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LTD., SAMSUNG ELECTRONICS AMERICA,

15 INC. and SAMSUNG

TELECOMMUNICATIONS AMERICA, LLC

17 UNITED STATES DISTRICT COURT

18 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

19
20 APPLE INC., a California corporation,

21 Plaintiff,

22 vs.

23 SAMSUNG ELECTRONICS CO., LTD., a

Korean business entity; SAMSUNG

24 ELECTRONICS AMERICA, INC., a New

York corporation; SAMSUNG

25 TELECOMMUNICATIONS AMERICA,

LLC, a Delaware limited liability company,

26 Defendant.

CASE NO. 11-cv-01846-LHK

**SAMSUNG'S MOTION TO DISMISS
APPLE'S COUNTERCLAIMS**

Date: April 5, 2012

Time: 1:30 p.m.

Place: Courtroom 8, 4th Floor

Judge: Hon. Lucy H. Koh

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NOTICE OF MOTION AND MOTION

TO THE COURT AND TO ALL PARTIES:

PLEASE TAKE NOTICE that on Thursday, April 5, 2012, at 1:30 p.m., or as soon thereafter as the matter may be heard by the Honorable Lucy H. Koh in Courtroom 8, United States District Court for the Northern District of California, Robert F. Peckham Federal Building, 280 South 1st Street, San Jose, CA 95113, Defendants Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Telecommunications America, LLC (collectively “Samsung”) shall and hereby do move the Court for an order dismissing Counts XXV to XXIX of “Apple Inc.’s Amended Counterclaims in Reply” filed on November 8, 2011, pursuant to Fed. R. Civ. P. 12(b)(6), with prejudice and without leave to amend, on the grounds that they fail to state facts sufficient to state a claim.

This motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities that follows, the declarations of Eric Wall (the “Wall Decl.”) and Professor Rémy Libchaber (the “Libchaber Decl.”), the pleadings on file in this action, and any further evidence or argument that the Court may properly receive at or before the hearing.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Undaunted by the Court's dismissal of its antitrust counterclaims, Apple again attempts to
 4 assert that Samsung has violated antitrust laws, that Apple is entitled to a license to Samsung's
 5 patents, that Samsung has breached contracts or reneged on promises to a standard-setting
 6 organization, and that Samsung has violated California's unfair competition laws. Once again,
 7 Apple has failed to plead facts that support its antitrust allegations, its breach of contract claims, or
 8 its unfair competition claims. And once again, these claims must be dismissed.

9 Apple fails to identify a proper market that Samsung has monopolized or to establish that
 10 Samsung has any market power. Apple's allegations rest solely on the premise that, because
 11 technology claimed by Samsung's patents is incorporated into the W-CDMA standard set by the
 12 European Telecommunications Standards Institute ("ETSI"), a premise that Apple contests, this
 13 technology and substitutes for this technology constitute a market. But Ninth Circuit case law
 14 requires that Apple identify markets by product, not by technology. Further, even if the W-
 15 CDMA standard were to require use of Samsung's technology, Apple has failed to demonstrate
 16 that the mere adoption of that technology confers market power on Samsung. Apple has not
 17 shown that this is the only digital telecommunications standard available to it (indeed, a competing
 18 standard, CDMA2000 is available) nor has it pled any facts indicating that it could not switch to a
 19 different standard.

20 Apple's claims for declaratory judgment that it is licensed to Samsung's patents, breach of
 21 contract, and promissory estoppel cannot be supported by Apple's allegations. Apple contends
 22 that it requested an offer to license Samsung's patents, but that Samsung never made an offer on
 23 fair, reasonable, and non-discriminatory ("FRAND") terms. Apple admits that it rejected the
 24 license offer that Samsung did make. Without an offer and acceptance, there can be no contract.
 25 Apple also has not established that Samsung breached a contract with ETSI. The ETSI rule, on
 26 which Apple relies, that members commit to be "prepared to grant a license" on FRAND terms
 27 evinces, at most, an agreement to negotiate, not an "agreement to agree," which courts refuse to
 28 enforce. In particular, Apple does not plead facts that show Samsung promised to offer terms

1 essential to a license, including a particular royalty rate or particular patents. Thus, Apple has not
 2 pled facts sufficient to establish formation of a contract, a breach of contract, or a clear and
 3 unambiguous promise. Apple's declaratory judgment, breach of contract, and promissory estoppel
 4 claims, therefore, must be dismissed.

5 The Court dismissed Apple's unfair competition counterclaim, which the Court concluded
 6 was indistinguishable from Apple's flawed antitrust counterclaim. Apple largely re-pleads its
 7 previously dismissed counterclaim, adding a few new allegations that cannot constitute unlawful
 8 or unfair business acts. Apple's allegation that the institution of this litigation constitutes an unfair
 9 business practice falls afoul of California law that renders immune from liability communications
 10 that bear some relation to judicial proceedings. Moreover, Apple's bare assertion that Samsung
 11 has violated Section 5 of the Federal Trade Commission Act is too conclusory to support its unfair
 12 competition counterclaim. Accordingly, Apple's unfair competition counterclaim should once
 13 again be dismissed.

14 **FACTUAL AND PROCEDURAL BACKGROUND**

15 **I. PROCEDURAL HISTORY**

16 Apple filed its Complaint on April 15 (and subsequently amended it on June 16), alleging
 17 that Samsung's mobile phones and tablet computers infringe trademarks, trade dress, and patents
 18 related to Apple's iPhone and other products. (D.N. 1; D.N. 75.) On July 1, Samsung filed its
 19 Answer, Affirmative Defenses, and Counterclaims to Apple's Amended Complaint, (D.N. 80),
 20 detailing Apple's infringement of Samsung's patents relating to mobile devices, including the use
 21 of Universal Mobile Telecommunications System (UMTS) technology and the Wideband Code-
 22 Division Multiple Access (W-CDMA) cellular communication protocol, as well as user interface
 23 elements and user features of mobile devices.

24 On July 21, Apple filed its Answer, Defenses, and Counterclaims in Reply to Samsung's
 25 Counterclaims. (D.N. 124.) Apple counterclaimed for (1) declaratory judgment of invalidity of
 26 non-infringement of each of Samsung's patents (Apple's first through twenty-fourth
 27 counterclaims); (2) breach of an alleged contract between Samsung and ETSI and promissory
 28 estoppel rendering Samsung's patents unenforceable (twenty-fifth and twenty-sixth); (3) violation

1 of Section Two of the Sherman Act (twenty-seventh); (4) violation of Section One of the Sherman
 2 Act and the corollary California Cartwright Act (twenty-eighth); (5) violation of California's
 3 Unfair Competition Laws (twenty-ninth); (6) an adjudication that Apple is already licensed or
 4 irrevocably has the right to a license to Samsung's patents (thirtieth); and (7) declaratory judgment
 5 of nonenforceability of Samsung's patents and that Samsung had no right to injunctive relief
 6 (thirty-first and thirty-second). (Id. ¶¶ 91-206.)

7 On August 15, 2011, Samsung moved to dismiss Apple's antitrust and unfair competition
 8 counterclaims and strike Apple's counterclaims regarding its right to a license to Samsung's
 9 patents, the nonenforceability of Samsung's patents, and Samsung's right to injunctive relief.
 10 (D.N. 153). The Court granted-in-part and denied-in-part Samsung's motion on October 18,
 11 dismissing Apple's antitrust and unfair competition counterclaims and striking Apple's
 12 counterclaims regarding the enforceability of Samsung's patents and Samsung's right to injunctive
 13 relief. (D.N. 315).

14 Following the Court's dismissal of Apple's counterclaims, Apple filed its Amended
 15 Answer, Affirmative Defenses, and Counterclaims in Reply to Samsung's Counterclaims on
 16 November 8. (D.N. 381.) In its Amended Counterclaims, Apple reasserts its breach of contract
 17 claim (twenty-fifth amended counterclaim), promissory estoppel (twenty-sixth amended
 18 counterclaim), declaratory judgment that Apple is licensed to Samsung's Declared-Essential
 19 Patents (twenty-seventh amended counterclaim), Section Two antitrust claim (twenty-eighth
 20 amended counterclaim), and California Unfair Competition Law claim (now twenty-ninth
 21 amended counterclaim). Apple abandoned its Sherman Act Section One claim and the declaratory
 22 judgment claims the Court struck.¹

23
 24
 25 ¹ In response to the Court's dismissal of its counterclaims, Apple changed and expanded its
 26 pleadings regarding its antitrust counterclaims by adding allegations regarding the relevant
 27 markets and Samsung's allegedly wrongful actions. (See, e.g., D.N. 381 Counterclaims ¶¶ 58-69,
 28 96-102.) Apple also added allegations regarding the particular agreements it contends are the
 basis for its contention that the Court should declare that it has a license to Samsung's declared-
 essential patents. (See, e.g., id. ¶¶ 47, 59-60.) This motion properly seeks to dismiss Apple's
 (footnote continued)

II. APPLE’S ALLEGATIONS REGARDING SECTION TWO OF THE SHERMAN ACT

A. Apple Defines the Relevant Market Solely According to the Scope of Samsung’s Declared-Essential Patents and Their Incorporation in the ETSI Standard

Apple alleges that Samsung violated Section Two of the Sherman Act based on the incorporation of Samsung’s essential patents into the UMTS wireless communication standard promulgated by ETSI. (D.N. 381 Counterclaims ¶ 99.)

In its Amended Counterclaims, Apple defines the relevant market in which Samsung asserts monopoly power solely by the scope of Samsung’s patents and the incorporation of those patents into the ETSI standard. (*Id.* ¶ 101.) For example, Apple asserts that U.S. Patent No. 6,928,604 (“the ‘604 patent”), which Samsung has declared essential to the UMTS standard, “identifies a Block Concatenation Technology.” (*Id.* ¶ 98.) Apple then asserts that the “technology identified in the ‘604 patent and its reasonable substitutes comprise the Block Concatenation Technology Market.” (*Id.* ¶ 99.) Finally, Apple alleges that because these patents are incorporated into the relevant standard, “[Samsung] has the power to raise prices and exclude competition with respect to each of the technologies covered by its patents.” (*Id.* ¶ 101.)

Apple contends that technological alternatives to Samsung’s patents exist, (*id.* ¶ 58), and Apple concedes that, by themselves, the patents do not confer market power. (*Id.* ¶ 67.) Apple does not allege that Samsung has monopoly power in any market defined by the sale of a product, whether to an end-consumer or a manufacturer, such as the market for mobile phones or mobile-phone chipsets. Nor does it allege any market of products that new entrants are prevented from entering or wherein Samsung can reduce production without competitors increasing production. Apple fails to support its antitrust claims with any fact allegations about any product market at all.

counterclaims in view of the new allegations raised in the pleadings. See Providence Metallizing Co. v. Tristar Prods., Inc., 717 F. Supp. 2d 227, 232 n.10 (D.R.I. 2010).

Apple separately alleges that “technical standardization also creates a ‘lock-in’ effect and the risk of ‘patent hold-up.’” (*Id.* ¶ 27.) Apple does not make any specific allegations as to whether substitutes to the UMTS standard exist. Apple merely alleges that “[e]ven if there were an alternative standard, the costs and disruption associated with switching is typically prohibitively expensive.” (*Id.* ¶ 28.) Apple never identifies what these costs would entail, how such a switch would disrupt its business, or why switching standards would be prohibitively expensive. Similarly, although Apple asserts that “a device manufacturer is locked in to the standard that its device practices,” (*id.* ¶ 27), Apple does not allege that *it* is “locked-in” to the UMTS standard, that it may not change the standard used by its devices, or that it would be prohibitively expensive for Apple to switch to another standard, such as the competing CDMA2000 standard.

B. Apple Contends That Samsung Delayed Its Disclosure of Essential Patents, Inducing ETSI To Incorporate Samsung’s Patents into the UMTS Standard

Apple’s allegations of anticompetitive conduct are divided into two parts. Apple alleges Samsung falsely committed to license its patents on FRAND terms, (*id.* ¶¶ 59-69), and Samsung concealed the existence of its patents while ETSI was considering what technologies to standardize. (*Id.* ¶¶ 57-59.)

According to Apple’s allegations, ETSI requires that its members, upon disclosure of an essential patent to ETSI, irrevocably undertake in writing that they are prepared to grant irrevocable licenses on FRAND terms and conditions. (*Id.* ¶ 52.) Apple further contends that a refusal to make such an undertaking allows ETSI to consider whether to suspend work on the relevant element of the standard or to design the standard around the patent, thereby rendering it non-essential. (*Id.* ¶ 53.)

Apple admits that Samsung submitted an undertaking stating that it was prepared to grant irrevocable licenses on FRAND terms for its essential patents. In late 1998, Samsung issued a general FRAND commitment, declaring that Samsung was prepared to grant licenses in accordance with Clause 6 of the ETSI IPR policy for all its patents deemed essential to the W-CDMA technology standard. (*Id.* ¶ 59.) When Samsung later specifically disclosed its essential

1 patents to ETSI, it included with each declaration a reaffirmation of its willingness and
 2 preparedness to grant licenses to each of its disclosed patents in accordance with ETSI policies—
 3 namely, on FRAND terms and conditions. (*Id.* ¶ 63.)

4 Despite these declarations, Apple alleges that Samsung failed to timely disclose its
 5 standards-essential patents and that, had each patent been timely disclosed, ETSI would have
 6 selected an alternative technology to perform the functionality covered by Samsung’s patent, or
 7 would have declined to incorporate the functionality in the standard at all. (*Id.* ¶ 58.) In its
 8 Amended Counterclaims, Apple has described technologies it alleges were in competition with
 9 Samsung’s patented technologies for incorporation into the standard. (*Id.*) Apple has not alleged
 10 that any of these technologies were unpatented or non-proprietary at the time of incorporation.

11 **III. APPLE’S ALLEGATIONS REGARDING DECLARATORY JUDGMENT THAT** 12 **APPLE IS LICENSED TO SAMSUNG’S DECLARED ESSENTIAL PATENTS**

13 Apple seeks a declaratory judgment that it is licensed to Samsung’s Declared-Essential
 14 Patents or that it has the irrevocable right to be licensed on FRAND terms under the patents.
 15 (D.N. 381 Counterclaims ¶ 195.) As noted above, Samsung declared it was “prepared to grant
 16 licenses to its essential IPR on a fair, reasonable, and non-discriminatory basis in accordance with
 17 the terms and conditions set forth in Clause 6.1 of ETSI IPR Policy.” (*Id.* ¶ 59.) Apple alleges it
 18 is licensed to the Declared-Essential Patents “by virtue of Samsung’s FRAND commitments.”
 19 (*Id.*) Apple asks the court to set forth the terms and conditions of that license. (*Id.* ¶ 196.)

20 Although Samsung did offer to license its patents to Apple, Apple indisputably rejected
 21 that offer. (*Id.* ¶ 77.) Indeed, Apple contends the offer was not on FRAND terms. (*Id.* ¶¶ 77, 78,
 22 86.) Apple has not alleged that it ever accepted a license offer made by Samsung or that the
 23 parties ever agreed to any license terms, such as the royalty rate. Nor has Apple alleged that any
 24 such agreement was entered into in writing.

25 **IV. APPLE’S ALLEGATIONS REGARDING PROMISSORY ESTOPPEL**

26 Apple’s twenty-sixth counterclaim alleges that “Samsung made clear and definite promises
 27 to potential licensees through its commitments to ETSI that it would license the Declared-
 28 Essential Patents on FRAND terms.” (D.N. 381 Counterclaims ¶ 186.) Apple alleges that

1 Samsung intended sellers of mobile wireless devices, including Apple, to rely on Samsung's ETSI
 2 commitments and that Apple did in fact so rely on the promises by developing products compliant
 3 with UMTS standard, suffering damages as a result. (*Id.* ¶¶ 187-88, 190.) Apple thus asserts that
 4 Samsung should be "estopped from reneging on these promises to ETSI, its members, designers,
 5 and sellers of products implementing the UMTS standard under the doctrine of promissory
 6 estoppel. (*Id.* ¶ 189.)

7 **V. APPLE'S ALLEGATIONS REGARDING UNFAIR COMPETITION**

8 Apple's amended pleadings regarding unfair competition are substantially the same as the
 9 allegations it drafted in its initially pleaded counterclaims. At best, there are two substantive
 10 differences in Apple's new pleadings. First, Apple contends that the instant litigation constitutes
 11 unfair business acts or trade practices because Apple is allegedly authorized or impliedly licensed
 12 to sell the accused infringing devices. (D.N. 381 Counterclaims ¶ 206.) Second, Apple adds a
 13 sentence contending that Samsung's behavior violates Section 5 of the Federal Trade Commission
 14 Act. (*Id.* ¶ 205.)

15 **ARGUMENT**

16 **I. LEGAL STANDARD**

17 **A. Fed. R. Civ. P. 12(b)(6): Dismissal of Implausible Claims**

18 Pursuant to Rule 12(b)(6), the Court may dismiss any claim that does not contain sufficient
 19 factual matter to state a facially plausible claim for relief. Fed. R. Civ. P. 12(b)(6); Bell Atl. Corp.
 20 v. Twombly, 550 U.S. 544, 555-56 (2007). In doing so, the Court must "construe all allegations
 21 of material facts in the light most favorable to the nonmoving party." Livid Holdings Ltd v.
 22 Salomon Smith Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005). Dismissal may be either for "lack
 23 of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal
 24 theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

25 The nonmoving party, however, must plead facts that, if regarded as true, establish more
 26 than a mere "speculative" right to relief. Twombly, 550 U.S. at 555. A plaintiff must make a
 27 "'showing,' rather than a blanket assertion, of entitlement to relief." *Id.* at 556 n.3. "A claim has
 28 facial plausibility when the plaintiff pleads factual content that allows the court to draw the

reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Twombly, 550 U.S. at 556). “[C]onclusory allegations” of illegal conduct do not satisfy this requirement. Twombly, 550 U.S. at 557.

**II. APPLE FAILS TO PLEAD FACTS SUFFICIENT TO GRANT RELIEF
PURSUANT TO SECTION 2 OF THE SHERMAN ACT**

Apple’s allegation that Samsung has violated Section Two of the Sherman Act by unlawfully monopolizing markets rests on the contention that each of the functions accomplished by Samsung’s standards-essential patents constitutes an “Input Technologies Market.” (See D.N. 381 Counterclaims ¶ 99.) Apple’s market definition is facially implausible and thus fatally defective. Despite its amendment, Apple has failed to plead any facts sufficient to support an inference that ETSI would have adopted alternatives to Samsung’s patented technologies when it defined the UMTS standard.

A. An Antitrust Litigant Must Allege a “Relevant Market”

Section Two of the Sherman Act makes it a felony to “monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States.” 15 U.S.C. § 2. A claim of unlawful monopolization under Section Two requires showings of “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” United States v. Grinnel Corp., 384 U.S. 563, 570-71 (1966).

To state a valid claim under the Sherman Act, a “plaintiff must allege both that a ‘relevant market’ exists and that the defendant has power within that market.” Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1044 (9th Cir. 2008). Although the validity of a “relevant market” is typically a factual matter, if the complaint’s definition of a market is “facially unsustainable,” dismissal under Rule 12(b)(6) is appropriate. Id. at 1045.

The Ninth Circuit has held that “[f]irst and foremost, the relevant market must be a *product* market,” that is, the market must be defined by a product. Id. The market for a product must include the product at issue as well as all reasonable economic substitutes for the product. Brown

1 Shoe Co. v. United States, 370 U.S. 294, 325 (1962). “The reasonable interchangeability of use or
 2 the cross-elasticity of demand between the product itself and substitutes for it” determine “[t]he
 3 outer boundaries of a product market.” Id. A claim is legally insufficient if the market definition
 4 “clearly does not encompass all interchangeable substitute products even when all factual
 5 inferences are granted in plaintiff’s favor.” Queen City Pizza, Inc. v. Domino’s Pizza, Inc., 124
 6 F.3d 430, 436 (3d Cir. 1997).

7 Here, Apple’s antitrust claims must fail because it has not alleged that Samsung has power
 8 in a product market. Rather, Apple alleges that the “relevant markets in which to assess the
 9 anticompetitive effects of Samsung’s conduct . . . are the *various markets for technologies* that
 10 . . . were competing to perform each of the various functions covered by each of Samsung’s
 11 purported essential patents for UMTS.” (D.N. 381 Counterclaims ¶ 99) (emphasis added). In
 12 particular, Apple contends that Samsung has monopolized the “Power Control Technology
 13 Market,” the “VoIP Header Technology Market,” the “Rate Matching Technology Market,” the
 14 “Block Concatenation Technology Market,” the “Interleaving Technology Market,” and the
 15 “Scrambling Code Technology Market.” (Id.) Apple simply alleges that each market is defined
 16 by the patented technology “and its reasonable substitutes.” (Id.) Apple does not identify the
 17 products that practice the technology or any “interchangeable substitute products.” Nor does
 18 Apple identify a single product for which the cross-elasticity of demand could be evaluated. See
 19 Brown Shoe, 370 U.S. at 325. As such, Apple has failed to define a product market and its
 20 antitrust claims must be dismissed. Newcal Indus., 513 F.3d at 1044; Chapman v. New York State
 21 Div. of Youth, 546 F.3d 230, 238 (2d Cir. 2008); Sun Microsystems, Inc. v. Versata Enters., Inc.,
 22 630 F. Supp. 2d 395, 403-04 (D. Del. 2009).

23 In failing to plead a product market, Apple’s allegations differ from those alleged in
 24 Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297 (3d Cir. 2007), which the Court cited in its
 25 Order granting Samsung’s previous motion to dismiss. (D.N. 315, at 6.) There, the plaintiff
 26 alleged the patentee controlled 90% of the market share of CDMA-compliant chipsets and actively
 27 sought a similar monopoly in the market for UMTS-compliant chipsets. Broadcom, 501 F.3d at
 28 304. Accordingly, the alleged anticompetitive barriers to entry surrounding the relevant market

1 were patents preventing new firms from entering the *chipset* markets. Broadcom, First Am.
 2 Compl., 2005 WL 6495807, at ¶ 82. The Third Circuit’s recognition of a technology market
 3 sounding in a standardized patent should not be torn from its foundation that a *product* market
 4 subject to monopoly prices and reduced output also exist. Cf. In re Rambus, Inc., No. 9302, 2006-
 5 2 Trade Cas. ¶ 75364, at *39 (F.T.C. 2006) (finding Rambus had monopoly power in the DRAM
 6 technology markets because over 90% of DRAM chips, covering multiple standards, were subject
 7 to Rambus’s patent claims). Yet Apple seeks to do so here.

8 **B. Apple Has Failed To Allege Any Cognizable Market in Which Samsung Has**
 9 **Power and Has Failed To Allege Any Measure of Market Share at All**

10 Apple’s failure to plead facts alleging that Samsung possessed any power in the relevant
 11 market provides an independent reason for dismissing its antitrust counterclaims. Apple’s
 12 allegation that Samsung possesses market power is based solely on ETSI’s incorporation of
 13 Samsung technology into the W-CDMA standard. From this allegation, Apple asserts that
 14 Samsung “has the power to raise prices and exclude competition with respect to each of the
 15 technologies covered by its patents and incorporated in the relevant standard.” (D.N. 381
 16 Counterclaims ¶ 101.)

17 The mere incorporation of patented technology into a standard does not justify an inference
 18 that the patentee has market power. “The adoption of an industry standard incorporating such
 19 proprietary technology does not confer any power to exclude that exceeds the exclusionary power
 20 to which a patent holder is otherwise legally entitled.” Rockwell Int’l Corp v. Townshend, No.
 21 99-cv-0400, 2000 WL 433505, at *12 (N.D. Cal. Mar. 28, 2000). And the Supreme Court has
 22 rejected the presumption that a patent lends monopoly power to its owner *per se*. Illinois Tool
 23 Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 42-45 (2006). Absent plausible allegations of market
 24 power related to a relevant market, whether through the pleading of a large market share or actual
 25 raised prices *and* reduced output, Apple’s allegation of market power must be dismissed. Harrison
 26 Aire, Inc. v. Aerostar Int’l, Inc., 423 F.3d 374, 381 (3d Cir. 2005); Townshend, 2000 WL 43305,
 27 at *12 (dismissing an antitrust claim for failure to plead market power when the plaintiff pled
 28 neither a market share nor that a standard prevented the development of proprietary technologies).

Apple fails to plead facts from which one could reasonably infer that the incorporation of Samsung technology into the W-CDMA standard gives rise to market power. Apple only alleges that, generally, a designer may be locked in to a particular standard and that “the costs and disruption associated with switching is *typically* prohibitively expensive.” (D.N. 381 Counterclaims ¶ 28.) Apple fails to plead specific facts showing the costs of switching technologies in the various “Input Technology Markets” it defined would actually be expensive or prohibitive here. Apple fails to plead any facts from which one could reasonably infer that Apple or any other competitor could not switch from W-CDMA to a different standard. See Iqbal, 129 S. Ct. at 1949. If Apple could switch from W-CDMA to a different standard without undue cost, the incorporation of Samsung’s technology into W-CDMA would necessarily confer no market power. See SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp., 188 F.3d 11, 19-20 (1st Cir. 1999).

III. APPLE’S ALLEGATIONS OF ANTICOMPETITIVE CONDUCT REMAIN INSUFFICIENT

In its Order granting in part and denying in part Samsung’s motion to dismiss, the Court identified two theories supporting Apple’s allegations of monopoly conduct: Samsung’s allegedly false FRAND declarations and Samsung’s alleged failures to disclose intellectual property rights. With regard to Apple’s failure-to-disclose theory, the Court found that Apple “failed to allege sufficient facts to support a plausible inference that had Samsung disclosed its intellectual property rights to the SSO, a viable alternative technology performing the same functionality would have been incorporated into the UMTS standard.” (D.N. 315 at 9.)

While Apple has amended its counterclaims to plead that alternative technologies existed at the time of ETSI’s standard setting, (see D.N. 381 Counterclaims ¶ 58), nothing in Apple’s allegations creates a plausible inference that ETSI would have adopted an alternative technology. As Apple concedes, standards setting organizations require that their members commit to license patents essential to a standard on FRAND terms to “address the problem of patent hold-up,” and FRAND commitments thereby “ensure the widespread adoption of the standard will not be

1 hindered by IPR holders seeking to extract unreasonable royalties and terms from those
 2 implementing the standard.” (Id. ¶¶ 29, 31.)

3 The ETSI Rules of Procedure, which Apple repeatedly quotes in its complaint, similarly
 4 confirm that ETSI did not seek to enact standards that avoided incorporation of patent rights.
 5 Rather, ETSI rules seek to “adequately and fairly reward[] [members] for the use of their IPRs in
 6 the implementation of STANDARDS and TECHNICAL SPECIFICATIONS.” (Decl. of Eric
 7 Wall In Support of Samsung’s Motion to Dismiss, dated Nov. 22, 2011, Ex. 1, Clause 3.2 (ETSI
 8 Intellectual Property Rights Policy).)² Only where a patent owner “is not prepared to license an
 9 IPR in respect of a STANDARD or TECHNICAL SPECIFICATION in accordance with Clause
 10 6.1,” do the ETSI Rules of Procedure provide that an alternative technology should be identified
 11 or that the patented technology should not be incorporated into a standard. (Id., Clauses 8.1.1 and
 12 8.1.2.)

13 Here, because Apple admits that Samsung prospectively agreed to license any patents
 14 incorporated into an ETSI standard on a FRAND basis, there is no reason to infer that ETSI would
 15 not have incorporated Samsung’s technology, regardless of the truth of Apple’s allegations that
 16 ETSI did not know beforehand that the technology was patented. Apple concedes that, before the
 17 adoption of W-CDMA, Samsung committed in general to license at a FRAND rate all essential
 18 technology it owned that was incorporated into the standard. (D.N. 381 Counterclaims ¶ 59.) In
 19 addition, Samsung supplemented its general commitment to FRAND licensing with specific
 20 disclosures of intellectual property rights. (Id. ¶ 63.)

21 Even if Samsung’s patenting of its technology were significant, Apple fails to plead that
 22 the alternative technologies available were unpatented or non-proprietary. Nor has Apple alleged
 23 that any of these technologies were superior to Samsung’s. Although Apple makes much of
 24

25 ² Samsung notes that while Apple relied on and cited the ETSI IPR policy, it did not attach it
 26 to its counterclaims. The Court can and should consider the entirety of this document.
 27 “[D]ocuments whose contents are alleged in a complaint and whose authenticity no party
 28 questions, but which are not physically attached to the pleading, may be considered in ruling on a
 Rule 12(b)(6) motion to dismiss.” Fecht v. Price Co., 70 F.3d 1078, 1080 n.1 (9th Cir. 1995).

1 identifying technologies it asserts ETSI *could* have adopted, it entirely fails to meet the Twombly
 2 standard of a plausible inference that ETSI *would* have adopted any of them. See 550 U.S. at 556.

3 Because Apple has failed to plead facts sufficient to create a plausible inference that ETSI
 4 would have adopted an alternative technology in response to Samsung's alleged required
 5 disclosure, its claim of anticompetitive conduct in Counterclaim Twenty-Eight based on this
 6 theory should be dismissed.

7 **IV. APPLE FAILS TO PLEAD FACTS SUFFICIENT TO GRANT RELIEF FOR**
 8 **BREACH OF CONTRACT OR DECLARATORY JUDGMENT THAT APPLE IS**
 9 **LICENSED TO SAMSUNG'S DECLARED-ESSENTIAL PATENTS**

10 In its twenty-seventh counterclaim, Apple alleges that by virtue of Samsung's FRAND
 11 commitments, Apple is entitled to a declaratory judgment that it is licensed to Samsung's
 12 Declared-Essential Patents or has the irrevocable right to be licensed on FRAND terms. (D.N.
 13 381 Counterclaims ¶ 195.) In its twenty-fifth counterclaim, Apple alleges that by seeking to
 14 enjoin Apple from practicing Samsung's patented technology, acting unreasonably toward Apple,
 15 and failing to timely disclose its essential patents, Samsung has breached a contract. (D.N. 381
 16 Counterclaims ¶¶ 180-83.) Apple's allegations are inconsistent with the terms of Samsung's
 17 FRAND declaration, which is quoted in Apple's Counterclaims and, as a result, Apple fails to
 18 plead facts sufficient to establish the formation of a contract between Apple and Samsung.

19 As an initial matter, although Apple pleads the ETSI IPR Policy is governed by French
 20 law, (id. ¶ 54), Apple fails to identify which law would apply to a license arising from ETSI
 21 obligations. See Fed. R. Civ. P. 44.1 ("A party who intends to raise an issue about a foreign
 22 country's law must give notice by a pleading or other writing. . . . The court's determination [of
 23 foreign law] must be treated as a ruling on a question of law."). There is no reason to believe
 24 Apple, a California corporation which brought this suit in California, and the Samsung entities,
 25 Korean and American corporations, would subject to French law a patent license agreement
 26 concerning U.S. patents simply because they are parties or third-party beneficiaries to a standard-
 27 setting organization governed by French law. In any event, under either California or French law,
 28 Apple has failed to plead facts sufficient to prove the existence of a license or a breach of

1 contract.³ Further, Apple’s alternative pleading—that it has the irrevocable right to a license—
 2 fails to state a cognizable legal theory.

3 **A. Under California Law, Apple’s Pleadings Fail To Establish the Formation of a**
 4 **Valid Contract**

5 It is well-settled that to create a contract under California law, the parties must mutually
 6 assent to the terms of the contract, i.e., there must be an offer and an acceptance. Tuso v. Green,
 7 194 Cal. 574, 580-81, 229 P. 327, 329 (1924). A binding offer exists only if it is reasonable to
 8 conclude, based on all the circumstances, that acceptance will leave nothing to negotiate or do
 9 before the contract is effective. Rubio v. Capital One Bank, 613 F.3d 1195, 1205 (9th Cir. 2010)
 10 (citing Donovan v. RRL Corp., 26 Cal. 4th 261, 109 Cal. Rptr. 2d 807, 27 P.3d 702, 709 (2001)).
 11 “Acceptance is the ‘manifestation of assent to the terms thereof made by the offeree in a manner
 12 invited or required by the offer.’” In re First Capital Life Ins. Co., 34 Cal. App. 4th 1283, 1288,
 13 40 Cal. Rptr. 2d 816, 819 (2d Dist. 1995) (quoting Rest. 2d Contracts (1981) § 50). Thus, “[a]
 14 contract requires an offer that articulates the terms of the agreement, and an acceptance that
 15 mirrors the offer.” McAfee v. Francis, 5:11-CV-00821-LHK, 2011 WL 3293759, at *2 (N.D. Cal.
 16 Aug. 1, 2011) (Koh, J.).

17 Moreover, California courts have rejected the proposition that a party may be entitled to a
 18 right to a contract, i.e., an “agreement to agree.” “There is no dispute that neither law nor equity
 19 provides a remedy for breach of an agreement to agree in the future. Such a contract cannot be
 20 made the basis of a cause of action.” Ehlert v. America’s Servicing Corp., No. 11-cv-1359, 2011
 21 WL 4862426, at *3 (S.D. Cal. Oct. 12, 2011) (quoting Autry v. Republic Prods., Inc., 30 Cal. 2d
 22 144, 151-52, 180 P.2d 888, 893 (Cal. 1947)); see also First Nat’l Mortg. Co. v. Federal Realty Inv.
 23 Trust, 631 F.3d 1058 (9th Cir. 2011) (“[A]n ‘agreement to agree,’ without more, is not a binding
 24 contract.”) (citing Autry, 30 Cal. 2d at 151-52, 180 P.2d at 893). While a party may manifest a
 25

26 ³ Although Samsung here applies California law, the analysis would not substantively change
 27 under the application of the law of any other United States jurisdiction. See generally 1 Arthur L.
 28 Corbin, Corbin on Contracts, §§ 2.1-3.41 (Joseph M. Perillo rev. ed., 1993 & Supp. 2011).

1 “willingness to enter into a bargain,” an agreement for future negotiation is “not the functional
2 equivalent of a valid, subsisting agreement.” Beck v. Am. Health Group Int’l, Inc., 211 Cal. App.
3 3d 1555, 1562, 260 Cal. Rptr. 237, 241 (2d Dist. 1989) (citations and internal quotation marks
4 omitted). Further, “[t]he court may not imply what the parties will agree upon.” Autry, 30 Cal. 2d
5 at 152, 180 P.2d at 893.

6 Apple’s claims only demonstrate that Samsung committed to negotiate a license on
7 FRAND terms, not that Samsung agreed to license its patents on any particular terms. Further,
8 Apple alleges that Samsung made no offer to license its Declared-Essential Patents on FRAND
9 terms, and Apple confirms it did not accept a license to those patents from Samsung. (D.N. 381
10 Counterclaims ¶ 76.) Thus, under California law, Apple has failed to plead the requirements for
11 the formation of a contract, and a claim that Apple has a right to a license, i.e., Samsung agreed to
12 agree, fails as a matter of law.

13 1. Samsung’s Declaration to ETSI Was Not an Offer To License

14 Apple alleges it is licensed to Samsung’s patents “by virtue of Samsung’s FRAND
15 commitments.” (Id. ¶ 195.) These “FRAND commitments” arise out of Samsung’s 1998
16 declaration to ETSI that Samsung was “prepared to grant licenses to its essential IPR on a fair,
17 reasonable, and non-discriminatory basis in accordance with the terms and conditions set forth in
18 Clause 6.1 of ETSI IPR Policy.” (Id. ¶ 59.) On its face, this declaration is not an offer to license
19 patents. Apple’s conclusory allegations that Samsung’s statement that it was “prepared to grant
20 licenses” on FRAND terms was an offer to a license are wholly insufficient. (See, e.g., id. ¶¶ 59,
21 64, 68) When read in the light most favorable to Apple, Apple’s allegations that Samsung
22 declared it was prepared to grant licenses establish *at most* that Samsung made a promise to
23 negotiate. See Beck, 211 Cal. App. 3d at 1563, 260 Cal. Rptr. at 242. A promise to negotiate,
24 though, is not a license or “an agreement to agree” to a license, which courts do not enforce. See
25 id.

26 Apple’s allegations illustrate the sound policy reasons why California courts will not
27 enforce an agreement to agree. See Ehlert, 2011 WL 4862426, at *3; Beck, 211 Cal. App. 3d at
28 1563, 260 Cal. Rptr. at 242. If Samsung’s statement that it was prepared to grant licenses was to

1 be considered a binding commitment to license its patents, a potential licensee, such as Apple,
 2 could unilaterally decide the terms of the license.⁴ If this were the case, members of SSOs
 3 committed to license their patents at FRAND rates would be bound to license their patents on one-
 4 sided terms benefitting the licensee. California courts refuse to interpret these commitments as an
 5 agreement to agree precisely to avoid such an inequitable result. Beck, 211 Cal. App. 3d at 1563,
 6 260 Cal. Rptr. at 242.

7 Moreover, fair, reasonable, and non-discriminatory terms are not one-size-fits-all. A
 8 FRAND commitment is not equivalent to a most-favored nation clause, by which the parties could
 9 simply insert the most favorable terms from another contract. See Ericsson Inc. v. InterDigital
 10 Comm. Corp., 418 F.3d 1217, 1219 (Fed. Cir. 2005); see also Autry, 30 Cal. 2d at 152, 180 P.2d
 11 at 893 (“The court may not imply what the parties will agree upon.”). What is “FRAND” will
 12 depend on the patents sought to be licensed, the term of the license, the territory of the license, and
 13 other factors. In short, different parties may agree to different terms, which are nevertheless
 14 FRAND terms. As such, a FRAND commitment lacks the requisite specificity to constitute an
 15 offer to license, see Rubio, 613 F.3d at 1205, and cannot constitute an enforceable agreement to
 16 agree. Ehlert, 2011 WL 4862426, at *3; Beck, 211 Cal. App. 3d at 1563, 260 Cal. Rptr. at 242.

17 2. Apple Admits that the Parties Never Concluded a License Agreement

18 Apple’s complaint makes clear that the parties never agreed to terms to license Samsung’s
 19 patents. Apple alleges that, despite its requests, Samsung did not make an offer on FRAND terms
 20 to Apple. (D.N. 381 Counterclaims ¶ 71; see also id. ¶ 76 (“Since Samsung sued Apple, Apple
 21 has asked Samsung to quote FRAND license terms no fewer than seven times.”); id. ¶ 76
 22 (“Indeed, while now claiming that it will quote FRAND license terms, Samsung has expressly
 23 reconfirmed that it will refuse to provide this information.”).) Apple admits that Samsung did
 24 make a license offer to Apple, but Apple rejected that offer, allegedly because the offer was

25
 26 ⁴ Moreover, according to Apple, Samsung’s offer would “preclude Samsung from seeking to
 27 enjoin [potential licensees].” (D.N. 381 Counterclaims ¶ 69.) Apple invites the nonsensical result
 28 that Apple could practice Samsung’s patented technology without paying any royalty *or* fearing
 litigation.

1 “manifestly not FRAND.” (*Id.* ¶ 77.) Thus, Apple’s pleadings establish that the parties never
 2 agreed to a license. *Tuso*, 194 Cal. at 580-81. Further, Apple fails to identify material terms of
 3 any Samsung offer. For example, immediately after identifying the statement Apple takes to be an
 4 offer, Apple contends “[t]hat declaration did not include references to any particular IPR.” (D.N.
 5 381 Counterclaims ¶ 59.) Likewise, Apple fails to identify a royalty rate or fee, a duration, any
 6 geographic limitations, or any other single term of the purported offer to license that Samsung
 7 offered Apple.

8 **B. Under French Law, Apple’s Pleadings Fail To Establish the Formation of a**
 9 **Valid Contract**

10 Apple’s allegations are equally insufficient if, instead, it asserts the license is governed by
 11 French law. Apple’s allegations fail to establish the formation of a valid contract under French
 12 law for at least five reasons.

13 First, pursuant to Article L. 613-8 of the French Intellectual Property Code, “[a patent]
 14 assignment or license shall be executed in writing, under penalty of nullity.” (Decl. of Prof. Remy
 15 Libchaber, dated Sept. 21, 2011, ¶ 54 (“Libchaber Decl.”).) Apple has not pled the existence of a
 16 written license.

17 Second, French law requires a patent license to include a price term. In France, a patent
 18 license is treated as a lease of things, (*see* Libchaber Decl. ¶¶ 43, 44), and a lease of things
 19 requires a price term. (*Id.* ¶ 46.) Apple’s counterclaims make plain that a price term, i.e., a
 20 royalty rate or fee, has never been set. (*See* D.N. 381 Counterclaims ¶¶ 71, 76, 77, 79.)

21 Third, under French law, a patent license is a contract entered into *intuitu personae*,
 22 meaning the identity of the contracting party is essential. (Libchaber Decl. ¶¶ 120-24.) A general
 23 declaration to ETSI that Samsung is prepared to grant licenses does not identify with sufficient
 24 specificity the parties with whom Samsung will contract.

25 Fourth, as in American law, French law requires an offer. “The offer is the proposal for
 26 which it will be enough for the approached person to agree for the contract to be concluded.” (*Id.*
 27 ¶ 70.) The offer must be firm and precise. (*Id.* ¶¶ 70-71.) As described above, Apple’s pleadings
 28 establish, at most, that Samsung committed to negotiate a license on FRAND terms and not that it

1 made a firm offer. (See *id.* ¶¶ 72-81.) Moreover, “FRAND terms” is not precise with regard to
 2 any term, let alone essential terms, such as price or the patents to be licensed.

3 Finally, French law also requires an acceptance. (*Id.* ¶ 70.) For the same reasons as with
 4 California law, Apple failed to plead acceptance of any Samsung offer.

5 For each and all of the foregoing reasons, Apple’s counterclaim for a declaratory judgment
 6 that Apple is licensed to Samsung’s Declared-Essential Patents must be dismissed.

7 **C. Samsung Did Not Breach a Contract with ETSI**

8 Just as Apple has failed to plead the formation of a valid license or an irrevocable right to a
 9 license, it has failed to plead facts sufficient to establish Samsung’s breach of any contract.
 10 According to Apple, Samsung entered into contractual commitments with ETSI, ETSI’s members,
 11 and adopters of the relevant ETSI standards by “committing to license the Declared Essential
 12 Patents . . . on FRAND terms.” (D.N. 381 Counterclaims ¶ 180.) Apple alleges that Samsung
 13 breached this contract by: (i) seeking to enjoin Apple from practicing Samsung’s inventions; (ii)
 14 “acting unreasonably and unfairly towards and discriminating against Apple”; and (iii) failing to
 15 timely disclose its essential patents. (*Id.* ¶¶ 182-83). Each of these purported breaches fails to
 16 state a claim on which relief can be granted.⁵

17 First, as explained, under either California or French law, Apple cannot have had a right to
 18 a license to , i.e., a right to practice, Samsung’s patented inventions. Samsung merely was
 19 “prepared to grant” licenses to willing licensees. To the extent Apple’s allegations imply that
 20 ETSI created an obligation to *grant* a license, not merely to negotiate, an agreement to agree is
 21 unenforceable. *Ehlert*, 2011 WL 4862426, at *3; *Beck*, 211 Cal. App. 3d at 1563, 260 Cal. Rptr.
 22 at 242; *Libhaber Decl.* ¶¶ 9-21. Thus, Samsung cannot have breached an enforceable contract by
 23 seeking to enjoin Apple, an unlicensed competitor, from practicing its patented technology.

24
 25 ⁵ Moreover, even if Apple could establish that Samsung breached the ETSI policy (it cannot),
 26 Section 14 of that policy dictates that “[t]he ETSI General Assembly shall have the authority to
 27 decide the action to be taken, if any, against the MEMBER in breach, in accordance with ETSI
 28 statutes.” (Wall Decl., Ex. 1, clause 14.) Thus, the ETSI General Assembly – not this Court –
 should determine if Apple is entitled to a remedy from Samsung.

1 Second, Apple's allegations that Samsung has acted unreasonably, unfairly, or
2 discriminatorily toward Apple are entirely insufficient to demonstrate that Samsung has breached
3 its agreement with ETSI by not licensing its Declared-Essential Patents or negotiate in good faith.
4 An agreement to negotiate is only breached by a party's refusal to negotiate or negotiate in good
5 faith, not a failure to agree. Copeland v. Baskin Robbins U.S.A., 96 Cal. App. 4th 1251, 1257,
6 117 Cal. Rptr. 2d 875, 880-81 (2002) ("A party will be liable only if a failure to reach ultimate
7 agreement resulted from a breach of that party's obligation to negotiate or to negotiate in good
8 faith."). Apple admits that Samsung has negotiated with Apple, even offering a license to Apple
9 on July 25, 2011, more than three months after Apple commenced this litigation. (D.N. 381
10 Counterclaims ¶ 77.) Moreover, because there is no way of knowing what the ultimate terms of
11 the agreement would have been or even if there would have been an ultimate agreement, Apple
12 cannot allege that it is entitled to a license to Samsung's Declared-Essential Patents as the result of
13 Samsung's purported breach. Copeland, 96 Cal. App. 4th at 1257, 117 Cal. Rptr. 2d at 880-81.

14 Finally, as explained in Section III, above, Apple's allegations fail to create a plausible
15 inference that Samsung's purported breach of its obligation to timely disclose its essential patents
16 caused any damage to Apple or any other party. Again, because Samsung prospectively agreed to
17 license its essential patents on FRAND terms, (id. ¶ 59), there is no reason to believe ETSI would
18 not have incorporated Samsung's patented technology into the standard if its members knew
19 beforehand that the technology was patented. That is, there is no reason to believe that Samsung's
20 alleged failure to timely disclose its essential patents was a substantial factor in causing damage to
21 Apple. See US Ecology, Inc. v. State, 129 Cal. App. 4th 887, 909, 28 Cal. Rptr. 3d 894, 910 (4th
22 Dist. 2005) (finding no causation where it was not "reasonably certain" and it was "at best
23 speculation" that circumstances would have changed). As a result, Apple has failed to plead the
24 elements required for breach of contract. McAfee, 2011 WL 3293759, at *2 (identifying fourth
25 element as "damages to the plaintiff from defendant's breach").

26 For all of the foregoing reasons, Apple's twenty-fifth counterclaim for breach of contract
27 should be dismissed.

28

V. APPLE FAILS TO PLEAD FACTS SUFFICIENT TO GRANT RELIEF FOR PROMISSORY ESTOPPEL

Apple's allegations regarding promissory estoppel only establish that Samsung committed that it was prepared to grant licenses on FRAND terms. This is not a promise that is enforceable under the doctrine of promissory estoppel, and, therefore, Apple fails to plead facts sufficient to sustain a claim for promissory estoppel.

Under California law, the required elements for promissory estoppel are "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) his reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." Laks v. Coast Federal Sav. & Loan Ass'n, 60 Cal. App. 3d 885, 890, 131 Cal. Rptr. 836, 839 (2d Dist. 1976). A promise "is not a 'clear and unambiguous' promise[] [if] it clearly contemplates further negotiations to finalize the terms of the [contract]." Columbia Pics. Television v. Krypton Broad. of Birmingham, Inc., 106 F.3d 284, 291-92 (9th Cir. 1997), rev'd on other grounds, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 118 S. Ct. 1279, 140 L. Ed. 2d 438 (1998) (quoting Laks, 60 Cal. App. 3d at 890, 131 Cal. Rptr. at 839). Moreover, because extrinsic evidence is relevant only for interpreting an ambiguous contract, "[i]t follows that if extrinsic evidence is needed to interpret a promise, then obviously the promise is not clear and unambiguous." Lange v. TIG Ins. Co., 68 Cal. App. 4th 1179, 1185, 81 Cal. Rptr. 2d 39, 43 (2d Dist. 1998).

As described above, the promise that Apple identifies as Samsung's breach is Samsung's declaration that it was "prepared to grant licenses to its essential IPR on a fair, reasonable, and non-discriminatory basis." (D.N. 381 Counterclaims ¶ 59.) This promise "clearly contemplates further negotiations to finalize the terms." Columbia Pics., 106 F.3d at 291-92. As described in Section IV.A, above, the promise fails to include any specific terms of a license, including which patents will be licensed and at what rate. In fact, Apple's own allegations undermine its claim of promissory estoppel because, to allow it to determine whether Samsung's terms are FRAND terms, Apple purports to require "information about any license agreements for declared-essential UMTS patents with other device manufacturers." (D.N. 381 Counterclaims ¶ 77.) That is, to

1 establish the terms of the promise, Apple requires extrinsic evidence, which establishes that the
2 promise is not clear and unambiguous. Lange, 68 Cal. App. 4th at 1185, 81 Cal. Rptr. 2d at 43.

3 Moreover, as explained in Section IV.A.1, above, the statement is, at most, a promise to
4 negotiate. According to Apple's own allegations, Samsung has negotiated with Apple regarding a
5 license to its essential patents, even offering such a license. (D.N. 381 Counterclaims ¶ 77.) Thus,
6 Apple has failed to plead facts sufficient to establish that Samsung breached any promise to
7 negotiate.

8 Because Apple has failed to plead facts sufficient to establish that Samsung made a
9 promise that was clear and unambiguous in its terms or that Samsung breached any such promise,
10 Apple's twenty-sixth counterclaim must be dismissed.

11 VI. APPLE FAILS TO PLEAD FACTS SUFFICIENT TO GRANT RELIEF FOR **12 UNFAIR COMPETITION**

13 The Court previously dismissed Apple's unfair competition claim as duplicative of its
14 Section 2 Sherman Act claim. The Court noted the California Supreme Court's holding that
15 "[w]hen a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or
16 practice invokes section 17200, the word 'unfair' in that section means conduct that threatens an
17 incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because
18 its effects are comparable to or the same as a violation of the law, or otherwise significantly
19 threatens or harms competition." Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20
20 Cal. 4th 163, 186-87, 973 P.2d 527 (1999). Noting that it was "unclear how Apple's UCL claim is
21 materially different than its claims for violations of the predicate antitrust laws," the Court
22 dismissed Apple's claims. (D.N. 315 at 13.)

23 The unfair competition allegations in Apple's amended complaint are substantially the
24 same as those it initially pled and should once again be dismissed for the same reasons that
25 Apple's antitrust claim should be dismissed. See Sections II and III, supra. Apple raises only two
26 new allegations in support of its unfair competition counterclaim. First, Apple contends that the
27 initiation of this lawsuit is an unfair business practice because Samsung is allegedly precluded
28 from bringing suit because Apple has purchased its chip sets from licensed suppliers and because

1 Apple is impliedly licensed. (D.N. 381 Counterclaims ¶ 206) Second, Apple's counterclaim now
2 contains a single sentence stating that Samsung's conduct violates Section 5 of the Federal Trade
3 Commission Act. (Id. ¶ 205.)

4 Apple fails to plead facts that demonstrate that Samsung's lawsuit is exempt from
5 immunity under California law. Pursuant to California Civil Code 47(b), communications that
6 bear some relation to judicial proceedings are absolutely immune from tort liability. Rubin v.
7 Green, 4 Cal. 4th 1187, 1193 (1993). A plaintiff may not make an end-run around this prohibition
8 by alleging an Unfair Competition claim. Cel-Tech, 20 Cal. 4th at 182. Samsung has not pled any
9 basis as to why Samsung's claims would not be subject to immunity and, therefore, its allegations
10 regarding this lawsuit cannot form the basis for an unfair competition claim.

11 Apple's pleadings with respect to Section 5 of the Federal Trade Commission Act fail to
12 state a claim as well. Apple's counterclaims merely assert the violation of this section without any
13 explanation as to what acts constitute the violation. Such conclusory allegations fail to satisfy the
14 Rule 12(b)(6) pleading standards and cannot establish that Apple is entitled to relief under Section
15 17200. Twombly, 550 U.S. at 557.

16 Thus, Apple has failed to make new allegations that support its unfair competition
17 counterclaim and its counterclaim should once again be dismissed.

VII. CONCLUSION

For the foregoing reasons, Samsung respectfully request that the Court dismiss Apple's Twenty-Fifth, Twenty-Sixth, Twenty-Seventh, Twenty-Eighth, and Twenty-Ninth Counterclaims.

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Respectfully submitted,

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