

1 Sherman Antitrust Act), and twenty-nine (California Unfair Competition Law) of Apple's
 2 Amended Answer, Defenses, and Counterclaims in Reply to Samsung's Counterclaims ("Amended
 3 Counterclaims in Reply" or "ACR"). *See generally*, Mot. to Dismiss. A hearing was held on April
 4 12, 2012. After considering the briefing provided by the parties, as well as the declarations and
 5 exhibits filed in support thereof by the parties, the Court grants in part and denies in part
 6 Samsung's Motion to Dismiss.

7 **I. RELEVANT BACKGROUND**

8 **A. Factual Background**

9 Unless otherwise noted, the following allegations are taken from Apple's Amended
 10 Counterclaims in Reply and are presumed to be true for purposes of ruling upon Samsung's Motion
 11 to Dismiss. Apple and Samsung both sell telecommunications handsets that operate on wireless
 12 networks. ACR ¶ 23. To facilitate the interoperability necessary for various manufacturers'
 13 products to function on wireless networks, standards setting organizations ("SSOs") establish
 14 precise specifications for essential components of the technologies. *Id.* ¶ 24. Standards may have
 15 both pro-competitive and anti-competitive effects. For example, standards may reduce costs for
 16 both suppliers and purchasers by allowing wider distribution of a single product and thus increased
 17 manufacturing volumes and lower per unit costs and by increasing price competition among many
 18 suppliers all making standards-compliant products. *Id.* ¶¶ 25-26. Alternatively, standardization
 19 also creates a "lock-in" effect such that alternative technological approaches are practically
 20 unavailable as substitutes and thus owners of patents that are incorporated into a standard may
 21 demand excessive royalties for use in the adopted patented technology. *Id.* ¶¶ 27-28.

22 Apple and Samsung are both members of the European Telecommunications Standards
 23 Institute ("ETSI"), which is an SSO headquartered in France. *Id.* ¶ 39. ETSI is one of six SSOs
 24 which combine to form the Third Generation Platform Partnership ("3GPP"). *Id.* ¶ 42. 3GPP sets
 25 standards for mobile wireless carrier technology, including the Universal Mobile
 26 Telecommunications Standard ("UMTS"), the standard at issue in this case. *Id.* ¶ 42. During the
 27 development of the UMTS, Samsung participated in ETSI working groups and proposed and
 28 advocated for the standardization of certain technologies to perform functions included in the

1 standard. *Id.* ¶¶ 55, 57. Samsung has represented to Apple that it owns several patents that are
2 essential to the UMTS (the “Declared-Essential Patents”). *Id.* ¶ 56.

3 ETSI has an intellectual property rights policy (“IPR policy”) meant to “‘reduce the risk’ to
4 those implementing the standards or other technical specifications ‘that investment in the
5 preparation, adoption and application of the standards could be wasted as a result of an essential
6 IPR for a standard or technical specification being unavailable.’” *Id.* ¶ 54. ETSI members
7 participating in 3GPP must comply with the ETSI IPR policy. *Id.* ¶ 45. The IPR policy requires
8 participants “to inform ETSI of essential IPRs in a timely fashion,” *id.* ¶ 51, and requires
9 participants, upon request, to agree irrevocably that they will license essential IPR on fair,
10 reasonable, and non-discriminatory (“FRAND”) terms. *Id.* ¶¶ 52-53. Apple has relied on
11 Samsung’s commitments to license its Declared-Essential Patents under FRAND terms (“FRAND
12 commitments”) in investing substantially in UMTS-compliant products. *Id.* ¶ 70. Apple alleges
13 that Samsung “deliberately and deceptively failed to disclose the existence of its claimed IPR
14 during the standard-setting process,” and that Samsung committed to license its IPR on FRAND
15 terms despite never having any intention to do so. *Id.* ¶¶ 57, 59-60.

16 Apple alleges that Samsung steered 3GPP to standardize Samsung’s Declared-Essential
17 Patents. *Id.* ¶ 57. Had Samsung disclosed its ownership of the relevant IPR and that it did not
18 intend to license on FRAND terms despite agreeing to do so on various occasions, 3GPP would
19 have selected a competing technology or declined to make the relevant function essential to the
20 standard. *Id.* ¶¶ 48, 58, 59, 63. As a result, Samsung thus excluded alternative technologies that
21 were available to perform the same functions as those covered by Samsung’s IPR, and acquired
22 monopoly power in the Input Technology Markets covered by Samsung’s Declared-Essential
23 Patents. *Id.* ¶¶ 58, 61, 67, 69.

24 Samsung has sought to exploit its alleged monopoly power to coerce Apple into tolerating
25 Samsung’s imitation of Apple’s products. *Id.* ¶¶ 72-75. Samsung did not sue Apple for infringing
26 its Declared-Essential Patents until Apple brought unrelated infringement claims against Samsung.
27 *Id.* ¶ 75. Apple alleges that Samsung has only offered licensing terms that are not FRAND. *Id.* ¶
28

1 49. Apple also alleges that Samsung's deceitful actions have an anticompetitive effect on the Input
2 Technologies Markets, thus injuring Apple. *Id.* ¶¶ 90-96.

3 **B. Procedural Background**

4 This is Samsung's second motion to dismiss Apple's counterclaims in reply. Apple, in its
5 initial complaint, alleged that Samsung's Galaxy cell phones and computer tablets infringe Apple's
6 trade dress, trademarks, and utility and design patents. Complaint, April 15, 2011, ECF No. 1. In
7 response, Samsung brought counterclaims against Apple, alleging that Apple products infringe
8 upon 12 of Samsung's own patents, including, among others, patents related to the UMTS
9 Standard. *See* Answer and Counterclaims, ECF No. 80. In response to these counterclaims, Apple
10 filed its Answer, Defenses and Counterclaims in Reply to Samsung's Counterclaims
11 ("Counterclaims in Reply") on July 21, 2011. *See* ECF No. 124.

12 In its Counterclaims in Reply, Apple alleged that Samsung violated both federal and state
13 antitrust laws, as well as the California Unfair Competition Law, by defrauding the standards
14 setting organization that set the UMTS standards, inducing the organization to adopt Samsung's
15 Declared-Essential Patents, and later refusing to license its Declared-Essential Patents on fair,
16 reasonable, and non-discriminatory terms ("FRAND" terms). Samsung sought to dismiss counts
17 twenty-seven (violation of Section 2 of the Sherman Antitrust Act), twenty-eight (violation of
18 Section 1 of the Sherman Antitrust Act and California Business and Professions Code §§ 16720),
19 and twenty-nine (California Unfair Competition Law). *See* Counterclaims in Reply at ¶¶ 176-206.
20 Samsung also sought to strike counts thirty (Declaratory Judgment that Apple is Licensed to
21 Samsung's Declared-Essential Patents), thirty-one (Declaratory Judgment of No Entitlement to
22 Injunctive Relief), and thirty-two (Declaratory Judgment of Unenforceability). *See id.* The Court
23 granted in part and denied in part Samsung's Motion to Dismiss, and allowed Apple leave to
24 amend to cure identified deficiencies. *See* Order Granting in Part, and Denying in Part, Motion to
25 Dismiss and Strike, ECF No. 315. Apple filed its Amended Counterclaims in Reply on October
26 28, 2011. Samsung filed the instant motion to dismiss on November 22, 2011. *See* ECF No. 405.

27 **II. LEGAL STANDARDS AND ANALYSIS**

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1 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal
2 sufficiency of a complaint. To withstand a motion to dismiss, a plaintiff must plead “enough facts
3 to state a claim to relief that is plausible on its face.” *Bell Atlantic v. Twombly*, 550 U.S. 544, 570
4 (2007). “On a motion to dismiss in an antitrust case, a court must determine whether an antitrust
5 claim is ‘plausible’ in light of basic economic principles.” *Coalition for ICANN Transparency,*
6 *Inc. v. VeriSign, Inc.*, 611 F.3d 495, 501 (9th Cir. 2010) (citing *Twombly*, 550 U.S. at 556). All
7 allegations of material fact are taken as true and interpreted in a manner most favorable to the non-
8 moving party. *Simon v. Hartford Life and Accident Ins. Co.*, 546 F.3d 661, 664 (9th Cir. 2008).
9 However, the court is not required to accept as true “allegations that are merely conclusory,
10 unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536
11 F.3d 1049, 1055 (9th Cir. 2008). Leave to amend should be granted unless it is clear that the
12 complaint’s deficiencies cannot be cured by amendment. *Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248
13 (9th Cir. 1995). If amendment would be futile, a dismissal may be ordered with prejudice. *Dumas*
14 *v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

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

24 **A. Section 2 of the Sherman Act**

25 Apple’s twenty-seventh counterclaim in reply alleges that Samsung’s failure to disclose its
26 IPR in the patents essential to the UMTS standard, and its affirmative misrepresentations regarding
27 Samsung’s intent to license its UMTS patents on FRAND terms, in conjunction with Samsung’s
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1 subsequent failure to license on FRAND terms, violates Section 2 of the Sherman Act. ACR ¶¶
2 198-201.

3 In order to state a claim under Section 2 of the Sherman Act, Apple must establish that: (1)
4 Samsung possessed monopoly power in the relevant market, and (2) that Samsung achieved or is
5 maintaining monopoly power through anticompetitive conduct. *Verizon Commc'ns, Inc. v. Law*
6 *Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). Samsung argues that Apple's
7 Amended Counterclaims in Reply should be dismissed because: (1) Apple has failed to sufficiently
8 allege a relevant market, (2) Apple has failed to sufficiently allege that Samsung possessed
9 monopoly power in the relevant market, and (3) Apple has failed to sufficiently allege antitrust
10 conduct. Mot. to Dismiss 9-14.

11 1. Monopoly Power in the Relevant Market

12 a. Relevant Antitrust Market

13 Samsung first argues that Apple's antitrust counterclaim should be dismissed because
14 Apple fails to plead a relevant antitrust market. Samsung argues that under prevailing Ninth
15 Circuit precedent, the relevant market must be a product market. Mot. to Dismiss at 9. Because
16 Apple has alleged a technology market, Samsung claims that Apple's antitrust counterclaim must
17 be dismissed.

18 "In order to state a valid claim under the Sherman Act, a plaintiff must allege that the
19 defendant has market power within a 'relevant market.'" *Newcal Industries, Inc. v. Ikon Office*
20 *Solution*, 513 F.3d 1038, 1044 (9th Cir. 2008). Because the validity of the "relevant market" is
21 typically a factual element rather than a legal element, alleged markets may survive scrutiny under
22 Rule 12(b)(6). *Id.* at 1045 (citing *High Tech. Careers v. San Jose Mercury News*, 996 F.2d 987,
23 990 (9th Cir. 1993)). Thus, an antitrust complaint survives a Rule 12(b)(6) motion that attacks the
24 definition of the relevant market unless it is apparent from the face of the complaint that the alleged
25 market suffers a fatal legal defect. *Id.*

26 The Ninth Circuit has acknowledged several principles for determining whether the
27 "relevant market" is sufficiently pled. First, consumers do not define the boundaries of the market;
28 the products or producers do. *Id.* (citing *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962)).

1 Second, the market must encompass the product at issue as well as all economic substitutes for the
2 product. *Id.* As such, the relevant market must include “the group or groups of sellers or
3 producers who have actual or potential ability to deprive each other of significant levels of
4 business.” *Thurman Industries, Inc. v. Pay ‘N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir.
5 1989).

6 Apple has sufficiently pled the “relevant market” for its antitrust claim. *See, generally*,
7 ACR ¶¶ 58, 90-102. Apple has pled that “[t]he relevant markets in which to assess the
8 anticompetitive effects of Samsung’s conduct . . . are the various markets for technologies that –
9 before the standard was implemented – were competing to perform each of the various functions
10 covered by each of Samsung’s purported essential patents for UMTS (collectively, the relevant
11 ‘Input Technologies Markets’).” *Id.* ¶ 99. Apple further identifies each of Samsung’s Declared-
12 Essential Patents in the UMTS standard that form the relevant technology markets for its Section 2
13 claim. *See id.* ¶¶ 98-99. These allegations define the bounds of the relevant markets. *See, e.g.*
14 *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 315 (3d Cir. 2007) (“The Complaint defined the
15 relevant market as the market for Qualcomm’s proprietary WCDMA technology, a technology
16 essential to the implementation of the UMTS standard.”). Moreover, for each of Samsung’s
17 technologies adopted as part of the UMTS standard, Apple alleges that pre-standardization there
18 existed alternative substitutes for the technologies covered by Samsung’s patents, and that after
19 ETSI adopted the proposed standard, viable alternative technologies were excluded. *Id.* ¶¶ 58, 99.
20 Thus, Apple has sufficiently pled a relevant antitrust market. *See Broadcom*, 501 F.3d at 315-16.

21 Samsung argues that prevailing Ninth Circuit law requires that a “relevant market” be a
22 market of physical products. Mot. to Dismiss at 10-11 (citing *Newcal*, 513 F.3d at 1044).
23 However, Samsung’s reading of *Newcal* is far too narrow. In *Newcal*, the Ninth Circuit
24 differentiated between markets defined by a set of consumers and markets defined by products or
25 producers, but defined the relevant market as a services market. *See* 513 F.3d at 1045; *see also*
26 *Coalition for ICANN Transparency, Inc.*, 611 F.3d at 507.

27 Apple’s position is consistent with other courts that have confirmed that technology
28 markets may serve as “relevant markets” for Sherman Act claims in the context of essential patents

1 adopted by standard setting organizations. For example, the Third Circuit concluded that a relevant
 2 market for an antitrust claim could be the market for proprietary technology, stating that “the
 3 incorporation of a patent into a standard . . . makes the scope of the relevant market congruent with
 4 that of the patent.” *Broadcom*, 501 F.3d at 315.

5 Another court in the Northern District of California has agreed. “[T]echnology markets,
 6 [for the purposes of an antitrust claim,] consist of intellectual property that is licensed.” *Hynix*
 7 *Semiconductor Inc. v. Rambus Inc.*, No. CV-0020905 RMW, 2008 WL 73689, at *2 (N.D. Cal.
 8 Jan. 5, 2008) (internal citations and quotation marks omitted). Thus, “[d]efining a technology
 9 market, as opposed to a product market, makes sense where ‘rights to intellectual property are
 10 marketed separately from the products in which they are used.’” *Id.* at *2 (quoting U.S. Dept. of
 11 Justice & Fed. Trade Comm’n, Antitrust Guidelines for the Licensing of Intellectual Property §
 12 3.2.2 (1995)). Apple’s theory is supported by the relevant case law, and Apple’s antitrust claim is
 13 not dismissed for failure to allege a relevant market.

14 b. Monopoly Power

15 Samsung also argues that Apple failed to allege that Samsung possessed any power in the
 16 relevant market, and that Apple instead erroneously bases its allegation of Samsung’s monopoly
 17 power on ETSI’s incorporation of Samsung technology into the WCDMA standard. Mot. to
 18 Dismiss at 11.

19 “Monopoly power . . . is the power to control prices or exclude competition,” and may be
 20 shown “by direct evidence or by circumstantial evidence.” *Forsyth v. Humana, Inc.*, 114 F.3d
 21 1467, 1475 (9th Cir. 1997) (internal quotation marks omitted). Apple alleges that Samsung has
 22 obtained “the power to raise prices and exclude competition” in the relevant Input Technologies
 23 Markets, and thus enjoys monopoly positions in the relevant markets. ACR ¶¶ 101-02. Moreover,
 24 Apple further alleges that it has been locked-in to the technology standard adopted by ETSI, which
 25 has conferred upon Samsung market power. *Id.* ¶¶ 93-94. Finally, Apple alleges that it could not
 26 switch to alternative technology absent undue cost. *Id.* ¶¶ 28; 70; 87; 16; 18. These allegations,
 27 taken together, sufficiently allege that Samsung has market power in the relevant Technology
 28 Markets. *See Broadcom*, 510 F.3d at 315 (concluding “quickly and easily” that plaintiff stated a

1 Section 2 claim where plaintiff alleged that defendant “had the power to extract supracompetitive
2 prices” with respect to standards essential patents).

3 Samsung argues that the “mere incorporation of patented technology into a standard does
4 not justify an inference that the patentee has market power.” Mot. to Dismiss at 11. Samsung
5 relies upon *Townshend v. Rockwell Int’l Corp.*, No. 99-CV-0400-SBA, 2000 WL 433505, at *12
6 (N.D. Cal. Mar. 28, 2000), a case from the Northern District of California, in which the court
7 observed that “[t]he adoption of an industry standard incorporating such proprietary technology
8 does not confer any power to exclude that exceeds the exclusionary power to which a patent holder
9 is otherwise legally entitled.” *Id.* The complaint in *Townshend*, however, is distinguishable from
10 the allegations in the Amended Counterclaims here. In *Townshend*, the claimant failed to allege
11 that the standardization of the patented technology prevented the development of other proprietary
12 technologies, in other words, alternative technologies were excluded through the standardization
13 process. *Id.* at *12-13. In comparison, Apple has identified the alternative technologies in each of
14 the relevant markets that could have been adopted had Samsung not made the allegedly false
15 FRAND commitments. ACR ¶¶ 57-58.

16 Moreover, a number of courts have recognized a legal distinction between a normal patent
17 – to which antitrust market power is generally not conferred on the patent owner, and a patent
18 incorporated into a standard – to which antitrust market power may be conferred on the patent
19 owner. In so doing, these courts have found similar allegations of market power conferred as a
20 result of a patent incorporated into a standard to be sufficient to state a claim upon which relief can
21 be granted. *See Broadcom*, 501 F.3d at 314 (“A standard, by definition, eliminates alternative
22 technologies. When a patented technology is incorporated in a standard, adoption of the standard
23 eliminates alternatives to the patented technology. . . . [The value of a patent] becomes
24 significantly enhanced . . . after the patent is incorporated in a standard.”); *see also Research in
25 Motion, Ltd. v. Motorola, Inc.*, 644 F. Supp. 2d 788, 793 (N.D. Tex. 2008) (explaining that
26 standards essential patents are different from normal patents in that standards essential patents
27 confer monopoly power on the patent owner because “[a] standard . . . by definition, eliminates
28 alternative technologies,” and enhances the value of the patent).

1 At oral argument, Samsung also argued that Apple has not sufficiently alleged that
2 Samsung has monopoly power in a relevant market because Samsung does not sell chipsets to third
3 parties, the product that incorporates Samsung's Declared-Essential Patents. Samsung's argument,
4 however, relies on a misreading of *Broadcom*. The defendant in *Broadcom* had a monopoly
5 position – 90% market share – in the CDMA chipset market. *See* 501 F.3d at 304. However, in
6 *Broadcom*, plaintiff's allegations regarding the CDMA chipset market were independent of its
7 allegations of monopolization arising out of defendant's conduct in the standard setting
8 organization, which arose in a distinct market. *Compare id.* at 315-17 and 317-19. The Third
9 Circuit did not require, or even analyze, monopoly power in the market of the product that
10 incorporates the standard. Thus, Apple is not required to allege more to plead monopoly power in
11 a relevant market than it has already done in its Amended Counterclaims.

12 2. Anticompetitive Conduct

13 As with Samsung's first Motion to Dismiss and Strike Apple's Original Counterclaims,
14 Samsung again challenges the adequacy of Apple's pleadings with respect to Samsung's
15 anticompetitive conduct. Samsung argues that Apple's Sherman Act counterclaim should be
16 dismissed because Apple's allegations are not "sufficient to create a plausible inference that ETSI
17 would have adopted an alternative technology in response to Samsung's alleged required
18 disclosure." Mot. to Dismiss at 14.

19 *False FRAND Theory.* An SSO can be used to obtain monopoly power and create
20 anticompetitive effects on the relevant markets when "(1) in a consensus-oriented private standard-
21 setting environment, (2) a patent holder's intentionally false promise to license essential
22 proprietary technology on FRAND terms, (3) coupled with [a standard setting organization's]
23 reliance on that promise when including the technology in a standard, and (4) the patent holder's
24 subsequent breach of that promise, is actionable anticompetitive conduct." *Broadcom*, 501 F.3d at
25 314.

26 The October 18, 2011 Order made clear that Apple's theory of monopoly conduct arising
27 from Samsung's false FRAND declarations was legally sufficient, but that the allegations in the
28 original counterclaims in reply did not meet Rule 9(b)'s heightened pleading standard for fraud.

1 See October 18, 2011 Order at 7. The Court based this finding on case law “recogniz[ing] that
2 fraudulent FRAND declarations that are used to induce SSOs to adopt standards essential patents
3 can be monopoly conduct for the purposes of establishing a Section 2 claim.” *Id.* at 6; *see also*
4 *Broadcom*, 501 F.3d 297; *Research in Motion Ltd.*, 644 F. Supp. 2d at 796-97. In its original
5 counterclaims, Apple identified only two paragraphs that supported its claim that false FRAND
6 declarations were made. *See* Counterclaims in Reply ¶¶ 56-57. Apple’s Amended Counterclaims,
7 however, allege specific facts about when the false FRAND declarations were made, by whom, and
8 for which patents. *See id.* at 59, 63. Apple’s allegations of Samsung’s false FRAND declarations
9 are thus sufficient to put Samsung on notice of the particular misconduct that creates the basis of
10 the alleged fraud and are therefore sufficient to meet the heightened pleading standards of Rule
11 9(b). *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).

12 *Failure to Disclose IPR Theory.* Apple has similarly added factual detail, and further
13 fleshed out its theory, that Samsung engaged in anticompetitive conduct in violation of Section 2 of
14 the Sherman Act by failing to disclose its IPR. *See* Counterclaims in Reply. The October 18, 2011
15 Order found that Apple “met its burden of pleading anticompetitive conduct for Samsung’s failure
16 to disclose IPR in the standards essential patents,” but that it did not “allege sufficient facts to
17 support a plausible inference that had Samsung disclosed its intellectual property rights to the SSO,
18 a viable alternative technology performing the same functionality would have been incorporated
19 into the UMTS standard, or the relevant functionality would not have been incorporated into the
20 standard at all.” October 18, 2011 Order at 8-9.

21 In its Amended Counterclaims in Reply, Apple presents alternatives that the working group
22 could have adopted to perform the same functionality as that performed by each Declared-Essential
23 Patent asserted. ACR at ¶ 58. Additionally, Apple alleges that, since the working group knew of
24 alternatives to Samsung’s technologies, had it known that Samsung did not intend to license on
25 FRAND terms the adopted patents, ETSI would not have adopted the standard because of the
26 negative lock-in effect. *Id.* at ¶¶ 198-99. Through the presentation of viable alternatives to each
27 Declared-Essential Patent, Apple’s allegations that ETSI would have adopted a different
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1 technology had Samsung's rights been known at the time of the standard setting are more than
2 mere conclusory statements and withstand Samsung's motion to dismiss.

3 Apple has cured the deficiencies identified in the October 18, 2011 Order with respect to its
4 theories of anticompetitive conduct, and has otherwise stated a claim for a violation of Section 2 of
5 the Sherman Act. Therefore, the Court DENIES Samsung's motion to dismiss Apple's twenty-
6 eighth counterclaim in reply.

7 **B. Unfair Competition Law**

8 Samsung moves to dismiss Apple's twenty-ninth counterclaim for violation of California's
9 Unfair Competition Law ("UCL"). Mot. to Dismiss at 22-23. Because Apple has adequately
10 alleged a violation of Section 2 of the Sherman Act, Apple has also stated a claim that Samsung's
11 conduct violates the California UCL. *See Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20
12 Cal. 4th 163, 187 (1999).

13 Samsung also argues that to the extent Apple's UCL claim is based on Samsung's initiation
14 of counterclaims for patent infringement, Apple's UCL claim is barred by California Civil Code
15 47(b). Mot. to Dismiss at 23. Section 47 states that "[a] privileged publication or broadcast is one
16 made . . . [i]n any . . . (2) judicial proceeding." Cal. Civ. Code § 47(b). The absolute immunity
17 created by Section 47 is not a mere defense but is a substantive rule of immunity which
18 extinguishes the cause of action as a matter of law. *See Berman v. RCA Auto Corp.*, 177 Cal. App.
19 3d 321, 323-25 (1986).

20 In the context of judicial proceedings, the Section 47(b) privilege applies to "any
21 communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other
22 participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some
23 connection or logical relation to the action." *Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990). The
24 absolute immunity created by Section 47 applies to all tort causes of action, "where the gravamen
25 of the injury is predicated on the privileged publication of an injurious falsehood." *Gootee v.*
26 *Lightner*, 224 Cal. App. 3d 587, 594 (1990). Thus, the California Supreme Court has recognized a
27 difference between communications, which are actionable, and conduct, which is not. *See Kimmel*
28 *v. Goland*, 51 Cal. 3d 202, 205 (1990) (Section 47(b) privilege "precludes recovery for tortiously

1 inflicted injury resulting from publications or broadcasts made during the course of judicial and
2 quasi-judicial proceedings, but does not bar recovery for injuries from tortious conduct regardless
3 of the purpose for which such conduct is undertaken.”); *see also Microsoft Corp. v. A-Tech Corp.*,
4 855 F. Supp. 308, 314 (C.D. Cal. 1994) (citing *Pacific Gas & Elec. v. Bear Stearns & Co.*, 50
5 Cal.3d 1118, 1126 n.12 (1990)).

6 For example, in *Microsoft Corp. v. A-Tech Corp.*, the district court found that Section 47(b)
7 immunity did not bar claims for abuse of process and UCL where the counterclaims arose from an
8 *ex parte* application for a temporary restraining order freezing Defendants’ assets. 855 F. Supp. at
9 314. Instead, the Court found that “[t]he publication in [that] case, which [was] the *ex parte*
10 application requesting the asset freeze, [was] only being used to prove the abuse of process claim,
11 and is not the claim itself.” *Id.* Thus, the district court determined that “the threat or extortion [of
12 the asset freeze], which in this case is the alleged deprivation of assets to prevent Defendants from
13 defending against Plaintiff’s claim . . . is the heart of” the claim. Thus, the district court
14 determined that the basis of the claim was conduct, and not communication, and thus was not
15 subject to Section 47(b) immunity.

16 Here, Apple references Samsung filing counterclaims in response to Apple’s lawsuit. The
17 basis of Apple’s claim is not the publication or communication of the pleadings in Samsung’s
18 counterclaims. Rather Apple’s claim is based on Samsung’s allegedly extortionist conduct in
19 attempting to file a patent infringement suit, despite the fact that Apple either owns a license or has
20 a right to license on FRAND terms, Samsung’s Declared-Essential Patents. *See* ACR ¶ 2-7. Thus,
21 Apple’s UCL claim is not entitled to Section 47(b) immunity.

22 Accordingly, the Court DENIES Samsung’s motion to dismiss Apple’s twenty-ninth
23 counterclaim for violation of the UCL.

24 **C. Breach of Contract and Declaratory Judgment**

25 Samsung moves to dismiss Apple’s twenty-fifth and twenty-seventh counterclaims. Mot. to
26 Dismiss at 14-20. Apple’s twenty-fifth counterclaim for breach of contract alleges that Samsung
27 entered into a contract with ETSI and its members; that Apple is an intended third party beneficiary
28 of the contract; and that Samsung breached the contract by “claiming infringement and seeking to

1 enjoin Apple from practicing the UMTS standard.” ACR ¶¶ 180-182. Apple claims that
 2 Samsung’s actions are a breach of the agreement because either: (1) “Apple is licensed to any valid
 3 patents” covered by the ETSI policy statements, or in the alternative, (2) Apple “has the right to a
 4 FRAND license to the Declared-Essential Patents by virtue of Samsung’s FRAND commitments.”
 5 ACR ¶ 182. As an independent breach of its contractual agreement with ETSI, Apple alleges that
 6 Samsung failed to timely disclose its allegedly essential patents in accordance with the
 7 requirements of the ETSI IPR Policy. ACR ¶ 183. Similarly, in Apple’s twenty-seventh
 8 Counterclaim, Apple seeks a declaratory judgment that Apple either: “[1] is licensed to Samsung’s
 9 Declared-Essential Patents by virtue of Samsung’s FRAND commitments or, in the alternative, [2]
 10 Apple has the irrevocable right to be licensed on FRAND terms under those patents.” *Id.* at ¶ 195.
 11 Because the declaratory judgment and breach of contract claims are overlapping – specifically with
 12 respect to whether Apple (1) already has a FRAND license to Samsung’s Declared-Essential
 13 Patents; or (2) has the right to a FRAND license to the Declared-Essential Patents by virtue of
 14 Samsung’s FRAND commitments – the Court will analyze these two claims together.

15 The first issue is the appropriate law to apply to these claims.¹ Apple argues that French
 16 law applies by virtue of a choice of law provision in the ETSI policy provision. Opp’n at 16-17.
 17 In contrast, Samsung urges the Court to apply California law to the contract-related counterclaims.
 18 Mot. to Dismiss at 15-18. To decide whether French or California law controls, the court applies
 19 the choice-of-law rules of California, the state in which it sits. *See Klaxon Co. v. Stentor Elec.*
 20 *Mfg. Co.*, 313 U.S. 487, 496 (1941). In determining whether a choice of law provision is
 21 enforceable under California law, a court first must determine: “(1) whether the chosen state has a
 22 substantial relationship to the parties or their transaction, or (2) whether there is any other
 23 reasonable basis for the parties’ choice of law.” *Nedlloyd Lines B.V. v. Super. Ct.*, 3 Cal. 4th 459,
 24 466 (1992). “If . . . either test is met, the court must next determine whether the chosen state’s law
 25 is contrary to a fundamental policy of California. If there is no such conflict, the court shall
 26 enforce the parties’ choice of law.” *Id.*

27 _____
 28 ¹ Apple argued at the hearing that there was no dispute that French law applies to Apple’s contract
 claims. However, it appears from the briefing that Samsung argued for application of California
 law. In light of this ambiguity, the Court will first address the choice of law issue.

1 Applying this standard, the choice of law provision in ETSI's IPR policy is applicable. The
2 ETSI IPR Policy, which forms the basis of Apple's breach of contract counterclaims, includes a
3 provision that specifies that it "shall be governed by the laws of France." ACR ¶ 54 (citing ETSI
4 IPR Policy Clause 12). France has a substantial relationship to the transaction because ETSI is a
5 non-profit organization headquartered in France. *Id.* ¶ 39. Moreover, French law is reasonable
6 because the ETSI IPR Policy and Samsung's patent disclosures to ETSI are central to Apple's
7 contract claims. Finally, it does not appear that French contract law is contrary to any fundamental
8 California policy. The applicable law is general commercial contract law as applied to
9 sophisticated entities engaging in arms-length negotiations. The issues raised do not implicate a
10 fundamental policy of the state. Accordingly, French law is applicable to Apple's contract
11 counterclaims.

12 Samsung argues that Apple has not provided sufficient notice of its intent to rely on French
13 law and therefore French law should not apply to Apple's counterclaims. Mot. to Dismiss at 14.
14 In support of its argument, Samsung relies on Federal Rule of Civil Procedure 44.1, which requires
15 that "[a] party who intends to raise an issue about a foreign country's law must give notice by a
16 pleading or other writing." Fed. R. Civ. P. 44.1. To determine whether a party has given
17 reasonable notice of its intent to invoke foreign law, a court considers: (1) the stage which the case
18 has reached at the time of notice; (2) the reason proffered by the party for the failure to give earlier
19 notice; and (3) the importance to the case as a whole of the issue of foreign law. *See APL Co. Pte.*
20 *Ltd. v. UK Aerosols Ltd.*, 582 F.3d 947, 955-56 (9th Cir. 2009). In this case, Apple has given
21 notice of the applicability of French law to its breach of contract claims because the ACR
22 specifically indicates that the ETSI IPR Policy "shall be governed by the laws of France." ACR ¶
23 54. Apple included the same allegation regarding the breach of contract claim, and thus gave
24 notice of its intent to apply French law, in its initial counterclaims in reply filed in July 2011.
25 Apple's Answer and Counterclaims in Reply ¶ 51, ECF No. 124. Indeed, it appears as though
26 Samsung was given adequate notice of Apple's intent, given that Samsung utilized its own French
27 law expert in its Motion to Dismiss the Amended Counterclaims. Therefore, the Court finds that
28

1 Apple has given adequate notice of its intent to raise an issue about a foreign country’s laws
2 pursuant to Federal Rule 44.1.

3 A court determining foreign law “may consider any relevant material or source, including
4 testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.”
5 Fed. R. Civ. P. 44.1. “Although, pursuant to Rule 44.1, courts may ascertain foreign law through
6 numerous means, expert testimony accompanied by extracts from foreign legal materials has been
7 and will likely continue to be the basic mode of proving foreign law.” *Universal Sales Co., Ltd. v.*
8 *Silver Castle, Ltd.*, 182 F.3d 1036, 1038 (9th Cir. 1999) (citation omitted). Both Apple and
9 Samsung have provided declarations from competing experts on French law regarding the
10 requirements for valid patent licenses. Unsurprisingly, Samsung’s expert, Mr. Remy Libchaber,
11 opines that Apple’s contract claim is invalid under French law, while, Apple’s expert, Professor
12 Nicolas Molfessis, disagrees.

13 After reviewing the declarations of both experts, as well as the supporting exhibits, several
14 general principles of French contract law are apparent. Under French law a contract “is an
15 agreement by which one or several persons undertake, towards one or more other persons, to give,
16 to do or not to do something.” Libchaber Decl. ¶ 22. Under French law, a valid contract requires:
17 (1) the consent of the parties; (2) capacity of the parties to enter into the contract; (3) a definite
18 object that constitutes the subject matter of the contract; and (4) consideration. Molfessis Decl. ¶ 8.
19 The consent of the parties is by far the most important. *Id.* ¶ 10; *see also* Libchaber Decl. ¶¶ 13-16.
20 The Court now turns to each of Apple’s theories.²

21 *Apple’s Theory of Breach of Contract to License.* Apple’s first breach of contract and
22 declaratory judgment theory is that Samsung has breached its contractual agreement with ETSI and
23 its members to license its Declared-Essential Patents on FRAND terms. Apple’s theory is that
24 Samsung entered into a contract with ETSI when it submitted its FRAND declarations, seeking to
25 have ETSI adopt Samsung’s standard essential patents. ACR ¶¶ 63, 65. In so doing, Samsung
26

27 ² It is clear from the briefing and from oral argument that the central dispute between the parties is
28 with regard to Apple’s theory that it currently holds a patent license for Samsung’s Declared-
Essential patents. Because Samsung challenges Apple’s other breach of contract claims in its
briefing, the Court addresses those arguments here.

1 agreed to be bound by ETSI IPR Policy Clause 6.1, which requires patent-owners to submit, in
2 writing, that they are “prepared to grant irrevocable licenses on fair, reasonable and non-
3 discriminatory terms.” *Id.* ¶ 63, 65, 52. Apple claims that the contract between ETSI and Samsung
4 required Samsung to license its patents on FRAND terms and that Samsung breached this
5 contractual commitment with ETSI, and its members, when Samsung filed suit against Apple
6 instead of licensing the patents to Apple on FRAND terms as Samsung had agreed to do. *Id.* ¶ 182.

7 Under French law, a contract may be created between the association and its members, and
8 among members of the association: “[a]n association is an agreement in which two or more people
9 permanently combine their knowledge or activities for a purpose other than sharing profits. Its
10 validity is governed by the general legal principles applying to contracts and obligations.”
11 Molfessis Decl. ¶ 49 (citing Article 1 of the July 1st 1901 French Act on Association Agreements).
12 According to Professor Molfessis, Article 1121 of the French Civil code permits “a party to enter
13 into a binding obligation for the benefit of third parties.” *Id.* ¶ 66. Thus, a third party beneficiary
14 may sue to enforce the execution of a contract. *Id.* ¶ 68. Apple’s theory is that Samsung’s FRAND
15 declarations establish a contract between Samsung and ETSI (and therefore all its members).
16 Under this contract ETSI agreed to adopt Samsung’s patents in setting a standard, and in exchange,
17 Samsung agreed to grant licenses on FRAND terms. The agreement between Samsung and ETSI
18 can plausibly be interpreted as granting Apple “the right to a FRAND license to the Declared-
19 Essential Patents by virtue of Samsung’s FRAND commitments.” ACR ¶ 182; *see also* Selwyn
20 Decl., Ex. H at 1659 (Professor Boucobza, an expert in French law retained by Samsung in another
21 proceeding, testified that “according to article 6.1, the holder of essential patent[s] needs to grant
22 licenses, is obliged to grant licenses to the ETSI members which request it.”).

23 Samsung argues that Apple’s breach of contract theory is faulty because Samsung’s ETSI
24 declarations cannot be construed as binding “agreements to agree” to a license. Samsung argues
25 that “agreements to agree” conflict with the freedom to contract principle in French law. Reply at
26 8; Libchaber Decl. ¶¶ 9-21; 108; 111. As Professor Libchaber explained “no contract can be
27 formed without one and another party to have wanted it, moreover against the will of one of the
28 party [sic]. Everyone has the right to refuse to sell the goods he owns or to employ someone he

1 does not want. The refusal to contract is a manifestation of freedom.” Libchaber Decl. ¶ 111
2 (internal citations and quotations omitted). Even adopting Professor Libchaber’s declaration of the
3 governing French law, it is not clear that Apple is not entitled to FRAND licenses pursuant to ETSI
4 IPR Policy 6.1 and Samsung’s FRAND declarations. Samsung arguably consented to enter into
5 FRAND licenses by submitting its FRAND declaration in order to have its patents adopted by the
6 standard setting organization. Samsung certainly had the right to refuse to license its patents, but
7 arguably relinquished that right when it submitted its FRAND declaration. At least at this stage,
8 the Court is not willing to say that Apple’s theory fails under French law.

9 *Apple’s Theory of Breach of Good Faith Negotiations.* Both experts agree that under
10 French law, the parties can enter into a valid contract to negotiate in *good faith*. See Mot. to
11 Dismiss at 20; Opp’n at 22 n.20; see also Libchaber Decl. ¶ 82; Molfessis Decl. ¶ 88. Moreover,
12 both parties agree that Samsung’s contractual obligation arising from its FRAND declarations to
13 ETSI at the very least created a duty to negotiate in good faith with Apple regarding FRAND
14 terms. See *id.* Samsung argues that Apple has not sufficiently pled a claim for breach of a contract
15 to negotiate. Reply at 13-14. The Court disagrees.

16 For example, Apple alleges that Samsung refused to quote licensing terms, and when it
17 finally did, those terms were not fair, reasonable and non-discriminatory. ACR ¶¶ 76-77. Apple
18 also alleges that Samsung’s negotiation tactics were discriminatory and that Samsung retaliated
19 against Apple by instigating litigation and refusing to grant FRAND licenses when Apple asserted
20 its own non-standards essential patents against Samsung in this litigation. ACR ¶¶ 182; 73-77.
21 These factual allegations sufficiently support a claim that Samsung has breached its duty to
22 negotiate FRAND terms in good faith.

23 Finally, it is worth noting that the two contractual theories explained above dovetail under
24 the particular circumstances of this case. A reasonable inference can be drawn from Apple’s
25 allegations that had Samsung negotiated in good faith and been willing to offer FRAND terms,
26 Apple would have accepted the offer and been granted a license. Thus, Apple’s allegations
27 regarding whether Samsung acted in good faith in the negotiation process overlap significantly
28 with its allegations that Samsung breached its alleged agreement to grant FRAND licenses.

1 *Apple’s Theory of Breach of the Agreement to Disclose IPR.* As an independent theory of
2 liability, Apple also argues that Samsung breached its agreement with ETSI to timely disclose its
3 IPR to the standard setting organization. *See* Opp’n at 16; ACR ¶ 183. ETSI IPR Policy Clause
4 4.1 requires members to timely disclose IPR “which might be essential if that proposal is adopted.”
5 ACR ¶ 51. Samsung argues that “Apple’s allegations fail to create a plausible inference that
6 Samsung’s purported breach of its obligation to timely disclose its essential patents caused any
7 damage to Apple or any other party.” Mot. to Dismiss at 20. However, Apple has alleged but for
8 Samsung’s non-disclosures “alternative viable technologies would not have been excluded from
9 the relevant Input Technology Market.” ACR ¶ 58. Moreover, according to Apple, Samsung’s
10 failure to disclose has resulted in “increased costs, lower quality or innovation of Input
11 Technologies.” ACR ¶ 184. Thus, Apple has sufficiently pled that Samsung’s breach of the
12 ETSI’s IPR disclosure policy has resulted in harm to Apple.

13 *Apple’s Theory of Existing License.* Finally, Apple alleges that it is presently licensed to
14 Samsung’s Declared-Essential Patents, and that Samsung’s decision to pursue this litigation is a
15 breach of the license. *See, e.g.,* ACR ¶¶ 180-182; Opp’n at 17-19. Apple’s theory is that
16 Samsung’s FRAND declaration constituted an offer under French contract law, and Apple’s use of
17 the patented technology constituted valid acceptance of Samsung’s offer. Thus, Apple argues,
18 because the license already exists, the Court need only supply the FRAND royalty rate. Under this
19 theory, Samsung breached the terms of the license when it brought the instant lawsuit for patent
20 infringement.

21 Samsung argues that Apple’s theory fails as a matter of French law for several reasons: (1)
22 the license between Apple and Samsung has not been reduced to writing as is required pursuant to
23 Article 613-8 of the French Intellectual Property Code, (2) price is an essential term of the
24 formation of a binding license and no price was provided in the FRAND declaration, (3) under
25 French law, a patent license is personal in nature and the identity of the contracting party is an
26 essential term, (4) the purported license requires a firm offer with specific terms, which were not
27 included here, and (5) French law requires an acceptance, which Apple has failed to plead. *See*
28 Mot. to Dismiss at 18-19; Reply at 9-13.

1 Several of Samsung's arguments have merit. First, there is no existing license between
2 Apple and Samsung because there was no firm offer and acceptance of the terms of the license that
3 Apple claims already exists. Both experts agree that an offer and acceptance are essential to
4 contract formation under French law, but disagree regarding its application in this case. *See*
5 Libchaber Decl. ¶ 70; Libchaber Reply Decl. ¶¶ 10-11; *see also* Molfessis Decl. ¶¶ 11-13.

6 Under French contract theory, "an offer must be specific enough for the contract to be
7 formed by a simple acceptance of the person to whom the offer is communicated." Libchaber
8 Decl. ¶ 70. At the hearing, the parties disagreed primarily as to whether French law requires a
9 price term in order to create an enforceable license. *See also* Molfessis Decl. ¶ 30 ("Absence of the
10 determination of the price does not void the contract. However, if the parties abuse their right to
11 determine the price, it will only give rise to indemnities or to allow revocation."). Even assuming,
12 without deciding, that Apple is correct that French law does not require a price term, taken as a
13 whole, it is not plausible that Samsung's FRAND declarations constitute an offer to license. The
14 FRAND declarations fail to specify not only the royalty rate, but also the duration of the license, as
15 well as the geographic scope of the license. Reply at 10. Apple now argues that these terms can be
16 implied: the geographic scope could be the geography covered by the patent, the duration can be
17 the patent term, and the royalty rate can be supplied at a later date. However, there is no indication
18 that the FRAND declarations in fact imply all of these terms. Instead, Samsung's FRAND
19 declarations, merely state that Samsung was "prepared to grant irrevocable licenses on fair,
20 reasonable and non-discriminatory terms." ACR ¶ 63.

21 Apple has also failed to establish acceptance by performance. Professor Molfessis opines
22 that "the idea of acceptance by way of performance of the offered contract is acknowledged as a
23 general principle" of French contract law. Molfessis Decl. ¶ 93. While offer and acceptance may
24 proceed as described by Apple, this theory is inconsistent with the ETSI IPR Policy and the
25 FRAND declarations, and the subsequent conduct of Apple itself. Samsung, as well as other ETSI
26 members submitting FRAND declarations, state only that they are "prepared to grant irrevocable
27 licenses." These statements neither implicitly, nor explicitly establish that the offeree takes a
28 license merely by adopting the standard and practicing the patented technology. Nor is it plausible

1 that anyone who uses the technology has a preexisting license merely because an ETSI member
2 submitted a FRAND declaration. If this were the case, manufacturers and producers could utilize
3 patented technology in silence without ever expressing acceptance or paying royalties. Finally,
4 additional allegations in the Amended Counterclaims belie Apple's allegations that it already has a
5 license to Samsung's Declared-Essential Patents. Apple alleges that it entered into negotiations
6 with Samsung over a FRAND license and that "Samsung finally offered Apple a license to its
7 Declared-Essential Patents on July 25, 2011." ACR ¶ 77. If Apple believed that it already owned
8 a license, it is unclear why Samsung would be obliged to offer Apple a license. Ultimately, it is not
9 plausible that the parties consented to the arrangement that Apple claims is now in place. *See*
10 Molfessis ¶ 10; *see also* Libchaber Decl. ¶¶ 13-16.

11 Additionally, there is no written license between Apple and Samsung. Both experts agree
12 that under French Intellectual Property Code Article L. 613-8 a patent assignment or license must
13 be executed in writing. *See* Libchaber Decl. ¶ 54; Molfessis Decl. ¶ 109. Professor Molfessis
14 opines that the writing requirement does not apply to ETSI. However, he fails to cite any direct
15 authority for this proposition. *See generally* Molfessis ¶ 109. Thus, the Court is unpersuaded by
16 his expert opinion on this point. In this case, Samsung did provide a "writing" in the form of its
17 FRAND declaration where Samsung agreed to be bound by ETSI IPR Policy Clause 6.1, and that it
18 was "prepared to grant irrevocable licenses on fair, reasonable and non-discriminatory terms." *Id.*
19 ¶ 63, 65, 52. There is no indication that Samsung's FRAND declaration contains the necessary
20 written agreement by Apple to abide by the terms of the purported license. *See* Libchaber Decl. ¶
21 54 (citing Article L. 613-8, § 5 of the Intellectual Property Code, "acts bearing a transfer or a
22 license . . . must be acknowledged in writing, under penalty of nullity.").

23 In sum, Samsung's motion to dismiss the twenty-fifth and twenty-seventh counterclaims is
24 DENIED. However, Apple's theory that it has an existing license of Samsung's Declared-
25 Essential Patents is implausible, and Apple may not proceed under this theory.

26 **D. Promissory Estoppel**

27 Samsung moves to dismiss Apple's twenty-sixth counterclaim for promissory estoppel.
28 Apple's promissory estoppel claim is likewise governed by French law. Because Samsung made

1 its alleged promises in connection with its FRAND commitments to ETSI pursuant to the ETSI
 2 IPR Policy, that agreement’s choice-of-law clause governs Apple’s promissory estoppel claim.
 3 *PAE Government Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856, 860 (9th Cir. 2007) (citing *Nedlloyd*
 4 *Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 470 (1992)); *see also Olinick v. BMG Entm’t*, 138
 5 Cal. App. 4th 1286, 1300 (2006) (choice-of-law clause applies to claims that are “inextricably
 6 intertwined with the construction and enforcement” of the contract).

7 Promissory estoppel is not traditionally recognized under French law. *See* Libchaber Reply
 8 Decl. ¶¶ 51-55; Molfessis Decl. ¶ 52. Although Professor Molfessis declares that the *Cour de*
 9 *cassation* “will likely apply the principle [of estoppel] not only for procedural matters, but also
 10 with regard to substantive issues,” his description of French law is too speculative to be credited.
 11 Molfessis Decl. ¶ 53. Instead, the Court is persuaded by Professor Libchaber’s explication
 12 regarding French law on the matter. Professor Libchaber explains that estoppel is a very narrow
 13 concept that has been applied to prevent parties from contradicting themselves in procedural
 14 matters in the same case. *See* Libchaber Reply Decl. ¶ 53. This view is consistent with the Court’s
 15 own independent review of French law. *See Universe Sales Co. v. Silver Castle, LTD.*, 182 F.3d
 16 1036, 1038 (9th Cir. 1999) (explaining that Federal Rule of Civil Procedure 44.1 allows a court to
 17 conduct its own research in determining the correct relevant foreign law); David V. Snyder,
 18 *Comparative Law in Action: Promissory Estoppel, The Civil Law, and the Mixed Jurisdiction*, 15
 19 *Ariz. J. Int’l & Comp. Law* 695, 705 & n.47 (1998) (“promissory estoppel would not serve any
 20 useful end, and it is consequently unknown to French law”). Thus, French law does not recognize
 21 a substantive claim for promissory estoppel.

22 Accordingly, the Court GRANTS Samsung’s motion to dismiss Apple’s twenty-sixth
 23 counterclaim for promissory estoppel. As this counterclaim cannot be cured by amendment, it is
 24 dismissed with prejudice.

25 **III. CONCLUSION**

26 For the foregoing reasons, Samsung’s motion to dismiss Apple’s amended counterclaims in
 27 reply is GRANTED, in part, and DENIED, in part. Samsung’s motion to dismiss Apple’s
 28 counterclaim for promissory estoppel is granted. Additionally, Samsung’s motion to dismiss

1 Apple’s counterclaim for breach of contract and declaratory judgment is granted to the extent that
2 Apple claims that it has an existing license to Samsung’s Declared-Essential Patents. In all other
3 respects, Samsung’s motion to dismiss is denied.

4 **IT IS SO ORDERED.**

5 Dated: May 14, 2012


LUCY H. KOH
United States District Judge

United States District Court
For the Northern District of California

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