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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

ChriMar Systems Inc. d/b/a CMS
Technologies and ChriMar Holding
Company, LLC,

Plaintiffs,

v.

Cisco Systems, Inc., Cisco Consumer
Products LLC, Cisco-Linksys LLC, and
Hewlett-Packard Co.

Defendants.

Case No. 4:13-cv-1300-JSW

**CHRIMAR’S REPLY IN SUPPORT OF
ITS MOTION TO DISMISS
DEFENDANTS HP AND CISCO’S
MONOPOLIZATION AND SECTION
17200 COUNTERCLAIMS AND HP’S
ATTEMPTED MONOPOLIZATION
COUNTERCLAIM**

Hearing: October 17, 2014
Time: Friday, 9:00 am
Courtroom: Courtroom 5, 2nd Floor
Judge: Honorable Jeffrey S. White

1 **SUMMARY OF ARGUMENT**

2 Defendants failed to plead essential elements of their counterclaims, including market
3 power and a relevant market. Instead, Defendants incorrectly claim that they need not do so
4 because they have pled abuse of the standard setting process. Defendants not only misstate the
5 cases they cite on this issue, but they are incorrect in suggesting that their own pleadings mirror
6 the pleadings in those cases. Defendants' standard setting arguments do not deal with the first
7 element of pleading monopolization, the possession of market power, but rather address only the
8 second element, willful acquisition or maintenance of that power. ChriMar does not have, and
9 has never had, monopoly power, a point fatal to Defendants' monopolization counterclaims.

10 HP failed to adequately plead attempted monopolization, and relies on case law rejected
11 by the U.S. Supreme Court to argue it need not plead specific intent or a dangerous probability of
12 attaining monopoly power. HP is incorrect in suggesting that it pled its attempted
13 monopolization counterclaim on the basis of a "scheme" or "overall course of conduct" that
14 includes standards setting misconduct. Therefore, HP cannot rely solely on protected litigation
15 conduct to plead this otherwise fatally-speculative counterclaim.

16 Because Defendants chose to plead the "unfair" and "illegal" prongs of their Section
17 17200 counterclaims based on the same alleged misconduct as alleged in the Sherman Act
18 Section 2 counterclaims, these counterclaims are properly dismissed even though Defendants
19 contend they could have brought them separately. Finally, because leave to amend would be
20 futile and Defendants raise the same conduct in other remaining counterclaims, the Court should
21 deny leave to amend.

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1 Plaintiffs ChriMar Systems, Inc. d/b/a CMS Technologies and ChriMar Holding
2 Company, LLC (collectively “ChriMar” or “Plaintiffs”) hereby present this reply in support of
3 their Rule 12(c) motion for judgment on the pleadings on certain counterclaims asserted by Cisco
4 Systems, Inc., Cisco Consumer Products LLC, and Cisco-Linksys LLC (“Cisco”) and Hewlett-
5 Packard Co. (“HP”) (collectively “Defendants”).

6 **I. INTRODUCTION**

7 In opposing ChriMar’s Motion for Judgment on the Pleadings, Defendants suggest
8 incorrectly that raising allegations of standards abuse relieves them from (1) having to plead
9 traditional elements for monopolization and attempted monopolization under Section 2 of the
10 Sherman Act such as a proper market, market power, or specific intent, or (2) the Supreme
11 Court’s rulings regarding *Noerr-Pennington* immunity. Defendants’ errors throughout their
12 opposition briefs (“Opp.”) are based on an incorrect and incomplete reading of cited cases and an
13 *aspirational* misreading of their own pleadings as “mirror[ing]” the pleadings of the cases they
14 misstate. Defendants’ errors are also based on an overly liberal understanding of the specificity
15 requirements for pleadings sufficient to survive judgment on the pleadings.

16 ChriMar continues to disagree with most of the allegations in Defendants counterclaims
17 (Mot. at 3), including that: (1) at the time Defendants allege ChriMar attended IEEE meetings
18 the IEEE imposed a duty to disclose patents, (2) the IEEE imposed a duty to license patents at
19 FRAND rates, (3) the IEEE rules applied to ChriMar as Defendants allege, or (4) the industry
20 was misled. The falsity of these allegations was all well demonstrated by discovery from
21 Defendants as well as non-parties in the ITC action, expert reports and depositions, and other
22 case law. ChriMar’s motion challenges the sufficiency of Defendants’ pleadings in an attempt to
23 streamline the case to issues actually and properly raised in the claims and counterclaims, and
24 ChriMar will address Defendants’ abusive factual allegations at the proper time in the proper
25 motions or at trial. Defendants mislead the Court by suggesting that ChriMar does not contest
26 these allegations. *See* HP Opp. at i; Cisco Opp. at i.

1 **II. DEFENDANTS FAILED TO PLEAD REQUIRED ELEMENTS OF**
 2 **MONOPOLIZATION AND ATTEMPTED MONOPOLIZATION.**

3 **A. Pleading Standards Abuse Does Not Exempt Defendants From Satisfying**
 4 **Required Elements In Their Counterclaims.**

5 Defendants allege throughout their oppositions that their assertions of abuse of a
 6 standards setting process somehow exempt them from having to plead the actual elements of a
 7 monopolization or attempted monopolization counterclaim. *See, e.g.*, HP Opp. at 5-6, 7
 8 (“ChriMar’s argument is at odds with a monopolization claim premised on subversion of the
 9 standards-setting process.”); Cisco Opp. at 6-7, 9. They are wrong, and the cases cited by
 10 Defendants do not suggest otherwise. Rather, those cases suggest at most that, on their particular
 11 facts, the standards allegations satisfy certain pleading requirements. *See, e.g.*, Cisco Opp. at 7
 12 (describing those facts for *Apple Inc. v. Samsung Elecs. Co.*, No. 11-cv-01846, 2012 WL
 13 1672493, at *1-2, 8 (N.D. Cal. May 14, 2012) (“*Samsung*”). The Supreme Court has held that a
 14 monopoly claim has two elements: “(1) the possession of monopoly power in the relevant market
 15 and (2) the willful acquisition or maintenance of that power.” *United States v. Grinnell Corp.*,
 16 384 U.S. 563, 570–71 (1966). Defendants agree that these are still the required elements of a
 17 monopoly claim today (HP Opp. at 5; Cisco Opp. at 6), as do the cases they incorrectly cite as
 18 somehow altering the requirements. *See, e.g., id.* (citing *Broadcom Corp. v. Qualcomm Inc.*, 501
 19 F.3d 297 (3d Cir. 2007)). For example, the *Broadcom* court held that Qualcomm “had the power
 20 to extract supracompetitive prices” and “possessed a dominant market share.” *Id.* at 315.
 21 Defendants must plead both elements, not just standards-related conduct, but also *possession* of
 22 monopoly power.

23 Furthermore, Defendants’ pleadings do not mirror those made by other parties asserting
 24 monopolization or attempted monopolization (*see, e.g.*, HP Opp. at 5 (suggesting “HP’s
 25 allegations largely mirror those made by Apple against Samsung” and also citing *Actividentity*
 26 *Corp. v. Intercede Group PLC*, No. C 08-4577, 2009 U.S. Dist. LEXIS 132206 (N.D. Cal. Sept.
 27 11, 2009) and *Broadcom*, 501 F.3d 297); Cisco Opp. at 7 (same)), and thus are not entitled to the
 28 same reasoning. The differences in the pleadings are addressed below with respect to the
 individual elements.

1 **B. Defendants Failed To Plead ChriMar Has Monopoly Power.**

2 Defendants have failed to plead that ChriMar had or obtained a dominant share of the
 3 market as the result of the alleged misconduct; without which ChriMar simply cannot “possess[]
 4 sufficient leverage to influence marketwide” output or prices. *See* Mot. at 10 (citing *Rebel Oil*
 5 *Co. v. Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995)). It is undisputed that now, and for all
 6 of the past fourteen years after what Defendants allege was attendance at an IEEE meeting,
 7 ChriMar does not possess monopoly power – a requirement for pleading monopolization under
 8 Section 2 of the Sherman Act. ChriMar raised this point (Mot. at 3) and Defendants did not plead
 9 or argue otherwise. Attempting to overcome the complete absence of a pleading of sufficient
 10 market share, Defendants try to assert in briefing that *if* ChriMar wins this litigation –
 11 establishing that the accused products infringe ChriMar’s patent, that the patent is enforceable
 12 and not invalid, and ChriMar’s right to relief survives these and other counterclaims – *then*
 13 ChriMar will have 100% of the market. HP Opp. at 8, n.7; Cisco Opp. at 12, n.5. Viewed in the
 14 most generous light possible, this pleading can amount only to a possibility that, after explicit
 15 action by a court, ChriMar may attain monopoly power, but not in a “dangerous way.” This is
 16 not a pleading that ChriMar has monopoly power, as required to plead monopolization, but at
 17 most a possible pleading for attempted monopolization, which only HP attempted to plead. As an
 18 initial matter, Defendants’ monopolization counterclaims should be dismissed *without leave to*
 19 *amend* as futile (*see Quinlan v. Power-One, Inc.*, No. 13-cv-03291, 2014 WL 129226, *2 (N.D.
 20 Cal. Jan. 14, 2014) (citation omitted)), because no pleading can establish that ChriMar has
 21 market power.¹

22 Defendants suggest that they need not plead market power because they pled a standards
 23 abuse case with a standards essential patent, and that their pleadings are “consistent with
 24 *Samsung* and other cases” in this respect. HP Opp. at 7-8; Cisco Opp. at 11. This is simply not
 25 the case, as these other cases included pleadings and findings of market power. Defendants cite
 26

27 ¹ In fact, Defendants pled elsewhere only that prices *could* rise or output *could* fall in the future
 28 as the result of the potential future conduct of ChriMar’s licensees, but not that this has happened
 in the 14 years since Defendants allege ChriMar attended an IEEE sub-group meeting.

1 *Broadcom*, 501 F.3d at 314, but failed to tell this Court that Broadcom pled Qualcomm had 90%
 2 of the relevant market and was leveraging that power into new markets. *Id.* at 304. Likewise
 3 Defendants cite *Actividentity*, 2009 U.S. Dist. LEXIS 132206, but failed to tell this Court that
 4 Intercede pled *Actividentity* had “approximately 90% of [the relevant] market.” *Id.* at *12.²
 5 Likewise, *Samsung*, 2012 WL 1672493 and *Research In Motion Ltd. v. Motorola Inc.*, 644 F.
 6 Supp. 2d 788 (N.D. Tex. 2008) (“*R.I.M.*”) involve large multinational entities with market
 7 positions far beyond that possessed by ChriMar.³

8 The *Broadcom* case is particularly notable. Defendants describe this case as “‘quickly and
 9 easily’ concluding that a monopolization claim was sufficiently pled where patentee ‘had the
 10 power to extract supracompetitive prices’ in the market for ‘technology essential to the
 11 implementation’ of a standard.” HP Opp. at 8; Cisco Opp. at 12. However, in reaching its
 12 conclusion “quickly and easily,” the *Broadcom* court stated it did so in part because (1)
 13 Qualcomm already “possessed a dominant market share” – the very element Defendants seek to
 14 avoid pleading here by citing *Broadcom* – and (2) because “Qualcomm had the power to extract
 15 supracompetitive prices.” *Broadcom*, 501 F.3d at 315. In contrast, Defendants have not pled that
 16 ChriMar has the ability to extract supra-competitive prices, they have pled only that in the future
 17 ChriMar’s “licensees...could charge super-competitive prices” because they “cannot meet the
 18 market demand.” HPCC ¶96 (HP pled this only in its Section 17200 counterclaim)(emphasis
 19 added), Cisco FAC ¶66. This possible, future, and temporary condition of higher prices and less
 20

21 ² Neither *Broadcom* nor *Actividentity* is premised on a pleading of monopolization that a patentee
 22 would own 100% of the alleged market if the alleged standards related misconduct was
 successful.

23 ³ *Hynix Semiconductor Inc. v. Rambus Inc.*, 527 F. Supp. 2d 1084 (N.D. Cal. 2007) (“*Hynix*”), is
 24 not relevant on this point because Hynix did not plead monopolization and attempted
 25 monopolization separately, and in reference to both collectively it pled “Rambus’s misconduct
 26 ... has given it monopoly power, or a dangerous probability of obtaining market power, in the
 27 relevant markets.” Hynix’s Second Amended Complaint (“SAC”), Case 5:00-cv-20905-RMW
 28 (Doc. No. 106 at 17, 21-22) (June 11, 2001)(“FIRST CLAIM FOR RELIEF –
 MONOPOLIZATION AND ATTEMPTED MONOPOLIZATION (15 U.S.C. §2)”). Hynix then
 pled that Rambus says “it has the market power to stop completely the production of all
 synchronous DRAMs and Logic Chips except its RDRAMs and compatible Logic Chips.” *Id.* at
 17 (¶79). Rambus did not move to dismiss Hynix’s monopolization counterclaim for failing to
 plead market power, and ultimately the trial court held that Rambus did not monopolize the
 designated markets.

1 competition is not antitrust injury, it is just normal market adjustments to changes in the source
 2 of supply. That Defendants do not and cannot plead it is happening now, but only *could* happen
 3 in the future, is fatal to their monopolization claim. To hold otherwise would make every
 4 successful patent litigant in a standards context (regardless of the merits) an illegal monopolist
 5 solely because of the possible actions and choices of its licensees and the adjustments of the
 6 market to them. None of these cases hold, as Defendants imply, that pleading failure to disclose
 7 in a standards context alone is all that is needed to *plead* these counterclaims.

8 **C. Defendants Failed To Plead A Relevant Market.**

9 Defendants suggest that they did not err in pleading a relevant market by selecting the
 10 intersection of ChriMar’s patent and two technical standards. Their reason, as with pleading
 11 monopoly power, is that other standards related cases suggest “courts have consistently held that
 12 the relevant market is defined by those technologies that—before the standard was adopted—
 13 were competing to perform the function that is allegedly covered by the purportedly essential
 14 patent.” HP Opp. at 6 (citing *Broadcom*, 501 F.3d at 315, *Apple v. Motorola Mobility*, No. 11-
 15 CV-178-BBC, 2011 U.S. Dist. LEXIS 72745 (“*Apple*”), and *Samsung*, 2012 WL 1672493, at
 16 *5); Cisco Opp. at 9-10. Specifically, Defendants suggest that:

17 In *Samsung*, Apple pled the relevant market as the technologies covered by the
 18 patents Samsung declared as standards-essential at the exclusion of viable
 19 alternative technologies. *Samsung*, 2012 WL 1672493, at *5. The Samsung court
 20 found those allegations to “define the bounds of the relevant market” and that
 21 “Apple ha[d] sufficiently pled a relevant antitrust market” because “the
 incorporation of a patent into a standard . . . makes the scope of the relevant
 market congruent with that of the patent.” *Id.* (quoting *Broadcom*, 501 F.3d at
 315) (emphasis added).

22 HP Opp. at 6; Cisco Opp. at 8. However, in contrast to Defendants’ pleadings, and not
 23 mentioned by Defendants in this case, the *Broadcom* court noted that *Broadcom* pled “this
 24 technology was not interchangeable with or substitutable for other technologies.” *Broadcom*, 501
 25 F.3d at 315 (citing paragraphs 7, 48, and 58-59 of *Broadcom*’s Complaint).

26 Defendants take these opinions out of context and omit language relevant to this point. In
 27 *Samsung*, the court was considering Samsung’s argument that the Ninth Circuit requires a market
 28

1 of *physical products*, and not a market for proprietary technology. *Samsung*, 2012 WL 1672493,
2 at *5. In response, the *Samsung* court referenced *Broadcom* in holding that “the Third Circuit
3 concluded that a relevant market for an antitrust claim *could* be the market for proprietary
4 *technology*, stating that ‘the incorporation of a patent into a standard . . . makes the scope of the
5 relevant market congruent with that of the patent.’” *Id.* (emphasis added). Thus, not only was this
6 point related to the propriety of pleading *technology markets* instead of product markets – a point
7 not raised in this motion – but the *Samsung* court held only that it “could,” and not that it must.
8 *Samsung* did not hold that pleading this overlap by itself is sufficient in a standards case.
9 Likewise, the *Broadcom* court was explaining the flaw in Qualcomm’s objection to defining an
10 antitrust market consistent with the scope of the patent claims. ChriMar has not raised this
11 objection either, but rather argued that defining the market this way cannot be done without also
12 considering the reasonable interchangeability of use or the cross-elasticity of demand between
13 the technology itself and substitutes for them, which substitutes may go beyond the
14 inappropriately artificial, standards-circumscribed market. Mot. at 8-10.

15 Without such pleadings, Defendants have merely defined the market by reference to
16 standards that they have voluntarily chosen to practice in the same way a franchisee chooses to
17 remain a franchisee and buy pizza supplies under the franchise contract, but not by reference to
18 market realities relevant to a claim for monopolization. *Id.* at 10. This is particularly important in
19 a market where standards are less widely adopted such that “capture” of a standard is not market
20 power – in contrast to standards incorporated into cell phones (*Broadcom*, *Samsung*, *Apple*, and
21 *R.I.M.*), or standards for computer memory (*Hynix*) – or where there are well developed
22 alternatives in the market to the standard itself. *See* Mot. at 6 (referring to, among other things,
23 Cisco’s proprietary and non-standardized in-line power technology, as well as well entrenched
24 standards for wireless communication and conventional unpowered Ethernet). Defendants evade
25 this point, arguing instead only that ChriMar’s case law is more general than the standards
26 context – the very limitation that dooms their pleadings.

27 Finally, Cisco argues that it sufficiently pled the market by pleading that certain alternate
28 technologies existed during the standardization process that could have performed the same

1 function, but that those certain alternatives are no longer alternatives due to ChriMar's
 2 technology instead being *locked-in* to the standard. Cisco Opp. at 10 (citing *In re Webkinz*
 3 *Antitrust Litig.*, No. C 08-1987, 2010 U.S. Dist. LEXIS 111810 (N.D. Cal. Oct. 20, 2010)).
 4 However, these pleadings continue to assume, without any basis in fact or pleading, that the
 5 standard is the market, the very error noted by ChriMar in referring to *Queen City Pizza, Inc. v.*
 6 *Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997) and *Tower Air, Inc. v. Fed. Express Corp.*,
 7 956 F. Supp. 270 (E.D.N.Y. 1996). Mot. at 9-10. In contrast, plaintiff in *In re Webkinz* pled that
 8 all other “virtual worlds” – and not just those having been considered for a technical
 9 standardization effort – are not reasonable economic substitutes. *In re Webkinz*, 2010 U.S. Dist.
 10 LEXIS 111810, *11-12. As the court held in that case, the relevant market “must encompass the
 11 product at issue *as well as all economic substitutes* for the product,” and “must include ‘the
 12 group or groups of sellers or producers who have actual or potential ability to deprive each other
 13 of significant levels of business.’” *Id.* (internal citations omitted) (emphasis added).

14 Cisco suggests in its opposition that “neither Cisco nor its customers regard products that
 15 comply with the PoE Standards and products that do not to be interchangeable: as Cisco alleged,
 16 industry and consumers have become “locked-in” to the standard, eliminating viable
 17 alternatives.” Cisco Opp. at 10. However, Cisco did not plead what it or its customers regard as
 18 interchangeable, and Defendants’ pleading of “lock-in” refers to the industry being locked-in to
 19 the current implementation [“the present form of the IEEE 802.3af and IEEE 802.3at
 20 amendments”] for Power over Ethernet-enabled products. Cisco FAC ¶32. Cisco did not, for
 21 example, consider the reasonable interchangeability of use or the cross-elasticity of demand for
 22 alternatives to the IEEE’s own particular Power over Ethernet standard, such as Cisco’s
 23 proprietary inline power technology, wireless communications generally, or conventional
 24 unpowered Ethernet, each of which would have market influences on the cost and demand for
 25 IEEE 802.11af or IEEE 802.3at products or technologies incorporated into them. *See* Mot. at 6.
 26 Defendants have ignored everything outside the two particular amendments of the IEEE
 27 standards in pleading the relevant market, and thus their counterclaims are facially unsustainable.
 28

1 **III. HP'S ATTEMPTED MONOPOLIZATION COUNTERCLAIM IS TOO**
 2 **SPECULATIVE, IT IS BASED ON PROTECTED CONDUCT, AND IT FAILS TO**
 3 **PLEAD NECESSARY ELEMENTS.**

4 In addition to Defendants' failure to plead sufficient market share in a relevant market as
 5 noted above, HP's attempted monopolization counterclaim should be dismissed on the pleadings
 6 without leave to amend for the reasons below.

7 **A. HP's Attempted Monopolization Counterclaim Is Plead Solely On The Basis**
 8 **of the ITC Action.**

9 HP cries "fiction" at the possibility that it premised its attempted monopolization
 10 counterclaim solely on the ITC action. *See* HP Opp. at 10-11 ("HP has pled ... intentional
 11 concealment ... coupled with its later assertion of those rights was part of its overall
 12 anticompetitive scheme. HPCC ¶¶ 10-35, 66-87." "ChriMar sought to further its anticompetitive
 13 scheme by alleging in its ITC Complaint that it had a domestic industry or was in the process of
 14 starting one—a standing requirement to maintain an ITC investigation—which turned out to be
 15 false. HPCC ¶¶ 74-78.") Leaving aside the facts that the word "intentional" does not appear in its
 16 attempted monopolization counterclaim, and the words "coupled," "scheme," "overall," "course"
 17 and "concealment" appear nowhere in any of its counterclaims,⁴ HP is simply incorrect.

18 HPCC paragraphs 10-35 are HP's general pleadings regarding standards setting issues
 19 not specific to any counterclaim, and they never mention the ITC. HP does "incorporate" by
 20 reference all preceding paragraphs into each of its subsequent counterclaims (HP Opp. at 5), but
 21 this alone does not provide ChriMar fair notice of the grounds on which HP's attempted
 22 monopolization counterclaim rests. *See Allagas v. BP Solar Int'l, Inc.*, No. C 14-00560 SI, 2014
 23 U.S. Dist. LEXIS 55857 (N.D. Cal. Apr. 21, 2014)(dismissing claims that merely incorporated
 24 preceding paragraphs of the complaint without specifying which facts are relied upon to make or
 25 support the claim); *Bulaoro v. Oro Real, Inc.*, No. C 11-03059 WHA, 2011 U.S. Dist. LEXIS
 26 146171 (N.D. Cal. Dec. 20, 2011)(dismissing claim that incorporated all previous paragraphs but
 27 provided no further detail as to which facts comprise the claim). Here, not only has HP failed to

28 ⁴ The words "knowing and willful" appear in HP's attempted monopolization counterclaim only
 with respect to an alleged "improper use of the court system." HPCC ¶80.

1 provide any detail suggesting it was specifically incorporating the alleged standards abuse issues
 2 in its attempted monopolization counterclaim, but HP clearly specified only allegations related to
 3 standing at the ITC. Thus, unlike *Bulaoro*, where the court held it “virtually impossible to
 4 determine which ‘facts’ are intended to support which claims” (*id.*), here the natural conclusion
 5 from looking at the counterclaim is that HP rested its grounds on the ITC action and *not* on the
 6 alleged standards misconduct.

7 HP’s attempted monopolization counterclaim can be found at HPCC ¶¶ 66-87. While
 8 paragraph 67 purports to identify an antitrust market, and paragraph 68 purports to describe
 9 excluded alternatives to that market – both with reference to the IEEE – these paragraphs in no
 10 way suggest or repeat allegations of *misconduct* before the IEEE. Likewise, paragraphs 69-87 of
 11 the attempted monopolization counterclaim then address the ITC action as the basis for the
 12 counterclaim, without *ever* mentioning alleged standards misconduct.⁵ HP makes no mention, let
 13 alone a pleading in this counterclaim (or anywhere else) of a “scheme” or “overall course of
 14 conduct” that includes both the allegations of standards abuse combined with an allegation that
 15 the ITC action was a sham. For example, in purporting to plead an antitrust injury for this
 16 attempted monopolization counterclaim, HP pled *only* the ITC action, with no reference to the
 17 IEEE or standards related conduct. HPCC ¶84 (allegedly baseless due to lack of standing).

18 **B. HP’s Pleading of Attempted Monopolization Is Too Speculative.**

19 Defendants do not contest that, in reviewing a Rule 12(c) motion, courts do not take as
 20 fact the mere recital of elements of a cause of action, conclusory statements, or legal conclusions
 21 couched as factual allegations. Nor do Defendants dispute that pleadings must show more than a
 22 speculative right to relief, must contain some minimum amount of specificity, and must permit
 23 the court to infer more than the mere possibility of misconduct.

24 HP’s attempted monopolization counterclaim is premised entirety on *speculation*,
 25 requiring that the Court *infer misconduct* from HP’s *conclusory* assertions, as ChriMar
 26 established in its Motion. *See* Mot. at 7-8. In response, HP merely identified the same speculative

27 _____
 28 ⁵ All references in these paragraphs to the IEEE are to identification of the particular standards at issue in the litigation, such as “IEEE 802.3af.”

1 pleadings ChriMar demonstrated to be insufficient. HP Opp. at 11-12 (citing HPCC ¶¶ 74-78).
 2 HP's pleading of attempted monopolization does nothing to "nudge[] [its] claims across the line
 3 from conceivable to plausible" and thus its "complaint must be dismissed." *Bell Atl. Corp. v.*
 4 *Twombly*, 550 U.S. 544, 570 (2007).

5 **C. HP's Pleading of Attempted Monopolization Without Pleading Objective**
 6 **Baselessness Must Be Dismissed As Protected Conduct.**

7 HP's arguments regarding objective baselessness and *Noerr-Pennington* immunity are
 8 confused and highly misleading. This issue arises where a party has raised sham litigation as a
 9 component of a claim or counterclaim. In the present case, only HP pled that litigation was
 10 anticompetitive, HP did so only with reference to the ITC litigation, and only in the context of its
 11 attempted monopolization counterclaim.⁶ See HPCC ¶¶ 66-87. Nevertheless, both Defendants
 12 mischaracterize ChriMar's motion as somehow suggesting that *Noerr-Pennington* immunity
 13 prevents monopolization or attempted monopolization claims arising from the standards setting
 14 context (HP Opp. at 10; Cisco Opp. at 14), or that *Noerr-Pennington* somehow immunizes the
 15 combined scheme of standards setting misconduct together with baseless litigation. HP Opp. at
 16 9-10 ("Courts have repeatedly recognized that the *Noerr-Pennington* doctrine does not apply to
 17 monopoly power gained through deception in the context of SSOs, even when an allegedly
 18 standards-essential patent is subsequently asserted in court."); Cisco Opp. at 14-15 (same).

19 As ChriMar detailed, *Noerr-Pennington* immunity applies to acts of petitioning the
 20 government and has been extended to include litigation activities and government investigations
 21 such as at the ITC. Mot. at 6-7. The cases cited by Defendants do not suggest to the contrary. HP
 22 Opp. at 10 (citing *Coal. for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 505-07
 23 (9th Cir. 2010) and *Broadcom*, 501 F.3d at 308); Cisco Opp. at 14. Rather, courts, including
 24 those two, have recognized two exceptions to immunity, fraud on the patent office – not at issue
 25 in this motion – or sham litigation. Mot. at 7-8. However, for the sham litigation exception to
 26 *Noerr-Pennington* immunity to apply, Defendants must plead and prove objective and subjective
 27 baselessness, and a court cannot examine subjective baselessness without first establishing

28 ⁶ Cisco did not raise an issue with respect to litigation (sham or otherwise) in its counterclaims
 and it did not plead attempted monopolization. Thus, it is unclear why Cisco argues this point.

1 objective baselessness. *Id.* at 6-7 (citing *Prof'l Real Estate Investors, Inc. v. Columbia Pictures*
2 *Indus.*, 508 U.S. 49, 60-61 (1993)(“*PRE*”). To plead objective baselessness, HP had to plead
3 facts with sufficient specificity that would make it more probable than merely possible that “no
4 reasonable litigant could realistically *expect success on the merits.*” *PRE*, 508 U.S. at 60
5 (emphasis added). Instead, HP pled litigation misconduct on the basis that ChriMar knew it
6 lacked a domestic industry and therefore knew it lacked “standing” (HP Opp. at 12), which
7 would not be an issue on the *merits.*⁷ Thus HP did not plead a basis on which a litigation can be
8 determined as objectively baseless under *PRE*.

9 Even had HP attempted to do so, it would be mere speculation and contrary to the only
10 available evidence. The parties to the ITC action cross-moved for summary judgment as to the
11 existence of a domestic industry, and while the ITC Judge did not rule on it, the ITC staff
12 attorney opposed both motions. Mot. at 2. Being that the staff attorney is the only other party to
13 the ITC litigation, with access to all the evidence produced as well as *ex parte* communications
14 with the parties, HP cannot claim that “no reasonable litigant could reasonably expect success”
15 on the issue. *Id.* In light of this, HP cannot argue it is more probable than merely conceivable
16 that the ITC litigation was objectively baseless, and under *Twombly* this counterclaim must be
17 dismissed.

18 HP argues that it did plead “objective baselessness” even if it did not use those words, but
19 HP points to no pleadings offering facts from which an objective determination could be made.
20 HP Opp. at 12. Instead, HP repeats its pleadings, which do nothing more than speculate as to the
21 reason why ChriMar withdrew its complaint – a question of subjective intent. HP Opp. at 12. HP
22 cites one case that purportedly establishes that objective baselessness can be plead on the basis of
23 a unilateral withdrawal of a complaint following the assertion that the patent is invalid over prior
24 art. HP Opp. at 12-13 (citing *Alternative Electrodes, LLC v. Empi, Inc.*, 597 F. Supp. 2d 322, 331
25 (E.D.N.Y. 2009)). HP also cites to the case on which *Alternative Electrodes* relies, *ICOS Vision*
26

27 ⁷ See, e.g., *Warth v. Seldin*, 422 U.S. 490, 498 (1975)(“In essence the question of standing is
28 whether the litigant is entitled to have the court decide the merits of the dispute or of particular
issues.”).

1 *Sys. Corp., N.V. v. Scanner Tech. Corp.*, No. 05-cv-6322, 2006 WL 838990, at *5 (S.D.N.Y.
 2 Mar. 29, 2006), as holding objective baselessness sufficiently plead where litigation was
 3 threatened for the sole purpose of harming plaintiff, despite knowing the legal basis for the threat
 4 did not apply. HP Opp. at 13. HP suggests that from a policy perspective these cases allow the
 5 claim of sham litigation in subsequent cases where the litigant withdrew earlier filed litigation to
 6 prevent a finding that the “claims have no merit.” *Id.* Of course, unlike both of these cases, (1)
 7 HP has alleged baselessness only on a non-merits issue, standing arising from domestic industry,
 8 (2) the precise question of standing before the ITC is not common to the question of standing in
 9 the present litigation,⁸ and (3) the facts on which HP has alleged baselessness speculate as to
 10 ChriMar’s subjective understanding of the facts, and not objective baselessness.

11 Finally, HP argues that its pleadings “are similar to those in” *Hynix*, which HP says
 12 stands for the proposition that “[a]sserting patents causally connected to that deceitful conduct is
 13 properly alleged as part of an overall anticompetitive scheme” (HP Opp. at 10-11), and
 14 “enforcement of a purported essential patent can be part of an anticompetitive scheme.” HP Opp.
 15 at i (quoting *Hynix*). However, as noted above, HP did not plead a *scheme* combining standards
 16 misconduct *and* assertion of litigation, as did *Hynix*. *See, e.g.*, *Hynix’s* SAC (pleading
 17 monopolization and attempted monopolization as the result of Rambus subverting the JEDEC
 18 process and instituting lawsuits and other actions to try to coerce license agreements).⁹

19 **D. HP’s Basis for Pleading Specific Intent and Dangerous Probability of**
 20 **Achieving Monopoly Power Was Rejected By The U.S. Supreme Court.**

21 HP argues that, in this Circuit, HP need not plead or prove either specific intent or
 22 dangerous probability of attaining monopoly power because they may be inferred from

23 ⁸ The distinction between a withdrawal on the basis of a merits issue that carries over to
 24 subsequent litigation and a non-merits issue is material because to the extent that a party can
 25 obtain substantially the same relief from the subsequent litigation (where for example the
 26 question of domestic industry is not present), that it could obtain from the litigation alleged to
 27 have been baseless, then there can be no violation of the Sherman Act. *Cf. Northwest Power*
 28 *Products, Inc. v. Omark Industries, Inc.*, 576 F.2d 83 (5th Cir. 1978) (“If a defendant could
 achieve a desired result either by lawful merger or by engaging in unfair competition, the choice
 of the unfair competition route alone should not give rise to an antitrust violation.”).

⁹ In addition to refuting HP’s assertions that it need not plead objective baselessness, this same
 point refutes HP’s claim of causal antitrust injury from attempted monopolization, as *Hynix* did
 not hold litigation costs *alone* are causal antitrust injuries. *Hynix*, 527 F. Supp. 2d at 1097.

1 anticompetitive conduct. In so doing, HP cites three Ninth Circuit cases that rely on a view
 2 previously held in this Circuit, but rejected by the U.S. Supreme Court. HP Opp. at 13-14. HP
 3 cites *Janich Bros., Inc. v. Am. Distilling Co.*, 570 F.2d 848, 853-54 (9th Cir. 1977) as “holding
 4 that specific intent and dangerous probability of success may be inferred from anticompetitive
 5 conduct.” HP Opp. at 14. However, in *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 452-
 6 460 (1993), the Supreme Court rejected this position, holding instead “that petitioners may not
 7 be liable for attempted monopolization under § 2 of the Sherman Act absent proof of a dangerous
 8 probability that they would monopolize a particular market and specific intent to monopolize.”
 9 *Id.* at 459. In so resolving the split between the Ninth Circuit and other circuits, the Supreme
 10 Court specifically cited as inconsistent *Lessig v. Tidewater Oil Co.*, 327 F. 2d 459 (9th Cir. 1964)
 11 and its progeny, on which *Janich Bros.*, 570 F.2d at 853, relied for this specific point. *Spectrum*
 12 *Sports*, 506 U.S. at 458 (“It is also our view that *Lessig* and later Ninth Circuit decisions refining
 13 and applying it are inconsistent with the policy of the Sherman Act.”)

14 It is unclear exactly what proposition HP seeks to support by citing *Portland Retail*
 15 *Druggists Ass’n v. Kaiser Found. Health Plan*, 662 F.2d 641, 648 (9th Cir. 1981) as holding
 16 “[t]his is all that is required at the pleading stage.” HP Opp. at 14. Regardless, *Portland Retail*
 17 *Druggists*, relied on the progeny of *Lessig* rejected by the Supreme Court on this proposition, *See*
 18 *Portland Retail Druggists*, 662 F.2d at 648 (citing *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*,
 19 627 F.2d 919 (9th Cir. 1980) (citing *Lessig*); *Gough v. Rossmoor Corp.*, 585 F.2d 381, 390 (9th
 20 Cir. 1978) (same)). HP also improperly relies on to *Cal. Computer Prods., Inc. v. IBM Corp.*,
 21 613 F.2d 727, 737 (9th Cir. 1979) which relies on *Lessig* and its progeny, including *Gough* and
 22 *Janich* for the proposition that specific intent can be established using illegal conduct and market
 23 power. HP Opp. at 13.

24 This leaves HP arguing only that it did, in fact, plead specific intent and dangerous
 25 probability of attaining monopoly power by citing the same alleged anticompetitive conduct
 26 (either standards setting abuse as it now incorrectly alleges,¹⁰ or filing the ITC action), with a

27
 28 ¹⁰ As explained *supra*, HP did not plead standards abuse as part of this counterclaim, although it
 argues in opposition that it did.

1 complete lack of specificity as to any evidence of specific intent to monopolize. HP Opp. at 14
 2 (citing HPCC ¶¶ 69, 78 and 80). For exactly the same reasons addressed by the Supreme Court in
 3 *Spectrum Sports* (chilling competition), alleging such conduct alone is insufficient to establish
 4 either specific intent or dangerous probability of attaining monopoly power – especially where
 5 (1) such conduct is easily motivated by legitimate business purposes (Mot. at 12 (citing *Lektro-*
 6 *Vend Corp. v. Vendo Co.*, 660 F.2d 255, 272-73 (7th Cir. 1981)(holding that specific intent
 7 required that the acts “were not predominantly motivated by legitimate business purposes”)), and
 8 (2) HP seeks to penalize otherwise protected conduct.

9 Finally, HP asserts half-heartedly that ChriMar came “dangerously close to succeeding”
 10 before dismissing its ITC action two months before trial. Not only does the paragraph HP cite
 11 (HPCC ¶78) fail to plead “dangerous probability of achieving monopoly power” as required, but
 12 like HP’s other paragraphs in this counterclaim (*see, e.g.*, ¶¶ 79, 81) it merely recites elements of
 13 the cause of action using conclusory statements.

14 **IV. DEFENDANTS’ SECTION 17200 COUNTERCLAIMS SHOULD BE DISMISSED**
 15 **BECAUSE THEY ARE BASED ON THE SAME ALLEGED CONDUCT AS IN**
 16 **THEIR SHERMAN ACT COUNTERCLAIMS.**

17 Defendants fail to address the point that, where they asserted that the same conduct
 18 supports both an antitrust claim such as Section 2 of the Sherman Act and a state law claim such
 19 as Business and Professions Code Section 17200, a finding that the conduct cannot violate the
 20 antitrust claim should “preclude” a finding of unfair competition under Section 17200. Mot. at 15
 21 (quoting *DocMagic, Inc. v. Ellie Mae, Inc.*, 745 F. Supp. 2d 1119, 1147 (N.D. Cal. 2010)
 22 (dismissing Section 17200 claim as “necessar[ily] fail[ing]” where the same conduct was plead
 23 to support it and a Sherman Act claim that was dismissed for failure to plead sufficient facts)
 24 (quoting *LifeUniverse, Inc. v. MySpace, Inc.*, 304 Fed. App’x. 554, 557 (9th Cir. 2008
 25 (unpublished)). Cisco’s argument that a violation of the antitrust laws may be a basis for a
 26 Section 17200 claim (Cisco Opp. at 15), and both Defendants’ argument that, solely under the
 27 unfair prong of Section 17200, a claim may be brought that violates the “policy or spirit of the
 28 antitrust laws” (*id.*; HP Opp. at 15), are both inapposite because Cisco and HP chose to file

1 counterclaims addressing the same conduct under Section 2 of the Sherman Act as well as
2 Section 17200.

3 Finally, Cisco argues that even following dismissal of the counterclaims at issue in this
4 motion, Cisco's remaining counterclaims still reach the same alleged standards issues. Cisco
5 Opp. at 15 (referring to the "fraud" prong of its Section 17200 counterclaim and its breach of
6 contract counterclaim). This argument does not reject the notion that the Court should clear
7 pleadings at this stage that are properly dismissed under Rule 12(c). Rather, Cisco's point weighs
8 in favor of denying leave to amend for lack of prejudice to Defendants because the subject matter
9 will continue to be addressed elsewhere.

10 **V. CONCLUSION**

11 Because Defendants cannot allege monopoly power, objective baselessness or specific
12 intent to monopolize, and the "unfair" and "illegal" prongs of their Section 17200 counterclaims
13 were pled on the same alleged misconduct as their Sherman Act Section 2 counterclaims, all
14 three counterclaims should be dismissed as futile, without leave to amend. To the extent they are
15 not, because Defendants have not pled a proper market or a dangerous probability of attaining
16 monopoly power, and their pleadings are fatally speculative, they should be dismissed without
17 leave to amend, as doing so would be harmless.

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Respectfully submitted,

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