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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 PHILIPS NORTH AMERICA, LLC,
11 et al.,

12 Plaintiffs,

13 v.

14 SUMMIT IMAGING INC., et al.,

15 Defendants.

CASE NO. C19-1745JLR

ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFFS' MOTION TO
DISMISS COUNTERCLAIMS

16 Before the court is Plaintiffs Philips North America, LLC, Koninklijke Philips
17 N.V., and Philips India, Ltd.'s (collectively, "Philips") motion to dismiss Defendants
18 Summit Imaging Inc. and Lawrence R. Nguyen's (collectively, "Summit") counterclaims
19 pursuant to Federal Rule of Civil Procedure 12(b)(6). (Mot. (Dkt. # 50).) Summit
20 opposes Philips's motion. (Resp. (Dkt. # 53).) Philips filed a reply. (Reply (Dkt. # 54).)
21 The court granted Summit's motion to file a surreply. (Order Granting Surreply (Dkt.
22 # 65); Surreply (Dkt. # 70).) Having considered the motion, the parties' submissions

1 regarding the motion, the relevant portions of the record, and the applicable law,¹ the
2 court GRANTS in part and DENIES in part Philips's motion to dismiss.

3 I. BACKGROUND

4 A. Factual Background

5 Summit "provides maintenance, repair and related services for medical equipment,
6 including ultrasound and mammography equipment." (Counterclaims (Dkt. # 41 at
7 30-48) ¶ 11.) Summit is an "independent service organization," or "ISO," that specializes
8 in servicing medical equipment manufactured and sold by other companies. (*Id.* ¶ 12.)
9 Summit's customers include healthcare facilities (such as hospitals) and other entities in
10 the United States and Canada that own and operate medical equipment, including
11 ultrasound equipment. (*Id.* ¶ 14.) Summit alleges that its customers "highly value and
12 prefer" Summit because of its "ability to minimize costly downtimes of vital medical
13 equipment," its "top-quality customer service and diagnostic and repair services," and
14 "the lower cost of Summit's services relative to its original equipment manufacturer
15 ('OEM') competitors in the service market." (*Id.* ¶¶ 15-17.)

16 One type of medical equipment that Summit services is ultrasound machines
17 manufactured by Philips. (*Id.* ¶ 18.) Philips's ultrasound machines are "expensive and
18 complex equipment that include both mechanical and computer software components."
19 (*Id.* ¶ 19.) Although Philips's ultrasound machines have a long lifespan, they require

21 ¹ The parties have requested oral argument. (*See* Mot. at 1, Resp. at 1.) The court finds
22 oral argument would not be helpful to the disposition of this motion, and therefore declines to
hold oral argument. *See* Local Rules W.D. Wash. LCR 7(b)(4).

1 frequent maintenance, repair, and other servicing. (*Id.*) In addition to manufacturing and
2 selling its ultrasound machines, Philips provides maintenance and repair services for the
3 machines. (*Id.* ¶ 23.) As a result, Philips competes with Summit and other ISOs for
4 business in the market for maintenance and repair services for Philips’s ultrasound
5 machines. (*Id.* ¶ 24.)

6 Summit alleges that the software included on Philips’s ultrasound machines “is
7 necessary for both operating the equipment and for properly diagnosing, troubleshooting,
8 and correcting” technical issues with the machines. (*Id.* ¶ 20.) Summit further alleges
9 that Philips “regulates and restricts access to and operation of” this software by
10 individuals and entities outside of Philips, including the purchasers of the machines and
11 ISOs such as Summit that provide maintenance and repair services. (*Id.* ¶ 21.)

12 Summit alleges that access to the diagnostic software is “vital to competition” in
13 the market for servicing Philips’s ultrasound machines because it provides access to tools
14 that “are essential for diagnosing, troubleshooting, and correcting technical problems or
15 issues with” the machines. (*Id.* ¶ 34; *id.* ¶¶ 35-37 (describing alleged features of Philips’s
16 diagnostic software that are unavailable to competitors, such as the ability to translate
17 error codes, correct errors, and display temperature sensor data).) Philips “does not and
18 will not provide access to the Diagnostic Software” to its competitors in the Philips
19 ultrasound machine service market, including Summit. (*Id.* ¶ 40.) Indeed, Philips has
20 never granted access to the diagnostic software to Summit. (*Id.* ¶ 41.) Summit asserts
21 that Philips’s refusal to provide access to the diagnostic software has impaired or
22

1 prevented Summit and Philips’s other competitors from performing certain maintenance
2 and repair services for their customers. (*Id.* ¶¶ 42-43.)

3 In an effort to “find ways to work around its lack of access to the Philips
4 Diagnostic Software,” Summit developed its own “proprietary software” to enable it to
5 service Philips’s ultrasound machines. (*Id.* ¶ 44.) Summit states that its software has a
6 “commercially significant, useful and lawful purpose” and “does not circumvent any
7 purported technological measure that Philips might include in its software, falsify or
8 remove any purported copyright information, or otherwise violate the DMCA or infringe”
9 Philips’s copyrights in any way. (*Id.* ¶¶ 44, 57.)

10 Summit alleges that Philips has engaged in anticompetitive conduct in order to
11 increase its share of the market for repair and maintenance of its ultrasound machines,
12 control prices, and exclude competitors from the market. (*Id.* ¶ 25.) This anticompetitive
13 conduct includes Philips’s refusal to provide its competitors access to diagnostic software
14 installed on its ultrasound machines and Philips’s efforts to enforce its copyrights on that
15 software. (*See, e.g., id.* ¶¶ 33-34, 40, 47, 49, 51, 57, 74-75.) Summit also alleges that
16 Philips’s refusal to license its copyrights in the diagnostic software, and its enforcement
17 or threatened enforcement of those copyrights (as in this lawsuit, which seeks to prevent
18 Summit from using its proprietary software) is anticompetitive conduct. (*See, e.g., id.*
19 ¶¶ 54, 57-58.) Summit asserts that Philips’s refusal to license its copyrights and its
20 enforcement actions are motivated not by a legitimate desire to protect its copyrights but
21 rather by Philips’s goal to exclude competition in the market for repair and servicing of
22 its ultrasound machines. (*Id.* ¶¶ 51-57.)

1 **B. Procedural Background**

2 Philips filed its initial complaint in this action on October 29, 2019. (Compl. (Dkt.
3 # 1).) It filed an amended complaint on December 20, 2019. (Am. Compl. (Dkt. # 23).)
4 Philips's claims against Summit arise from its allegation that Summit hacks into Philips's
5 ultrasound systems using a program Summit developed in order to enable features or
6 options in the ultrasound systems for which Philips's customers have not paid. (Am.
7 Compl. ¶¶ 4-6.) Philips also alleges that Summit wrongfully advertises that its software
8 is a "legal solution" or "legal alternative" to working with Philips in order to enable
9 features and options in the ultrasound systems. (*See id.* ¶ 8.)

10 The court granted in part and denied in part Summit's subsequent motion to
11 dismiss Philips's claims. (3/30/2020 Order (Dkt. # 35).) Specifically, the court
12 dismissed, without prejudice and with leave to amend, Philips's claims against Summit
13 for modifying copyright management information in violation of the Digital Millennium
14 Copyright Act ("DMCA"), 17 U.S.C. § 1202; false advertising in violation of the
15 Lanham Act, 15 U.S.C. § 1125(a); and unfair competition in violation of Washington's
16 Consumer Protection Act ("CPA"), ch. 19.86 RCW. (3/30/2020 Order at 20-21.) The
17 court denied Summit's motion to dismiss Philips's claims for circumventing a
18 technological measure in violation of the DMCA; trade secret misappropriation in
19 violation of the Defend Trade Secrets Act, 18 U.S.C. § 1836, and Uniform Trade Secrets
20 Act, ch. 19.108 RCW; and for contributory copyright infringement in violation of the
21 Copyright Act, 17 U.S.C. §§ 101, 501. (3/30/2020 Order at 20-21.)
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1 On April 20, 2020, Philips filed its second amended complaint. (2d Am. Compl.
2 (Dkt. # 36).) Summit answered the second amended complaint on May 18, 2020 and
3 asserted counterclaims. (*See generally* Ans. & Counterclaims (Dkt. # 41).) In its
4 counterclaims, Summit alleges that Philips has engaged in monopolization and attempted
5 monopolization in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2.
6 (Counterclaims ¶¶ 26-64 (monopolization), 65-68 (attempted monopolization).) Summit
7 also seeks a declaratory judgment that Philips’s copyrights on the diagnostic software
8 installed on its ultrasound machines are unenforceable due to Philips’s misuse of those
9 copyrights. (*Id.* ¶¶ 69-82.) Philips now moves to dismiss all of Summit’s counterclaims.
10 (*See generally* Mot.)

11 II. ANALYSIS

12 A. Standard on Motions to Dismiss

13 Federal Rule of Civil Procedure 12(b)(6) provides for dismissal for “failure to
14 state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). When
15 considering a motion to dismiss under Rule 12(b)(6), the court construes the complaint in
16 the light most favorable to the nonmoving party. *Livid Holdings Ltd. v. Salomon Smith*
17 *Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all well-pleaded
18 facts as true and draw all reasonable inferences in favor of the plaintiff. *Wylor Summit*
19 *P’ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). The court,
20 however, is not required “to accept as true allegations that are merely conclusory,
21 unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State*
22 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “To survive a motion to dismiss, a

1 complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
2 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting
3 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Telesaurus VPC, LLC v.*
4 *Power*, 623 F.3d 998, 1003 (9th Cir. 2010). “A claim has facial plausibility when the
5 plaintiff pleads factual content that allows the court to draw the reasonable inference that
6 the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 677-78. Dismissal
7 under Rule 12(b)(6) can be based on the lack of a cognizable legal theory or the absence
8 of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police*
9 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

10 **B. Monopolization Claims**

11 Section 2 of the Sherman Antitrust Act makes it illegal to “monopolize . . . any
12 part of the trade or commerce among the several states.” 15 U.S.C. § 2. The
13 requirements for monopolization and attempted monopolization claims “are similar,
14 differing primarily in the requisite intent and the necessary level of monopoly power.”
15 *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997). To state
16 a claim for monopolization under § 2, the plaintiff must allege facts that, if true, will
17 prove the defendant (1) possesses monopoly power and (2) uses that power to “foreclose
18 competition, to gain a competitive advantage, or to destroy a competitor.” *Aerotec Int’l,*
19 *Inc. v. Honeywell Int’l, Inc.*, 836 F.2d 1171, 1183 (9th Cir. 2016) (quoting *Eastman*
20 *Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 482-83 (1992) (“*Kodak*”). To state a
21 claim for attempted monopolization, the plaintiff must allege facts that, if true, will prove
22 “(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a

1 specific intent to monopolize and (3) a dangerous probability of achieving monopoly
2 power.” *Kaiser Found. Health Plan, Inc. v. Abbott Labs., Inc.*, 552 F.3d 1033, 1043–44
3 (9th Cir. 2009) (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993)).
4 “To safeguard the incentive to innovate, the possession of monopoly power will not be
5 found unlawful [under § 2] unless it is accompanied by an element of anticompetitive
6 conduct.” *Verizon Comm’cns Inc. v. Law Offices of Curtis V. Trinko* (“*Trinko*”), LLP,
7 540 U.S. 398, 407 (2004).

8 **1. Noerr-Pennington Immunity**

9 Summit alleges that Philips has engaged in anticompetitive conduct prohibited by
10 Section 2 of the Sherman Act by filing its lawsuit seeking to enforce its copyrights in the
11 software installed on its ultrasound machines. (*See, e.g.*, Counterclaims ¶¶ 57-58.)
12 Philips contends that Summit’s claims based on Philips’s efforts to enforce its copyrights
13 are barred by the *Noerr-Pennington* doctrine. “That doctrine provides a party immunity
14 from antitrust liability for petitioning the government for redress, in light of the First
15 Amendment right to petition the government. And it is clear that the petitioning activity
16 includes enforcing one’s intellectual property rights in court.” *United Food and*
17 *Commercial Workers Unions and Emp’rs v. Novartis Pharmaceuticals Corp.*, 902 F.3d 1,
18 4-5 (1st Cir. 2018) (citing *Prof’l Real Estate Inv’rs, Inc. v. Columbia Pictures Indus., Inc.*
19 (“*PREF*”), 508 U.S. 49, 63-65 (1993)) (applying *Noerr-Pennington* and affirming the
20 dismissal of plaintiff’s antitrust claims arising from Novartis’s efforts to enforce its
21 patents on a prescription drug). An entity loses *Noerr-Pennington* immunity from anti-
22 trust liability, however, if its conduct falls within the “sham” exception to the doctrine.

1 | *Kaiser Found. Health Plan, Inc.*, 552 F.3d at 1044. A “sham” lawsuit is one where the
2 | suit is both “objectively baseless in the sense that no reasonable litigant could realistically
3 | expect success on the merits” and “an attempt to interfere *directly* with the business
4 | relationship of a competitor through the use of the governmental *process*—as opposed to
5 | the *outcome* of that process.” *Rock River Commc’ns, Inc. v. Universal Music Grp., Inc.*,
6 | 745 F.3d 343, 351-52 (9th Cir. 2014) (quoting *PREI*, 508 U.S. at 60–61) (emphasis in
7 | original)).

8 | Summit does not allege that Philips has engaged in sham litigation to enforce its
9 | copyrights. (Resp. at 13.) Rather, it argues that the *Noerr-Pennington* doctrine does not
10 | bar its claims because they are not based “*solely*” on Philips’s non-sham litigation.
11 | (Resp. at 11-12 (emphasis in original).) Relying primarily on *Clipper Exxpress v. Rocky*
12 | *Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1265 (9th Cir. 1982), Summit argues
13 | that *Noerr-Pennington* does not apply here because “Plaintiffs’ litigation activity is part
14 | of a broader scheme of anticompetitive conduct.” (Resp. at 13.)²

15 | In *Clipper Exxpress*, the plaintiff, a freight forwarding company, alleged that the
16 | defendant trucking company had engaged in sham rate protests and had provided
17 | fraudulent information to a regulatory agency as part of a larger scheme to stifle
18 | competition that included price-fixing and customer allocation. *Id.* at 1246-63. The
19 | *Clipper Exxpress* court recognized that “[g]enuine efforts to induce governmental action
20 | are shielded by *Noerr* even if their express and sole purpose is to stifle or eliminate

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22 | ² Philips does not respond to Summit’s arguments regarding *Clipper Exxpress*. (See
generally Reply.)

1 competition.” *Id.* at 1254. Nevertheless, the court also observed that “when . . . the
2 petitioning activity is but part of a larger overall scheme to restrain trade, there is no
3 overall immunity.” *Id.* at 1263-64 (emphasis added). Rather, *Noerr-Pennington*
4 “provides immunity only for the narrow petitioning activity, if done with the requisite
5 intent to influence government action.” *Id.* at 1265.

6 Here, Summit challenges Philips’s entire course of conduct—not just Philips’s
7 efforts to enforce its copyrights in court. Although *Noerr-Pennington* provides Philips
8 immunity from antitrust liability against Summit’s claims based on Philips’s legitimate,
9 non-sham litigation activity, that immunity does not extend to Summit’s other allegations
10 of anticompetitive conduct. *See Clipper Express*, 690 F.3d at 1263-64. Therefore, the
11 court DISMISSES with prejudice Summit’s antitrust claims under the *Noerr-Pennington*
12 doctrine only to the extent they are premised on Philips’s litigation activity. *See Lopez v.*
13 *Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (where claims are dismissed under Rule
14 12(b)(6), the court “should grant leave to amend . . . unless it determines that the pleading
15 could not possibly be cured by the allegation of other facts.”).

16 2. Relevant Market

17 “A threshold step in any antitrust case is to accurately define the relevant market,
18 which refers to ‘the area of effective competition.’” *Federal Trade Comm’n v.*
19 *Qualcomm, Inc.*, 969 F.3d 974, 992 (9th Cir. 2020) (quoting *Ohio v. Am. Express Co.*,
20 138 S. Ct. 2274, 2285 (2018)). The plaintiff must allege both that a legally cognizable
21 ‘relevant market’ exists and that the defendant has power within that market. *Newcal*
22 *Indus., Inc. v. Ikon Office Solutions*, 513 F.3d 1038, 1044 (9th Cir. 2008). “There is no

1 requirement that these elements of the antitrust claim be pled with specificity.” *Id.* at
2 1045. Although the validity of the “relevant market” is typically a factual element rather
3 than a legal element, a complaint may be dismissed if the complaint’s “relevant market”
4 definition is “facially unsustainable.” *Id.*

5 Summit alleges that the relevant market for its antitrust claims is the market for
6 “provision of . . . maintenance and repair services on Philips Ultrasound Machines in the
7 United States” (the “Philips Ultrasound Machine Service Market”). (Counterclaims
8 ¶ 27.) Summit asserts that Philips’s market power is demonstrated by its dominant share
9 in the market, which Summit estimates is at least 76% of the market based on 2018 data
10 showing that OEMs “typically account for greater than 76% of the revenue generated in
11 service aftermarkets for specialized medical equipment, including ultrasound machines.”
12 (*Id.* ¶ 28.) Summit also alleges that there are barriers to entry in the market arising from
13 high costs to enter and participate in the market, the high level of technical skill and
14 knowledge of Philips’s ultrasound machines required to participate in the market, and
15 Philips’s own actions in controlling and restricting access to the software on the
16 ultrasound machines. (*Id.* ¶¶ 31-32.)

17 Philips argues that Summit has failed to sufficiently plead “a plausible single-
18 modality, single-brand relevant market.” (Reply at 9.) First, it contends that Summit
19 fails to allege facts regarding why other imaging systems are not reasonably
20 interchangeable with ultrasound systems for purposes of providing maintenance, repair
21 and related services or why the market does not encompass manufacturers other than
22 Phillips. (Reply at 8-9.) Second, it argues that Summit has failed to allege “a change in

1 policy or other deceptive conduct that ‘locks in’ customers” in order to demonstrate
2 market power. (*Id.* at 10 (citing *Newcal*, 513 F.3d at 1045, 1051, and *POURfect Prod. v.*
3 *KitchenAid*, No. CV-09-2660PHXGMS, 2010 WL 1769413, at *3-4 (D. Ariz. May 3,
4 2010)).) Finally, Philips argues that Summit’s allegation of Philips’s market share
5 “cannot stand” because it depends on an “unidentified” study regarding OEMs’ share of
6 the revenue generated in service aftermarkets for specialized medical equipment and is
7 not specific to Philips or ultrasound machines. (*Id.* at 10-11 (citing *Rebel Oil*, 51 F.3d at
8 1434 (9th Cir. 1995).)

9 The court finds that Summit has sufficiently alleged a relevant market in which
10 Philips has market power. It is clear that an antitrust plaintiff may base its claims on a
11 single-product relevant market. *See Kodak*, 504 U.S. at 456-59 (markets for Kodak parts
12 and service); *Newcal*, 513 F.3d at 1048 (markets for IKON and GE copier equipment and
13 copier service). Because the relevant market for aftermarket service must be determined
14 based on the choices available to the owners of Philips ultrasound machines, *see Kodak*,
15 504 U.S. at 482, Summit need not plead facts regarding other imaging systems or
16 ultrasound systems made by manufacturers other than Philips in order to sufficiently
17 allege a single-brand relevant market.

18 The court also concludes that Summit has plausibly alleged that Philips possesses
19 market power in the relevant market. The existence of an antitrust defendant’s market
20 power “ordinarily is inferred from the seller’s possession of a predominant share of the
21 market.” *Kodak*, 504 U.S. at 464 (internal citations omitted). The Supreme Court has
22 concluded that market shares similar to the 76% market share that Summit alleges Philips

1 possesses are sufficient to demonstrate monopoly power under Section 2. *See United*
2 *States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (87% of market constitutes a
3 monopoly); *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946) (over two-
4 thirds of market constitutes a monopoly). Whether Philips’s market share is actually 76%
5 percent is a factual issue that must be tested through discovery.

6 Philips argues that Summit must allege that Philips initiated a change in policy
7 that would “lock-in” customers in order to survive a motion to dismiss. (See Mot. at 9-
8 10.) The court disagrees. Rather, the court concludes that the lesson from *Kodak* and
9 *Newcal* is that an aftermarket shift in policy is one example of a way in which a firm may
10 exercise its market power. *See Kodak*, 504 U.S. at 458 (discussing “lock-ins” in the
11 context of a Sherman Act § 1 tying claim); *Newcal*, 513 F.3d at 1051 (same); *see also*
12 *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 820 (6th Cir. 1997) (same).³
13 For these reasons, the court DENIES Philips’s motion to dismiss to the extent it alleges
14 that Summit’s case should be dismissed for failure to plausibly allege a “relevant market”
15 in which Philips possesses market power.

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³ To the extent Philips relies on *POURfect Products*, 2010 WL 1769413, at *3-4, the court finds that Summit has sufficiently alleged facts that make the factors listed in that case plausible: the existence of high “switching costs,” high “information costs,” and a “substantial” ability to exploit “ignorant” customers. (*See, e.g.*, Counterclaims ¶ 19 (alleging that Philips ultrasound machines are “expensive and complex” equipment with a “relatively long lifespan” and that purchasers “are not able to accurately predict required maintenance or estimate long-term maintenance costs at the time of purchase.”))

3. Refusal to Deal

“As the Supreme Court has repeatedly emphasized, there is ‘no duty to deal under the terms and conditions preferred by [a competitor’s] rivals[.]’ *Aerotec Int’l*, 836 F.3d at 1184 (quoting *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 555 U.S. 438, 457 (2009)). “The Sherman Act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.” *Trinko*, 540 U.S. at 408 (internal citations and alterations omitted).

“The one, limited exception to the general rule that there is no antitrust duty to deal comes under the Supreme Court’s decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).” *Qualcomm*, 969 F.3d at 993. Under the *Aspen Skiing* exception, a company engages in prohibited, anticompetitive conduct when “(1) it unilaterally terminates a voluntary and profitable course of dealing; (2) the only conceivable rationale or purpose is to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition; and (3) the refusal to deal involves products that the defendant already sells in the existing market to other similarly situated customers.” *Id.* at 993-94 (quoting *Aerotec Int’l*, 836 F.3d at 1184, and *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132-33 (9th Cir. 2004)) (internal citations and quotation marks omitted). Because the *Aspen Skiing* exception is “at or near the outer boundary of § 2 liability,” it should be applied only in rare circumstances. *Qualcomm*, 969 F.3d at 994 (quoting *Trinko*, 540 U.S. at 409).

1 Here, Summit alleges that Philips engaged in anticompetitive conduct under
2 Section 2 of the Sherman Act by refusing to give access to its diagnostic software to
3 Summit and other competitors. (Counterclaims ¶ 49.) Summit does not, however, allege
4 that Philips has “unilaterally terminate[d] a voluntary and profitable course of dealing.”
5 *Qualcomm*, 969 F.3d at 994. Indeed, according to Summit, “Philips has *never* granted
6 access to the Philips Diagnostic Software to Summit.” (Counterclaims ¶ 41 (emphasis
7 added).) Summit’s allegation that Philips has never granted it access to the diagnostic
8 software directly contradicts the requirement that it plead a unilateral termination of a
9 voluntary course of dealing. That allegation is therefore fatal to Summit’s argument that
10 the court should apply the *Aspen Skiing* exception to the general rule that there is no duty
11 to deal. *See Qualcomm*, 969 F.3d at 994-95 (reversing the district court’s holding that
12 *Qualcomm* was under an antitrust duty to deal where the district court’s conclusion that
13 *Qualcomm* had terminated a voluntary and profitable course of dealing with respect to its
14 previous licensing practices was in error).

15 In its surreply, Summit argues that “any interpretation [of *Aspen Skiing*] that
16 requires every refusal to deal case to meet the exact factual elements present in *Aspen*
17 *Skiing* is contrary to existing Ninth Circuit precedent.” (Surreply at 2.) Summit relies on
18 *Image Technical Services*, 125 F.3d at 1211, for the proposition that a plaintiff need not
19 allege a prior course of dealing to plead a refusal to deal claim. (*See id.*) Summit asserts
20 in a footnote that *Trinko*, which recognized the significance of “the unilateral termination
21 of a voluntary course of dealing” in *Aspen Skiing*, *see Trinko*, 540 U.S. at 409, did not
22 “alter *Aspen Skiing*’s general rule that the presence of ‘valid business reasons’ is the

1 touchstone for determining whether or not a refusal to deal is anticompetitive.” (Surreply
2 at 3 n.3.) Although the court is sympathetic to Summit’s argument, the Ninth Circuit has
3 instructed that there is but “*one*, limited exception to the general rule that there is no
4 antitrust duty to deal,” and that proof of that exception requires a showing that the
5 defendant “unilaterally terminate[d] a voluntary and profitable course of dealing.”
6 *Qualcomm*, 969 F.3d at 993 (emphasis added), 995 (observing that a unilateral
7 termination of a voluntary course of dealing is a “required element[] for the *Aspen Skiing*
8 exception”). This court is bound to follow Ninth Circuit precedent.⁴ Because Summit’s
9 allegation that “Philips has never granted access to the Philips Diagnostic Software to
10 Summit” establishes that Summit cannot prove a claim for refusal to deal under the
11 limited *Aspen Skiing* exception, the court GRANTS Philips’s motion to dismiss Summit’s
12 Sherman Act § 2 claims for monopolization and attempted monopolization based on its
13 refusal to deal theory with prejudice. *See Lopez v. Smith*, 203 F.3d at 1127.

14 **4. Essential Facility**

15 Summit also alleges that Philips violated Section 2 of the Sherman Act under an
16 essential facilities theory. The essential facilities doctrine is a “variation on a refusal to
17 deal claim.” *Aerotec Int’l*, 936 F.3d at 1184. It “imposes liability where competitors are
18 denied access to an input that is deemed essential, or critical, to competition.” *Id.* To
19 establish a violation of the essential facilities doctrine, Summit must show (1) that Philips
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21 ⁴ The *Qualcomm* panel that set forth the elements of the *Aspen Skiing* exception was
22 aware of *Image Technical Services*. *See Qualcomm*, at 969 F.3d at 992 (quoting *Image
Technical Services*, 125 F.3d at 1202, for its definition of “relevant market”).

1 is a monopolist in control of an essential facility, (2) that Summit, as Philips's
2 competitor, is unable reasonably or practically to duplicate the facility, (3) that Philips
3 has refused to provide Summit access to the facility, and (4) that it is feasible for Philips
4 to provide such access. *Id.* at 1185 (citing *MetroNet Servs.*, 383 F.3d at 1128-29).
5 Because mandating access shares the same concerns as mandating dealing with a
6 competitor, a facility is essential “only if control of the facility carries with it the power
7 to *eliminate* competition in the downstream market.” *Id.* (quoting *Alaska Airlines, Inc. v.*
8 *United Airlines, Inc.*, 948 F.2d 536, 546 (9th Cir. 1991) (emphasis in original)).

9 Summit alleges that the diagnostic software that runs on Philips's ultrasound
10 machines is an essential facility that is necessary for competition in the Philips
11 Ultrasound Machine Service Market. (Counterclaims ¶ 34.) Summit alleges that
12 “[c]ertain aspects of the software are vital to competition” in that market “because they
13 provide access to tools that are essential for diagnosing, troubleshooting and correcting
14 technical problems or issues,” such as identifying error codes, providing tools that allow
15 the machine's operator to troubleshoot and identify the issue that caused an error code,
16 and displaying data regarding thermal and electrical sensors. (*Id.* ¶¶ 35-37.) Summit
17 alleges that there is no way other than Philips's diagnostic software to view sensor data
18 and to determine from the error codes what repairs to make. (*Id.* ¶ 37-88.) For these
19 reasons, according to Summit, Philips's diagnostic software is “necessary and vital to
20 providing repair and maintenance services for Philips Ultrasound Machines and
21 constitutes an essential facility in the Philips Ultrasound Service Market.” (*Id.* ¶ 39.)
22 Summit further alleges that Philips's diagnostic software cannot be practically or

1 economically duplicated, that Philips has refused to license or otherwise provide access
2 to the software, and that when Summit has tried to find ways to work around its lack of
3 access to the software, Philips has initiated legal action. (*Id.* ¶¶ 43-45.)

4 In contradiction to the above, however, Summit also alleges that there are
5 competitors in addition to Summit and Philips in the relevant market for service of
6 Philips’s ultrasound machines, that Summit is able to deliver high-quality service for
7 Philips’s ultrasound machines at a low cost, and that it has developed a lawful alternative
8 to Philips’s software that does not violate Philips’s copyrights. (*Id.* ¶¶ 17, 22- 24, 28, 30,
9 57.) Thus, Summit’s own allegations show that Philips does not have the power to
10 “*eliminate* competition” in the market for service of its ultrasound machines by its control
11 of access to its diagnostic software. *Alaska Airlines, Inc.*, 948 F.2d at 546 (emphasis in
12 original); *see Kinderstart.com LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2006 WL
13 3246595, at *9-10 (N.D. Cal. Jul. 13, 2006) (dismissing essential facilities claim where
14 plaintiff alleged that it maintained website content, generated sustainable traffic, and
15 received high rankings from other search engines). Based on the foregoing, the court
16 concludes that Summit has failed to plausibly allege Sherman Act § 2 claims for
17 monopolization and attempted monopolization based on an essential facilities theory.
18 The court DISMISSES these claims without prejudice and with leave to amend. *See*
19 *Lopez v. Smith*, 203 F.3d at 1127.

20 **C. Misuse of Copyright Claim**

21 Summit also seeks a declaratory judgment that Philips’s legal actions with respect
22 to its claims under the DMCA and its claims for copyright infringement constitute a

1 misuse of copyright, thus making Philips’s copyrights in the software installed on its
2 ultrasound machines unenforceable as long as the alleged copyright misuse continues.⁵
3 (Counterclaims ¶¶ 69-82; *see also id.* at 46, ¶¶ D & E.)

4 “Copyright misuse is a judicially created affirmative defense to copyright
5 infringement.” *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1157 (9th Cir. 2011). The
6 equitable defense of copyright misuse “forbids a copyright holder from securing an
7 exclusive right or limited monopoly not granted by the Copyright Office” by preventing
8 “copyright holders from leveraging their limited monopoly to allow them control of areas
9 outside the monopoly.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th
10 Cir. 2001) (internal quotations omitted). The doctrine “does not prohibit using conditions
11 to control use of copyrighted material, but it does prevent copyright holders from using
12 the conditions to stifle competition.” *Apple*, 658 F.3d at 1159. The Ninth Circuit has
13 “applied the doctrine sparingly.” *Id.* at 1157. A successful copyright misuse defense
14 precludes a copyright owner from enforcing the copyright during periods of misuse. *See*
15 *Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516, 520 (9th Cir. 1997).

16 Summit alleges that Philips has moved to enforce its copyrights on the software
17 installed on its ultrasound machines, including its diagnostic software, with the intent to
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19 ⁵ In a footnote, Philips argues that copyright misuse is cognizable only as an affirmative
20 defense. (Mot. at 18 n.1.) The court notes, however, that *Apple v. Psystar*, 658 F.3d 1150, 1154
21 (9th Cir. 2011), involved a counterclaim for a declaratory judgment that Apple was misusing its
22 copyrights. *See also Philips N. Am. LLC v. KPI Healthcare, Inc.*, No. SACV191765JVSJDEX,
2020 WL 5260865, at *4 (C.D. Cal. July 24, 2020) (denying motion to dismiss copyright misuse
counterclaim). The court therefore proceeds to evaluate Summit’s counterclaim.

1 exclude competition in the market for Philips ultrasound machine repair and service.
2 (Counterclaims ¶¶ 71-74, 76.) It also alleges that Philips's attempts to exclude
3 competition for repair and maintenance services for its ultrasound machines by refusing
4 to license the copyrights for its diagnostic software. (*Id.* ¶ 75.) As a result, according to
5 Summit, Philips is improperly attempting to extend the limited monopoly granted by
6 Philips's copyrights. (*Id.* ¶ 79.) The court finds that Summit has sufficiently alleged a
7 counterclaim for misuse of copyright. *See Philips N. Am. LLC v. KPI Healthcare, Inc.*,
8 No. SACV191765JVSJDEX, 2020 WL 5260865, at *4 (C.D. Cal. July 24, 2020)
9 (denying Philips's motion to dismiss copyright misuse counterclaim).

10 Although Philips argues that Summit's copyright misuse claim is barred by the
11 *Noerr-Pennington* doctrine, that doctrine does not bar Summit's copyright misuse claim.⁶
12 *Practice Mgmt.*, 121 F.3d at 521 (declining to consider a *Noerr-Pennington* defense to
13 copyright misuse). Philips also argues that Summit's counterclaim should be dismissed
14 because the Ninth Circuit has not upheld a copyright misuse defense or claim under facts
15 similar to those presented here. The Ninth Circuit cases Philips cites, however, were
16 decided on more developed records in the context of motions for summary judgment or
17 for preliminary injunction, rather than motions to dismiss. (*See Reply* at 6-7 (citing

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19 ⁶ This result is not incongruent with the court's prior holding that *Noerr-Pennington*
20 precludes Summit from pursuing its *antitrust* counterclaims arising from Philips's efforts to
21 enforce its copyrights, *see supra* Section II.B.1, because the remedies available to a successful
22 antitrust plaintiff are far greater than those available on a successful claim of copyright misuse.
A plaintiff that succeeds on an antitrust claim is entitled to substantial remedies, including treble
damages. *See* 15 U.S.C. § 15(a). The remedy for a successful copyright misuse claim, in
contrast, is limited to an order precluding the copyright owner from enforcing the copyright
during periods of misuse. *See Practice Mgmt.*, 121 F.3d at 520.

1 *Omega S.A. v. Costco Wholesale Corp.*, 776 F.3d 692, 700 (9th Cir. 2015), *Apple*, 658
2 F.3d at 1157; *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1026-27 (9th Cir. 2001);
3 and *Practice Mgmt.*, 121 F.3d at 520.) The court, therefore, DENIES Philips’s motion to
4 dismiss Summit’s copyright misuse counterclaim.

5 **III. CONCLUSION**

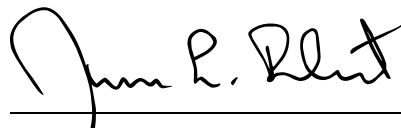
6 For the foregoing reasons, the court GRANTS in part and DENIES in part
7 Philips’s motion to dismiss (Dkt. # 50).

- 8 • The court GRANTS Philips’s motion to dismiss Summit’s Sherman Act § 2
9 antitrust counterclaims arising from Philips’s legal action to enforce its copyrights
10 in the diagnostic software. Summit’s antitrust counterclaims are DISMISSED
11 with prejudice to the extent they arise from Philips’s attempts to enforce its
12 copyrights.
- 13 • The court GRANTS Philips’s motion to dismiss Summit’s Sherman Act § 2
14 antitrust counterclaims based on a “refusal to deal” theory. These counterclaims
15 are DISMISSED with prejudice.
- 16 • The court GRANTS Philips’s motion to dismiss Summit’s Sherman Act § 2
17 antitrust counterclaims based on an “essential facilities” theory. These
18 counterclaims are DISMISSED without prejudice and with leave to amend.
- 19 • The court DENIES Philips’s motion to dismiss Summit’s counterclaim seeking a
20 declaratory judgment that Philips has misused its copyrights.

21 //

1 Summit shall file amended counterclaims, if any, alleging facts that resolve the
2 issues stated herein, by no later than twenty days from the filing date of this order.
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4 Dated this 16th day of November, 2020.

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7 JAMES L. ROBERT
8 United States District Judge
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