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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 NOTICE OF MOTION AND MOTION TO DISMISS DEFENDANTS HP AND CISCO'S MONOPOLIZATION AND SECTION 17200 COUNTERCLAIMS AND HP'S ATTEMPTED MONOPOLIZATION COUNTERCLAIM

Hearing:	September 26, 2014
Time:	Friday, 9:00 am
Courtroom:	Courtroom 5, 2nd Floor
Judge:	Honorable Jeffrey S. White

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on September 26, 2014, at 9:00 a.m., or as soon thereafter as it may be heard, in the courtroom of the Honorable Jeffrey S. White, Oakland Courthouse, Courtroom 5- 2nd floor, 1301 Clay Street, Oakland, CA 94612. Plaintiffs ChriMar Systems, Inc. d/b/a CMS Technologies and ChriMar Holding Company, LLC (collectively "ChriMar" or "Plaintiffs") hereby move, pursuant to Civil L.R. 7-2 and 7-4 and Rule 12(c) of the Federal Rules of Civil Procedure for judgment on the pleadings as to Defendants Cisco Systems, Inc., Cisco Consumer Products LLC, and Linksys LLC (together, "Cisco") and Defendant Hewlett-Packard Company ("HP") (collectively, "Defendants") counterclaims asserting monopolization of the Power over Ethernet ("POE") technology market in violation of section 2 of the Sherman Act (Cisco's Counterclaim Count V, HP's Counterclaim Count IV), HP's counterclaim asserting attempted monopolization of the POE technology market in violation of section 2 of the Sherman Act (HP Counterclaim Count V), and portions of Defendants' counter claims asserting unlawful and unfair acts and practices in violation of California Business & Professions Code, Section 17200 ("Section 17200") (Cisco Counterclaim Count VI, HP Counterclaim Count VI).

Plaintiffs' Motion is based on and supported by the memorandum of points and authorities contained herein, the Declaration of Robert Auchter submitted concurrently herewith, the complaint, answers and counterclaims on file in this action, and all other evidence, information and argument that has been or will be properly presented to the Court in connection with this Motion.

STATEMENT OF RELIEF REQUESTED

ChriMar respectfully requests that the Court grant ChriMar's motion for judgment on the pleadings with respect to Defendants' counterclaims of monopolization, HP's counterclaim of

attempted monopolization, and the "unlawful" and "unfair" acts and practices portions of Defendants' counterclaims under Section 17200.

Dated: August 15, 2014

Respectfully submitted,

MCKOOL SMITH P.C.

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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 MEMORANDUM IN SUPPORT OF IT'S NOTICE OF MOTION AND MOTION TO DISMISS DEFENDANTS HP AND CISCO'S MONOPOLIZATION AND SECTION 17200 COUNTERCLAIMS AND HP'S ATTEMPTED MONOPOLIZATION COUNTERCLAIM

Hearing:	September 26, 2014
Time:	Friday, 9:00 am
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SUMMARY OF ARGUMENT

Defendants' monopolization, attempted monopolization and unfair competition counterclaims should be dismissed because Defendants failed to plead essential elements of the counterclaims, and the elements they did plead lack specificity, they are speculative and conclusory, they merely recite elements of the causes of action, and they do not permit the Court to infer more than the mere possibility of misconduct. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Defendants also failed to define a legally relevant market that considers the reasonable interchangeability of substitutes or the cross-elasticity of demand between them. Instead, Defendants defined a narrower market, setting the outer boundaries to be co-extensive with ChriMar's claim of infringement against certain products practicing two technical standards, ignoring substitutes outside those standards.

Defendants failed to plead ChriMar's market share in pleading monopoly power. HP failed to plead specific intent to monopolize or dangerous probability of obtaining monopoly power for attempted monopolization, because although they are premised on the ITC investigation that ran parallel to the present case being a sham, HP failed to plead the litigation was objectively baseless. *See Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 57 (1993). Defendants also failed to plead causal antitrust injuries, offering instead conclusory statements and speculating as to injuries the antitrust laws were not intended to prevent. *See Cascade Health Solutions v. Peacehealth*, 515 F.3d 883, 901-022 (9th Cir. 2008). Finally, since the unlawful and unfair acts and practices in Defendants' Section 17200 counterclaims are premised on the same alleged conduct, they too should be dismissed. *See DocMagic, Inc. v. Ellie Mae, Inc.*, 745 F. Supp. 2d 1119, 1147 (N.D. Cal. 2010) ("a finding that the conduct is not an antitrust violation precludes a finding of unfair competition."); *Cel-Tech Commc'n, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 539-40 (Cal. 1999) (Section 17200 cannot be used to plead around bars to relief).

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I. INTRODUCTION

Cisco Systems, Inc., Cisco Consumer Products LLC, and Cisco-Linksys LLC ("Cisco") and Hewlett-Packard Co. and 3Com Corporation ("HP") (collectively "Defendants") have failed to set forth facts sufficient to establish that ChriMar Systems, Inc. d/b/a CMS Technologies and ChriMar Holding Company, LLC (collectively "ChriMar" or "Plaintiffs") have monopoly power, a dangerous probability of obtaining monopoly power, or specific intent to monopolize in pleading their counterclaims for monopolization and attempted monopolization under Section 2 of the Sherman Act. Likewise, HP and Cisco failed to set forth facts sufficient to establish a legally relevant market or that they have suffered causal antitrust injury. Defendants plead virtually identical monopolization and Section 17200 counterclaims against ChriMar. HP alone pled the attempted monopolization counterclaim against ChriMar. ChriMar therefore moves for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) with respect to Defendants' monopolization and attempted monopolization counterclaims, as well as the "unlawful" and "unfair" acts and practices portions of their Section 17200 counterclaims, which are plead as premised on exactly the same threadbare allegations and disguised legal conclusions.

II. ISSUES TO BE DECIDED

Whether judgment on the pleadings with respect to Defendants' counterclaim for *monopolization* is warranted where Defendants failed to plead facts that if taken as true establish (a) that ChriMar has monopoly power or sufficient share of the market, and (b) the existence of causal antitrust injury.

Whether judgment on the pleadings with respect to HP's counterclaim for *attempted monopolization* is warranted where HP failed to plead facts that if taken as true establish (a) that ChriMar has a dangerous probability of obtaining monopoly power, (b) that ChriMar acted with specific intent to monopolize, and (c) the existence of causal antitrust injury.

Whether judgment on the pleadings with respect to Defendants' counterclaims for *monopolization and attempted monopolization* is warranted where Defendants failed to define a legally cognizable relevant market.

Whether partial judgment on the pleadings is warranted where Defendants counterclaims for "unlawful" and "unfair" acts and practices under *Section 17200* are premised on the same underlying conduct as their monopolization and attempted monopolization counterclaims.

III. STATEMENT OF FACTS

On October 31, 2011, ChriMar filed a complaint in the District of Delaware for infringement of U.S. Patent No. 7,457,250 by Cisco and HP, among others. Dkt. No. 1 (The full docket sheet from the District of Delaware litigation is attached hereto as Exhibit 1).

On November 1, 2011, ChriMar filed a complaint under section 337 of the Tariff Act of 1930, as amended, against the same parties in the International Trade Commission ("ITC") (Investigation No. 337-TA-817), which the ITC instituted on December 7, 2011. 76 *Fed. Reg.* 76436-37 (Dec. 7, 2011). On January 9, 2012, the District Court case was stayed at the request of HP and other defendants due to the parallel proceeding in the ITC. Dkt. Nos. 21 and 25.

The private parties in the ITC filed opposing motions for summary determination on the issue of domestic industry (Inv. No. 337-TA-817, Motion Docket. No. 817-031 (June 21, 2012); *id.*, Motion Docket No. 817-035 (June 27, 2012), and thereafter opposed each other's motions. (*Id.*, Complainants' Opposition to Respondents' Motion Docket No. 817-031 (July 2, 2012); *id.*, Respondents Response to ChriMar's Motion Docket No. 817-035 (July 9, 2012)). On July 5, 2012, the ITC Staff attorney, who is not a judicial decision-maker, but rather is a party to the ITC proceeding allowed to have *ex parte* communications with the other parties, filed a combined response to ChriMar and Respondents' motions arguing that the Administrative Law Judge deny both motions. [*Id.*, Staff's Combined Response to Motion Docket Nos. 817-031 and 817-035 (July 5, 2012) ChriMar moved pursuant to the ITC Rules to withdraw the ITC complaint voluntarily as to all remaining respondents and moved for termination of the investigation on July 20, 2012. (*Id.*, Motion Docket No. 817-048). The ITC Administrative Law Judge terminated

the ITC Action pursuant to the ITC Rules on August 1, 2012. (*Id.*, Order No. 24, Initial Determination (Aug. 1, 2012)).

The District Court of Delaware lifted the stay in the present action on November 26, 2012 (Dkt. No. 43), and Defendants filed the present counterclaims on December 26, 2012. Dkt. No. 57 (Cisco's First Amended Counterclaims ("FAC"), attached hereto as Exhibit 2); Dkt. No. 56 (HP's Answer and Counterclaims ("HPCC"), attached hereto as Exhibit 3)).[1] On January 22, 2013, ChriMar filed answers to these counterclaims. Dkt. No. 60 (Cisco), Dkt. No. 61 (HP). This case was transferred to the Northern District of California in March 2013. Dkt. Nos. 82 and 83.

In pleading their counterclaims for monopolization and unfair competition, Defendants assert numerous facts and imply misconduct by ChriMar in a standards setting organization commonly referred to as the IEEE between 1999 and 2005. *See* Cisco FAC ¶¶ 11-36, 50-51, 55-57, 61, 64, 66, 73, 76, 82, 86-91; HPCC ¶¶ 10-35, 46-47, 51-53, 57, 68, 91, 94, and 100. Likewise, in pleading its counterclaim for attempted monopolization, HP implies misconduct on the basis of its allegation that ChriMar prosecuted the aforementioned ITC investigation in bad faith. HPCC ¶¶ 69-84. Leaving aside numerous conclusory statements most of which offer legal conclusions, HP's sole alleged fact for this is that "[d]iscovery in the ITC investigation established that ChriMar's allegations for domestic industry were baseless." HPCC ¶78. Although ChriMar disputes most of these asserted facts, including the speculation as to what discovery in the ITC investigation established, none of those facts are relevant to this motion, which challenges the legal adequacy of Defendants' pleadings.

IV. ARGUMENT

ChriMar does not have monopoly power and has no dangerous probability of obtaining monopoly power. Defendants failed to plead facts that, even if taken as true for purposes of a Rule 12(c) motion, would establish such monopoly power. Defendants similarly failed to plead

[1] Defendants originally filed their answer and counterclaims under seal (*see* Dkt. Nos. 51 & 52 on the D. Del. Docket sheet). The citation to Dkt. Nos. 56 and 57 refer to the public and/or redacted versions the Defendants filed on January 3, 2013.

ChriMar's market share, that Defendants suffered causal antitrust injury, or even that ChriMar's enforcement of its patent rights falls into an antitrust exception from the general exemption provided patentees who seek to enforcement their patent rights. HP also failed to plead that ChriMar had specific intent to monopolize or a dangerous probability of obtaining it, as needed to establish its counterclaim for attempted monopolization. Accordingly, Defendants' monopolization and attempted monopolization claims should be dismissed, as well as their Section 17200 counterclaims to the extent the "unlawful" or "unfair" acts or practices are pled as premised on the same alleged conduct or monopoly power.

A. A Motion for Judgment on the Pleadings Should Be Granted Where Movant is Entitled to Judgment as a Matter of Law.

Antitrust issues are decided under the law of the regional circuit, while Federal Circuit law governs the Federal Circuit's exclusive jurisdiction relating to patents (such as stripping antitrust immunity from patent enforcement actions). *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1067–68 (Fed. Cir. 1998). A Rule 12(c) motion is functionally identical to a Fed. Rule Civ. Proc. Rule 12(b)(6) motion but can be filed at a different time. *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). "`A judgment on the pleadings is properly granted when, taking all the allegations in the pleadings as true, [a] party is entitled to judgment as a matter of law.'" *Dunlap v. Credit Prot. Ass'n, L.P.*, 419 F.3d 1011, 1012 n. 1 (9th Cir. 2005) (*per curiam*) (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001)). Nevertheless, the Court does not need to accept as true the mere recital of elements of a cause of action with conclusory statements or what amounts to "legal conclusion[s] couched as a factual allegation[s]." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Rather, the pleadings must include factual allegations that show more than a speculative right to relief. *Twombly*, 550 U.S. at 555 (emphasis added). These factual allegations must contain some minimum amount of specificity to justify imposing the cost of discovery—especially in an antitrust case where the cost of discovery can be unusually

high. *Id.* at 558–59 (emphasis added).[2] Finally, where Defendants' factual allegations in the pleadings "do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Ashcroft,* 556 U.S. at 679 (quoting Fed. Rule Civ. Proc. 8(a)(2)) (emphasis added).

B. Defendants Failed to Plead That ChriMar Has Monopoly Power in the "Power Over Ethernet Technology Market."

The elements of a monopolization claim under the Sherman Act, Section 2 are (1) monopoly power, and (2) willful acquisition or maintenance of that power. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1996) (defining monopoly power as "the power to control prices or exclude competition") (quoting *United States v. Du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)). Monopoly power can be demonstrated through either direct evidence or circumstantial evidence. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). Defendants did not plead direct evidence of monopoly power, such as actual restricted output or supra-competitive prices. *Id.* Thus, Defendants were required to plead monopoly power through circumstantial evidence, which requires definition of a legally cognizable relevant market and facts that show it is probable ChriMar owns a dominant share of it. *See Image Technical Servs. Inc v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997). Defendants failed to do either.

1. Defendants' Pleadings Cannot Rely Merely on the Existence of Patent Rights or the Enforcement of Those Patent Rights.

In pleading that monopoly power is probable and not just possible, Defendants cannot simply rely on the existence of patent rights or actions to enforce them, as they have done. Cisco FAC ¶64; HPCC ¶60 ("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."). As a matter of law, "patent rights are not legal monopolies in the

[2] The ITC investigation did not include antitrust allegations and therefore did not include discovery specific to these counterclaims.

antitrust sense of that word" (*Am. Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1367 (Fed. Cir. 1984)), and simply owning or enforcing the patent right does not make one a "prohibited monopolist." *Abbott Labs. v. Brennan*, 952 F.2d 1346, 1354 (Fed. Cir. 1991). While the patent may give its owner a right to exclude, that is in no way synonymous with having monopoly power. *Id.* at 1355 ("for example … if there are close substitutes" in the market). Such is presumably the case in a market related to a standards setting context where the standard does not practice the patented technology as Defendants allege in this action, where there are market alternatives to the standard itself such as Cisco's own proprietary inline power technology, where other parties have rights to exclude in the same technology market (in the form of other patents that read on the standards) and can effectively limit the ability of other parties to exert monopoly power (*i.e.* control price), or where competing technologies like wireless communication or conventional unpowered Ethernet can exert economic influences that can keep Power over Ethernet prices or the exercise of monopoly power in check — all issues Defendants' pleadings never address.

In 1988, Congress explicitly eliminated any *presumption* of monopoly power resulting from an alleged misuse or enforcement of the patent. *See* 35 U.S.C. § 271(d) ("No patent owner otherwise entitled to relief … shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having … sought to enforce his patent rights against infringement or contributory infringement."). The Supreme Court correspondingly eliminated any *per se* presumption of monopoly power in antitrust cases in 2006. *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 31, 45-46 (2006). The Supreme Court also provided through two cases referred to as *Noerr* and *Pennington* general immunity from antitrust liability for petitioning the government in the form of litigation. *See Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49 (1993) ("PRE") ("Those who petition government for redress are generally immune from antitrust liability."). This *Noerr-Pennington* immunity was extended to conduct before both administrative agencies, such as the ITC, and the courts by *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

While the earlier cases recognized an exception for what is called "sham litigation," *PRE* subsequently clarified that to be a sham, a litigation must be "objectively baseless," 508 U.S. at 57 (holding that "objectively reasonable effort to litigate cannot be sham regardless of subjective intent"), and further that to be objectively baseless "litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief." *Id.* at 62. This bar is set high to protect "the act of petitioning the government," which "deserves especially broad protection from antitrust liability." *Id.* at 72. Only two exceptions to this bar have been recognized: (1) fraud on the patent office in obtaining the patent, and (2) sham litigation that is *no more than* an attempt to directly interfere with the business relationships of a competitor. *In re Ind. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1326 (Fed. Cir. 2000) (previously *CSU, L.L.C. v. Xerox Corp.*) (emphasis added). With respect to these counterclaims, Cisco has pled neither exception and HP has attempted to plead only sham litigation in reference to the terminated ITC Action.

> ChriMar's baseless claims … constitute a knowing and willful attempt to interfere directly with the business relationship of HP and its other competitors through the improper use of the court system as an anticompetitive tool, by precluding, delaying, and/or multiplying the costs of entry into the relevant market for HP and the other competitors in the Power over Ethernet Technology Market.

HPCC ¶80. The only offer of factual support for this conclusion is HP's conclusory assertion that: "[d]iscovery in the ITC investigation established that ChriMar's allegations for domestic industry were baseless." *Id.* ¶78. HP also speculates as to misconduct by noting that ChriMar withdrew its complaint nine months after it was filed, and after HP filed a motion for summary determination on the issue of domestic market. *Id.* ¶78. HP's pleading in the present case fails to allege sufficient facts, if taken as true, to constitute a *probability* that the ITC action was a sham. To constitute a "sham" such that the assertion or prosecution of it can form part of a pleading of attempted monopoly – in this case either by adding circumstantial evidence of specific intent to monopolize (as HP implies, *id.* ¶79) or a dangerous probability of obtaining monopoly power (*id.* ¶81) – a litigation must be both (1) objectively baseless, and (2) subjectively brought in bad faith. *Nobelpharma*, 141 F.3d at 1072. Litigation is only objectively baseless if "no reasonable litigant

could realistically expect success on the merits." *PRE*, 508 U.S. at 60–61. A court may only examine the subjective motivation after the litigation is determined to be objectively baseless. *Id.* at 60.

HP has not alleged that ChriMar's ITC action was "objectively" baseless, and ***there is no such finding or determination from the ITC or elsewhere***. Rather, HP appears to be alleging that because ChriMar knew subjectively that it lacked a domestic market (HPCC ¶78), ChriMar's assertion or prosecution of the ITC action nevertheless was nothing more than a "knowing and willful attempt to interfere directly with the business relationship of HP and its other competitors." *Id.* ¶80. HP offers nothing more than implication and speculation as to the reason why ChriMar withdrew the ITC action. This Court is not required to give any credence to conclusory allegations or speculation. *See* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed. 2004). A voluntary withdrawal of a complaint is not a loss in litigation, and even in circumstances of a litigation loss, "a court must 'resist the understandable temptation to engage in post hoc reasoning by concluding' that an ultimately unsuccessful 'action must have been unreasonable or without foundation.'" *PRE* at 60, n.5 (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978)). Failing to plead objective baselessness, HP cannot rely as it does on the ITC action to plead either specific intent to monopolize or a dangerous probability obtaining monopoly power, and its counterclaim should be dismissed.

2. Defendants Have Failed to Adequately Define a Relevant Market.

To plead counterclaims for monopolization and attempted monopolization, Defendants were required to plead that ChriMar had monopoly power or a dangerous probability of obtaining it *within a legally significant relevant market*. *See Newcal Indus. Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008) (citing *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436-37, 442 (3d Cir. 1997) (affirming dismissal of claims for monopolization and attempted monopolization pursuant to Rule 12(b)(6) where party failed to define a legally sufficient relevant market)). To plead a sufficient market, courts have held that a party needs to

define "outer boundaries" that "are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Newcal Indus.*, 513 F.3d at 1045 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)).

Defendants attempted to define the relevant market not as a product market, such as the Power over Ethernet product market, but as a market for developing and licensing particular technology defined by the intersection of technology protected by ChriMar's '250 patent and two specific technical standards. Specifically, they defined the market as follows:

> ChriMar actually, potentially, and/or purportedly competes in the United States and worldwide markets for developing and licensing technology essential to implement the IEEE 802.3af and 802.3at amendments to the IEEE 802.3 standard and for technology essential to perform certain functions, allegedly covered by the '250 Patent, necessary to implement the IEEE 802.3 standard (hereinafter "Power over Ethernet Technology Market").

Cisco FAC ¶60; HPCC ¶56. Not only have Defendants failed to identify what particular technologies they are referring to here, but they have pled a market whose outer boundaries are defined by ChriMar's infringement claims (one patent asserted against two standards) rather than any exploration of the "reasonable interchangeability of use or the cross-elasticity of demand" outside this intersection. Defendants failed to consider that the technologies and products at issue in this litigation may be interchangeable with other technologies and products such as Power-over-Ethernet technologies and products that are not compliant with these two standards, Power-over-Ethernet technologies and products compliant with other standards that compete with these two standards, or even technologies and products not compliant with any standard, but that themselves are alternatives to the Power over Ethernet technologies and products compliant with these two standards.

Thus, when Defendants pled that existing alternatives are not viable, that switching costs are too high, and that technologies need to be interoperable (Cisco FAC ¶¶ 35, 61; HPCC ¶¶ 34, 57), they did so solely within the context of the two existing standards: alternatives are merely pled as non-viable replacement technologies within the existing standards, switching costs are considered with respect to changing technologies in the same two standards, and interoperability

is considered only with respect to other products compliant with the same two standards. Defendants are asking the Court to assess ChriMar's economic power within the context of the two standards, and not monopoly power. *See Queen City Pizza*, 124 F.3d at 435 (affirming dismissal where the relevant market was "defined by contractual terms contained in the franchise agreement, and not measured by cross-elasticity of demand or product interchangeability.") The *Queen City Pizza* court reasoned that:

> Plaintiffs do not and cannot purchase ingredients and supplies from alternative suppliers not because Domino's dominates the ingredient and supply market or because Defendant is the market's only supplier, but because the franchisee-plaintiffs are contractually bound to purchase only from suppliers approved by Defendant. It is economic power resulting from the franchise agreement, therefore, and not market power, that defines the `relevant market' Plaintiffs allege in support of their antitrust claims.

Id. Here, Defendants plead economic power with respect to those entities voluntarily choosing to continue making products compliant with these two particular standards (like the choice of franchisees to remain franchisees and buy pizzas supplies under contract), and not the market demand for these particular Power over Ethernet technologies themselves. As such, these counterclaims have fatal legal defects and should be dismissed. *See, e.g., Tower Air, Inc. v. Fed. Express. Corp.*, 956 F. Supp. 270 (E.D.N.Y. 1996) ("Because a relevant market includes all products that are reasonably interchangeable, plaintiff's failure to define its market by reference to the rule of reasonable interchangeability is, standing alone, valid grounds for dismissal.").

3. Defendants Have Failed to Plead That ChriMar Has Sufficient Market Share to Make it Probable That ChriMar Owns a Dominant Share of It.

Pleading that it is probable that ChriMar has a dominant share of the relevant market is necessary because without it ChriMar cannot "possesses sufficient leverage to influence marketwide" output or prices. *Rebel Oil Co.*, 51 F.3d at 1437 ("With a dominant share of the market's productive assets, a firm may have the monopoly power to restrict marketwide output and, hence, increase prices, as its rivals may not have the capacity to increase their sales quickly to make up for the reduction by the dominant firm."). The Ninth Circuit has rejected monopoly claims where the accused monopolist held 16% market share, "far below" what is required by

law for a monopoly. *Barry v. Blue Cross of Cal.*, 805 F.2d 866, 874 (9th Cir. 1986); *see also Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1274 (9th Cir. 1975) (quoting Judge Learned Hand in *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945) (33 percent market share is "certainly" not enough to be a monopoly)). Generally a market share of at least 65% is required to make a prima facie case of monopoly power. *Image Technical Servs.*, 125 F.3d at 1206. While counterclaims for attempted monopoly may require a lower percentage, sufficient market share must still be pled. *Rebel Oil*, 51 F.3d at 1438 ("When the claim involves attempted monopolization, most cases hold that a market share of 30 percent is presumptively insufficient to establish the power to control price.").

Rather than attempt to establish any quantity of market share, Defendants merely plead that ChriMar "competes" in the defined market.

> ChriMar actually, potentially, and/or purportedly competes in … markets for developing and licensing technology essential to implement the IEEE 802.3af and 802.3at amendments to the IEEE 802.3 standard and for technology essential to perform certain functions, allegedly covered by the '250 Patent, necessary to implement the IEEE 802.3 standard (hereinafter "Power over Ethernet Technology Market").

Cisco FAC ¶60; HPCC ¶¶ 56, 67. This falls far short of the requirement to plead either a dominant share for their monopolization counterclaim, or a legally sufficient share for purposes of HP's attempted monopolization counterclaim.

C. HP's Pleading of Attempted Monopolization is Legally Insufficient as It Failed to Plead That ChriMar Had a Specific Intent to Monopolize or a Dangerous Probability of Obtaining Monopoly Power.

In addition to pleading that ChriMar has a legally sufficient share of the relevant market to survive dismissal on its attempted monopolization counterclaim, HP must plead facts sufficient to establish for each element of attempted monopolization that it was probable that: "(1) the [accused party] has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). Leaving aside contested allegations about ChriMar's conduct, HP failed to do so.

As noted above, HP's attempted monopolization pleading is built solely around the already terminated ITC investigation. HPCC ¶¶ 69-81. Having failed to plead *objective baselessness*, HP may not rely on the ITC investigation to exempt ChriMar from the general immunity afforded patentees engaging in legitimate business conduct such as enforcing their patents in litigation. Even if HP's counterclaim is not dismissed on this basis, HP's only pleadings related to specific intent and dangerous probability of obtaining monopoly power merely recite elements of the cause of action using conclusory statements.

> The act by ChriMar of initiating the baseless ITC investigation was predatory and anticompetitive conduct. ChriMar filed its Complaint in the ITC investigation *with a specific intent to monopolize* the Power over Ethernet Technology Market *because it accuses the leading vendors* of Power over Ethernet-enabled products *of infringement* and *alleges that there is no meaningful level of Power over Ethernet-enabled products that do not infringe the '250 Patent*.

HPCC ¶79 (emphasis added).

> ChriMar's baseless claims in the ITC investigation with its intent to monopolize the Power over Ethernet Technology Market … constitute a *dangerous probability of ChriMar succeeding* in its attempt to monopolize the market.

HPCC ¶81. HP has not pled any factual allegations that an ITC Investigation terminated two years ago — that did not result in an exclusion order or any other remedy — can contribute to a dangerous probability that ChriMar obtains monopoly power. Nor has HP pled facts that if taken as true show that ChriMar was motivated by an intent to monopolize, rather than primarily motivated by legitimate business purposes. *See, e.g.*, *Lektro-Vend Corp. v. Vendo Co.*, 660 F. 2d 255, 272-73 (7th Cir. 1981). HP's pleading of attempted monopolization is thus legally insufficient for several reasons and should be dismissed.

D. Defendants Failed to Plead Causal Antitrust Injury.

An antitrust lawsuit brought by a private party under the Sherman Act must plead an injury that the "antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (the loss must flow from that which makes the act unlawful). This is often referred to as "causal antitrust injury." *See Rebel Oil*, 51 F.3d at 1433. A causal antitrust injury is one that harms the competitive process, rather than individual competitors.

Cascade Health Solutions v. Peacehealth, 515 F.3d 883, 901-22 (9th Cir. 2008) ("Subsequent to *Brunswick*, the [Supreme] Court has often reinforced the principle that the antitrust laws' prohibitions focus on protecting the competitive process and not on the success or failure of individual competitors."). There is no causal antitrust injury if ChriMar's conduct harms HP or Cisco without adversely affecting competition generally. *See MetroNet Servs Corp. v. U.S. West Commc'n.*, 325 F.3d 1086, 1108 (9th Cir. 2003). Even if the conduct were "illegal per se," causal antitrust injury cannot flow from aspects of ChriMar's conduct that is either "beneficial or neutral to competition." *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001).

Defendants pleadings are merely conclusory allegations that they have suffered injury. Specifically, Cisco pled with respect to its monopolization counterclaim:

> ChriMar's anticompetitive conduct has and will directly and proximately cause antitrust injury to Cisco within the Power over Ethernet Technology Market including but not limited to causing substantial injury to competition, consumers and competitors (including Cisco) in the Power over Ethernet Technology Market. By reason of ChriMar's wrongful, exclusionary, and anticompetitive conduct, Cisco has suffered injury-in-fact and has been deprived of money or property in which it has a vested interest.

Cisco FAC ¶66; *see also id.* ¶83 (repeating language in Cisco's Section 17200 counterclaim). Cisco does go on to plead with respect to both its monopolization and Section 17200 counterclaims that if ChriMar is successful in the present litigation demand will not meet supply, super-competitive prices "could [be] charged," and customers will be harmed because of this. *Id.* ¶¶ 66, 78. But Cisco's reasoning for this is that only ChriMar's existing licensees "would be legally permitted to sell" the relevant products and they "cannot meet the market demand." *Id.* Whether or not this is true, it is a potential consequence in any successful patent litigation, no party has suggested the present litigation is illegal conduct, and as such, while it may represent a harm to individual competitors who refuse to take a license, it is not harm to the competitive process and thus does not warrant antitrust protection.

HP's Section 17200 counterclaim pleads the same conclusory statements as to injury as did Cisco, and is legally insufficient for the same reasons. HPCC ¶96. HP's pleading of injury with respect to monopolization is wholly conclusory and without any supporting factual

allegations. HPCC ¶¶ 62–65. HP's allegations of injury with respect to its counterclaim for attempted monopolization are equally conclusory, adding only that "HP was required to incur significant expenses to defend against the [ITC] action." *Id.* ¶84. Even if HP had pled that the ITC investigation was objectively baseless, HP's pleading of injury by way of expenses to defend against it is not an injury that the antitrust laws are intended to prevent. *Chip-Mender, Inc. v. Sherwin-Williams Co.*, No. 05-3465 PJH, 2006 U.S. Dist. LEXIS 2176, at *14–15 (N.D. Cal. Jan. 3, 2006) ("purely individual economic injury"). Likewise, Section 17200 does not recognize attorneys' fees as relevant injuries. *See Aureflam Corp. v. Pho Hoa Phat I*, No. 05-CV-00746, 2005 U.S. Dist. LEXIS 37272, at *3-*4 (N.D. Cal., Sept. 16, 2005) ("there is no current authority which provides that such [attorneys'] fees constitute an actual injury for the purpose of Section 17200"). Having pled no causal antitrust injury, both the monopolization and attempted monopolization counterclaims should be dismissed, as well as the corresponding Section 17200 counterclaims.

E. Defendants' Counterclaims for "Unlawful" and "Unfair" Acts or Practices Under California Business & Profession Code, Section 17200 Should Be Dismissed Along With The Sherman Act, Section 2 Counterclaims

Defendants have alleged "unlawful" and "unfair" acts or practices in violation of California's Business & Profession Code, Section 17200, resulting from the same alleged improper acquisition of monopoly power that forms the basis of their monopolization counterclaims. Defendants assert in their monopolization counterclaims that ChriMar "improperly obtained power over the market for the technology for the standards-compliant equipment" by "[f]ailure to disclose Essential Patent Rights [to the IEEE]." Cisco FAC ¶¶ 18, 62; HPCC ¶¶ 17, 58. Defendants then assert Section 17200 counterclaims based on unlawful and unfair acts or practices because "ChriMar was required to disclose [to the IEEE]… but failed to do so" (Cisco FAC ¶73; HPCC ¶ 91), "ChriMar committed unlawful business acts by monopolizing the Power over Ethernet Technology Market" (Cisco FAC ¶74; HPCC ¶92), and "ChriMar engaged in unfair business practices by … not disclos[ing] its intellectual property rights and unwillingness to license on RAND terms." Cisco FAC ¶76; HPCC ¶94.

This Court has dismissed Section 17200 claims for "unfair" business acts or practices "[w]here … the same conduct is alleged to support both a plaintiff's federal antitrust claims and state-law unfair competition claim" because "a finding that the conduct is not an antitrust violation precludes a finding of unfair competition." *DocMagic, Inc. v. Ellie Mae, Inc.*, 745 F. Supp. 2d 1119, 1147 (N.D. Cal. 2010)(internal citations omitted). Likewise, Section 17200 does not establish separate "unlawful" acts, but rather borrows law from other statutes. *See, e.g.*, *Cel-Tech Commc'n, Inc. v. L.A. Cellular Tel,*. 973 P.2d 527, 539-40 (Cal. 1999) ("section 17200 'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable"). In asserting the unlawful prong of Section 17200, Defendants have relied on precisely the same conduct alleged in their monopolization counterclaims and under the "unfair" acts or practices prong of Section 17200. Thus, the allegations of "unlawful" conduct should fall along with these other two. Defendants should not be permitted to plead around bars to their relief under those causes of action by suggesting there is a separate cause of action under the "unlawful" prong of Section 17200. *Id.* at 562-63 (quoting *Mfr. Life Ins. Co. v. Super. Ct.*, 895 P.2d 56, 71 (Cal. 1995)); *Rubin v. Green*, 847 P.2d 1044, 1053 (Cal. 1993) (rejecting attempt to circumvent the litigation privilege "by recasting the action as one under … section 17200").

V. CONCLUSION

Defendants' monopolization counterclaims and HP's attempted monopolization counterclaim should be dismissed because Defendants have failed to plead (a) a legally relevant market, (b) that ChriMar has sufficient monopoly power in that market, (c) that ChriMar had specific intent to monopolize or a dangerous probability of obtaining monopoly power, and (4) causal antitrust injury. Likewise, Defendants' Section 17200 counterclaims should be dismissed to the extent they depend on establishing a violation of the antitrust laws or are barred by the litigation privilege.

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Respectfully submitted,

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