



1 response to these counterclaims, Apple filed its Answer, Defenses and Counterclaims in Reply to  
 2 Samsung's Counterclaims ("Counterclaims in Reply") on July 21, 2011. *See* ECF No. 124. In its  
 3 Counterclaims in Reply, Apple alleges that Samsung has violated both federal and state antitrust  
 4 laws, as well as the California Unfair Competition Law, by defrauding the standards setting  
 5 organization that set the UMTS standards, inducing the organization to adopt Samsung's declared-  
 6 essential patents, and later refusing to license its declared-essential patents on fair, reasonable, and  
 7 non-discriminatory terms ("FRAND" terms).

8 Samsung seeks to dismiss counts twenty-seven (violation of Section 2 of the Sherman  
 9 Antitrust Act), twenty-eight (violation of Section 1 of the Sherman Antitrust Act and California  
 10 Business and Professions Code §§ 16720), and twenty-nine (California Unfair Competition Law).<sup>1</sup>  
 11 Samsung seeks to strike counts thirty (Declaratory Judgment that Apple is Licensed to Samsung's  
 12 Declared-Essential Patents), thirty-one (Declaratory Judgment of No Entitlement to Injunctive  
 13 Relief), and thirty-two (Declaratory Judgment of Unenforceability). Counterclaims in Reply at  
 14 ¶¶176-206. Pursuant to Local Civil Rule 7-1(b), the Court concludes that this motion is  
 15 appropriate for determination without oral argument and vacates the October 20, 2011 motion  
 16 hearing.<sup>2</sup> For the foregoing reasons, Samsung's Motion to Dismiss and Strike is GRANTED in  
 17 part, and DENIED in part.

#### 18 **I. RELEVANT FACTS**

19 Unless otherwise noted, the following allegations are taken from Apple's Counterclaims in  
 20 Reply and are presumed to be true for purposes of ruling upon Samsung's motions to dismiss and  
 21 strike. Standards setting organizations ("SSOs") play an important role in the wireless  
 22 communications industry. Mobile wireless carriers provide consumers with access to networks,  
 23 which allows consumers to place and receive calls, access e-mail, and the internet. Counterclaims  
 24 in Reply ¶ 19. The development of technical standards across the industry, including among cell  
 25

26 <sup>1</sup> Samsung has not challenged counterclaims twenty-five (breach of contract), or twenty-six  
 27 (promissory estoppel). These claims arise out of the same alleged conduct giving rise to the  
 28 antitrust and UCL claims discussed herein.

<sup>2</sup> The Court postponed the hearing on this motion from September 22, 2011 to October 20, 2011 at  
 the parties' request. The Court denies the parties' request of October 18, 2011, to postpone the  
 hearing further.

1 phone carriers, device manufacturers, handset, and chipset manufacturers, facilitates compatibility  
2 across products and networks. Counterclaims in Reply ¶¶ 21-22. Technical standards may have  
3 pro-competitive benefits. Manufacturing volumes can increase because product lines can be sold  
4 to multiple purchasers, thus decreasing per unit costs. Counterclaims in Reply ¶ 22. Likewise,  
5 industry standards can create increased price competition among suppliers. Counterclaims in  
6 Reply ¶ 22.

7 Alternatively, the creation of technical industry standards presents the potential for anti-  
8 competitive effects. Establishing industry technical standards can create a “lock-in” effect and the  
9 risk of “patent hold-up.” Counterclaims in Reply ¶ 23. This is because a patent owner can, when  
10 the SSO created standard includes patented technology, require other designers to use patented  
11 technology. In that situation, a patent owner can demand exorbitant licensing fees or other terms  
12 from designers. Counterclaims in Reply ¶ 24. In order to avoid the risks associated with the “lock-  
13 in” effect, standard setting organizations often employ policies designed to compel disclosure of an  
14 entity’s intellectual property rights (“IPR”) prior to adoption of a standard by the SSO.

15 Alternatively, an SSO may require that an entity seeking to have its IPR incorporated into the  
16 industry standard commit to licensing its patents on fair, reasonable, and non-discriminatory terms  
17 (“FRAND”) before the SSO agrees to incorporate the proposal. Counterclaims in Reply ¶ 27.

18 Apple and Samsung are both members of the European Telecommunications Standards  
19 Institute (“ETSI”), a standard setting organization involved in setting the standards for mobile  
20 wireless carrier technology, including the UMTS standard. Counterclaims in Reply ¶¶ 35. The  
21 UMTS standard was designed to support increased speeds and bandwidth capacity on mobile  
22 devices. Counterclaims in Reply ¶ 37. ETSI, and several other organizations, were involved in  
23 developing the UMTS standard. Counterclaims in Reply ¶ 38.

24 The SSOs responsible for developing the UMTS standard incorporated Samsung’s patented  
25 technology into the standard. Under the terms of the ETSI policy, Samsung had a duty to disclose  
26 its intellectual property rights<sup>3</sup> in the technology that was essential, or might be essential, for the

27 \_\_\_\_\_  
28 <sup>3</sup> Intellectual Property Rights under ETSI’s policies is defined as “any intellectual property right  
conferred by statute law including applications therefore other than trademarks.” Counterclaims in  
Reply ¶ 48.

1 standards it was proposing. Counterclaims in Reply ¶ 48. Apple alleges that Samsung failed to  
2 disclose its IPR during the standards-setting process and that the SSOs relied upon Samsung's  
3 failure to disclose in adopting the Samsung-proposed standards.

4 Apple also alleges that Samsung made a commitment to license its declared-essential  
5 patents on FRAND terms. Apple argues that these false FRAND declarations violated ETSI policy  
6 which requires an owner of an essential IPR to undertake a commitment to license on FRAND  
7 terms. If an IPR owner fails to make a FRAND commitment, ETSI "may suspend work on  
8 relevant parts of the standard or redesign the standard to render the IPR non-essential."

9 Counterclaims in Reply ¶ 50. Apple alleges that by falsely agreeing to license its declared essential  
10 patents on FRAND terms, Samsung induced ETSI to adopt Samsung's patents into its proposed  
11 standard. Apple also alleges that Samsung has subsequently refused to license its declared  
12 essential patents on FRAND terms and has otherwise attempted to use its declared essential patents  
13 as leverage in litigation. Counterclaims in Reply ¶¶ 65-75.

14 Apple argues that by (1) failing to disclose its IPR in the declared-essential patents, as it  
15 was required to do under the policy terms of the SSO, and (2) making affirmative misstatements  
16 regarding its intent to license its declared essential patents on FRAND terms, Samsung obtained  
17 monopoly power which it has subsequently used to inhibit competition. Apple claims that, absent  
18 Samsung's fraudulent behavior, ETSI would not have adopted the standard proposed by Samsung.

## 19 **II. LEGAL STANDARDS AND ANALYSIS**

### 20 **A. Motion to Dismiss**

21 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal  
22 sufficiency of a complaint. To withstand a motion to dismiss, a plaintiff must "plead enough facts  
23 to state a claim to relief that is plausible on its face." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555  
24 (2007). "On a motion to dismiss in an antitrust case, a court must determine whether an antitrust  
25 claim is 'plausible' in light of basic economic principles." *Coalition for ICANN Transparency,*  
26 *Inc. v. VeriSign, Inc.*, 611 F.3d 495, 501 (9th Cir. 2010) (citing *Twombly*, 550 U.S. at 556). All  
27 allegations of material fact are taken as true and interpreted in a manner most favorable to the non-  
28 moving party. *Simon v. Hartford Life and Accident Ins. Co.*, 546 F.3d 661, 664 (9th Cir. 2008).

1 However, the court is not required to accept as true “allegations that are merely conclusory,  
2 unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536  
3 F.3d 1049, 1055 (9th Cir. 2008). Leave to amend should be granted unless it is clear that the  
4 complaint’s deficiencies cannot be cured by amendment. *Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248  
5 (9th Cir. 1995). If amendment would be futile, a dismissal may be ordered with prejudice. *Dumas*  
6 *v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

7 A complaint must “state with particularity the circumstances constituting fraud.” Fed. R.  
8 Civ. P. 9(b). Allegations of fraud must be stated with “specificity including an account of the  
9 ‘time, place, and specific content of the false representations as well as the identities of the parties  
10 to the misrepresentations.’” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (quoting  
11 *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004)). To survive a motion to  
12 dismiss, “allegations of fraud must be specific enough to give defendants notice of the particular  
13 misconduct which is alleged to constitute the fraud charged so that they can defend against the  
14 charge and not just deny that they have done anything wrong.” *Id.* (quoting *Bly-Magee v.*  
15 *California*, 236 F.3d 1014, 1019 (9th Cir. 2001)).

16 1. Section 2 of the Sherman Act

17 a. Monopoly Conduct

18 Apple first claims that Samsung’s failure to disclose its IPR in the patents essential to the  
19 UMTS standard, and alternatively its affirmative misrepresentations regarding Samsung’s intent to  
20 license its UMTS patents on FRAND terms, and subsequent failure to do so, violates Section 2 of  
21 the Sherman Act. Counterclaims in Reply ¶ 178. In order to state a claim under the Sherman Act,  
22 Apple must allege that: (1) Samsung possessed monopoly power in the relevant market, and (2)  
23 that Samsung achieved or is maintaining monopoly power through anticompetitive conduct.  
24 *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP.*, 540 U.S. 398, 407 (2004).  
25 Samsung first argues that Apple has failed to state a claim under Section 2 of the Sherman Act  
26 because it has failed to adequately allege monopoly conduct. Apple’s theory regarding false  
27 FRAND declarations will be discussed first, followed by Apple’s theory regarding Samsung’s IPR  
28 disclosure.

### False FRAND Declaration Theory

Courts have recognized that fraudulent FRAND declarations that are used to induce SSOs to adopt standards essential patents can be monopoly conduct for the purposes of establishing a Section 2 claim. For example, in *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007), Broadcom asserted that it had been the victim of “patent hold up” because the standards essential patent holder had allegedly promised the SSO to license its essential patents on FRAND terms. The SSO adopted the standards and thereby locked participants in to the standard, allowing the patent holder to extract supra-competitive royalties from the industry participants. *Id.* at 310-311. The Third Circuit recognized that an SSO can be used to obtain monopoly power and create anticompetitive effects on the relevant markets when “(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 [standard setting organization’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.” 501 F.3d at 314. Thus, intentionally false promises to SSOs regarding licenses with FRAND terms can give rise to actionable claims under Section 2 of the Sherman Act. *See also Research in Motion Ltd. v. Motorola, Inc.*, 644 F. Supp. 2d 788, 796-97 (N.D. Tex. 2008) (denying motion to dismiss based on similar theories of liability regarding FRAND term misrepresentations).

Samsung first argues that Apple has failed to allege sufficient facts to establish that Samsung has engaged in monopolistic conduct.<sup>4</sup> Because Apple’s allegations regarding Samsung’s conduct sound in fraud, it is required to plead, with particularity, “the circumstances constituting fraud or mistake.”<sup>5</sup> Fed. R. Civ. Pro. 9(b). Plaintiffs must plead facts “specific enough to give

<sup>4</sup> Samsung also appears to argue briefly in passing that Apple has not sufficiently alleged that Samsung possesses monopoly power in the relevant market. It appears, however, that Apple has sufficiently alleged monopoly power. *See Counterclaims in Reply ¶¶ 81-86.*

<sup>5</sup> Although it is theoretically an open question as to whether Rule 9(b) pleading standards are applicable in this situation, it appears that Apple should plead with particularity the allegations regarding the false FRAND declarations. First, the theory upon which the claim is based, is one that sounds in fraud, and Rule 9(b) itself requires a heightened pleading standard in these situations. Second, other fraud claims in the patent context, such as claims for inequitable conduct, must also be pled with particularity. *See, e.g. Cent. Admixture Pharmacy Servs., Inc. v. Advanced*

1 defendants notice of the particular misconduct which is alleged to constitute the fraud . . . so that  
2 they can defend against the charge.” *Semegen v. Weidner*, 780 F.2d 727731 (9th Cir. 1985).

3 Although there does not appear to be anything legally defective about Apple’s theory of  
4 monopoly conduct arising from false FRAND licensing terms, the Court finds that Apple’s  
5 allegations, as pled, have failed to meet the heightened pleading standard. Apple has identified two  
6 paragraphs in its Counterclaims in Reply that support its claim that false FRAND declarations were  
7 made. These allegations simply state that “Samsung has submitted declarations to ETSI  
8 committing to irrevocably license the Declared-Essential Patents on FRAND terms pursuant to  
9 Clause 6.1 of ETSI’s IPR policy.” Counterclaims in Reply ¶ 56. Apple has not set forth facts  
10 establishing when these declarations were made and by whom, and for *which patents* these  
11 FRAND declarations were made.<sup>6</sup> Apple argues that these documents are in Samsung’s control,  
12 and therefore it has met its burden. Apple’s allegations that Samsung submitted false FRAND  
13 declarations, however, are not sufficient to put Samsung on notice of the particular misconduct that  
14 creates the basis of the alleged fraud. *Semegen v. Weidner*, 780 F.2d 727731 (9th Cir. 1985).  
15 Therefore, Apple’s claim that Samsung misrepresented its intent to license its declared essential  
16 patents on FRAND terms is DISMISSED with leave to amend.

### 17 **Failure to Disclose IPR Theory**

18 Courts have been more reluctant to find antitrust violations based on the theory that a  
19 failure to disclose intellectual property rights in a declared essential patent created monopoly  
20 power for a member of the SSO. In *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008), the D.C.  
21 Circuit overturned an FTC decision that Rambus violated the antitrust laws in failing to disclose its  
22 intellectual property rights to the standard setting organization. The Commission failed to show

23 *Cardiac Solutions*, 482 F.3d 1347, 1356 (Fed. Cir. 2007); *see also In re Netflix Litig.*, 506 F. Supp.  
24 2d 308, 315 (N.D. Cal. 2007) (applying Rule 9(b) to a fraud-based claim in another antitrust  
context). Moreover, Apple does not appear to contest that 9(b) is the proper standard to apply here.

25 <sup>6</sup> The requirement that Apple plead with particularity which patents FRAND declarations were  
26 made and when is important here because Apple also alleges that Samsung has declared essential  
27 many patents that are not, in fact, essential to practicing the UMTS standard. Counterclaims in  
28 Reply ¶ 58. If, as Apple alleges, some Samsung patents are not essential to the standard, it will  
likely be difficult for Apple to establish that Samsung’s conduct has antitrust implications. If the  
patents at issue are non-essential, then the “lock-in” effect of the standard setting does not exist.  
Thus, it is important to know which patents Apple is alleging are essential to the patent, and for  
which patents Samsung made FRAND declarations.

1 that but for Rambus's failure to disclose its intellectual property rights, the SSO would not have  
2 adopted the standard at issue. *Id.* at 466. The court held that in order to establish anticompetitive  
3 conduct, the plaintiff must show that the patent holder's failure to disclose its intellectual property  
4 rights induced the SSO to set the standard incorporating the essential patent. *Id.* In other words,  
5 Apple must allege that there was an alternative technology that the SSO was considering during the  
6 standard setting process and that the SSO would have adopted an alternative standard had it known  
7 of the patent holder's intellectual property rights.

8 Similarly, in *Townshend v. Rockwell Intl. Corp.*, 2000 U.S. Dist. LEXIS 5070 (N.D. Cal.  
9 2000), the plaintiff also failed to allege that but for the failure to disclose, the SSO would have  
10 adopted an alternative standard that did not include the essential patent at issue. Neither  
11 *Townshend*, nor *Rambus*, 522 F.3d 456 (discussed above), preclude Apple's claim based on failure  
12 to establish anticompetitive conduct. *Rambus* identified a failure of proof, not a failure of pleading,  
13 for a claim based on allegations that a patent holder had not disclosed intellectual property rights to  
14 a standard setting organization. Moreover, the court in *Townshend* granted  
15 plaintiff/counterdefendant's motion to dismiss, in part, because the plaintiff also failed to establish  
16 that but for the failure to disclose, the SSO would have adopted an alternative standard that did not  
17 include the essential patent at issue. At the pleading stage, Apple must allege that the standard  
18 setting organization would have adopted a different technology had the patent holder's rights been  
19 known at the time of the standard setting. The Court next turns to whether Apple has met the  
20 pleading requirements to establish monopoly conduct for its failure to disclose IPR theory.

21 The Court finds that Apple has pled with sufficient particularity facts supporting Samsung's  
22 alleged anticompetitive conduct with respect to non-disclosure of intellectual property rights,  
23 Apple has indicated which patents at issue were not disclosed to the SSO, when those patents were  
24 filed, and when Samsung allegedly gave presentations to the SSO regarding patents at issue. *See,*  
25 *generally*, Counterclaims in Reply ¶ 54. Apple has identified which provisions of the SSO policies  
26 Samsung's failure to disclose implicated. Counterclaims in Reply ¶ 48. Therefore under the  
27 heightened pleading standard of Rule 9(b), Apple has met its burden of pleading anticompetitive  
28 conduct for Samsung's failure to disclose IPR in the standards essential patents.

1 Apple, however, has failed to allege sufficient facts to support a plausible inference that had  
2 Samsung disclosed its intellectual property rights to the SSO, a viable alternative technology  
3 performing the same functionality would have been incorporated into the UMTS standard, or the  
4 relevant functionality would not have been incorporated into the standard at all. Counterclaims in  
5 Reply ¶¶ 55, 178. Apple’s allegations are merely conclusory statements that “[h]ad Samsung  
6 properly disclosed the existence of its IPR, the relevant SSO would have selected a viable  
7 alternative technology or would have decided not to incorporate that proposal into the standard.”  
8 Counterclaims in Reply ¶ 55. Without more, for example, factual allegations that there were other  
9 technologies considered by the SSO at the time of standard setting, Apple has not met its burden  
10 under the pleading standards set forth in Fed. R. Civ. P. 8. Therefore, Samsung’s motion to  
11 dismiss Apple’s Section 2 claim is GRANTED with leave to amend.

12 b. Antitrust Injury

13 Samsung also argues that Apple has not established a Section 2 claim because it fails to  
14 allege antitrust injury. Even though deficiencies in Apple’s allegations of monopoly conduct have  
15 already been identified, the Court will address Samsung’s alternative argument in the event that  
16 Apple chooses to amend its Counterclaims in Reply. In order for Apple to properly plead that it  
17 has suffered an antitrust injury, it must allege injury to *competition*. *Brunswick Corp. v. Pueblo*  
18 *Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Samsung argues that Apple’s allegations “describe  
19 harms to Apple as a competitor, and not harms to competition.” Mot. to Dismiss and Strike Apple’s  
20 Counterclaims at 9, August 15, 2011, ECF No. 153.

21 The Court disagrees. While Apple has alleged that it has suffered increased prices, and  
22 other effects, it has also clearly alleged harm to competition more broadly. Counterclaims in Reply  
23 ¶ 88. For example, Apple alleges that “Samsung’s conduct more broadly has and continues to  
24 threaten unlawfully to exclude rivals from and increase royalties and other costs associated with the  
25 manufacture and sale of downstream wireless communications devices that implement the UMTS  
26 standard and chill competition to develop and sell innovative new UMTS-compliant products,  
27 resulting in increased prices and decreased quality and innovation in downstream product markets  
28 and complementary innovation markets.” Counterclaims in Reply ¶ 88; *see also* Counterclaims in

1 Reply ¶¶ 89-90. It is unclear what more Samsung believes Apple must allege to sufficiently plead  
 2 harm to competition. At this stage in the litigation, Apple has alleged facts sufficient to support a  
 3 plausible theory of anticompetitive harm. *See Research in Motion v. Motorola, Inc.*, 644 F. Supp.  
 4 2d 788, 794 (N.D. Tex. 2008) (“[S]tandards [implemented by standard setting organizations],  
 5 without the proper safeguards, are inherently anticompetitive. It follows that when an entity side-  
 6 steps these safeguards in an effort to return the standard to its natural anti-competitive state, anti-  
 7 competitive effects are inevitable. Motorola’s breach of the commitments to IEEE and ETSI, as a  
 8 result, is harmful to competition.”).

9 2. Section 1 of the Sherman Act

10 Samsung moves to dismiss Apple’s twenty-eighth counterclaim in reply for violation of  
 11 Section 1 of the Sherman Act as well as California Business and Professions Code § 16720.<sup>7</sup>  
 12 Section 1 of the Sherman Act provides: “Every contract, combination in the form of trust or  
 13 otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with  
 14 foreign nations, is declared to be illegal.” 15 U.S.C. § 1. The Supreme Court has explained that the  
 15 plaintiff in a Section 1 action must show “a unity of common purpose or a common design and  
 16 understanding, or a meeting of minds in an unlawful arrangement.” *American Tobacco Co. v.*  
 17 *United States*, 328 U.S. 781, 810 (1946). In other words:

18 The correct standard is that there must be evidence that tends to exclude the  
 19 possibility of independent action by [the parties]. That is, there must be direct or  
 20 circumstantial evidence that reasonably tends to prove that [the parties] had a  
 conscious commitment to a common scheme designed to achieve an unlawful  
 objective.

21 *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). “Unilateral activity by a  
 22 defendant, no matter the motivation, cannot give rise to a section 1 violation.” *See InterVest, Inc.*  
 23 *v. Bloomberg, L.P.*, 340 F.3d 144, 159 (3d Cir. 2003)). Samsung argues that Apple’s theory is  
 24 incompatible with the requirements necessary to plead a cause of action pursuant to Section 1 of  
 25 the Sherman Act because Apple’s theory is predicated on a fraud on the SSO. Because Samsung  
 26

27 <sup>7</sup> The parties agree that Apple’s Cartwright Act claims require the same showings as its § 1  
 28 Sherman Act claims. Apple’s Opposition at 16 n.10, August 29, 2011, ECF No. 189 (citing *Partee*  
*v. San Diego Chargers Football Co.*, 34 Cal. 3d 378, 392 (Cal. 1983)); Samsung Reply at 6 n.5,  
 September 6, 2011, ECF No. 209.

1 allegedly defrauded the SSO, either by lying about offering FRAND licensing terms, or by failing  
2 to disclose its IPR in standard essential patents, Samsung acted unilaterally and thus there could not  
3 have been a common understanding or concerted action between the SSO and Samsung.

4 The Court agrees. An allegation that Samsung unilaterally subverted a collaborative  
5 standard-setting process in order to restrain trade is not the equivalent of an allegation that  
6 Samsung contracted with, combined with, or conspired with other members of the collaborative  
7 body to restrain trade. A Plaintiff cannot state a claim under section 1 absent an allegation that it  
8 acted in concert with another party; it is not sufficient to allege that it acted alone in a collaborative  
9 forum. *See Monsanto Co.*, 465 U.S. at 764. Under Apple's theory, the SSO did not intend to set a  
10 standard involving Samsung's undisclosed patents, or patents that it believed would be licensed on  
11 FRAND terms. Accordingly, Apple's theory necessarily fails to allege a concerted action between  
12 Samsung and the SSO necessary to state a claim under Section 1.

13 Apply relies principally on two cases to establish that the second party need not be a  
14 "willing" participant in the alleged conspiracy. *See Helix Milling Co. v. Terminal Flour Mills Co.*,  
15 523 F.2d 1317, 1322 (9th Cir. 1975); *Spectators' Commun. Network Inc. v. Colonial Country Club*,  
16 253 F.3d 215, 222 (5th Cir. 2001). Both cases, however, are distinguishable from the allegations  
17 put forth by Apple here.

18 In *Helix* plaintiff's mill burned down in a fire, and plaintiff sought to buy a replacement.  
19 *Id.* at 1319. Building a new mill was considered too costly for the plaintiff, and the defendant sold  
20 the replacement mill to an existing competitor, effectively putting plaintiff out of business. *Id.*  
21 The District Court found that in order for there to be a combination to exclude plaintiff from the  
22 mill market, there must have been an agreement, explicit or implicit, between the other mill owners  
23 to not sell any mill to the plaintiff. *Id.* at 1321-22. The Ninth Circuit rejected this conclusion,  
24 instead holding that if a plaintiff's exclusion is a necessary consequence of a defendant's actions,  
25 then there exists a Section 1 combination. *Id.* at 1322. Thus, the Ninth Circuit confirmed that  
26 concerted action may have unintended anticompetitive *effects*, even if the parties to a contract,  
27 combination, or conspiracy do not intend those anticompetitive effects. This rule does not address  
28 the unique situation presented here in which the SSO was allegedly defrauded, and thus necessarily

1 did not, or could not, have known it was engaging in the specific conduct alleged to harm  
2 competition.

3 Similarly, a party may be liable for a combination or conspiracy entered under coercion,  
4 even though the party did not intend the anticompetitive effects of its acts. *See, e.g., Spectators’*  
5 *Commun. Network Inc.*, 253 F.3d at 222 (concluding that a competitor coerced into knowingly  
6 curtailing competition by another conspirator is liable under Section 1). Thus, “[c]onspirators who  
7 are not competitors of the victim may have no interest in curtailing competition in a market in  
8 which they do not compete; nevertheless, when they have been enticed or coerced to share in an  
9 anticompetitive scheme, there is still a combination within the meaning of the Sherman Act.”  
10 *Spectators’ Commun. Network, Inc.*, 253 F.3d at 221. This rule, however, does not speak to  
11 whether the unilateral and fraudulent actions of an individual may be sufficient to establish a  
12 concerted action between two parties as is required for a Section 1 claim.

13 Based on Apple’s allegations and theory of monopoly conduct, the Court finds that Apple  
14 has not sufficiently alleged a “unity of common design and understanding, or a meeting of minds in  
15 an unlawful arrangement” and thus Samsung’s motion to dismiss counterclaim in reply twenty-  
16 eight is GRANTED with leave to amend.

### 17 3. California Unfair Competition Law

18 Samsung moves to dismiss counterclaim in reply twenty-nine, which includes allegations  
19 that Samsung has violated the California Unfair Competition Law. In order to state a claim under  
20 Cal. Bus. & Prof. Code § 17200, Apple must allege that Samsung’s conduct violates a predicate  
21 statute or law, is fraudulent, or unfairly harms competition. Samsung argues that Apple has failed  
22 to allege a violation of the UCL separate and apart from its antitrust allegations and that Apple has  
23 failed to allege harm to competition.

24 The California Supreme Court has explained that in order to establish a claim of unfair  
25 harm to competition, a plaintiff must show that the alleged conduct is “tethered to some  
26 legislatively declared policy or proof of some actual or threatened impact on competition.” The  
27 California Supreme Court went on to elaborate that “[w]hen a plaintiff who claims to have suffered  
28 injury from a direct competitor’s ‘unfair’ act or practice invokes section 17200, the word ‘unfair’ in

1 that section means conduct that threatens an incipient violation of an antitrust law, or violates the  
2 policy or spirit of one of those laws because its effects are comparable to or the same as a violation  
3 of the law, or otherwise significantly threatens or harms competition.” *Cel-Tech Communications,*  
4 *Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 186-187 (1999).

5 Based on the complaint, it is unclear how Apple’s UCL claim is materially different than its  
6 claims for violations of the predicate antitrust laws discussed above. Therefore, Samsung’s motion  
7 to dismiss counterclaim in reply number twenty-nine is GRANTED with leave to amend.

8 B. Motion to Strike

9 “The court may strike from a pleading an insufficient defense or any redundant,  
10 immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). On a motion to strike, the  
11 court must view the pleading under attack in the light most favorable to the pleader. *See Equine*  
12 *Legal Solutions, Inc. v. Buntrock*, C 07-04976 CRB, 2008 WL 111237, at \*2 (N.D. Cal. Jan. 9,  
13 2008); *State of Cal. v. United States*, 512 F.Supp. 36, 39 (N.D. Cal. 1981). “Motions to strike are  
14 generally regarded with disfavor because of the limited importance of pleading in federal practice,  
15 and because they are often used as a delaying tactic.” *Greenwich Ins. Co. v. Rodgers*, 729 F. Supp.  
16 2d 1158, 1162 (C.D. Cal. 2010) (quoting *Cal. Dep’t of Toxic Substances Control v. Alco Pac., Inc.*,  
17 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002)).

18 “Numerous courts have used that discretion to dismiss counterclaims under Fed. Rule Civ.  
19 Pro. 12(f) where they are either the ‘mirror image’ of claims in the complaint or redundant of  
20 affirmative defenses.” *Stickrath v. Globalstar, Inc.*, No. 07-1941, 2008 WL 2050990 (N.D. Cal.  
21 May 13, 2008). “The court should focus on whether the counterclaims serve any useful purpose,  
22 and should dismiss or strike a redundant counterclaim only when “it is clear that there is a  
23 complete identity of factual and legal issues between the complaint and the counterclaim.” *Id.* at  
24 \*4 (internal quotations and citations omitted). “Ultimately, whether to grant a motion to strike lies  
25 within the sound discretion of the district court.” *Alco Pac.*, 217 F. Supp. 2d at 1033 (citing  
26 *Fantasy*, 984 F.2d at 1528). Samsung moves to strike Counterclaims Thirty, Thirty-One, and  
27 Thirty-Two as being duplicative and unnecessary in light of the affirmative defenses and other  
28 counterclaims contained in Apple’s Counterclaims in Reply.

1 The Thirtieth Counterclaim seeks a declaratory judgment that Apple is licensed to  
2 Samsung's declared-essential patents. Further, Apple alleges that "as a result of Samsung's refusal  
3 to make disclosures relating to FRAND or provide Apple with any information it would need to  
4 determine whether any purportedly FRAND license offer is in fact fair, reasonable, and non-  
5 discriminatory, Apple and Samsung have been unable to agree on FRAND terms for Samsung's  
6 Declared-Essential Patents, Apple is further entitled to a declaratory judgment setting forth the  
7 FRAND terms and conditions for a license to the Declared-Essential Patents, including the  
8 applicable royalty rate." Counterclaims in Reply ¶198. The Court agrees with Apple that at this  
9 stage of the proceedings, dismissing the Thirtieth Counterclaim is premature. In the Thirtieth  
10 Counterclaim Apple seeks a declaration of its rights, and a determination of the applicable royalty  
11 rate of the licenses, both of which may not necessarily be determined in the course of adjudicating  
12 other claims. As a result, Samsung's motion to strike the Thirtieth Counterclaim is DENIED.

13 Apple's Thirty-First and Thirty-Second Counterclaims in Reply appear to offer no useful  
14 purpose, separate and apart from the "mirror image" affirmative defenses already contained  
15 elsewhere in Apple's Counterclaims. For example, the Thirty-First Counterclaim seeks a  
16 declaratory judgment that Samsung is not entitled to injunctive relief if it prevails on any of its  
17 patent infringement claims. Counterclaims in Reply ¶ 200. This Counterclaim appears to mirror  
18 Apple's Sixth Affirmative Defense of no injunctive relief. The issue presented in the Thirty-First  
19 Counterclaim will necessarily be determined in the course of the litigation, and Apple has raised  
20 the issue sufficiently in its Affirmative Defense. Therefore, Samsung's motion to strike the Thirty-  
21 First Counterclaim in Reply is GRANTED.

22 Finally, Apple's Thirty-Second Counterclaim is also duplicative of its Affirmative Defense  
23 and does not appear to offer any additional relief. The Thirty-Second Counterclaim requests a  
24 declaration that Samsung's asserted patents are unenforceable "by virtue of estoppel, laches,  
25 waiver, unclean hands, patent exhaustion, implied license, and/or other equitable doctrines  
26 applicable to such misconduct." Counterclaims in Reply ¶ 206. The Thirty-Second Counterclaim  
27 appears to be entirely duplicative of Apple's Fifth Affirmative Defense. Although Apple argues  
28 against striking this Counterclaim, it is unclear what Apple hopes to gain from the declaratory

1 judgment that it seeks. Ultimately, the Thirty-Second Counterclaim appears to be redundant, and  
2 therefore Samsung’s motion to strike is GRANTED.

3 **III. CONCLUSION**

4 For the forgoing reasons, Samsung’s motion to dismiss Apple’s counterclaims in reply and  
5 Samsung’s motion to strike Apple’s counterclaims in reply is GRANTED, in part, and DENIED, in  
6 part. Apple may amend its pleadings to cure the deficiencies identified in this Order. To the extent  
7 it seeks to do so, Apple shall file an amended set of counterclaims in reply within 21 days of the  
8 date of this Order.

9 **IT IS SO ORDERED.**

10 Dated: October 18, 2011

  
\_\_\_\_\_  
LUCY H. KOH  
United States District Judge

United States District Court  
For the Northern District of California

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28