly*, 550 U.S. at 545, 555. As such, “naked assertion[s] bereft of “further factual enhancement” do not suffice. *Iqbal*, 556 U.S. at 678. Ultimately, “[c]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.” *Jackson v. BellSouth Telecomms*, 372 F.3d 1250, 1263 (11th Cir. 2004); *see also Iqbal*, 556 U.S. at 678-79.

A. ViewSonic Fails To Plausibly Plead Market Power And Exclusionary Conduct Sufficient To Support Its Section 2 Counterclaim

ViewSonic’s first Counterclaim alleges a claim for monopolization under Section 2 of the Sherman Act (“Section 2 Counterclaim”). 15 U.S.C. § 2. Monopolization reaches the unilateral actions of a single firm. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 454 (1993); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984). The offense of monopolization has two elements: ““(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”” *Morris Commc’ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1293-94 (11th Cir. 2004) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)); *see also United States v. Microsoft*, 253 F.3d 34, 50 (D.C. Cir. 2001). ViewSonic fails to allege either prong with the requisite specificity and thus the Section 2 Counterclaim should be dismissed under *Twombly*.

1. Failure To Plausibly Plead Monopoly Power

Monopoly power is the power to control prices in or to exclude competition from the relevant market. *Morris Commc’ns Corp.*, 364 F.3d at 1293-94 (citing *United States v. E.I. du*

Pont de Nemours & Co., 351 U.S. 377, 391 (1956)). Although the “existence of [monopoly] power ordinarily may be inferred from the predominant share of the market,” *Grinnell*, 384 U.S. at 571, under *Twombly* this must be alleged with specificity, not through vague generalizations. Yet, ViewSonic fails to allege *any* facts whatsoever demonstrating that Zenith and Philips alone have the power to exclude manufacturers of ATSC compatible TVs. The only allegation of monopoly power in the ATSC compatible television market is contained in Counterclaim Paragraph 71 which states: “ViewSonic is informed and believes ... that *Manufacturing Plaintiffs and the other manufacturing members* of the ATSC Pool have market power in the relevant market, as together they account for a large percentage of the televisions sold in the United States.” (CC at ¶ 71) (emphasis added). Not only is this not a specific allegation, it is not even an allegation against Zenith and Philips. However, because monopolization (and attempted monopolization) addresses the unilateral actions of a single firm, ViewSonic must allege – but does not – that Zenith and Philips individually have monopoly power in order to state a viable Section 2 claim. *See, e.g., City of Moundridge v. Exxon Mobil Corp.*, 471 F. Supp. 2d 20, 42 (D.D.C. 2007) (“Section 2 liability requires actual or attempted monopolization by one defendant.”). Indeed, the fact that ViewSonic needs to aggregate the TV sales of Zenith and Philips with “other manufacturing members” of the ATSC pool to reach “a large percentage” – and not even a monopoly percentage – on its own defeats the claims as a matter of law. (It is also an implicit admission by ViewSonic that neither Zenith nor Philips has the requisite power required by Section 2.)

2. Failure To Plausibly Allege Exclusionary Conduct

Willfulness, or exclusionary conduct, is the use of monopoly power “to foreclose competition, to gain a competitive advantage, or to destroy a competitor.” *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482-83 (1992) (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948)); *Morris Commc’ns Corp.*, 364 F.3d at 1294 (“The second element requires predatory or exclusionary acts or practices that have the effect of preventing or excluding competition within the relevant market.”); *Rambus Inc. v. FTC*, 522 F.3d 456, 463 (D.C. Cir. 2008) (“[A] monopolist’s act must have anticompetitive effect. That is, it must harm the competitive process”) (internal quotes and citations omitted)). ViewSonic makes two allegations concerning exclusionary conduct: (i) Zenith and Philips used deception in the standards setting process (CC at ¶¶ 3, 84); and, (ii) Zenith and Philips, by requesting a non-

FRAND royalty rate, raise costs which “restricts output and reduces or eliminates competition in the relevant market,” *i.e.*, the market for ATSC compatible TVs. (CC at ¶ 74; *see generally* CC at ¶¶ 69-75). Neither claim withstands scrutiny.

a. *Reliance on the purported deception is not pled with specificity*

ViewSonic alleges that Zenith and Philips “crossed from permissible monopoly to illegal monopolization” (CC at ¶ 70) by “fail[ing], in good faith, to offer licenses on FRAND terms” in violation of the commitments they made in having “their technology incorporated into the ATSC Standard.” (CC at ¶¶ 86-87). However, a deceptive FRAND commitment constitutes “exclusionary conduct” only when the standard setting organization (“SSO”) relied on that deceptive FRAND commitment to choose that technology over competing alternative technologies that were under consideration – which ViewSonic does not allege was the case here. *See Rambus*, 522 F.3d at 467; *see also Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 315 (3d Cir. 2007); *Apple Inc. v. Samsung Elecs. Co., Ltd.*, No. 11-CV-01846-LHK, 2011 WL 4948567 (N.D. Cal. Oct. 18, 2011).

In *Rambus*, the D.C. Circuit reversed a FTC decision that Rambus violated the antitrust laws when it failed to disclose its intellectual property rights to an SSO because the FTC failed to show that *but for* Rambus’s failure to disclose its IP rights, the SSO would not have adopted the standard at issue. According to the D.C. Circuit, in order to establish the exclusionary conduct prong of Section 2, a plaintiff must show that the patentee’s deceit induced the SSO to set the standard incorporating the deceiver’s essential patents rather than an alternative technology that had been under consideration. 522 F.3d at 466-67. *See also Broadcom Corp.*, 501 F.3d at 316 (Broadcom alleged that there were other viable technologies competing for inclusion in the standard); *Apple Inc.*, 2011 WL 4948567, at *6 (Apple failed to allege a viable alternative technology performing the same functionality would have been incorporated in the standard).

Thus, ViewSonic must allege, but does not, that there were alternative technologies to those offered by Zenith and Philips that the SSOs were considering during the standard setting process and that the SSOs would have adopted one of those alternative standards had they known of the patentees’ deception. However, ViewSonic only alleges the following in conclusory fashion: “ViewSonic is informed and believes, and on that basis alleges, that the ITU, ATSC, and FCC relied on the promises of Zenith and Philips to license the Patents in Suit on FRAND

terms, as they would not have agreed to adopt a U.S. standard that would have given them ‘blocking patents.’” (CC at ¶ 85; *see also* CC at ¶ 46).

In addition, ViewSonic’s allegations of deception are also woefully inadequate. The Counterclaim contains no facts regarding Zenith’s and Philips’ alleged statements to the SSOs. Instead, ViewSonic merely states that they “falsely represented to the ITU, ATSC, and/or FCC, *either expressly, impliedly or by omission*, that if elements of their patented technology were included in the ATSC Standard, then they would license any such patents to all applicants on FRAND terms.” (CC at ¶ 84) (emphasis added). What is plain from this statement is that ViewSonic has no idea whatsoever of who said what or when to the SSOs.

b. *Increasing the price of an input is not exclusionary conduct*

ViewSonic alleges that Zenith’s and Philips’ requests for non-FRAND royalties raises costs and ultimately “restricts output and reduces or eliminates competition in the relevant market,” *i.e.*, the market for ATSC compatible TVs. (CC at ¶ 74; *see generally* CC at ¶¶ 69-75). ViewSonic’s claim rests on a legal conclusion, the mere assertion of which is insufficient to state a claim under *Twombly*. *See Iqbal*, 556 U.S. at 679. ViewSonic constantly repeats the word “FRAND” as if it has magical significance. It does not. FRAND is not an objective number but a number subject to negotiation and determination by a court if negotiations fail. *See Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JLR, 2013 WL 2111217, at *2-3 (W.D. Wash. Apr. 25, 2013) (deciding range for FRAND); *In re Innovatio IP Ventures, LLC Patent Litig.*, No. 11C9308, MDL2303, 2013 WL 5593609 (N.D. Ill Oct. 3, 2013) (setting FRAND rate). Therefore, absent some factual allegations as to what FRAND is, the Counterclaim fails to meet the standards of *Twombly*.

Moreover, all royalties potentially raise the cost of a final product but this is not a consequence of anything forbidden by the antitrust laws. Rather it flows from a party’s right as a patent holder. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136 (1998); *Rambus*, 522 F.3d at 466. As the D.C. Circuit in *Rambus* explained, “[D]ecept merely enabling a monopolist to charge higher prices than it otherwise could have charged—would not in itself constitute monopolization,” because the increase in price did not flow from a decrease in competition, but

the “exercise of market power that is lawfully in the hands of a monopolist.”⁶ *Id.* at 459, 465 (citations omitted).

B. ViewSonic Fails To Plausibly Plead That Zenith, Panasonic, Philips And MPEG LA Conspired With And Among Each Other In Its Section 1 Counterclaim

ViewSonic’s Second Counterclaim asserts that Zenith, Philips, Panasonic and MPEG LA conspired with and among each other in violation of Section 1 of the Sherman Act (“Section 1 Counterclaim”). 15 U.S.C. § 1. Section 1 prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.” 15 U.S.C. § 1. The *sine qua non* of Section 1 is concerted action. *See Am. Needle, Inc. v. NFL*, 560 U.S. 183, 190 (2010) (“Section 1 applies only to concerted action”); *In re Fla. Cement & Concrete Antitrust Litg.*, 746 F. Supp. 2d 1291, 1308 (S.D. Fla. 2010) (“Under any formulation of the necessary elements of a Section 1 cause of action, a plaintiff must allege the existence of a conspiracy.”). Accordingly, to survive a motion to dismiss, the Counterclaim must contain enough factual matter, taken as true, to plausibly suggest that the defendants entered into an agreement. *See Duty Free America, Inc. v. Estee Lauder Cos., Inc.*, No. 12-60741-Civ., 2013 WL 2303764, at *5 (S.D. Fla. May 2013) (citing *Twombly*, 550 U.S. at 556); *In re Fla. Cement & Concrete Antitrust Litig.*, 746 F. Supp. 2d at 1308. Factual allegations must not only be consistent with an inference of conspiracy but must be “‘suggestive enough to render a conspiracy plausible’ and must ‘raise a reasonable expectation that discovery will reveal evidence of illegal agreement.’” *Id.* (quoting *Twombly*, 550 U.S. at 556). Mere labels and

⁶ To the extent that ViewSonic purports to allege an attempt to monopolize on the part of Zenith and Philips, the Counterclaim also fails to state a claim for relief and must be dismissed. (CC at ¶¶ 75, 88). The offense of attempted monopolization requires facts showing: (1) “the defendant has engaged in predatory or anticompetitive conduct with; (2) a specific intent to monopolize and; (3) a dangerous probability of achieving monopoly power.” *Spanish Broad. Sys. v. Clear Channel Commc’ns., Inc.*, 376 F.3d 1065, 1074 (11th Cir. 2004) (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993)). First, paragraphs 75 and 88 are simply conclusory allegations parroting the third element of monopolization. As discussed above, neither the deception alleged nor the dispute over the ATSC Pool royalty are anticompetitive acts. Further, as discussed, the Counterclaim contains no specific allegations of Zenith’s or Philips’ individual market shares in the ATSC compatible TV market and therefore there are insufficient allegations as to a significant jumping off point from which either Zenith or Philips can catapult to a monopoly. *See U.S. Anchor Mfg. v. Rule Indus., Inc.*, 7 F.3d 986, 994, 999-1001 (11th Cir. 1993).

conclusions coupled with a formulaic recitation of the elements will not satisfy a plaintiff's burden. *Jacobs*, 626 F.3d at 1333. Instead, plaintiff must allege "enough facts to give sufficient notice as to the who, what, where, or when of its conspiracy theory." *Duty Free Am.*, 2013 WL 2303764, at *8.

Relying on a series of ambiguously phrased, formulaic and often overlapping allegations, ViewSonic appears to allege three separate conspiracies or agreements: (i) a conspiracy between the Manufacturing Plaintiffs and MPEG LA to fix the price of ATSC compatible televisions (CC at ¶¶ 67, 73, 77, 94); (ii) an agreement among the Manufacturing Plaintiffs and MPEG LA that the Manufacturing Plaintiffs would not compete against MPEG LA by licensing their ATSC patents on an individual basis and that the ATSC Pool would be licensed at non-FRAND rates (CC at ¶ 94); and, (iii) an agreement among the Manufacturing Plaintiffs to: (a) not license their patents on FRAND terms; (b) demand unreasonable royalty rates; (c) refuse to license patents on an individual basis; and (d) demand licenses despite failing to demonstrate essentiality of patents. (CC at ¶ 95). However, each of these "conspiracies" or agreements suffers from the same legally fatal infirmities: ViewSonic's allegations merely recite or paraphrase the statute or its requisite elements in conclusory fashion never averring the "who, what, where, or when" of each conspiracy. *See Duty Free Am.*, 2013 WL 2303764, at *8 (discussing complaint that failed to allege the "who, what, where, or when" of a Section 1 claim).

For example, ViewSonic alleges that Zenith, Panasonic, Philips and MPEG LA "conspired in restraint of trade to affect, raise, fix, maintain, and stabilize prices for television sets sold in the U.S...." (CC at ¶ 77). This is simply a conclusory definition of price fixing. Conspicuously absent are the allegations of collusive conversations between and among the Manufacturing Plaintiffs and MPEG LA leading up to the purported agreement to fix TV prices. Importantly, the Counterclaim does not allege the identities of the individuals at Zenith, Panasonic, Philips and MPEG LA who allegedly colluded. Nor does the Counterclaim identify where or what the unidentified employees communicated. ViewSonic does not even allege when Zenith, Panasonic, Philips and MPEG LA entered into their alleged conspiracy. *Twombly*, 550 U.S. at 557 ("[A] conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.").

Similarly, ViewSonic alleges no factual allegations supporting its claims that the Zenith, Panasonic, Philips and MPEG LA agreed to limit ViewSonic's access to ATSC licenses at

FRAND rates. (CC at ¶ 94). Again, the Counterclaim avers no allegations of conversations between and among the allegedly colluding parties or where or when they took place. These same defects taint ViewSonic's claims that Zenith, Panasonic and Philips agreed not to license on FRAND terms, to demand unreasonable royalties, refuse to offer individual licenses on the patents at issue, and demand a license for patents despite failing to demonstrate essentiality. (CC at ¶ 95). Thus, however ViewSonic's purported illegal conspiracies or agreements are construed or dissected, they are all tantamount to naked assertions of conspiracy that are insufficient to state a plausible claim. *Twombly*, 550 U.S. at 557.

Moreover, the alleged conspiracy to fix prices for ATSC compatible TVs is simply implausible. ViewSonic essentially alleges that only *three* of a multitude of manufacturers have fixed the prices of ATSC compatible TVs. The fallacy of this conspiracy lies in ViewSonic's failure to allege what role, if any, the remaining TV manufacturers played in the scheme. Absent the participation of virtually all of the TV manufacturers, Zenith, Panasonic and Philips could not feasibly fix prices as they would be undersold by the companies who were not party to the conspiracy. In other words, any effort to fix prices would be futile as the manufacturers who were not participants in the conspiracy would sell below the fixed price. For this additional reason, ViewSonic's Counterclaim fails to allege a plausible conspiracy to fix the prices of ATSC compatible TVs and should be dismissed. *See Twombly*, 550 U.S. at 556 (plaintiff must provide "plausible grounds to infer an agreement").

II. MPEG LA Is Incapable of Conspiring With The Manufacturing Plaintiffs And Thus The Section 1 Counterclaim Against It Must Be Dismissed

ViewSonic's only claim against MPEG LA is in its Section 1 Counterclaim where it alleges that MPEG LA is a co-conspirator with the Manufacturing Plaintiffs. This claim must be dismissed because MPEG LA is incapable of conspiring with the Manufacturing Plaintiffs. *See Copperweld Corp.*, 467 U.S. 752. It is well established that Section 1 liability does not attach to a broad range of service providers – bankers, lenders, lawyers, and accountants – who lack the requisite competitive interest and stake in the relevant market and who do not have any conscious commitment to achieve the alleged restraint of trade in that market. *See Gulf States Reorg. Grp., Inc. v. Nucor Corp.*, 822 F. Supp. 2d 1201, 1220-21 (N.D. Ala. 2011), *aff'd*, 721 F.3d 1281 (11th Cir. 2013); *see also Va. Vermiculite Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277 (4th Cir. 2002); *U.S. Anchor Mfg. v. Rule Indus., Inc.*, 7 F.3d 986, 1002 (11th Cir.

1993); 7 P. Areeda, ANTITRUST LAW, ¶ 1474 (2010). As ViewSonic alleges, MPEG LA is not a “horizontal competitor” in the relevant ATSC compatible TV market, but rather a licensing administrator “acting on behalf of each of the Counter-Defendants” solely in that capacity. (CC at ¶ 10). Therefore, MPEG LA lacks any economic interest in the state of competition in the alleged relevant ATSC compatible TV market. Accordingly, MPEG LA cannot share a “conscious commitment to a common scheme designed to achieve an unlawful objective,” and therefore cannot conspire for the purposes of Section 1. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (citation omitted).

III. Even If ViewSonic’s Antitrust Counterclaims Conform To The *Twombly* Standard, They Must Be Dismissed Because ViewSonic Did Not Suffer “Antitrust Injury,” A Prerequisite For The Relief That It Seeks

To assert a claim for damages under the antitrust laws, ViewSonic must suffer “antitrust injury,” meaning “injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants’ acts unlawful.” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *see Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986) (requiring antitrust injury where antitrust injunction sought).⁷ As the Supreme Court explained, this element “ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant’s behavior.” *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990). When a complaint or counterclaim by its terms fails to establish antitrust injury, it must be dismissed as a matter of law. *See Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 711 F.3d 1264, 1270-71 (11th Cir. 2013); *QSGI, Inc. v. IBM Global Financing*, No. 11-80880-CIV, 2012 WL 1150402, at *2 (S.D. Fla. Mar. 14, 2012) (absent factual allegations of antitrust injury, an antitrust claim fails under *Twombly*). ViewSonic cannot meet this standard and therefore its antitrust counterclaims must be dismissed.

⁷ Antitrust injury is the first element of antitrust standing, the other being whether the plaintiff is an efficient enforcer of the antitrust laws. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n. 5 (1986); *see also Sunbeam Television Corp. v. Nielsen Media Research*, 711 F.3d 1264, 1270-72 (11th Cir. 2013). It is unnecessary to reach the second prong of standing, however, as ViewSonic has not suffered antitrust injury.

A. ViewSonic’s Section 2 Counterclaim Must Be Dismissed Because Competitors, Including ViewSonic, Have Not Been Excluded from The Relevant Market

The “antitrust injury” that flows from a Section 2 monopolization claim is exclusion from a relevant market. *See, e.g., Morris Commc’ns Corp.*, 364 F.3d at 1294 (citing *Microsoft Corp.*, 253 F.3d at 58, 60-64). ViewSonic’s Section 2 claim alleges that Zenith and Philips each excluded competition in the market for ATSC Standard compatible televisions by: (i) deceiving ITU, ATSC and the FCC; and (ii) setting royalty rates above FRAND levels. (CC at ¶¶ 68, 73, 84, 87, 89).

Aside from these conclusory allegations, which merely paraphrase the requisite legal standard, ViewSonic’s monopolization claim does not assert *any* facts demonstrating that competition in the market for ATSC compatible televisions has suffered in any way. In fact, the Counterclaim does not identify any TV competitors that have been excluded. As the Counterclaim concedes, a license for more than 100 essential patents in the ATSC Standard is available to *anyone and everyone* for \$5 per ATSC compatible TV. Alternatively, an ATSC compatible television manufacturer can license the essential patents from each of the patent holders by licensing the patentee’s portfolio of essential patents. (CC at ¶ 49). Indeed, ViewSonic admits in its Answer that MPEG LA offered the ATSC Pool license to it but that it refused to enter into a pool license. (Compl. at ¶¶ 29-30; Answer at ¶¶ 29-30; CC at ¶ 58).

Finally, although harm to competition, not harm to an individual competitor, is the standard for “antitrust injury,” *Brunswick Corp.*, 429 U.S. at 488, ViewSonic, by its own admission, has not been excluded at all from the relevant market it alleges. Indeed, ViewSonic concedes that it has been manufacturing and selling ATSC compatible TVs presumably at a cost advantage over its competitors who, unlike ViewSonic, have paid for a license for the IP utilized in their products. As such, there is no cognizable “antitrust injury” that ViewSonic can plead – even if given a second chance to amend its Counterclaim.

B. ViewSonic, As An Alleged Competitor In The Market For ATSC Compatible TVs, Is Not Harmed By A Price Fixing Conspiracy

ViewSonic alleges, to the extent discernible, that the Manufacturing Plaintiffs and MPEG LA “have conspired ... to affect, raise, fix, maintain, and stabilize prices for television sets sold in the U.S. ...” (CC at ¶ 77; *see also* ¶¶ 67, 73, 94). As alleged, Zenith, Panasonic and Philips

are “horizontal competitors” of ViewSonic (CC at ¶¶ 1, 72, 73) and, accordingly, compete against ViewSonic in the ATSC compatible television market. (CC at ¶¶ 56, 73).

However, it is black-letter law that a party lacks antitrust standing to assert a price-fixing claim against its horizontal competitors because it does not suffer any antitrust injury. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582-83 (1986); *Atl. Richfield Co.*, 495 U.S. at 336-38; *City of Moundridge*, 471 F. Supp. 2d at 30 (“Competitors cannot suffer an antitrust injury from a conspiracy to raise prices.”). The reason is obvious: a competitor who is not part of the price-fixing conspiracy can undersell the “fixed” price, and thus is “benefited,” not “injured,” by the alleged illegal price-fixing. *See, e.g., City of Moundridge*, 471 F. Supp. 2d at 30-31. This is precisely the case here. By refusing to enter into a license, but continuing to sell ATSC compatible TVs, ViewSonic is able to undercut its competitors who pay royalties for the ATSC Standard IP in their products. Thus, ViewSonic’s Section 1 Counterclaim suffers from the same infirmity as its Section 2 Counterclaim and must be dismissed as a matter of law.

IV. The Statute Of Limitations Has Expired On ViewSonic’s Antitrust Claims

ViewSonic’s Section 1 and Section 2 Counterclaims are barred by the applicable four-year statute of limitations. 15 U.S.C. § 15b (requiring antitrust actions to be “commenced within four years after the cause of action accrued”). The statute of limitations begins to run when a defendant commits an act that injures a plaintiff’s business. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). Only three dates with any relevance to the antitrust claims are listed in the Counterclaim: the FCC’s adoption of the ATSC Standard in December 1996 (CC at ¶¶ 1, 38); the formation of the “Grand Alliance” in 1993 (CC at ¶ 37); and the year ViewSonic began competing with Manufacturing Plaintiffs in the digital television market in 2007 (CC at ¶ 56). Each of these dates is outside the four year statute of limitations. Significantly, ViewSonic does not allege, nor could it, that the Plaintiffs concealed their actions, thereby tolling the four-year statute of limitations. *See In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1169 (5th Cir. 1979) (“To avail himself of this tolling doctrine, an antitrust plaintiff must show that the defendants concealed the conduct complained of, and that he failed, despite the exercise of due diligence on his part, to discover the facts that form the basis of his claim.”) (citations omitted). The ATSC Pool is public and all of the actions constituting purported antitrust violations alleged in the Counterclaim were known, or should have been known, to ViewSonic more than four years ago.

V. ViewSonic’s Breach Of Contract Counterclaim Should Be Dismissed For Failure To Plead Facts Plausibly Supporting Its Claim

ViewSonic’s third Counterclaim alleges that Zenith, Panasonic and Philips⁸ allegedly breached contractual obligations to which others, including ViewSonic, are purportedly third party beneficiaries by allegedly failing to license their ATSC essential patents on FRAND terms. (CC at ¶¶ 100-104). ViewSonic has not alleged that Zenith, Panasonic, or Philips have failed to offer it a license. ViewSonic simply does not like the offer terms. It alleges that the terms are unfair and unreasonable given ViewSonic’s size, market position, and practice of competing on lower prices. (CC at ¶ 58). ViewSonic explicitly seeks to obtain a rate that discriminates in its favor. This is an argument properly left for the jury which will assess Plaintiffs’ reasonable royalty damages when ViewSonic’s patent infringement defenses fail. At best, in other words, ViewSonic has a defense to the amount of damages it owes the Plaintiffs, but it does not have a standalone cause of action sounding in contract. But even if ViewSonic had asserted a plausible breach of contract claim, which it has not, its breach of contract claim is not a valid defense to its willful patent infringement. A damages determination will be necessary in any event.

In order to plead breach of a third party beneficiary contract under Florida law⁹, a plaintiff must allege (1) the existence of a contract in which plaintiff is not a party, (2) “an intent, either expressed by the parties, or in the provisions of the contract, that the contract primarily and directly benefit” the plaintiff, (3) breach of that contract by one of the parties and (4) damages to plaintiff resulting from the breach. *Rinker v. Carnival Corp.*, 753 F. Supp. 2d 1237, 1244 (S.D. Fla. 2010) (quoting *Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.*, 647 So. 2d 1028, 1031 (Fla. 4th DCA 1994)). This ViewSonic has failed to do.

A. ViewSonic Has Failed To Plead Facts Supporting The Existence Of A Contract That Was Intended To Primarily And Directly Benefit ViewSonic

ViewSonic has not alleged facts to support the existence of a contract intended to primarily and directly benefit ViewSonic. ViewSonic does allege that it is “informed and

⁸ The breach of contract counterclaim is not asserted against Columbia or MPEG LA.

⁹ Plaintiffs cite Florida law solely in connection with this Motion to Dismiss because ViewSonic has not pled the existence of a contract in sufficient detail to permit a choice of law analysis. In the absence of facts justifying application of some other law, the law of the forum governs. *See, e.g., Cavic v. Grand Bahama Dev. Co.*, 701 F.2d 879 (11th Cir. 1983).

believes” that “for consideration, including membership and participation in the FCC, ATSC, ITU, and/or the ATSC Pool, the Manufacturing Plaintiffs entered into an express and/or implied contract with FCC, ATSC, ITU, MPEG LA, and/or their members, to which others, including ViewSonic, are third party beneficiaries.” (CC at ¶ 102). But ViewSonic makes no supporting allegations that it is an ITU or ATSC member with standing to enforce them. *Compare In re Innovatio IP Ventures, LLC Patent Litig.*, 921 F. Supp. 2d 903, 923-24 (N.D. Ill. 2013) (assuming only for purposes of a motion to dismiss, allegations of membership in the standards body established standing to enforce a FRAND obligation made to the standards body, but a third party could not assert rights of other third party beneficiaries). Indeed, ViewSonic has failed to plead anything beyond the mere conclusion that it is a beneficiary. While there are courts that have permitted third party beneficiary claims to enforce a FRAND obligation to proceed based on the different agreements and facts at issue in those cases, ViewSonic has not alleged sufficient facts here to plausibly support an intent, either expressed by all parties, or in the provisions of the unspecified contract, that the contract primarily and directly benefit the third party ViewSonic.

B. ViewSonic Has Also Failed To Plead Facts That Plausibly Support That Zenith, Panasonic And Philips Breached A Contractual Obligation Merely Because ViewSonic Disagrees That The License It Concedes It Has Been Offered Is Fair And Reasonable

Even if ViewSonic could allege sufficient facts that plausibly support its third party beneficiary theory, the contract counterclaim should be dismissed for a more fundamental reason. ViewSonic’s contract counterclaim fails to satisfy *Twombly* and *Iqbal* standards because it has failed to allege facts that plausibly support that what it alleges is a contract breach were in fact obligations included among the terms of the unspecified alleged contract. (*see, e.g.*, CC at ¶¶ 58-60, 103).

The scant factual allegations made in support of the alleged breach are the Manufacturing Plaintiffs’ alleged “failure to consider:” (i) “patents in the ATSC Pool have or will soon expire;” (ii) “royalty rates should decrease as patents in the pool expire;” (iii) “royalties had already been paid or were already due to be paid by third parties on products, and should not be demanded a second time in violation of the patent exhaustion doctrine;” and (iv) “some of the Manufacturing Plaintiffs failed to offer individual licenses for only the Patents in Suit, instead demanding royalty fees for the entire ATSC Pool and/or each individual Plaintiffs’ ATSC patent portfolio,

... despite the fact that all of the patents are not essential and despite having inadequate safeguards to ensure that the pool” was limited to essential patents. (CC at ¶ 103).

These allegations are insufficient for a number of reasons. For example, even if one assumes that failing to offer an individual patent license is somehow actionable, ViewSonic does not specify which Manufacturing Plaintiffs supposedly failed to offer individual licenses, instead only averring that “some” have not. Moreover, the alleged “failure to consider” that patents in the ATSC Pool will soon expire, allegations regarding inclusion of nonessential patents, foreign patents or unspecified Plaintiffs offering licenses to individual ATSC patent portfolios, have nothing to do with any obligation alleged to have been part of the purported contractual commitment to license essential ATSC patents on FRAND terms. In the absence of such supporting facts, these allegations cannot plausibly be enforced as the basis for a breach of contract claim independently of the reasonable royalty determination at issue in Plaintiffs’ infringement action.

The FCC’s Fourth Report and Order in the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268 (December 24,1996), cited in paragraph 42 of the Counterclaim, does not support ViewSonic’s threadbare allegations. The Fourth Report states that the FCC specifically declined “to establish a period of time after which the [ATSC] Standard no longer would be required or exclusive (*i.e.*, “sunsetting” it) thereby allowing digital licensees freedom to use any technology that does not interfere with users of the Standard.” Fourth Report at ¶¶ 48-49.¹⁰ It also noted that the FCC was going “to keep abreast of developments” and would “review [its] rules as appropriate based upon technological developments and marketplace conditions” and that ATSC “committed to continue to review the ATSC DTV Standard and to implement compatible extensions of, and deviations from, the ATSC DTV Standard that evolve in the future.” *Id.* In light of these FCC statements, it is implausible to assert, as ViewSonic does, that the alleged FRAND commitment was breached as a contractual matter by failing to consider expiring patents, changes in market conditions, or ViewSonic’s size, market position, and alleged practice of competing on lower prices, or any of the other conduct alleged to constitute a breach. (CC at ¶¶ 58, 103). ViewSonic

¹⁰ The Court can consider this document, which is quoted in the Counterclaim in connection with Plaintiffs’ Motion to Dismiss. *See, e.g., Boom v. Rosebandits, LLC*, No. 13–21506–CIV, 2013 WL 5928342, at *2 (S.D. Fla. Nov. 5, 2013).

has not identified any terms of any contractual commitment, then-contemporaneous, or even *post hoc*, ATSC, FCC, ITU pronouncement or rule, that would plausibly support a claim that the alleged FRAND commitment was breached as a contractual matter on the grounds alleged above (e.g., expiring patents, special circumstances, failing to license patents individually or changed market conditions). ViewSonic may attempt to assert as infringement defenses unspecified allegations concerning patent exhaustion or royalties already allegedly paid, but such purported “defenses” have nothing to do with whether a contract to offer a FRAND license to essential ATSC patents has plausibly been breached. Moreover, these purported defenses are also not alleged to be part of any contractual FRAND commitment.

ViewSonic also alleges that it “attempted to negotiate license agreements with MPEG LA” (CC at ¶ 58) and MPEG LA “repeatedly declined ViewSonic’s offers of compromise.” (CC at ¶ 62). Yet the Counterclaim contains absolutely no “who what where when” support. As noted, courts in this district have held that plaintiff must allege “enough facts to give sufficient notice as to the “who,” “what,” “where,” or “when” of its conspiracy theory.” *Duty Free Am.*, 2013 WL 2303764, at *8. ViewSonic’s bare allegations of negotiations fail this district’s requirements.

C. ViewSonic Has Failed To Allege Sufficient Facts Supporting Damages

ViewSonic alleges generally without any supporting facts that it has “incurred damages and irreparable harm and will be further damaged in the future due to the Manufacturing Plaintiffs’ breach of their contractual obligations.”¹¹ (CC at ¶ 104). A disagreement over the ultimate rate does not state a claim for contract damages. ViewSonic cannot make out a breach of contract based on a purported obligation to offer a specific FRAND rate that ultimately turns out to be the correct rate after trial. ViewSonic fails to point to anything in any contractual commitment or otherwise that plausibly supports imposing what would effectively be a fundamentally unfair penalty on an essential patent holder if an infringer disagrees that the FRAND rate is fair and reasonable and the jury awards a different rate than what the essential patent holder offered after infringement is proven. This is particularly true here, where ViewSonic is attempting to dispute infringement and validity, and has not indicated it will agree

¹¹ Having not taken a license, ViewSonic has not suffered an overcharge or any other contract damages.

to take a license at a rate set by the Court or jury, leaving Plaintiffs no choice but to assert infringement claims. The FRAND rate will be a “heavily disputed, fact-sensitive issue” and what constitutes a FRAND rate will be considered in the context of appropriate reasonable royalty damages for infringement to be awarded to Plaintiffs. *Microsoft Corp.*, 2013 WL 2111217, at *2-3; *see also In re Innovatio IP Ventures, LLC Patent Litigation*, *supra* at *6 (“the purpose of the RAND determination ... is to set damages for infringement of the standard-essential patents.”). In short, ViewSonic fails to provide factual support sufficient to plausibly allege damage from the alleged contract breach. The breach of contract counterclaim must therefore be dismissed under *Twombly* and *Iqbal*.

VI. ViewSonic’s Promissory Estoppel Counterclaim Against Zenith, Panasonic And Philips Also Should Be Dismissed For Failure To Plead A Plausible Claim

The elements required to establish promissory estoppel liability under Florida law are: (1) a promise made by the promisor; (2) ““which the promisor should reasonably expect to induce action or forbearance on the part of the promisee,”” (3) that in fact induced such action or forbearance, and that (4) “injustice can be avoided only by enforcement of the promise.” *See, e.g., White Holding Co., LLC v. Martin Marietta Materials, Inc.*, 423 Fed. App’x. 943, 947 (11th Cir. 2011) (quoting *W.R. Grace & Co. v. Geodata Servs., Inc.*, 547 So. 2d 919, 924 (Fla. 1989)). Thus, the equitable relief of promissory estoppel applies if the promisor makes a promise “which he should reasonably expect” to cause the promisee either to take some action or forego taking action. *White Holding*, 423 Fed. App’x. at 947 (quoting *Mount Sinai Hosp. of Greater Miami, Inc. v. Jordan*, 290 So. 2d 484, 486 (Fla. 1974)). “For promissory estoppel to be applied, the evidence must be clear and convincing.” *W.R. Grace*, 547 So. 2d at 925.

Here, ViewSonic has alleged that Zenith, Panasonic and Philips made unspecified “representations and engaged in other conduct, including representations and/or omissions to the FCC, ATSC, and/or ITU, and/or in agreements with MPEG LA that obligated them to license any patents they may own that they allege are required to operate in accordance with the accused ATSC Standard on FRAND terms.” (CC at ¶ 106). ViewSonic alleges on information and belief that those were promises made to the FCC, ATSC, MPEG LA, their members and/or third parties that make, use, sell, offer to sell, or import into the United States ATSC compliant products. (CC at ¶ 107). ViewSonic’s allegations of a promise that ViewSonic has standing to enforce and that

have been breached suffer from the same fatal defects as the contract claim discussed above and thus fail to satisfy *Iqbal* and *Twombly* for the same reasons.

ViewSonic also alleges, again on information and belief, that “the intended purpose” of the alleged “promises was to induce reliance thereon” and that Zenith, Panasonic and Philips “should have known they would be relied upon.” (CC at ¶ 107). ViewSonic also alleges on information and belief that the FCC, ATSC, MPEG LA, their members and/or third parties, including ViewSonic, invested substantial resources developing, marketing and selling products with the expectation that the Manufacturing Plaintiffs would “offer licenses to any essential patents on FRAND terms.” (CC at ¶ 108). As discussed in Point I above, however, ViewSonic fails to provide any factual allegations that plausibly support its reliance claim. Moreover, ViewSonic purports to deny that it even had notice of the patents despite admitting that it received correspondence offering to license certain of them (Compl. at ¶¶ 24, 29; Answer at ¶¶ 24, 29), let alone include allegations that would plausibly support that ViewSonic made any decisions to willfully infringe in reliance on any alleged FRAND promise that was breached for the reasons discussed above that satisfies the *Iqbal* and *Twombly* pleading standards.

ViewSonic is unable to legally maintain an antitrust action or properly plead an antitrust, contract or promissory estoppel claim because it simply does not have one. What ViewSonic does have is a dispute as to how much it should pay in damages to Plaintiffs for its patent infringement. As the Sixth Circuit has said, “antitrust law is not a negotiating tool for a [defendant] seeking better contract terms.” *CBC Co., Inc. v. Equifax, Inc.*, 561 F.3d 569, 573 (6th Cir. 2009). This Court should find no differently.

CONCLUSION

For the foregoing reasons, Plaintiffs and Third Party Defendant respectfully request that Defendant and Counterclaimant ViewSonic’s Counterclaims First through Fourth be dismissed with prejudice.

Dated: December 16, 2013

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 16th day of December, 2013, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court by using the CM/ECF system. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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