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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ChriMar Systems Inc., et al.,

Plaintiffs,

v.

Cisco Systems Inc., et al.,

Defendants.

Case No. 4:13-cv-1300-JSW (MEJ)

DEFENDANTS CISCO SYSTEMS, INC. AND LINKSYS LLC'S OPPOSITION TO CHRIMAR'S MOTION TO DISMISS DEFENDANTS HP AND CISCO'S MONOPOLIZATION AND SECTION 17200 COUNTERCLAIMS AND HP'S ATTEMPTED MONOPOLIZATION COUNTERCLAIM

Judge: Honorable Jeffrey S. White
Magistrate Judge: Maria-Elena James
Hearing Date: October 17, 2014
Hearing Time: 9:00 a.m.
Place: Courtroom 5, 2nd Floor

SUMMARY OF ARGUMENT

ChriMar moves pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings on federal antitrust and California Unfair Competition Law ("UCL") counterclaims asserted by Cisco against ChriMar arising from ChriMar's intentional deception of the Institute of Electrical and Electronics Engineers ("IEEE"), the standards-setting organization ("SSO") responsible for developing the 802.3af and 802.3at standards for the delivery of power over Ethernet cables, which ChriMar accuses of infringing its patent-in-suit. Cisco's claims are based on well-settled law ignored by ChriMar, and ChriMar's motion should be denied.

ChriMar does not deny it hid its patent rights from the IEEE nor does it address Cisco's related fraud and breach of contract counterclaims based on that concealment. Instead, ChriMar challenges a sub-set of Cisco's counterclaims, arguing that Cisco has not alleged certain elements of those claims. But ChriMar is wrong. Cisco's monopolization claim pleads every required element of that claim, including relevant market, monopoly power, and antitrust injury allegations that are unquestionably sufficient under the law. Specifically, Cisco alleges that ChriMar deceptively acquired and now holds monopoly power over the market for the technology used to perform the functions allegedly covered by ChriMar's allegedly essential patent, functions ChriMar asserts are required to implement the IEEE's 802.3af and 802.3at standards for the transmission of electric power over Ethernet cables (the "PoE Standards"). Cisco's antitrust and UCL claims are based on a well-accepted theory that deceptive conduct in an SSO can constitute monopolization. ChriMar's motion, however, fails even to cite, let alone address, the numerous cases holding that allegations like Cisco's are legally sufficient. *See, e.g., Apple Inc. v. Samsung Elecs. Co.*, No. 11-cv-01846, 2012 WL 1672493, at *8 (N.D. Cal. May 14, 2012) (finding similar allegations sufficient to support monopolization claim); *see also Coal. for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 505-07 (9th Cir. 2010) (*Noerr-Pennington* immunity does not apply). Cisco's UCL claim likewise pleads every required element under established law. *See, e.g., Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 539-40, 544 (Cal. 1999). Accordingly, ChriMar's motion for judgment on the pleadings on Cisco's monopolization and UCL claims should be denied.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

ChriMar's Motion challenges the sufficiency of the allegations supporting Cisco's counterclaims against ChriMar for monopolization in violation of Section 2 of the Sherman Act and under California Business and Professions Code Section 17200.[1] ChriMar waited nearly two years to raise this pleading challenge to Cisco's claims, which first were asserted in Cisco's First Amended Counterclaims ("FAC") filed on December 26, 2012. Dkt. Nos. 51 and 57. ChriMar's late-raised pleading challenges are no more valid now than if they had been promptly raised: under numerous decisions ChriMar ignores, Cisco's allegations are unquestionably sufficient.

ChriMar disregards the detailed allegations supporting Cisco's counterclaims, including those that describe ChriMar's intentional concealment of the patent-in-suit from the IEEE despite ChriMar's alleged belief that the patent was required to implement the PoE Standards, in violation of the IEEE's rules. *See, e.g.*, FAC ¶¶ 10-36. Cisco does not agree the patent-in-suit is infringed by products practicing the PoE Standards. But if ChriMar's infringement allegations are correct, ChriMar illegally attained monopoly power in the market for technologies that could have performed the same function allegedly covered by a patent ChriMar asserts is essential to implement the PoE Standards. Cisco's allegations that ChriMar's anticompetitive conduct caused well-established forms of antitrust injury to competition, consumers, and competitors in the relevant market—which must be accepted as true for purposes of ruling on ChriMar's pleading challenge under Rule 12(c)—likewise are well recognized as sufficient to plead a monopolization claim under Section 2 of the Sherman Act.

ChriMar does not cite a single case addressing an antitrust claim involving standards, even though many courts, including this one, have addressed pleading challenges to monopolization claims based on standards-related conduct and consistently found allegations like Cisco's sufficient.

[1] As used herein, "ChriMar" collectively refers to Plaintiffs ChriMar Systems, Inc. d/b/a CMS Technologies and ChriMar Holding Company, LLC; "Cisco" collectively refers to Defendants Cisco Systems Inc. and Linksys LLC; "HP" refers to Defendant Hewlett-Packard Co.; and "UCL" refers to Cal. Bus. & Prof. Code § 17200. HP also asserted the monopolization and UCL claims addressed in this brief, and joins in this brief with respect to those claims. Cisco and HP have filed separate opposition briefs because certain arguments raised in ChriMar's motion are specific to HP, such as ChriMar's request for judgment on the pleadings on HP's attempted monopolization counterclaim, which has not been asserted by Cisco; that claim is addressed in HP's separate filing.

Instead, ChriMar relies on misapplication of cases outside the standards context, attempting to use those cases to argue around the clear factual allegations supporting Cisco's antitrust claim.

ChriMar also challenges the "unfair" and "unlawful" prongs of Cisco's UCL claim, arguing those aspects of Cisco's UCL claim should not proceed because Cisco's antitrust claim allegedly is deficient. Just as it does not challenge Cisco's fraud or breach of contract claims based on ChriMar's standards deception, ChriMar does not challenge the "fraudulent" prong of Cisco's UCL claim, or argue that ChriMar's standards deception is insufficient to support the "fraudulent" prong of that claim. The "unfair" and "unlawful" prongs of Cisco's UCL claims likewise are well supported: as described above, Cisco's antitrust allegations are sufficient under the law.

II. ISSUES TO BE DECIDED

Whether ChriMar's motion for judgment on the pleadings as to Cisco's monopolization and UCL claims should be denied where Cisco's claims are supported by detailed allegations that numerous cases analyzing similar circumstances recognize are sufficient to support those claims.

III. STATEMENT OF FACTS

A. Procedural Background

ChriMar filed this action against Cisco and other defendants on October 31, 2011 in the District of Delaware, alleging that the defendants' products incorporating standardized technology for transmission of electrical power over Ethernet cables ("Power-over-Ethernet" or "PoE") infringe U.S. Patent No. 7,457,250 (the "'250 patent"). *See* Dkt. No. 1. On December 26, 2012, Cisco filed its FAC asserting, for the first time, the monopolization and UCL claims challenged by ChriMar. Dkt. Nos. 51 and 57. The case was subsequently transferred to this Court. Dkt. Nos. 82 and 83. On August 15, 2014, ChriMar filed its Motion seeking judgment on the pleadings on Cisco's monopolization and UCL claims. Dkt. No. 202.

B. Technical Standards, and Industry Lock-In and Hold-Up

ChriMar alleges that the '250 patent is "essential" to the PoE Standards. FAC ¶¶ 19-24; ChriMar's Answer to FAC ("FAC Answer") (Dkt. No. 60) ¶ 60. ChriMar's position is that any product compatible with the PoE Standards necessarily infringes the '250 patent. *See* Dkt. No. 1 ¶¶ 15-18. Technical standards like the PoE Standards are critical to encourage innovation and

investment by Cisco and other companies in developing products that implement those standards. FAC ¶ 13. Standards allow consumers to create communications networks knowing that products from different vendors will work together. *Id.* ¶ 12. Standards help drive innovation by making new products available that will be compatible with each other. *Id.*

Unfortunately, implementers of standards are susceptible to patent "hold-up." *Id.* ¶¶ 11-14. Hold-up can occur where, after a standard is set and products implementing the standard are developed and sold, a patentee claims to own patents required to implement the standard. *Id.* ¶ 14. Prior to standardization, the royalty a patentee can charge for its technology is limited by substitute technologies that can perform the same function, but often a single approach is selected when a standard is adopted and other alternatives are not incorporated into the standard. *Id.* Because implementation of the standard becomes a commercial requirement, and the costs to the industry of switching to an alternative technology become prohibitive, where the standard is widely adopted, "lock-in" to the standard occurs and a patentee like ChriMar can demand royalties for alleged infringement that far exceed what is warranted by the intrinsic value of the technology absent its incorporation in the standard ("hold-up"). *Id.*

To address the hold-up problem, the IEEE and other SSOs have policies requiring, among other things: (a) timely and prompt disclosure of intellectual property such as patents or patent applications that would be infringed by implementation of a standard; and (b) timely submission of statements by the owners of such patent rights regarding whether they will commit to license those patents on reasonable and non-discriminatory ("RAND") terms. *Id.* ¶ 15, 22; FAC Answer ¶ 22. The IEEE's policy requires participants in the standards-setting process to disclose patents and patent applications they believe to be Essential Patent Rights. FAC ¶ 22; FAC Answer ¶ 22. The IEEE also requires any holder of such Essential Patent Rights to submit Letters of Assurance indicating whether the holder will enforce any of its present or future patents required to implement a proposed standard, or that the holder is willing to provide a license on RAND terms or without compensation. FAC ¶ 22; FAC Answer ¶ 22.

Timely disclosure of any arguably Essential Patent Rights and whether the holder of such rights is willing to license those rights on RAND terms is critical to the standards-development

process as well as to the market. FAC ¶ 16. Such disclosure allows other participants in the standards-development process to make informed decisions about whether to include the feature covered by the patented invention in the standard, or to instead choose alternative approaches. *Id.* ¶¶ 16, 22. Non-disclosure of Essential Patent Rights and breach of RAND commitments undermine the safeguards that SSOs put in place to guard against abuse and to prevent patent hold-up. *Id.* ¶ 17. Failure to abide by the SSO's rules can lead to anti-competitive patent hold-up when a patentee seeks to extract royalties that far exceed those it could have obtained before consumers became locked-in to the standard. *Id.* ¶ 18.

C. ChriMar's Deliberate Subversion of the IEEE Standard Setting Process

Development of the 802.3af and 802.3at amendments to the IEEE 802.3 standard occurred between March 1999 and September 2009. *Id.* ¶¶ 19, 20, 23.[2] During the standards-development process, John F. Austermann, III, President of ChriMar and a named inventor on the '250 patent, attended meetings of the IEEE 802.3af and 802.3at groups, making presentations to the 802.3af task force in July 2000 and to the 802.3at PoE-Plus Study Group in January 2005. *Id.* ¶ 26; FAC Answer ¶ 26. Consistent with the IEEE's established practice, at each meeting Mr. Austermann attended, the chair of the meeting asked participants to disclose patents. FAC ¶ 26. In contravention of IEEE policies and practices, Mr. Austermann failed to disclose the '250 patent or its applications, or any belief that the standard would be covered by the '250 patent or its applications, to the IEEE, even though—as described below—he disclosed a separate patent to the IEEE. *Id.*

Participants in development of the PoE Standards sought to select technologies to provide the functions covered by the standard, choosing between viable alternative technologies. *Id.* ¶ 34. These decisions were based on considerations including intellectual property considerations such as disclosures of patents the discloser believed would be essential to implement the standard and whether the discloser had committed to license its technology on RAND terms. *Id.* Various companies sought to have technologies included within the standard—including viable alternative

[2] The 802.3af amendment to the IEEE 802.3 standard initially defined a standard for supplying power (as well as data) over Ethernet cables to devices such as VoIP phones, IP cameras, and Wireless Access Points. FAC ¶ 21. The 802.3at amendment, among other things, increased the power available over the Ethernet cable. *Id.*

ways of providing the functionality ChriMar alleges is covered by the '250 patent. *Id.* ¶ 35.

In 2001, ChriMar submitted a Letter of Assurance to the IEEE identifying U.S. Patent No. 5,406,260. *Id.* ¶ 27. Despite identifying one of its patents, ChriMar never identified the '250 patent or its related applications to the IEEE. *Id.* Had ChriMar disclosed the '250 patent or its applications to the IEEE, or its belief that they would be infringed by practicing the proposed standard, the IEEE would have (a) incorporated one or more viable alternative technologies into the PoE Standards; (b) required ChriMar to provide a Letter of Assurance for the '250 patent or its applications; (c) decided to not adopt the PoE Standards; and/or (d) adopted a standard that did not incorporate technology that ChriMar claims is covered by the '250 patent, pursuant to the IEEE's policies. *Id.* ¶ 36. ChriMar's failure to disclose the '250 patent was done knowingly and with intent to deceive and induce the IEEE PoE groups to adopt those standards. *Id.* ¶ 31. ChriMar sought to have the best of both worlds: disclose one patent that would be subject to a RAND commitment, while holding back another it could later use opportunistically to hold up adopters of the standard.

Based on ChriMar's deception in connection with the IEEE standards process, Cisco has asserted fraud, breach of contract, monopolization, and UCL claims against ChriMar. *See id.* ¶¶ 25-36, 54-91. ChriMar's Motion does not address Cisco's fraud or breach of contract claims, or the "fraudulent" prong of Cisco's UCL claim, but addresses only Cisco's monopolization claim and the "unlawful" and "unfair" prongs of Cisco's UCL claim.

IV. ARGUMENT

A. Relevant Legal Principles

A court reviewing a motion for judgment on the pleadings under Rule 12(c) "must accept all factual allegations in the [claim] as true and construe them in the light most favorable to the non-moving party." *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). A claim must contain "enough facts to state a claim to relief that is plausible on its face," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), so that it "raise[s] a right to relief above the speculative level." *Id.* at 555. "'Specific facts are not necessary; the statement need only give the defendant[s] fair notice of what . . . the claim is and the grounds upon which it rests.'" *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 738 F. Supp. 2d 1011, 1017 (N.D. Cal. 2010) (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)).

A claim for monopolization under Section 2 of the Sherman Act must establish that: "(1) [the party against which the claim is asserted] possessed monopoly power in the relevant market, and (2) that [party] achieved or is maintaining monopoly power through anticompetitive conduct." *Apple Inc. v. Samsung Elecs. Co.*, No. 11-cv-01846, 2012 WL 1672493, at *4 (N.D. Cal. May 14, 2012) (citing *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004)). Monopolization claims are subject to the pleading standards in Rule 8 of the Federal Rules of Civil Procedure. *Actividentity Corp. v. Intercede Group PLC*, No. C 08-4577, 2009 WL 8674284, *3 (N.D. Cal. Sept. 11, 2009).

Numerous cases hold that a participant in standards development violates Section 2 of the Sherman Act when it conceals patented technology from other participants to incorporate its patented technology into the standard or otherwise engages in fraudulent conduct in connection with an SSO. *See, e.g.*, *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007) (fraudulent conduct in connection with an SSO "is actionable anticompetitive conduct"); *Samsung*, 2012 WL 1672493, at *8 (denying motion to dismiss antitrust claim where patentee allegedly failed to disclose its intellectual property to an SSO); *Actividentity*, 2009 WL 8674284, at *3 (denying motion to dismiss antitrust claim and stating: "Failure to disclose intellectual property rights to an SSO can lead to violation of Section 2 of the Sherman Act."); *Research In Motion Ltd. v. Motorola, Inc.*, 644 F. Supp. 2d 788, 793-97 (N.D. Tex. 2008) (denying motion to dismiss antitrust claim and stating that "anti-competitive effects are inevitable" when an entity defrauds an SSO).

In *Samsung*, District Judge Koh considered Samsung's motion to dismiss certain of Apple's counterclaims, including claims under Section 2 of the Sherman Act. Apple alleged that during development of the UMTS standard, Samsung "deliberately and deceptively failed to disclose the existence of its claimed [standard-essential intellectual property rights] during the standard-setting process" and claimed that such conduct was anticompetitive. *Samsung*, 2012 WL 1672493, at *1-2, *8 (quotations omitted). Apple further alleged that Samsung steered the SSO to standardize Samsung's technology, and had Samsung disclosed its ownership of the relevant patents and that it did not intend to license those patents on RAND terms, the SSO would have selected a competing technology or declined to make the relevant function essential to the standard. *Id*. at *2. As a result,

Apple alleged, "Samsung thus excluded alternative technologies that were available to perform the same functions as those covered by Samsung's [patents], and acquired monopoly power in the [relevant markets] covered by Samsung's [standard-essential patents]." *Id*. Apple alleged that Samsung had monopoly power by way of being able to "raise prices and exclude competition" in the defined market, and because of lock-in to the standard. *Id.* at *6 (quotations omitted). Based on these allegations, the Court denied Samsung's motion to dismiss Apple's antitrust counterclaim, holding that Apple adequately pled its claim under Section 2 of the Sherman Act. *Id*. at *8.

B. Cisco Has Adequately Pled Its Monopolization Claim

Although ChriMar argues that Cisco's monopolization claim is deficient, ChriMar's Brief does not address or cite to even a single case that considered antitrust violations in the context of standard setting. *See* Br. at 5-8. Cisco's allegations mirror those found sufficient in the other cases that have considered this issue. For example, Cisco's allegations largely mirror those made by Apple against Samsung in the *Samsung* case, which the Court found sufficient. *Compare* FAC ¶¶ 10-36, 59-69, *with Samsung*, 2012 WL 1672493, at *1-2, *8; *see also Actividentity*, 2009 WL 8674284, at *2, *4; *Broadcom*, 501 F.3d at 314 ("We hold that (1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with an [SSO's] reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct.").

Rather than address the relevant cases, ChriMar instead picks at aspects of Cisco's monopolization claims (relevant market, monopoly power, and antitrust injury) and suggests ChriMar's standards misconduct is immune from antitrust liability, relying on misapplication of cases decided in other contexts. ChriMar's criticisms are unfounded and not supported by the law.

1. Cisco Has Adequately Pled A Relevant Market

Market definition is rarely grounds for dismissal of a pleading because "the validity of the 'relevant market' is typically a factual element rather than a legal element," and therefore "alleged markets may survive scrutiny under Rule 12[c] subject to factual testing by summary judgment or trial." *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008). Dismissal

based on a failure to allege a relevant market is appropriate only where "it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect." *Id.*; *accord In re eBay Seller Antitrust Litig.*, 545 F. Supp. 2d 1027, 1032 (N.D. Cal. 2008) ("[T]here has been no evidence [yet] presented regarding the relevant market," and the claimant should be "entitle[d] to the opportunity to prove [its] allegations." (quotation omitted)). As discussed below, the technology market pled by Cisco is an established market type supporting a monopolization claim in the context of standards misconduct.

Numerous courts have addressed market definition in the SSO context. Those cases consistently hold that the relevant market is defined by those technologies that—before the standard was adopted—were competing to perform the function that was covered by the purportedly essential patent. *See, e.g.*, *Broadcom*, 501 F.3d at 315 (relevant market sufficiently pled when defined as "the market for Qualcomm's proprietary WCDMA technology, a technology essential to the implementation of the UMTS standard"); *Apple Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178, 2011 WL 7324582, at *13 (W.D. Wis. June 7, 2011) (relevant market sufficiently pled when defined as "the various technologies competing to perform the functions covered by Motorola's declared-essential patents for each of the relevant standards"). ChriMar does not cite to a single case that considered the relevant market where antitrust violations occurred in connection with misconduct in the context of standards development.

In *Samsung*, Apple pled the relevant market as "the various markets for technologies that—before the standard was implemented—were competing to perform each of the various functions covered by each of Samsung's purported essential patents for UMTS." *Samsung*, 2012 WL 1672493, at *5 (quotation omitted). Apple also identified the patents Samsung declared as standard essential and alleged that "pre-standardization there existed alternative substitutes for the technologies covered by Samsung's patents," and that after standardization, "viable alternative technologies were excluded." *Id.* The *Samsung* court found those allegations to "define the bounds of the relevant markets" and that "Apple ha[d] sufficiently pled a relevant antitrust market," stating:

> Apple's position is consistent with other courts that have confirmed that technology markets may serve as "relevant markets" for Sherman Act claims in the context of essential patents adopted by [SSOs]. For example, the Third Circuit concluded that a

> relevant market for an antitrust claim could be the market for proprietary technology, stating that "the incorporation of a patent into a standard . . . ***makes the scope of the relevant market congruent with that of the patent***."

Id. (emphasis added) (quoting *Broadcom*, 501 F.3d at 315).

Consistent with these cases, Cisco defined the market to comprise the technologies that competed to perform the functions in the PoE Standards allegedly covered by the '250 patent. FAC ¶ 60. Similar to the markets found adequate in *Samsung* and *Broadcom*, that definition appropriately focuses on alternative technologies that were excluded from the market by ChriMar's deceptive conduct and which Cisco and other implementers of the standard cannot now choose because the industry is "locked-in" to the standard. *See*, *e.g.*, *Motorola*, 2011 WL 7324582, at *13; *Broadcom*, 501 F.3d at 315.[3]

To the extent ChriMar argues the correct market definition should include the entire standard, rather than some portion of the standard, that argument is inconsistent with both the complaint and with governing case law. Cisco plainly alleges a market "for technology essential to perform certain functions, allegedly covered by the '250 patent, necessary to implement the IEEE 802.3 standard." FAC ¶ 60. That is the appropriate market definition under cases such as *Samsung* and *Broadcom*.

Rather than addressing relevant authority considering antitrust claims in the context of SSOs, ChriMar instead cites to inapposite cases and impugns Cisco's pled market for "fail[ing] to identify what particular technologies [Cisco] is referring to" and for not exploring the "'reasonable interchangeability of the use or cross-elasticity of demand' outside [the] intersection [of ChriMar's infringement claims]." Br. at 9. ChriMar's argument is at odds with how courts assess the relevant market where, as here, a monopolization claim is premised on subversion of the standards-setting process. Courts recognize the relevant antitrust market in circumstances like those addressed by Cisco's claim to be "the various technologies competing to perform the functions covered by [the]

[3] To the extent ChriMar suggests the relevant market must be defined as a "product market" and not "a market for developing and licensing particular technology" (Br. at 9), ChriMar is wrong. Numerous courts, including this one, have held an antitrust market comprising technology and licensing is appropriate. *See, e.g., Samsung*, 2012 WL 1672493, at *5 ("[T]echnology markets may serve as 'relevant markets' for Sherman Act claims in the context of essential patents adopted by [SSOs]."); *Hynix Semiconductor Inc. v. Rambus Inc.*, Nos. CV-00-20905, C-05-00334, C-05-02298, C-06-00244, 2008 WL 73689, at *2 (N.D. Cal. Jan. 5, 2008) ("[T]echnology markets, which [for the purposes of an antitrust claim] consist of intellectual property that is licensed." (quotation omitted)).

declared-essential patents." *Motorola*, 2011 WL 7324582, at *13. Cisco specifically pled that alternative technologies existed during the standards development process that could have performed the same function as that performed by the '250 patent. FAC ¶¶ 34-36, 61. Cisco also specifically pled that those technologies are no longer alternatives that Cisco and other implementers of the standard can select because industry and consumers are now "locked-in" to the standard. FAC ¶¶ 34-36, 60-64; *Broadcom*, 501 F.3d at 314 ("A standard, by definition, eliminates alternative technologies."). That is more than sufficient to plead the appropriate market definition.[4]

ChriMar relies on two cases in an effort to support its arguments—*Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997) and *Tower Air, Inc. v. Fed. Express Corp.*, 956 F. Supp. 270 (E.D.N.Y. 1996) (Br. at 9-10)—neither of which relates to standards or is relevant. In *Queen City Pizza*, the court considered antitrust claims in the context of a franchisee relationship, where the franchise agreement required franchisees to purchase only approved supplies. 124 F.3d at 438. The court rejected the franchisees' argument that the contractual restraints they agreed to should determine the market, stating: "[T]he relevant inquiry here is not whether a Domino's franchisee may reasonably use both approved or non-approved products interchangeably without triggering liability for breach of contract, but whether pizza makers in general might use such products interchangeably. Clearly, they could." *Id.* Here, neither Cisco nor its customers regard products that comply with the PoE Standards and products that do not to be interchangeable: as Cisco alleged, industry and consumers have become "locked-in" to the standard, eliminating viable alternatives. FAC ¶¶ 34-36, 60-64. Moreover, Cisco has not alleged that the market is defined by a bilateral contractual agreement, as in *Queen City Pizza*. Rather, the relevant market is defined by specific requirements included in standards that have enjoyed widespread adoption in the networking industry, so that being able to implement them is a commercial necessity for Cisco and its customers and competitors. *Tower Air* is likewise inapposite for similar reasons. 956 F. Supp. at 279 (considering the relevant antitrust market under a government contract).

[4] Additionally, there is no requirement that Cisco plead specific cross-elasticities of demand between the standardized technologies allegedly covered by ChriMar's patent and the alternatives that were available prior to standardization. *See In re Webkinz Antitrust Litig.*, No. C 08-1987, 2010 WL 4168845, at *3 (N.D. Cal. Oct. 20, 2010) (holding that on a motion to dismiss, extensive analysis of interchangeability and cross elasticity is not required).

2. Cisco Has Adequately Pled Monopoly Power

In the standards context, it is well settled that patentees holding standard-essential patents can possess monopoly power. *See, e.g.*, *Samsung*, 2012 WL 1672493, at *6 ("[A] number of courts have recognized a legal distinction between a normal patent—to which antitrust market power is generally not conferred on the patent owner, and a patent incorporated into a standard—to which antitrust market power may be conferred on the patent owner."); *Actividentity*, 2009 WL 8674284, at *4 ("Actividentity obtained monopoly market share as the market became 'locked-in' to the standard."). ChriMar's arguments regarding market share (*see* Br. at 10-11) fail for many of the same reasons its market definition argument fails. Because it holds an allegedly standard-essential patent, ChriMar has the power to exclude—and, indeed, has excluded—alternative technologies that could have performed the functions allegedly covered by the '250 patent. The power to exclude competition is monopoly power. Additionally, if it does indeed hold a standard-essential patent (as it claims), then ChriMar has the power to exclude any implementation of a widely adopted standard to which the industry has become "locked in."

In *Samsung*, Apple alleged that Samsung had market power over the relevant market because it obtained the power to raise prices and exclude competition over the technologies covered by Samsung's standard-essential patents. *Samsung*, 2012 WL 1672493, at *6-7. Apple also alleged there was "lock-in" to the standard. *Id.* at *6. The court found that because standard-essential patents may confer antitrust market power on the patent owner, Apple's claims were sufficient and it was "not required to allege more to plead monopoly power in a relevant market." *Id.* at *6-7.

Contrary to ChriMar's argument, which cites to only one paragraph of Cisco's pleading (Br. at 11), Cisco's monopoly power allegations are consistent with those found to be sufficient in *Samsung* and other cases considering antitrust claims in the standards context:

> Because . . . ChriMar accuses the leading vendors of Power over Ethernet-enabled products of infringement, it is ChriMar's position that ***no meaningful level of Power over Ethernet-enabled products do not infringe the '250 Patent***. Nor, because of "lock-in" to the standard, are there any viable technology substitutes at present. Accordingly, if the '250 Patent claims covered products that comply with the IEEE standard as claimed by ChriMar, ChriMar has monopoly power over the Power over Ethernet Technology Market.

FAC ¶ 64 (emphasis added); *see also id.* ¶¶ 61-63, 65 (standard adoption and switching costs; ChriMar's assertions of the '250 patent based on compliance with the 802.3af and 802.3at standards; restraint of interstate commerce); *Actividentity*, 2009 WL 8674284, at *4 ("Actividentity obtained monopoly market share as the market became 'locked-in' to the standard."); *Broadcom*, 501 F.3d at 315 (concluding "quickly and easily" a monopolization claim was sufficiently pled where patentee "had the power to extract supracompetitive prices" in the market for "technology essential to the implementation" of a standard by virtue of adoption of the standard).[5]

3. Cisco Has Adequately Pled Antitrust Injury

In order to "properly plead that it has suffered an antitrust injury, [a plaintiff] must allege injury to *competition*." *Apple, Inc. v. Samsung Electronics Co., Ltd.*, No. 11-cv-01846, 2011 WL 4948567, at *6 (N.D. Cal. Oct. 18, 2011) ("*Samsung I*") (emphasis in original). Cisco has done so; ChriMar's arguments to the contrary should be rejected.

It is well settled that misconduct before an SSO harms competition by "obscuring the costs of including proprietary technology in a standard and increasing the likelihood that patent rights will confer monopoly power on the patent holder." *Broadcom*, 501 F.3d at 314; *accord Samsung I*, 2011 WL 4948567 at *6; *Research In Motion*, 644 F. Supp. 2d at 793-96 (standards-essential patent holder's actions as licensing "gatekeeper" to the standardized technology can harm competition).

Cisco's pleading contains detailed allegations concerning the harm to competition caused by ChriMar's deception in the context of standards setting. Cisco's counterclaims explain in detail how ChriMar's deception before the IEEE excluded rival technologies that could have been included in the PoE Standards—thereby harming competition and resulting in supra-RAND costs. FAC ¶¶ 34-36. Similarly, Cisco's pleading explains the various other harms to competition that have resulted

[5] ChriMar again relies on irrelevant cases in an effort to support its argument that Cisco did not adequately plead monopoly power, relying on cases that do not involve standards and which were decided on the merits and not the pleadings. *See* Br. at 11 (citing *Barry v. Blue Cross of Cal.*, 805 F.2d 866, 874 (9th Cir. 1986) (16% market share too low for a monopoly); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1274 (9th Cir. 1975) (33% "certainly" not a monopoly); *Image Tech. Serv. Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997) (65% market share required to make out a *prima facie* case of monopoly power)). Even if ChriMar's cases were applicable, Cisco easily satisfies the threshold of 65% market share, as it alleges that, once ChriMar's patent allegedly became essential to implement the PoE Standards, there were no viable alternatives to using the patent, making ChriMar's market share 100%. *See* FAC ¶ 64.

from ChriMar's deception:

> ChriMar's actions seek to reduce output, prevent competition on the standardized product, raise prices, waste the time and money spent standardizing the product, and run counter to the policy of encouraging the setting of standards to promote competition. ChriMar's actions have subverted and disrupted the key purpose of standard setting. Under ChriMar's approach, only companies now licensed by ChriMar would be legally permitted to sell products or devices that are compliant with the IEEE 802.3af and IEEE 802.3at amendments to the IEEE 802.3 standard. Any current ChriMar licensees cannot meet market demand, and could ***charge supra-competitive prices*** for the products that are compliant with the IEEE 802.3 standard that they would be able to manufacture and sell. ***Customers and consumers will be harmed***, either by ***not getting products that are compliant with the IEEE 802.3af and IEEE 802.3at amendment to the IEEE 802.3 standard*** or having to ***pay an exorbitant price*** for one. ***These actions would result in higher prices and harm competition***.

FAC ¶ 66 (emphases added). ChriMar's brief fails to acknowledge the totality of these allegations, including in particular the allegation that consumers will be forced to pay "supra-competitive prices" as a result of ChriMar's anticompetitive conduct.

This Court has held that allegations like Cisco's are sufficient to plead antitrust injury. In *Samsung I*, Apple alleged antitrust injury in substantially the same way that Cisco has, pleading that Samsung's alleged subversion of the policies of the standards-setting organization:

> threaten[ed] unlawfully to ***exclude rivals from and increase royalties and other costs*** associated with the manufacture and sale of downstream wireless communications devices that implement the UMTS standard and ***chill competition*** to develop and sell innovative new UMTS-compliant products, ***resulting in increased prices and decreased quality and innovation*** in downstream product markets and complementary innovation markets.

Samsung I, 2011 WL 4948567, at *6 (emphases added) (quotation omitted). In light of Apple's allegations, the Court stated: "It is unclear what more Samsung believes Apple must allege to sufficiently plead harm to competition." *Id*. Likewise here, Cisco has sufficiently pled harm to competition. *See also Research In Motion*, 644 F. Supp. 2d at 796 (holding that Motorola's breach of its commitments to the IEEE and ETSI was harmful to competition).

ChriMar does not address cases considering antitrust injury in the standards context. Instead, ChriMar argues that the anticompetitive harm alleged by Cisco "is a potential consequence in any successful patent litigation." Br. at 13. This is not just "any patent litigation," and the competitive harm alleged by Cisco is not the natural result of any patent litigation: here, ChriMar deliberately subverted the goals of the IEEE standards-setting process by not disclosing its patent rights, waiting

until the industry became locked-in to the PoE Standards, and demanding royalties from implementers of the standards that Cisco has alleged will lead to "***supra-competitive*** prices." FAC ¶¶ 10-36, 59-69 (emphasis added). These higher prices are not the result of patent royalties generally, but are the consequence of an ability to charge "supra-competitive" prices as a result of ChriMar's exclusion of rivals' alternative technologies and lock-in to the PoE Standards.

ChriMar also argues that ChriMar's conduct does "not harm [] the competitive process and thus does not warrant antitrust protection." Br. at 13. That argument ignores the allegations in Cisco's pleading and the substantial authority cited above confirming that ChriMar's deception of the standards body harms competition and warrants antitrust protection. *See, e.g.*, *Samsung I*, 2011 WL 4948567, at *6; *Research In Motion*, 644 F. Supp. 2d at 793-96.[6]

4. ChriMar's Deceptive Conduct In Connection With the Standards-Setting Process Is Not Immunized By *Noerr-Pennington*

Finally, ChriMar argues that its deception in the context of the IEEE standards process should be immunized under *Noerr-Pennington*, and that Cisco has failed to plead any exceptions to this doctrine. Br. at 6-7. That argument is incorrect, as confirmed by substantial authority. Courts have repeatedly recognized that the *Noerr-Pennington* doctrine does not apply to monopoly power gained through deception in the context of SSOs, even when an allegedly standard-essential patent is subsequently asserted in court.[7] *See, e.g.*, *Coal. for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 505-07 (9th Cir. 2010) ("[T]he Supreme Court has held that an entity may be prosecuted for an antitrust violation on the basis of improper coercion of a standards-setting body."); *Broadcom*, 501 F.3d at 308 (discussing *Noerr-Pennington*: "'[I]n less political arenas,' however, such as [in an SSO], 'unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations.'" (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,

[6] ChriMar's reliance on *MetroNet Servs. Corp. v. U.S. West Commc'n*, 325 F.3d 1086 (9th Cir. 2003) and *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024 (9th Cir. 2001) is misplaced. Neither of these cases addresses the standards-setting context and the type of harm to competition alleged here.

[7] Contrary to ChriMar's argument relying on 35 U.S.C. § 271(d) and *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006) (Br. at 6), Cisco does not allege that ChriMar's monopoly power should be *presumed* by virtue of the '250 patent itself, but instead that ChriMar unlawfully obtained monopoly power through its deception of the IEEE, an allegation that is amply supported by the case law. *See* FAC ¶¶ 60-64; discussion *supra* at §§ A-B.3.

486 U.S. 492, 500 (1988))). *Noerr-Pennington* immunity does not apply here; as a consequence, ChriMar is incorrect that Cisco must plead one of two exceptions to the *Noerr-Pennington* doctrine to survive its Motion. *Broadcom*, 501 F.3d at 308.

C. Cisco's UCL Counterclaim for "Unlawful" And "Unfair" Business Acts Or Practices Should Not Be Dismissed

ChriMar argues that the "unlawful" and "unfair" prongs of Cisco's UCL claim should be dismissed because they are premised on the same underlying factual allegations as Cisco's allegedly inadequate antitrust claim. Br. at 14-15. Cisco's UCL claim is also based on the "fraudulent" prong of the UCL, due to ChriMar's deceptive conduct in the standards context, and ChriMar does not challenge that aspect of Cisco's UCL claim. *See* FAC ¶¶ 72, 82-83. ChriMar therefore is not entitled to judgment on the pleadings on Cisco's UCL claim on that basis alone. *See, e.g.*, *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 540 (Cal. 1999).

Moreover, because Cisco's monopolization claim is adequately pled, so are the "unlawful" and "unfair" aspects of its UCL claim. *DocMagic, Inc. v. Ellie Mae, Inc.*, 745 F. Supp. 2d. 1119, 1146 (N.D. Cal. 2010) (violation of another law may serve as basis for UCL claim). Indeed, even if there was some technical defect with Cisco's monopolization claim, a UCL claim brought under the "unfair" prong could still proceed, as such claims may be based not only on "an incipient violation of an antitrust law," but also on a violation of "the policy or spirit of one of those laws." *Cel-Tech*, 973 P.2d at 544 (Cal. 1999). Here, the policy and spirit of the antitrust laws have unquestionably been violated by ChriMar's standards misconduct as alleged by Cisco. *See also Korea Kumho Petrochemical v. Flexsys Am. LP*, No. C07-01057 MJJ, 2008 WL 686834, *9 (N.D. Cal. Mar. 11, 2008) ("An act need not violate the antitrust laws to be actionable by a competitor as unfair, it can be actionable if it 'significantly threatens or harms competition.'" (quoting *Cel-Tech*, 973 P.2d at 544)).

V. CONCLUSION

ChriMar's motion should be denied as to Cisco's claims for the foregoing reasons.[8]

[8] To the extent Cisco's claims are dismissed, Cisco respectfully requests leave to amend its counterclaims. *See Quinlan v. Power-One, Inc.*, No. 13-cv-03291, 2014 WL 129226, *2 (N.D. Cal. Jan. 14, 2014) ("Courts have discretion to grant leave to amend in conjunction with 12(c) motions, and may dismiss causes of action [with leave to amend] rather than grant judgment." (internal quotation omitted)).

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