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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 GROUP14 TECHNOLOGIES, INC.,

9 Plaintiff,

10 v.

11 NEXEON LIMITED,

12 Defendant.

C22-1354 TSZ

ORDER

13 THIS MATTER comes before the Court on Plaintiff's motion to dismiss
14 Defendant's counterclaims and strike affirmative defenses, docket no. 34. Having
15 reviewed all papers filed in support of, and in opposition to, the motion, the Court enters
16 the following order.

17 **Background**

18 The parties, and the Court, are familiar with the facts of this case. *See* Order
19 (docket no. 27) (denying a motion to dismiss brought by Defendant Nexeon Limited
20 ("Nexeon")). Plaintiff Group14 Technologies, Inc., ("Group14") alleges that Nexeon
21 misappropriated its trade secrets pertaining to the development of Silicon-Carbon ("Si-
22 C") batteries. Compl. ¶ 33 (docket no. 1).
23

1 After the Court denied Nexeon’s motion to dismiss, Nexeon answered the
2 complaint and asserted four counterclaims against Group14: declaratory judgment (Count
3 I), tortious interference (Count II), violation of the Washington Consumer Protection Act
4 (“CPA”) (Count III), and actual or attempted monopolization (Count IV). Countercls.
5 ¶¶ 37–66 (docket no. 28). In its counterclaims, Nexeon alleges that it created the
6 technology at issue independently and that Group14 has no basis to assert any of its
7 claims. *See* Countercls. ¶¶ 38, 45, 52, 62. Nexeon posits that Group14 is using this
8 allegedly meritless lawsuit as a lever to keep competitors out of the Si-C battery space.
9 Countercls. ¶¶ 62–71. Said differently, Nexeon avers that this lawsuit is “objectively
10 baseless,” and that Group14’s conduct in filing and publicizing this allegedly baseless
11 lawsuit amounts to actionable behavior. *See* Countercls. ¶¶ 62–66; *see generally* Answer
12 (docket no. 28) (alleging, among other things, the independent development of the
13 technology at issue and the public nature of Group14’s technology).

14 Nexeon also asserts eight affirmative defenses:

- 15 A. Group14’s complaint fails to state a claim upon which relief may be
16 granted.
- 17 B. Nexeon independently developed the technology as well as any alleged
18 confidential or trade secret information related to the making and using of
19 NSP-2.
- 20 C. The alleged confidential and trade secret information alleged to have been
21 misappropriated, used, or disclosed in violation of the non-disclosure
22 agreement is a matter of public record through no fault or action by
23 Nexeon.
- D. One or more of Group14’s claims are barred by the applicable statute of
limitations.
- E. Group14 lacks standing to assert one or more claims.

- 1 F. One or more of Group14’s claims are barred by laches, estoppel, or
2 acquiescence.
- 3 G. One or more of Group14’s claims are barred by the doctrine of unclean
4 hands.
- 5 H. Group14’s Complaint should be dismissed for failure to join a necessary
6 party, including but limited to EnerG2.

7 Answer at 36–37.

8 Group14 first asserts immunity from Nexeon’s counterclaims under the *Noerr-*
9 *Pennington* doctrine. Separately, Group14 moves to dismiss all of Nexeon’s
10 counterclaims. Group14 also moves to strike certain of Nexeon’s affirmative defenses.
11 Finally, Group14 moves to strike Nexeon’s reservation of rights to assert additional
12 affirmative defenses.

13 **Discussion**

14 **I. The Noerr-Pennington Doctrine**

15 Group14 first argues that Nexeon’s claims are barred by the *Noerr-Pennington*
16 doctrine. Under this doctrine, parties are generally immune from any claim that would
17 subject them to liability for filing a lawsuit. *Pro. Real Est. Invs., Inc. v. Columbia*
18 *Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993). “[B]ecause it is based on and implements
19 the First Amendment right to petition, the *Noerr-Pennington* doctrine is not limited to the
20 antitrust context, but applies equally in all contexts.” *White v. Lee*, 227 F.3d 1214, 1231
21 (9th Cir. 2000). That said, case law has created exceptions to this rule, one of which
22 Nexeon asserts here—the “sham” litigation exception. The *Noerr-Pennington* doctrine
23 does not protect a plaintiff who files objectively baseless claims in a concealed effort to

1 interfere with a competitor’s business. *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180,
2 1184 (9th Cir. 2005). To survive a motion to dismiss, the pleading must allege, among
3 other things, “that the suit is objectively baseless,” and is “merely an attempt to stifle
4 competition.” *Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056, 1063 (9th Cir.1998).

5 Nexeon has sufficiently pleaded in its counterclaims that Group14’s pre-suit
6 allegations are both objectively baseless and an attempt to stifle competition, and thus a
7 “sham.” See Countercls. ¶¶ 31–36 (detailing the independent methods by which Nexeon
8 developed the technology and clearing the technology’s use with Group14); see also *id.*
9 ¶ 49 (alleging subjective intent to interfere with Nexeon’s business). The Ninth Circuit
10 has held that “[w]hether something is a genuine effort . . . or a mere sham [for *Noerr–*
11 *Pennington* purposes], is a question of fact.” *Clipper Exxpress v. Rocky Mountain Motor*
12 *Tariff Bureau, Inc.*, 690 F.2d 1240, 1253 (9th Cir. 1982). “Thus, courts rarely award
13 *Noerr–Pennington* immunity at the motion to dismiss stage, where the Court must accept
14 as true the non-moving party’s well-pleaded allegations.” *Sonus Networks, Inc. v.*
15 *Inventergy, Inc.*, No. 15-0322, 2015 WL 4539814, at *2 (N.D. Cal. July 27, 2015); see
16 also *Netflix, Inc. v. Blockbuster, Inc.*, No. 06–02361, 2006 WL 2458717, at *7–8 (N.D.
17 Cal. Aug. 22, 2006) (denying Federal Rule of Civil Procedure 12(b)(6) motion brought
18 pursuant to *Noerr–Pennington* because “[i]f the above allegations [about objective
19 baselessness] are proven true, plaintiff may demonstrate the requisite abuse . . . to
20 succeed on a sham-litigation claim”). Group14’s motion as to the *Noerr-Pennington*
21 doctrine is DENIED.

1 **II. Motion to Dismiss**

2 Group14 moves to dismiss Nexeon’s counterclaims for declaratory judgment,¹
3 tortious interference, attempted or actual monopolization, and a violation of the CPA.
4 Although a pleading challenged by a Rule 12(b)(6) motion to dismiss need not provide
5 detailed factual allegations, it must offer “more than labels and conclusions” and contain
6 more than a “formulaic recitation of the elements of a cause of action.” *Bell Atl. Corp. v.*
7 *Twombly*, 550 U.S. 544, 555 (2007). The pleading must indicate more than mere
8 speculation of a right to relief. *Id.* When the pleading fails to adequately state a claim,
9 such deficiency should be “exposed at the point of minimum expenditure of time and
10 money by the parties and the court.” *Id.* at 558. The pleading may be lacking for one of
11 two reasons: (i) absence of a cognizable legal theory, or (ii) insufficient facts under a
12 cognizable legal claim. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th
13 Cir. 1984). In ruling on a motion to dismiss, the Court must assume the truth of the
14 allegations and draw all reasonable inferences in favor of the non-moving party. *Usher v.*
15 *City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). The question for the Court is
16 whether the facts in the counterclaims sufficiently state a “plausible” ground for relief.
17 *See Twombly*, 550 U.S. at 570. If the Court dismisses a counterclaim or portions thereof,

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20 ¹ Nexeon improperly pleads an action for declaratory judgment because declaratory judgment is a form of
21 relief, not a cause of action. *See Veridian Credit Union v. Eddie Bauer, LLC*, 295 F. Supp. 3d 1140, 1156
22 (W.D. Wash. 2017). The declaratory judgment claim also is duplicative of Nexeon’s other claims. *See*
23 *Segar v. Allstate Fire & Cas. Ins. Co.*, No. C21-1526, 2022 WL 102035, at *8 (W.D. Wash. Jan. 11,
2022). Group14’s motion to dismiss is GRANTED as it relates to Nexeon’s declaratory judgment
counterclaim (Count I), and this counterclaim is DISMISSED with prejudice.

1 it must consider whether to grant leave to amend. *See Lopez v. Smith*, 203 F.3d 1122,
2 1130 (9th Cir. 2000).

3 **A. Tortious Interference**

4 To establish tortious interference with a contractual relationship or business
5 expectancy, Nexeon must prove: (i) the existence of a valid contractual relationship or
6 business expectancy; (ii) Group14's knowledge of that relationship; (iii) an intentional
7 interference inducing or causing a breach or termination of the relationship or
8 expectancy; (iv) Group14's interference had an improper purpose or used an improper
9 means; and (v) resultant damage. *See Leingang v. Pierce County Med. Bureau, Inc.*, 131
10 Wn.2d 133, 157, 930 P.2d 288, 300 (1997). "Exercising in good faith one's legal interests
11 is not improper interference." *Id.*

12 As Nexeon's brief seems to recognize, Nexeon has failed to identify the third
13 parties involved in its contractual relationships. *Stuc-O-Flex Int'l, Inc. v. Low & Bonar,*
14 *Inc.*, No. 18-cv-01386, 2019 WL 4688803, at *6 (W.D. Wash. Sept. 26, 2019)
15 (explaining that a tortious interference claim "must [] fail" where claimant "does not
16 identify any specific customers or contracts that [the opposing party] purportedly
17 interfered with"); *see also* Resp. at 8 (docket no. 37). Nexeon promises to amend its
18 counterclaim to include additional factual content if given leave to do so. *Id.* Group14's
19 motion is therefore GRANTED, and Nexeon's counterclaim for tortious interference
20 (Count II) is DISMISSED without prejudice and with leave to amend.

1 **B. Actual or Attempted Monopolization**

2 To state a claim for actual monopolization, a party must allege (i) monopoly
3 power in the relevant markets; (ii) that such power was willfully acquired or maintained
4 through exclusionary conduct; and (iii) that the conduct caused antitrust injury. *Am. Pro.*
5 *Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Pro. Publ'ns, Inc.*, 108 F.3d
6 1147, 1151 (9th Cir. 1997). Here, Nexeon's counterclaim fails to fulfill the first element
7 of the test. Nexeon's only allegation that Group14 possesses monopoly power is the bare
8 recitation that Group14 "has monopoly power." Countercls. ¶ 61. Nexeon must plead
9 more than conclusory allegations to survive a motion to dismiss. Group14's motion as to
10 actual monopolization is GRANTED.

11 To state a claim for attempted monopolization, a party must allege "(1) specific
12 intent to control prices or destroy competition; (2) predatory or anticompetitive conduct
13 directed at accomplishing that purpose; (3) a dangerous probability of achieving
14 'monopoly power' and (4) causal antitrust injury." *Khalid v. Microsoft Corp.*, 409 F.
15 Supp. 3d 1023, 1032 (W.D. Wash. 2019) (quoting *Rebel Oil Co. v. Atl. Ritchfield Co.*, 51
16 F.3d 1421, 1432–33 (9th Cir. 1995)). According to the United States Supreme Court, "a
17 specific intent to monopolize" is an essential element of an attempted monopolization
18 claim. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). Accordingly, "[t]o
19 state a claim for . . . [an] attempt to monopolize, [a party] must set forth facts to support
20 the element of specific intent to monopolize." *Wuxi Multimedia, Ltd. v. Koninklijke*
21 *Philips Elecs., N.V.*, No. 04CV1136, 2006 WL 6667002, at *9 (S.D. Cal. Jan. 5, 2006).

1 Once again, Nexeon offers only conclusory allegations. To support the inference
2 for specific intent, Nexeon pleads only that Group14 “acted with specific intent to
3 eliminate Nexeon as a competitor.” Countercls. ¶ 63 (docket no. 28). That conclusory
4 allegation does not suffice, and Group14’s motion as to attempted monopolization is
5 GRANTED. Nexeon’s counterclaim for actual or attempted monopolization (Count IV)
6 is DISMISSED without prejudice and with leave to amend.

7 **C. CPA**

8 To establish a violation of the CPA, a private party must prove: (i) the defendant
9 engaged in an unfair or deceptive act or practice; (ii) such act or practice occurred within
10 in the conduct of a trade or business commerce; (iii) such act or practice affected the
11 public interest; (iv) the party suffered an injury to his or her business or property; and
12 (v) a causal relationship exists between the defendant’s act or practice and the party’s
13 injury. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778,
14 785–93, 719 P.2d 531 (1986). Whether conduct constitutes an unfair or deceptive trade
15 practice within the meaning of the CPA constitutes a question of law. *Robinson v. Avis*
16 *Rent A Car Sys., Inc.*, 106 Wn. App. 104, 114, 22 P.3d 818 (2001). To qualify, the
17 alleged act must have had the “capacity to deceive a substantial portion of the public.”
18 *Hangman Ridge*, 105 Wn.2d at 785. Group14 challenges the public interest element of
19 this claim.

1 Without the survival of the antitrust claim, Nexeon alleges no behavior that
2 conceivably could concern the public interest.² Nexeon offers no evidence that others
3 have been or will be injured in exactly the same fashion. *See Sloan v. Thompson*, 128
4 Wn. App. 776, 792, 115 P.3d 1009 (2005) (“[I]t is the likelihood that additional plaintiffs
5 have been or will be injured in exactly the same that changes the factual pattern from a
6 private dispute to one that affects the public interest.” (quoting *Hangman Ridge*, 105
7 Wn.2d at 790–91)). Group14’s motion is GRANTED as to its counterclaim under the
8 CPA (Count III), and the counterclaim is DISMISSED without prejudice and with leave
9 to amend.

10 **III. Motion to Strike Affirmative Defenses**

11 Group14 moves to strike six of Nexeon’s affirmative defenses: failure to state a
12 claim, independent development, statute of limitations, standing, laches, and unclean
13 hands. Group14 also asks the Court to strike Nexeon’s reservation of rights language.
14 Under Rule 12(f), a district court may strike from a pleading an insufficient defense to
15 “avoid the expenditure of time and money that must arise from litigating spurious issues
16” *Sidney–Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). A defense

18 ² Nexeon’s reliance on *Seven Gables Corp. v. Sterling Recreation Organization Co.*, No. C84-1057, 1987
19 WL 56622 (W.D. Wash. June 25, 1987), is unavailing. *Seven Gables* espoused, as Nexeon does here, that
20 the CPA does not require that the alleged conduct had the capacity to deceive a substantial portion of the
21 public. *Id.* at *10. *Husky International Trucks v. Navistar, Inc.*, No. 10-cv-5409, 2010 WL 4053082
22 (W.D. Wash. Oct. 14, 2010), specifically rejected that proposition. There, the *Husky* Court reviewed
23 “Washington Supreme Court decisions . . . Ninth Circuit [law and] . . . a plain reading of the statute” to
conclude that “*Seven Gables* is incorrect and [] the ‘substantial portion of the public test’ applies to all
claims brought under [RCW] 19.86.020.” *Id.* at *5. This Court agrees with the *Husky* Court—the
language of the statute, and the body of Washington case law, necessitates a public interest hook in all
CPA cases.

1 is insufficient unless it gives “fair notice of the defense . . . supported by at least some
2 facts indicating the grounds on which the defense is based[.]” *Id.*

3 Nexeon’s “failure to state a claim” affirmative defense is improper and must be
4 STRICKEN with prejudice. *See Tollefson v. Aurora Fin. Grp., Inc.*, No. 20-cv-0297,
5 2021 WL 462689, at *3 (W.D. Wash. Feb. 9, 2021). Nexeon’s “statute of limitations”
6 affirmative defense does not allege “which statute(s) of limitations it is relying upon,
7 what cause(s) of action are barred, the date after which such bar became effective, and
8 some factual allegations concerning why the limitations period has expired.” *Id.* Nexeon
9 might be able to correct this error on amendment, but its statute of limitations affirmative
10 defense is not well pleaded at this time and is STRICKEN without prejudice. Regarding
11 Nexeon’s “standing” affirmative defense, “an alleged lack of standing cannot be pled as
12 an affirmative defense.” *Johnson v. Providence Health & Servs.*, No. 17-cv-1779, 2018
13 WL 2289331, at *1 (W.D. Wash. May 18, 2018) (granting motion to strike) (citing
14 *Hernandez v. Cnty. of Monterey*, 306 F.R.D. 279, 286 (N.D. Cal. 2015)). Nexeon’s
15 “standing” affirmative defense is STRICKEN with prejudice. Otherwise, Nexeon
16 properly pleads the affirmative defenses at issue (independent development, laches, and
17 unclean hands) and thus puts Group14 on notice. As such, Group14’s motion as to
18 Nexeon’s affirmative defenses is otherwise DENIED.

19 **Conclusion**

20 For the foregoing reasons, the Court ORDERS:

- 21 (1) Group14’s motion as to the *Noerr-Pennington* doctrine is DENIED.
- 22 (2) Group14’s motion to dismiss, docket no. 34, is GRANTED as follows:

1 a. The motion is GRANTED as to Group14's counterclaim for
2 declaratory judgment (Count I), and Count I is DISMISSED with prejudice; and

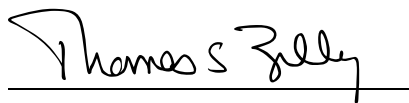
3 b. Group14's motion as to tortious interference (Count II), the CPA
4 (Count III), and actual or attempted monopolization (Count IV) is GRANTED,
5 and these counterclaims are DISMISSED without prejudice and with leave to
6 amend.

7 (3) Group14's motion to strike Nexeon's affirmative defenses is GRANTED as
8 to "failure to state a claim" and "standing," and these affirmative defenses are
9 STRICKEN with prejudice. The motion is further GRANTED as to "statute of
10 limitations," and that affirmative defense is STRICKEN without prejudice and with leave
11 to amend. Group14's motion is otherwise DENIED.

12 (4) Nexeon shall file any amended counterclaims within fourteen (14) days of
13 this Order. Group14 shall file any responsive pleadings or motions within fourteen (14)
14 days thereafter.

15 (5) The Clerk is directed to send a copy of this Order to all counsel of record.
16 IT IS SO ORDERED.

17 Dated this 23rd day of May, 2023.

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20 Thomas S. Zilly
21 United States District Judge
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