

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION**

**LUXPRO CORPORATION, a Taiwanese)
corporation,)**

Plaintiff,)

Civil Action No. 4:08cv04092-HFB

vs.)

**APPLE, INC. f/k/a Apple Computer,)
Inc.,)**

Defendant.)

**LUXPRO CORPORATION'S RESPONSE TO APPLE INC.'S
SECOND MOTION TO DISMISS**

TABLE OF CONTENTS

Table of Contents	i-iv
Table of Authorities.....	v-x
I. Summary of Response.....	1
II. Brief Procedural History.....	2
III. Brief Factual History.....	4
A. Apple’s Domination of the MP3 Player Market is Achieved Illegally.....	4
B. Luxpro Developed Superior Products That Found Market Acceptance.....	6
C. Apple Obtained an <i>Ex Parte</i> Injunction Against Luxpro Based on Purported Intellectual Property that Apple Did Not Identify.....	7
D. Apple Continued Its Sham Litigation in Taiwan and Threatened Luxpro’s Customers and Partners.....	8
IV. Argument and Authorities.....	10
A. Since the Court Takes Luxpro’s Factual Allegations as True, Luxpro’s Claims are Clearly Plausible Under the Federal Pleading Standard.....	10
B. Apple’s Analysis Of Luxpro’s Claims Under Federal Rule 8 Invites Error By Applying an Incorrect Standard Of Review.....	11
C. Luxpro’s Claims For Tortious Interference Meets <i>Twombly</i> ’s Plausibility Pleading Standard Because Luxpro’s SAC Describes Dozens Of Relationships, Contracts, Instances of Interference, And Damages.....	12
1. The Court Previously Held that Luxpro has Plausible Tortious Interference Claims.....	12
2. Luxpro’s Claims for Tortious Interference are Plausible under either Arkansas or California Law.....	13
a. Luxpro Adequately Pleads an Economic Relationship with its Customers and Partners.....	14
b. Luxpro Adequately Pleads Apple’s Interference with Luxpro’s Contracts, Relationships, and Prospective Economic Advantages.....	15

c.	Luxpro Adequately Pleads Actual Disruption as a Result of Apple’s Illegal Misconduct.....	16
d.	Luxpro Adequately Pleads that Apple had Knowledge of Its Existing Business Relationships and Its Prospective Business Relationships.....	17
e.	Luxpro Adequately Describes the Damages Caused by Apple’s Interference With Luxpro’s Contracts, Relationships and Prospective Economic Advantages.....	17
f.	Arkansas Law Does Not Require Luxpro to Plead Independent Actionable Conduct in Order to State a Claim for Tortious Interference.....	18
g.	Since Luxpro’s Complaint Adequately Pleads that Apple Violated Both Federal and State Law, it Satisfies California’s Requirement of Independent Actionable Conduct to Recover for Tortious interference.....	20
D.	The Second Amended Complaint Adequately Pleads a Cause of Action for a Violation of § 43(a) Of The Lanham Act, 15 USCA § 1125(a).....	20
1.	Apple’s Threats of Boycott and False Statements about Luxpro’s Product Constitute Commercial Promotion of Apple's Products ...	21
2.	Apple’s Communications Influenced Luxpro’s Business Partners.....	24
3.	Rule 8(a), Not Rule 9(b), Applies to Luxpro’s Claims.....	26
E.	Luxpro’s Claim Under CAL. BUS. & PROF. CODE § 17200 Satisfies <i>Twombly</i> ’s Plausibility Pleading Standard Because Luxpro’s SAC satisfies the Unfair Competition Statute’s Three Distinct Prongs and Seeks Remedies Available Under The Statute.....	30
1.	Since Luxpro’s SAC Adequately Pleads Facts that Demonstrate Apple Violated Federal and State law, It Satisfies the “Unlawful” Prong of §17200.....	31
2.	Apple’s Incipient Acts also Establish Luxpro’s Claim Under § 17200’s “Unfair” Prong as Plausible.....	32

3.	Since Apple’s Threats Deceived Luxpro’s Customers and Partners, Luxpro has a Plausible Claim Under the “Fraudulent” Prong of § 17200.....	33
4.	Luxpro’s Requested Remedy for § 17200 Violations is Consistent with the Unfair Competition Statute’s Purpose Because It Restores to Luxpro Money Apple Wrongfully Acquired.....	35
F.	Luxpro’s Commercial Disparagement Claim Satisfies <i>Twombly’s</i> Plausibility Pleading Standard.....	36
1.	Apple’s Admissions Show Luxpro has Pled a Plausible Claim for Commercial Disparagement.....	36
2.	Luxpro also Identifies the Type of Damages Caused by Apple’s Disparagement.....	38
G.	The <i>Noerr-Pennington</i> Doctrine is Inapplicable to Luxpro’s Claims.....	38
1.	Due to the Fact-Intensive Nature of Luxpro’s Claims and Apple’s Defenses, None of Luxpro’s Claims Should be Dismissed at the Pleadings Stage; No Discovery Has Been Conducted, so Summary Judgment Analysis is Not Appropriate.....	41
2.	The <i>Noerr-Pennington</i> Doctrine Applies Only to Sherman Act Antitrust Claims; None of Luxpro’s Claims are Subject to <i>Noerr Pennington</i> Immunity.....	42
3.	Apple’s Interference With Luxpro’s Current and Prospective Customers, Suppliers, and Partners is Not Protected Under <i>Noerr-Pennington</i> Because it is Not “Petitioning Conduct.”.....	44
4.	<i>Noerr-Pennington</i> is Inapplicable Because Apple’s Conduct Does Not Relate to the Protection of Any Intellectual Property Owned by Apple.....	47
5.	Actions Undertaken by Apple in Foreign Countries are Not Protected by <i>Noerr Pennington</i>	48
6.	This Court Has Already Ruled That the Majority of Luxpro’s Claims Can Proceed Even if <i>Noerr Pennington</i> is Considered.....	49
7.	In the Unlikely Event That the Court Considers <i>Noerr-Pennington</i> —Despite Controlling Eighth Circuit Precedent to the Contrary—both the “Sham Litigation” and “Pattern Exception” Apply to Preclude Apple’s Attempt to Assert the Defense.....	50

a.	The “Pattern Exception” Applies to Luxpro’s Claims--Thereby Precluding Application of a Strict <i>Noerr Pennington</i> Analysis.....	51
b.	Apple’s Legal Proceedings Were Objectively Baseless, and Therefore, Luxpro Can Establish That the “Sham Litigation” Exception Applies.....	57
c.	All of Apple’s Continued Legal Proceedings and Communication with Luxpro Partners and Customers Following the Reversal of the Preliminary Injunction in Taiwan Are Objectively Baseless and Qualify as “Sham Litigation.”.....	59
V.	Conclusion.....	63

TABLE OF AUTHORITIES

Page

CASES

<i>Abels v. Farmers Commodity Corp.</i> , 259 F.3d 910 (8th Cir. 2001).....	28
<i>Accord Commercial Prop. Inv., Inc. v. Quality Inns Int'l, Inc.</i> , 61 F.3d 639 (8th Cir. 1995).....	29
<i>Aircapital Cablevision, Inc. v. Starlink Commc'ns Group, Inc.</i> , 634 F.Supp. 316 (D.Kan. 1986).....	55, 57
<i>Alexander v. Nat'l Farmers Org.</i> , 687 F.2d 1173 (8th Cir. 1982).....	54, 55
<i>Animal Fair Inc. v. Amfesco Indus. Inc.</i> , 620 F.Supp. 175 (D. Minn. 1985).....	26
<i>Ashcroft v. Iqbal</i> , 556 U.S. ___, 129 S.Ct. 1937 (2009).....	11, 15, 17, 30, 37
<i>Aten v. Scottsdale Ins. Co.</i> , 511 F.3d 818 (8th Cir. 2008).....	11
<i>Axcan Scandipharm, Inc. v. Ethex Corp.</i> , 585 F.Supp.2d 1067 (D. Minn. 2007).....	27, 29
<i>Bank of the West v. Superior Court</i> , 2 Cal. 4th 1254, 833 P.2d 545, 553 (Cal. 1992).....	31
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).....	1, 3, 11, 12, 13, 15, 17, 30, 36, 37
<i>Bill Johnson's Restaurants, Inc. v. NLRB</i> , 461 U.S. 731 (1983).....	45
<i>Bolger v. Youngs Drug Prods. Corp.</i> , 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983).....	21, 22
<i>Brosnan v. Tradeline Solutions, Inc.</i> , No. C-08-0694 JCS, 2009 WL 1604572 (N.D. Cal. June 5, 2009).....	28
<i>Buck's, Inc. v. Buc-ee's, Ltd.</i> , No. 8:08CV519, 2009 WL 1839007 (D. Neb. Jun 25, 2009).....	43
<i>Bulkferts, Inc. v. Salatin, Inc.</i> , 574 F.Supp. 6 (S.D.N.Y. 1983).....	48
<i>California Motor Transport Co. v. Trucking Unlimited</i> , 404 U.S. 508 (1972).....	44, 53

<i>Cardtoons, L.C. v. Major League Baseball Players Ass'n</i> , 208 F.3d 885 (10th Cir. 2000).....	46, 47, 58
<i>Carpenter Technology v. Allegheny Technologies</i> , 646 F.Supp.2d 726 (E.D. Pa. 2006).....	23
<i>Cel-Tech Comms., Inc. v. Los Angeles Cellular Tel. Co.</i> , 20 Cal.4 th 163, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999).	32
<i>City of Columbia v. Omni Outdoor Advertising</i> , 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991).....	52
<i>City of Lafayette v. Louisiana Power & Light Co.</i> , 435 U.S. 389 (1978).....	45
<i>Coastal States Marketing, Inc. v. Hunt</i> , 694 F.3d 1358 (5th Cir. 1983).....	45, 46
<i>Colgan v. Leatherman Tool Group., Inc.</i> , 135 Cal.App. 4th 663 (Cal.Ct.App. 2006).....	35
<i>Commercial Prop. Inv., Inc. v. Quality Inns Int'l, Inc.</i> , 61 F.3d 639 (8th Cir. 1995).....	29
<i>Doe ex rel. Doe v. School Dist. of City of Norfolk</i> , 340 F.3d 605 (8th Cir. 2003).....	12, 37
<i>Downeast Ventures, Ltd. v. Washington County</i> , 2005 WL 3409483 (D. Me. 2005).....	41
<i>Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.</i> , 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961).....	43, 44, 45, 46
<i>Entergy Arkansas, Inc. v. Nebraska</i> , 358 F.2d 528 (8th Cir. 2004).....	42, 43, 46
<i>Futuristic Fences, Inc. v. Illusion Fence Corp.</i> , 558 F.Supp.2d 1270 (S.D. Fla. 2008).....	23
<i>Gordon & Breach Sci. Publishers S.A. v. Am Inst. of Physics</i> , 859 F.Supp.1521 (S.D.N.Y. 1994).....	21
<i>Great Am. Indem .Co. v. Brown</i> , 307 F.2d 306 (5th Cir. 1962).....	38
<i>Great Plains Trust Co v. Union Pac. R. Co.</i> , 492 F.3d 986 (8th Cir. 2007).....	29
<i>Grillo v. John Alden Life Ins. Co.</i> , 939 F.Supp. 685 (D. Minn. 1996).....	41
<i>Guessous v. Chrome Hearts, LLC</i> , 179 Cal.App. 4th 1177, 102 Cal.Rptr.3d 214, (Cal.App. 2 Dist. 2009).....	48

<i>Healthpoint, Ltd. v. Allen Pharmaceutical, LLC</i> , No. SA-07-CA-0526-XR, 2008 WL 728333 (W.D. Tex. March 18, 2008).....	27
<i>Huggins v. FedEx Ground Package System, Inc.</i> , 592 F.3d 853 (8th Cir. 2010).....	12
<i>In re DDAVP Direct Purchaser Antitrust Litigation</i> , 585 F.3d 677 (2d Cir. 2009).....	54
<i>In re NationsMart Corp. Securities Litigation</i> , 130 F.2d 309 (8th Cir. 1997).....	42
<i>In re Terazosin Hydrochloride Antitrust Litigation</i> , 335 F.Supp.2d 1336 (S.D.Fla. 2004).....	54
<i>Interface Sec. Systems, L.L.C. v. May</i> , No. 4:07CV369 HEA, 2007 WL 1300394 (E.D. Mo. May 2, 2007).....	27
<i>International Technologies Consultants, Inc. v. Steward</i> , 554 F.Supp.2d 750 (E.D. Mich. 2008).....	26
<i>International Motor Contest Assoc., Inc. v. Staley</i> , 432 F. Supp 2d 650 (N. D. Iowa 2006).....	61
<i>John P. Villano Inc. v. CBS, Inc.</i> , 176 F.R.D. 130 (S.D.N.Y. 1997).....	27
<i>K.C. Properties of N.W. Arkansas, Inc. v. Lowell Inv. Partners, LLC</i> , 373 Ark. 14, 280 S.W.3d 1 (Ark. 2008).....	13
<i>Korea Supply Co. v. Lockheed Martin Corp.</i> , 29 Cal.4th 1134, 131 Cal.Rptr.2d 29, 63 P.3d 937 (2003).....	20, 26, 35
<i>Laitram Mach v. Carnitech A/S</i> , 901 F.Supp. 1155 (E.D. La. 1995).....	61
<i>Laker Airways Ltd. v. Pan Am World Airways, Inc.</i> , 604 F. Supp. 280 (D.D.C. 1984).....	49
<i>Livingston Downs Racing Ass'n, Inc. v. Jefferson Downs Corp.</i> , 192 F.Supp.2d 519 (M.D. La. 2001).....	54
<i>Logan Graphic Products, Inc. v. Textus USA, Inc.</i> , No. 02C-1823, 2002 WL 31507174 (N.D. Ill. Nov. 8, 2002).....	24
<i>Luxpro Corp. v. Apple, Inc.</i> . 658 F. Supp. 2d 921 (W.D. Ark. 2009).....	1, 11, 13, 30, 49, 50
<i>M. Eagles Tool Warehouse, Inc. v. Fisher Tooling Co., Inc.</i> , No. 97-1568-(JAG), 2007 WL 979854 (D. N.J. March 30, 2007).....	23, 24
<i>Mason v. Wal-Mart Stores, Inc.</i> , 333 Ark. 3, 11, 969 S.W.2d 160, 164 (1998).....	18

<i>Max Daetwyler Corp. v. Input Graphics, Inc.</i> , 608 F.Supp. 1549 (E.D. Pa. 1985).....	28
<i>McGuire Oil Co. v. Mapco, Inc.</i> , 958 F.2d 1552 (11th Cir.1992).....	45, 46
<i>Minneapolis Taxi Owners Coalition, Inc. v. City of Minneapolis</i> , 572 F.3d 502 (8th Cir. 2009).....	10, 11
<i>Mobius Mgmt. Systems, Inc. v. Fourth Dimension Software, Inc.</i> , 880 F.Supp. 1005 (S.D.N.Y 1994).....	23
<i>NAACP v. Claiborne Hardware</i> , 458 U.S. 886 (1982).....	46
<i>NationsMart Corp. Securities Litigation</i> , 130 F.3d 309 (8th Cir. 1997).....	42
<i>Occidental Petroleum Corp. v. Buttes Gas & Oil Co.</i> , 331 F. Supp. 92 (C.D.Cal 1971), <i>aff'd per curiam on other grounds</i> , 461 F.2d 1261 (9th Cir.), <i>cert. denied</i> , 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972).....	49
<i>Olcott v. Delawaqre Flood Co.</i> , 76 F.3d 1538 (10th Cir. 1996).....	41
<i>Omni Resource Dev. Corp. v. Conoco, Inc.</i> , 739 F.2d 1412 (9th Cir. 1984).....	62
<i>Pastoria v. Nationwide Ins.</i> , 112 Cal.App.4th 1490 (Cal. Ct. App. 2003).....	31
<i>Patrick v. Henderson</i> , 255 F.3d 914 (8th Cir. 2001).....	11
<i>Pestube Sys., Inc. v. HomeTeam Pest Def., LLC</i> , No. CIV-05-2832-PHX-MHM, 2006 WL 1441014 (D. Ariz. May 24, 2006).....	28
<i>Podolsky v. First Healthcare Corp.</i> , 50 Cal.App.4th 632 (Cal.Ct.App. 1996).....	34
<i>Porous Media Corp. v. Pall Corp.</i> , 173 F.3d 1109 (8th Cir. 1999).....	22
<i>Primetime 24 Joint Venture v. National Broadcasting Co., Inc.</i> , 219 F.3d 92 (2nd Cir. 2000).....	54
<i>Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.</i> , 508 U.S. 49, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993).....	43, 50, 51, 53
<i>Reeves v. Hanlon</i> , 33 Cal.4th 1140, 95 P.3d 513 (Cal. 2004).....	14
<i>Rivera-Carrion v. U. S.</i> , 2009 WL 453460 (D. Puerto Rico 2009).....	41
<i>Schnall v. Hertz Corp.</i> , 78 Cal.App.4th 1144 (Cal. Ct. App. 2000).....	34

<i>Soilworks, LLC v Midwest Industrial Supply, Inc.</i> , No. 06-2141-PHX-DGC, 2007 WL 704511 (D. Ariz. 2007).....	27
<i>Swierkiewicz v. Sorema, N.A.</i> , 534 U.S. 506, 122 S.Ct. 992 (2002)	12, 37
<i>Theme Promotions Inc., v. News America Marketing FSI</i> , 546 F. 3d 991 (9th Cir 2008).....	62
<i>Total Renal Care, Inc. v. Western Nephrology and Metabolic Bone Disease, P.C.</i> , 2009 WL 2596493 (D.Colo. 2009).....	54
<i>U. S. Power Inc., v. Seimens Power Transmission & Distribution, L.L.C.</i> No. 05-525 (JRT/FLN), 2006 WL 1876686 (D. Minn. July 5, 2006).....	49, 58
<i>USS-POSCO Industries v. Contra Costa County Bldg. & Const. Trades</i> , 31 F.3d 800 (9th Cir. 1994).....	53, 54
<i>United Indus. v. Clorox Co.</i> , 140 F.3d 1175 (8th Cir. 1998).....	21
<i>United Mine Workers of Am. v. Pennington</i> , 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).....	43, 44
<i>Venetian Casino Resort, L.L.C. v. N.L.R.B.</i> , 484 F.3d 601 (D.D.C. 2007).....	61
<i>Wellnx Life Sciences Inc. v. Iovate Health Sciences Research Inc.</i> , 516 F.Supp.2d 270 (S.D.N.Y. 2007).....	27
<i>Wiener v. Dannon Co., Inc.</i> , 255 F.R.D. 658 (C.D. Cal. 2009).....	35
<i>Zinus Inc. v. Simmons Bedding Co.</i> , No. C 07-3012 PVT, 2007 WL 4287391 (N.D. Cal. Dec. 06, 2007).....	23

STATUTES AND RULES

15 U.S.C. § 1, <i>et seq.</i> (Sherman Act).....	42, 44, 45, 46
15 U.S.C. § 1125 (a) (Lanham Act).....	19, 20, 21, 26, 27, 28, 31
28 U.S.C. § 1404.....	2
FED. R. CIV. P. 8, 8 (a).....	11, 12, 15, 29, 30, 37, 42
Fed. R. Civ. P. 8(a)(2).....	21, 26
Fed. R. Civ. P. 9, 9(b)	27, 28, 29

FED R. CIV. P. 12(b)(6)	2, 43
Cal. Bus. & Prof. Code. § 17200, <i>et seq.</i>	2, 19, 30, 31, 32, 33, 34, 35

TREATISES AND REFERENCES

5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1215 (3D 2004)	12, 37
FEDERAL PRACTICE & PROCEDURE: CIV. 2D § 1297 (3RD ED. 2007)	29, 30
FEDERAL UNFAIR COMPETITION: LANHAM ACT 43(A) §6:3	27
RESTATEMENT (SECOND) OF TORTS § 767, PP. 30-32 (1977)	19, 36
WEBSTER'S NEW WORLD COLLEGE DICTIONARY 682 (3D. ED. 1986)	32

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**LUXPRO CORPORATION’S RESPONSE TO APPLE INC.’S
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I. SUMMARY OF THE RESPONSE

Apple, Inc.’s (“Apple”) second attempt to dismiss all of Plaintiff Luxpro Corporation’s (“Luxpro”) claims ignores this Court’s decision on Apple’s first motion to dismiss, attempts to improperly sidestep Luxpro’s legitimate claims, and misapplies the applicable law and facts. This Court previously ruled against Apple’s two principal arguments; Apple now, improperly, attempts to re-litigate those issues in an effort to further delay this case. First, this Court held that Luxpro’s claims must be plausible.¹ Luxpro’s claims, as re-pled in the Second Amended Complaint (“SAC”),² meet *Twombly*’s plausibility standard. Second, this Court did not rule that Apple’s illegal conduct was protected under the *Noerr-Pennington* doctrine.³ Unfortunately, Apple

¹ *Luxpro Corp. v. Apple, Inc.*, 658 F.Supp.2d 921, 926 (W.D.Ark. 2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974 (2007)).

² Dkt. No. 62

³ *Luxpro Corp.*, 658 F.Supp.2d at 929.

continues to waste the parties' time (as well as this Court's) with further dilatory motions, despite having been previously turned away, contending that *Noerr-Pennington* protects its illegal conduct. Because the Court has already addressed Apple's arguments, Apple's motion to dismiss should be denied.

II. BRIEF PROCEDURAL HISTORY

Luxpro's Original Complaint was filed on October 14, 2008.⁴ Following the filing of its First Amended Complaint, Apple filed its first motion to dismiss. Luxpro's First Amended Complaint thoroughly detailed Apple's illegal scheme to destroy Luxpro, as well as the damages caused by Apple's various illegal acts.⁵ Specifically, Luxpro's First Amended Complaint alleged facts supporting causes of action for tortious interference with a contract, tortious interference with contractual/prospective advantage, attempted common law monopolization, violations of CAL. BUS. & PROF. CODE § 17200, and commercial disparagement.⁶ In response, Apple filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) and a motion to transfer venue under 28 USCA § 1404.⁷ Luxpro responded to both motions⁸ and Apple filed reply briefs.⁹

The Court held a hearing on both of Apple's motions and issued a Memorandum Opinion and Orders on Apple's first motion to dismiss and motion to transfer venue. The Court granted-in-part and denied-in-part Apple's motion to dismiss and denied Apple's

⁴ Dkt. No. 1.

⁵ Dkt. No. 6.

⁶ *Id.*

⁷ Dkt. Nos. 23-26.

⁸ Dkt. Nos. 33-34.

⁹ Dkt. No. 37-38.

motion to transfer venue.¹⁰ The Court allowed Luxpro leave to re-plead and to clarify some of the remaining claims.¹¹

The Court denied Apple's motion to transfer venue.¹² Seeking to overturn this Court's denial of its motion, Apple sought the extraordinary remedy of filing a petition for writ of mandamus in the United States Court of Appeals for the Eighth Circuit. In its petition, Apple accuses this Court of abusing its discretion by refusing to transfer this case to the Northern District of California.¹³ In addition, Apple's venue briefing contains multiple material misstatements of the record and of the law in what can only be described as a desperate attempt to have a judge and jury in California, rather than Arkansas, hear this case.

Luxpro filed its motion for leave to file a second amended complaint, which included substantial briefing on the pleading requirements in federal court, explaining how the SAC satisfied the "plausibility" standard under *Twombly* for each of the causes of action alleged.¹⁴ Apple failed to timely respond (thus waiving any objection to the contents of the motion for leave), and the Court granted Luxpro's motion.¹⁵ Luxpro then filed its SAC.¹⁶ Apple followed with its second motion to dismiss, which, inexplicably, contains argument that relates to Luxpro's claims that this Court has already deemed to be well-pled, in addition to arguing points that Apple waived by failing to file a response to Luxpro's motion for leave.¹⁷

¹⁰ Dkt. No. 48-50.

¹¹ Dkt. No. 48-49.

¹² Dkt. No. 50.

¹³ Dkt. No. 57.

¹⁴ Dkt. No. 59.

¹⁵ Dkt. No. 61.

¹⁶ Dkt. No. 62.

¹⁷ Dkt. 66.

Apple's motive is transparent; it seeks delay in the hopes that a small, foreign company that lacks the resources of an industry giant like Apple will not be able to withstand a long, protracted legal battle. In fact, Apple's delay tactics here are simply an extension of the illegal tactics that it used in Taiwan against Luxpro to improperly extend baseless legal proceedings for several years. This second motion to dismiss is merely more evidence of Apple's tactics. First, Apple filed an extraordinary - and baseless - writ of mandamus following this Court's denial of its motion to transfer venue, which was well-grounded on Eighth Circuit law. Despite that, Apple argued to the Eighth Circuit that this Court abused its discretion in denying its motion to transfer venue. Next, instead of conferring in good faith and complying with the federal rules, Apple forced Luxpro to file a motion for entry of a Rule 16 scheduling order because it refused to hold a Rule 26(f) conference, which would start discovery in a case that has been pending for approximately 17 months.¹⁸ Now, Apple regurgitates *Noerr-Pennington* and other arguments to Luxpro's SAC that this Court already decided in Luxpro's favor. The inescapable conclusion must be that Apple takes every opportunity to slow down this litigation, which at this point, is no surprise to Luxpro.

III. BRIEF FACTUAL HISTORY

A. Apple's Domination of The MP3 Player Market is Achieved Illegally.

Apple's rise to fame in the MP3 player market is well-documented, although littered with various forms of illegal conduct that significantly assisted it in creating a monopoly.¹⁹ Apple's targeting of Luxpro is merely more evidence of Apple's sharp, illicit business tactics. Luxpro's SAC provides extensive background information

¹⁸ Dkt. 65.

¹⁹ See e.g., Dkt. No. 33 at 6-7 (footnotes 19 and 20); Dkt. No. 62 at ¶26.

regarding Apple's entrance into and domination of the MP3 player and digital music markets, which Luxpro specifically incorporates herein.²⁰ It also explains Apple's illegal practices designed to improperly stem competition in this burgeoning market.²¹ Small competitors to Apple, like Luxpro, gained market share as the MP3 player market developed. So, Apple turned its attention to these smaller competitors to prevent them from acquiring market share.²² Apple's motive is obvious; additional competition, especially from lower-cost manufacturers like Luxpro, would force Apple to reduce the cost of its over-priced products. Apple's ability to maintain inflated pricing for its products has led to the outsized gains in its market share, stock price, and bottom line. In order to maintain higher prices, Apple engaged in various illegal schemes that stymied competition.

For example, Apple implemented the iTunes Store and tied all purchases of iTunes music to the iPod by precluding purchasers of iTunes music from playing songs on other MP3 players.²³ Apple intended iTunes to work in tandem with the iPod and to only allow its music for sale on the iPod. However, Apple experienced more difficulty than expected in negotiating deals with record companies for their music. These negotiations delayed Apple's new product rollouts. Additionally, these negotiations forced Apple to invent various nefarious schemes to delay competitors, like Luxpro, entry to the MP3 player market, which further stymied competition (especially when coupled with the anticompetitive effects of limiting the playback of songs purchased on iTunes to

²⁰ Dkt. No. 62 at ¶¶ 8-20.

²¹ *Id.* at ¶¶ 21-26.

²² *Id.* at ¶ 20.

²³ *Id.* at ¶¶ 9-26.

Apple's iPod products). Once Apple secured agreements with record companies, it launched new products.²⁴

In addition, Apple's failed attempt to put another small MP3 competitor out of business by initiating substantial patent litigation against it, only to end up *paying* that competitor—Creative Technology—\$100M is further evidence of Apple's course of conduct during the critical time period when the MP3 player market was developing and evolving.²⁵ Moreover, as detailed more thoroughly in the SAC, Apple intentionally manipulated its software on the iPod so that competitors to Apple's iTunes music store could not obtain customers that owned iPods.²⁶

The foregoing are merely examples of the manner in which Apple achieved its monopoly status in the MP3 player market and is relevant to the case at bar given that Apple's illegal tactics against Luxpro were simply another step in the scheme to maintain inflated prices on its products and stamp out competition until a monopoly was achieved.

B. Luxpro Developed Superior Products That Found Market Acceptance.

Luxpro has been developing consumer electronics technology since 2002.²⁷ In addition to attending trade shows around the world, Luxpro was marketing and developing MP3 player products in the years prior to Apple's launch of the Shuffle.²⁸ Consumers could use Luxpro's MP3 players to listen to digital music, but also to listen to FM radio and to record music. Additionally, Luxpro's products contained language learning functions, OLED display monitors, and voice positioning systems.²⁹ Although

²⁴ *Id.* at ¶¶ 21-26.

²⁵ *Id.* at ¶ 21.

²⁶ *Id.* at ¶¶ 22-25.

²⁷ *See e.g.*, <http://www.luxpro.com.tw/English/Office/Office02.html>

²⁸ *Id.*

²⁹ Dkt. No. 62 at ¶¶ 27-28.

Luxpro lacked the market power of Apple, the world-wide MP3 player market accepted Luxpro's popular products.³⁰ In addition to the extensive distribution agreements achieved by Luxpro throughout Asia, Luxpro received significant orders from North American retailers.³¹ Luxpro also received significant positive feedback from its customers and retailers regarding the superiority of its products compared to Apple's.³² The products' successes allowed Luxpro to plan an initial public offering on Taiwan's stock exchange and increased its glowing reputation in the MP3 player market.³³

C. Apple Obtained An *Ex Parte* Injunction Against Luxpro Based On Purported Intellectual Property That Apple Did Not Identify.

The SAC more specifically describes Apple targeting Luxpro and its functionally superior products for elimination.³⁴ Apple's strategy began, but did not end, with the scheme of sham litigation disparaging Luxpro and its products. Apple obtained an *ex parte* injunction in Germany that stopped Luxpro from producing a prototype product called the Super Shuffle. Apple obtained this *ex parte* injunction absent any proof of a registered patent, trademark or copyright that Luxpro had violated claiming, somehow, that the term "Shuffle" was being improperly used by Luxpro. Notably, the injunction applied to only one of Luxpro's MP3 products—the Super Shuffle—which was nothing more than a prototype. Although Luxpro did not agree with the ruling, given its finite resources, Luxpro complied with the injunction. To end the dispute, Luxpro changed the name and the appearance of this product.³⁵

³⁰ *Id.* at ¶¶ 29-34.

³¹ *Id.* at ¶¶ 6-7, 31-34.

³² *Id.* at ¶¶ 27-28.

³³ *Id.* at ¶¶ 35-36.

³⁴ *Id.* at ¶¶ 37-63.

³⁵ *Id.* at ¶¶ 37-38.

D. Apple Continued Its Sham Litigation in Taiwan And Threatened Luxpro's Customers And Partners.

Not satisfied that it had won the “Shuffle” issue, Apple then took the same meritless claims of “protecting its intellectual property” to court in Taiwan. In another clearly one-sided presentation, Apple obtained a preliminary injunction against *all* of Luxpro's MP3 product lines. Again without producing a single registered patent, trademark or copyright in Taiwan or in the United States, Apple tried to destroy Luxpro and its products.³⁶ Indeed, Apple continued this illegal campaign against Luxpro despite the fact that Luxpro had agreed to comply with the German injunction and change the name and appearance of its proto-type product. Apple's lawsuit in Taiwan actually attempted to broaden its reach and cover products that are *clearly* different than Apple's iPod. For example, the EZ Tangent MP3 product manufactured by Luxpro that Apple sought to enjoin has an LED screen, different locations for the touchpad that controls the player, different shapes for the touchpad that controls the player, and has emblazoned on the front of the device the brand “LUXPRO” in a clear, distinct form.

Again, without citing a single piece of intellectual property (no patent, no copyright, and no trademark), Apple sought to enjoin the sale of products that, apparently, have a slim, rectangular design. This argument—apparently, as Luxpro learned for the first time from Apple's lawyer at the hearing on the first motion to dismiss this case,³⁷ a “trade dress infringement” claim—is objectively baseless. Apple has not, and cannot, identify or claim to have invented this design. They cite to no patent, no trademark, no copyright, and no evidence providing the conception of the claimed design and shape of the iPod Shuffle product. On the contrary, there were *several* MP3 players

³⁶ *Id.* at ¶ 39-46.

³⁷ Dkt. 59-2, at Page 10

with the design that Apple claims to have invented available on the market *prior to* Apple's launch of the Shuffle in 2005 and, in addition, several MP3 players with the same design were launched in the following years, including in 2005, 2006, 2007, 2008, and 2009. Tellingly, Apple never sued any of the other companies that manufactured and sold MP3 players with the same design both prior to the launch of the iPod Shuffle product, and subsequent to its commercialization.

The filing of the two injunction actions, however, does not constitute the only basis for the claims asserted by Luxpro. Luxpro's claims for damages are also grounded in the actions Apple took subsequent to the filing of the two injunction suits, including the misuse and/or misrepresentations related to intellectual property that Apple claimed to have when it communicated with Luxpro customers, suppliers, and partners, the *continued* litigation against Luxpro following the reversal of the injunction by the Taiwanese court (including appeals, etc.), the filing of the action at the Taiwanese Trade Commission, which was rejected by that agency, and the multiple, detailed misrepresentations that Apple made towards Luxpro clients, distributors and other business partners, especially *after* Luxpro appealed and overturned the injunction in Taiwan.³⁸ Apple used these injunctions as the opening salvo of an illegal campaign to eliminate legitimate competition. The SAC includes these injunctions to eliminate any doubt of Apple's specific target - Luxpro and its products.³⁹

Even after Apple *lost* the injunction directed toward the majority of Luxpro's products, Apple continued in bad faith to disparage Luxpro and its products and improperly claim to third parties that it held intellectual property that Luxpro was

³⁸ Dkt. No. 62 at ¶¶ 37-63.

³⁹ *Id* at ¶¶ 47-63.

infringing. After losing, Apple sent “warning letters” to Luxpro’s customers, distributors and other business partners wrongfully accusing Luxpro of selling “cheap knockoffs,” illegal copies of Apple’s products, and/or claims that Apple intellectual property was being violated. Apple threatened similar meritless litigation, boycotts and cutoffs to Apple products, which exerted pressure on these entities to stop business with Luxpro.⁴⁰ These illegal representations and threats caused Luxpro substantial damages. Luxpro’s damages include the loss of current and future sales, the cancellation of distribution agreements, damages to Luxpro’s goodwill and reputation, and the opportunity for Luxpro’s initial public offering.⁴¹

Significantly, Luxpro’s well-pled SAC contains *only* what Luxpro has been able to discover without the assistance of court orders related to discovery. Given the scope and breadth of Apple’s illegal campaign, it is more than likely that discovery in this case will yield substantially more evidence of illegal dealings.

IV. ARGUMENT AND AUTHORITIES

A. **Since The Court Accepts Luxpro’s Factual Allegations As True, Luxpro’s Claims Are Clearly Plausible Under the Federal Pleading Standard.**

When deciding a motion to dismiss for failure to state a claim, the Court must accept the facts as alleged in the complaint as true.⁴² Additionally, the Court must grant all reasonable inferences in favor of the non-moving party.⁴³ As such, Apple’s various attempts to take issue with Luxpro’s facts, as alleged, should be denied.

⁴⁰ *Id.* at ¶¶ 30, 49-61.

⁴¹ *Id.* at ¶¶ 62-63.

⁴² *Minneapolis Taxi Owners Coalition, Inc. v. City of Minneapolis*, 572 F.3d 502, 506 (8th Cir. 2009).

⁴³ *Id.*

B. Apple’s Analysis Of Luxpro’s Claims Under Federal Rule 8 Invites Error By Applying An Incorrect Standard Of Review.

The only question this Court must answer is whether Luxpro’s claims can be considered plausible.⁴⁴ Apple essentially argues Luxpro must plead *all* facts supporting its claims *now*, prior to discovery. Apple’s argument of federal pleading standards ignores Rule 8 precedent and invites this Court to err.

Apple continually distorts Luxpro’s factual allegations as insufficient. Since discovery has not commenced, the Court and Luxpro have no ability to weigh facts to determine the ultimate sufficiency of the claims. Apple’s arguments run counter to this Court’s and others’ holdings that only the legal sufficiency of a complaint should be considered – evidence weighing is impermissible.⁴⁵ Taking all factual allegations as true, as the Court must do, avoids the pitfalls of weighing evidence while addressing a motion to dismiss.⁴⁶

Instead of following Eighth Circuit precedent, Apple asks the Court to require the entire universe of facts be pled *now*. *Twombly* bars Apple’s request for “heightened fact pleadings of specifics” and only requires Luxpro to “nudge their claims across the line from conceivable to plausible.”⁴⁷ The United States Supreme Court does not require “detailed factual allegations” with the specificity of those supporting Luxpro’s claim; therefore, the Court can deny Apple’s motion in its entirety.⁴⁸ Since *Twombly*, the Eighth

⁴⁴ *Twombly*, 550 U.S. at 570.

⁴⁵ *Luxpro Corp.*, 658 F.Supp.2d at 924; *see, also, Aten v. Scottsdale Ins. Co.*, 511 F.3d 818, 820-21 (8th Cir. 2008) (reversing district court grant of defendants motion to dismiss in insurance coverage lawsuit because fact issue as whether subcontractors poured or leveled basement floor or performed work which suffered water damage as result of improperly graded basement floor could not be decided without discovery); *Patrick v. Henderson*, 255 F.3d 914, 916 (8th Cir. 2001) (holding fact issue in adverse employment actions are rarely appropriate for Rule 12 resolution).

⁴⁶ *Minneapolis Taxi Owners*, 572 F.3d at 506.

⁴⁷ *Twombly*, 550 U.S. at 570.

⁴⁸ *Ashcroft v Iqbal*, 556 U.S. _____, 129 S.Ct. 1937,1949 (2009) (quoting *Twombly*, 550 U.S. at 555).

Circuit has reaffirmed that Rule 8(a) only requires a short and plain statement providing a defendant fair notice of a plaintiff's claims.⁴⁹

Apple's second motion to dismiss actually requests that this Court decide issues better suited for summary judgment and ignores that the Court will have a complete record when it inevitably addresses such a motion.⁵⁰ The Court should deny Apple's motion and ignore attempts to go farther than Rule 8's plausibility standard allows. To require Luxpro to plead under the standard that Apple argues is applicable would constitute error. Luxpro's SAC satisfies Rule 8's required short and plain statement that gives Apple fair notice of its claims and shows that its claims are plausible under *Twombly*.

C. Luxpro's Claims For Tortious Interference Meets *Twombly's* Plausibility Pleading Standard Because Luxpro's SAC Describes Dozens Of Relationships, Contracts, Instances of Interference, And Damages.

Twombly requires Luxpro's complaint state a plausible claim that Apple tortiously interfered with Luxpro's contracts and business relationships. The SAC clearly meets the short and plain statement required by Rule 8(a) and provides many more detailed factual allegations. Luxpro's SAC pleads facts showing dozens of contracts, relationships and instances of Apple's interference.⁵¹

1. The Court Previously Held that Luxpro has Plausible Tortious Interference Claims.

Addressing Apple's first motion to dismiss, the Court sustained the vast majority of Luxpro's claims for tortious interference under FED. R. CIV. P. 8 and Supreme Court

⁴⁹ *Huggins v. FedEx Ground Package System, Inc.*, 592 F.3d 853, 862 (8th Cir. 2010).

⁵⁰ *See, e.g., Swierkiewicz vs. Sorema, N.A.*, 514 U.S. 506, 512-13, 122 S. Ct. 992, 997 (2002); *Doe ex rel. Doe v. School District of City of Norfolk*, 340 F.3d 605, 614 (8th Cir. 2003); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE. CIV. § 1215, p. 174, 190 (3d. 2004).

⁵¹ Dkt. No. 62 at ¶¶ 30-34, 40-44, 47-48, 52-59, 74-75.

precedent.⁵² The Court requested clarification of others. Luxpro's SAC improves on the first by outlining dozens of relationships, contracts and instances of interference of the same by Apple.⁵³

However, Apple invites the Court to ignore *Twombly* by insisting that this Court conduct a piecemeal analysis of every detail of every contract, relationship or instance of interference. Instead, the Court should review Luxpro's tortious interference claims in their *entirety* because Luxpro's SAC alleges a *campaign of unlawful attacks*. In other words, Apple did not make dozens of individual decisions to approach each of Luxpro's partners. Instead, Apple launched an attack on Luxpro's business and products as a whole. Accordingly, the Court should review Luxpro's tortious interference claims in the same manner. Once the Court conducts that type of review, it will be abundantly clear that Apple's motion to dismiss Luxpro's tortious interference claims should be dismissed in its entirety.

2. Luxpro's Claims for Tortious Interference are Plausible Under Either Arkansas or California Law.

The Arkansas Supreme Court straightforwardly explained the tortious interference elements:

The elements of tortious interference that must be proved are: (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interfering party; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted.⁵⁴

⁵² *Luxpro Corp.*, 658 F.Supp.2d at 931-32 (citing *Twombly* 550 U.S. at 570).

⁵³ Dkt. No. 62 at ¶¶ 30-33, 40-43, 47-48, 52-59, 62-63, 67, 70, 73, and 75.

⁵⁴ *K.C. Properties of N.W. Arkansas, Inc. v. Lowell Inv. Partners, LLC*, 373 Ark. 14, 26, 280 S.W.2d 1, 11 (2008).

The California Supreme Court has described tortious interference with contracts using nearly identical elements:

To prevail on a cause of action for intentional interference with contractual relations, a plaintiff must plead and prove (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.⁵⁵

The decision in *Reeves* also shows substantial similarity between California and Arkansas law regarding tortious interference with a prospective economic advantage:

To prevail on a cause of action for intentional interference with prospective economic advantage in California, a plaintiff must plead and prove (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) the defendant's intentional acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harms to the plaintiff proximately caused by defendant's acts.⁵⁶

Luxpro pleads a plausible claim for tortious interference under either state's law.

a. Luxpro adequately pleads an economic relationship with its customers and partners.

The Court should ignore Apple's contention that the SAC is deficient because it has not named *all* of Apple's agents that implemented the plan of tortious interference. The federal pleading standard does not require "detailed factual allegations," but Luxpro's SAC actually exceeds the requirements of the standard and discloses the names of Apple's distributors that spread false statements about Luxpro's products to numerous customers and partners of Luxpro.⁵⁷ Going further than the law requires, Luxpro

⁵⁵ *Reeves v. Hanlon*, 33 Cal.4th 1140, 1148, 95 P.3d 513, 517 (Cal. 2004).

⁵⁶ *Id.*, 33 Cal.4th at 1152 n.6, 95 P.3d at 519 n.6.

⁵⁷ *Iqbal*, 556 U.S. ____, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555).

identifies a dozen of its distributorship agreements by date and content.⁵⁸ Through these distributorship agreements, Luxpro obtained world-wide orders for its MP3 players. Additionally, Luxpro identifies United States retailers, independent distributors, suppliers and consumers who ordered its products, resulting in completed sales.⁵⁹

Luxpro's extensive detail in identifying these business relationships and sales of products more than satisfy the short and plain statement required by Rule 8(a) to show existing contracts and probability of future benefits from those relationships. To be sure, though, if Luxpro had identified 200 relationships, Apple would claim that 300 are required. The Supreme Court never intended *Twombly* to turn reviews of complaints for plausibility into mathematical formulas and counting. Yet, Apple requests the Court to do just that. Instead, confident that its current complaint shows plausibility, Luxpro respectfully suggests the Court look at its claims for tortious interference as a whole.

b. Luxpro adequately pleads Apple's interference with Luxpro's contracts, relationships, and prospective economic advantages.

Again, Apple attempts to lead the Court down a path of error by arguing Luxpro needs to plead all acts of interference. The current complaint discusses Apple's interference by threats of baseless litigation (on multi-faceted, changing, yet vague grounds) and boycotts directed towards Luxpro's ongoing relationships with its distributors and retailers.⁶⁰

More specifically, Luxpro identifies Apple's interference with its primary North American retailer, InterTAN/Circuit City.⁶¹ Not surprisingly, Apple conveniently ignores Luxpro's allegation that this specific interference resulted in Circuit City

⁵⁸ Dkt. No. 62 at ¶ 30.

⁵⁹ *Id.* at ¶ 32-33.

⁶⁰ *Id.* at ¶¶ 40-42 and 47-48.

⁶¹ *Id.* at ¶¶ 31, 48.

destroying thousands of Luxpro's MP3 players and discontinuing orders from Luxpro.⁶² Additionally, Apple threatened Orchard Company, Kaga Electronics Company Ltd., and WebWorker demanding they cease all business relations with Luxpro or face litigation.⁶³

After expressing an interest in purchasing thousands of Luxpro's products, Elecom, Co., Ltd. informed Luxpro that, if it did business with Luxpro, Apple would cease doing business with it.⁶⁴ Global retailers like Best Buy, RadioShack and Wal-Mart expressed interest in joint ventures with Luxpro.⁶⁵ Apple threatened other retailers like Dai-ichi Denki, TKEC 3C, and ET-Mall TV Shopping interested in Luxpro's products with threats of lawsuits if they purchased Luxpro's MP3 players.⁶⁶ Starbucks Corporation agreed to trial marketing campaigns placing Luxpro's MP3 players in Starbuck's Japanese stores.⁶⁷ Japan Airlines expressed interest in Luxpro's products. Luxpro sent samples, but Japan Airlines cancelled the deal because of Apple's interference.⁶⁸ The current complaint sets forth even more examples of Apple's interference.⁶⁹ Although the federal pleading standards do not require a detailed factual analysis, Luxpro provides more than enough detailed facts to provide Apple ample notice of its claims.⁷⁰

c. Luxpro Adequately Pleads Actual Disruption as a Result of Apple's Illegal Misconduct.

The SAC pleads actual disruption of Luxpro's listed contracts and business relationships:

⁶² *Id.* at ¶ 48.

⁶³ *Id.* at ¶ 52.

⁶⁴ *Id.* at ¶ 53.

⁶⁵ *Id.* at ¶ 54.

⁶⁶ *Id.* at ¶ 56.

⁶⁷ *Id.* at ¶ 54.

⁶⁸ *Id.* at ¶ 55.

⁶⁹ *Id.* at ¶ 57-59.

⁷⁰ *Iqbal*, 556 U.S. ____, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555).

Because of Apple's threats and intimidation, Carrefour *cancelled* the orders and distribution shipments with Luxpro.⁷¹

* * *

Due to Apple's pattern of sham litigation and other illegal tactics, however, Nikko VC *decided later not to invest* in Luxpro.⁷²

Also, the SAC explains how Apple wrongfully placed enormous pressure on InterTAN/Circuit City to discontinue Luxpro's MP3 players in its retail stores and to destroy thousands of Luxpro MP3 players.⁷³ Luxpro's distributors cancelled their agreements.⁷⁴ The cancellation of distributor agreements, orders and investment capital, as a result of threats and intimidation, show Apple disrupted Luxpro's contracts, business expectancies, and prospective economic advantages.

d. Luxpro adequately pleads that Apple had knowledge of its existing business relationships and its prospective business relationships.

Apple sought out information about Luxpro's relationships with its retailers, distributors, and business partners and directly threatened these relationships by disparaging Luxpro and its products.⁷⁵ Luxpro identifies these threatened entities.⁷⁶ Any fair reading of Luxpro's SAC renders illogical Apple's argument that it threatened these entities without knowledge of Luxpro's relationship with each, especially given that the threats were directly aimed at *Luxpro's* products.

e. Luxpro adequately describes the damages caused by Apple's interference with Luxpro's contracts, relationships and prospective economic advantages.

⁷¹ Dkt. No. 62 at ¶ 57.

⁷² *Id.* at ¶ 58.

⁷³ *Id.* at ¶¶ 43 and 48.

⁷⁴ *Id.* at ¶¶ 30 and 49.

⁷⁵ *Id.* at ¶¶ 67 and 73.

⁷⁶ *Id.* at ¶¶ 30, 33, 43, 48, 52-58.

Apple's interference caused damages to Luxpro's business reputation and to the marketability of its products.⁷⁷ Other damages caused by Apple's interference include the loss of distribution agreements, profits, market share, goodwill, reputation, and investment capital. Luxpro's lost opportunity to present its initial public offering on the Gre-Tai stock exchange cost the burgeoning company important working capital.⁷⁸ Apple blatantly attempts to mislead the Court claiming that the SAC doesn't include information that it, in fact, does. Unfortunately, this occurs throughout Apple's briefing. Luxpro's SAC plausibly shows Apple's interference caused it a broad array of damages.

f. Arkansas law does not require Luxpro to plead independent actionable conduct in order to state a claim for tortious interference.

Unlike California law, Arkansas law simply requires that Luxpro's SAC contain allegations of Apple's "improper" conduct.⁷⁹ *Mason v. Wal-Mart Stores, Inc.*, 333 Ark. 3, 11, 969 S.W.2d 160, 164 (1998). Luxpro's SAC easily exceeds the standards set forth by the *Mason* Court for improper conduct:

In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

- (a) the nature of the actor's conduct;
- (b) the actor's motive;
- (c) the interests of the other with which the actor's conduct interferes;
- (d) the interests sought to be advanced by the actor;
- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other;
- (f) the proximity or remoteness of the actor's conduct to the interference;
and
- (g) the relations between the parties.⁸⁰

⁷⁷ *Id.* at ¶ 62.

⁷⁸ *Id.* at ¶¶ 63, 70 and 75.

⁷⁹ *Mason v. Wal-Mart Stores, Inc.*, 333 Ark. 3, 11, 969 S.W.2d 160, 164 (1998).

⁸⁰ *Id.*, 333 Ark. at 12; 969 S.W.2d at 164 (quoting RESTATEMENT (SECOND) OF TORTS § 767 (1977)).

The comment to this Restatement section characterizes the nature of the tortfeasor's conduct as involving the threats of physical violence, fraudulent misrepresentation, threat of wrongful prosecution (civil or criminal), conduct independently unlawful, offensive economic pressure, or violation of recognized ethical codes or established business customs.⁸¹ Arkansas law only considers unlawful conduct as one of many factors used to determine whether a defendant's acts are improper. Nevertheless, Luxpro's SAC specifically pleads claims for independently unlawful actions through violations of the Lanham Act and the California Business and Professions Code.⁸²

The Court must take as true Luxpro's allegations against Apple, including the following: allegations of misrepresentations of the quality of Luxpro's products; threats of wrongful civil prosecution; and threats of economic pressure, all of which are independently unlawful conduct. For example, the SAC shows how Apple made threats and intimidated Luxpro's business partner, Carrefour, resulting in Carrefour cancelling orders and distribution shipments with Luxpro.⁸³ Also, Apple forced Luxpro's distributors and retailers to drop existing contracts with Luxpro or be subject to lawsuits and be shut off from access to Apple's products.⁸⁴ Apple wrote letters to Luxpro's retailers and distributors threatening them with litigation if they continued doing business with Luxpro.⁸⁵ Apple misrepresented to the entire MP3 industry that Luxpro's MP3 players were cheap "knock-offs," cheap copies or illegal copies of Apple's iPod.⁸⁶

⁸¹ RESTATEMENT (SECOND) OF TORTS § 767, pp. 30-32 (1977).

⁸² 15 U.S.C.A § 1125(a). CAL. BUS. PROF. CODE § 17200; Dkt. No. 62 at ¶¶ 76-80.

⁸³ Dkt. No. 62 at ¶ 57.

⁸⁴ *Id.* at ¶ 40-41, 47, 60, 65-69, and 74.

⁸⁵ *Id.* at ¶¶ 40-41, 47, 60, 65-69.

⁸⁶ *Id.* at ¶¶ 40 and 48.

Apple's contention that Luxpro failed to meet the Arkansas state law requirement of alleging "improper conduct" is totally meritless.

- g. Since Luxpro's complaint adequately pleads that Apple violated both federal and state law, it satisfies California's requirement of independent actionable conduct to recover for tortious interference.**

Apple's actions are unlawful because, Apple attempted to squash Luxpro by spreading false statements throughout the worldwide MP3 player market.⁸⁷ Apple's false statements that Luxpro sold cheap knockoffs and illegal copies of Apple's iPod violated the Lanham Act.⁸⁸ Luxpro also alleges violations of California's unfair-competition statute.⁸⁹ As a result of Apple's false statements, Luxpro incurred extensive damages including the loss of its goodwill and ability to raise capital through investors.⁹⁰ A review of these allegations in the SAC demonstrate Apple's contention that Luxpro failed to meet the California state law requirement of an independent wrong is also without merit.⁹¹ Luxpro's SAC plausibly shows Apple committed independent wrongs so that it may be held liable for its tortious interference.

D. The Second Amended Complaint Adequately Pleads A Cause of Action For A Violation Of § 43(a) Of The Lanham Act, 15 USCA § 1125(a)

In the Eighth Circuit, to establish a cause of action under Section 43(a) of the Lanham Act, the plaintiff must allege the following elements:

- (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product;
- (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience;
- (3) the deception is material and likely to influence the purchasing decision;
- (4) the defendant caused its false statement to enter

⁸⁷ *Id.* at ¶ 83.

⁸⁸ 15 U.S.C.A § 1125(a); Dkt. No. 62 at ¶¶ 76-80.

⁸⁹ Dkt. No. 62 at ¶¶ 81-85.

⁹⁰ *Id.* at ¶¶ 78-79.

⁹¹ *Korea Supply.*, 29 Cal. 4th 1134, 1159 (2003).

interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the statement, either by direct diversion of sales from itself to defendant or by a loss of goodwill associated with its products.⁹²

As required by Fed. R. Civ. P. 8(a)(2), Luxpro's SAC more than adequately sets forth a "short and plain statement showing it is entitled to relief" pursuant to Section 43(a) of the Lanham Act.⁹³

1. Apple's Threats of Boycott and False Statements about Luxpro's Product Constitute Commercial Promotion of Apple's Products

The Lanham Act prohibits false or misleading statements in "commercial advertising or promotion."⁹⁴ Most courts define "commercial advertising or promotion" as "(1) commercial speech (2) made by a defendant who is in commercial competition with plaintiff (3) for the purpose of influencing consumers to buy defendant's goods or services, and (4) that is sufficiently disseminated to the relevant purchasing public."⁹⁵ Further, in *Bolger v. Youngs Drug Prods. Corp.*, the Supreme Court defined commercial speech by applying the following three factors: (1) whether the communication is an advertisement, (2) whether it refers to a specific product or service, and (3) whether the speaker has an economic motivation for the speech.⁹⁶ In that case, the Court found that a defendant's message to a plaintiff's customer warning of alleged deficiencies in plaintiff's competing product was considered "commercial speech."⁹⁷ Here, the factual allegations set forth in Luxpro's SAC satisfies the standard set out in *Bolger*.

⁹² *United Indus. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998).

⁹³ In its motion, Apple does not argue that Luxpro failed to adequately allege facts relating to elements (2), (4), and (5).

⁹⁴ 15 U.S.C. § 1125(a)(1)(B).

⁹⁵ *Gordon & Breach Sci. Publishers S.A. v. Am Inst. of Physics*, 859 F.Supp.1521, 1536 (S.D.N.Y. 1994).

⁹⁶ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983).

⁹⁷ The Eighth Circuit has adopted the Supreme Court's definition of commercial speech by the use of these three factors. *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1120 (8th Cir. 1999).

Luxpro's SAC alleges each of the following stated elements, which must be taken as true:

- Apple made “false statements that Luxpro was selling cheap knockoffs or illegal copies of Apple’s MP3 players....”⁹⁸
- Apple made false representations that disparaged “both the commercial business and operations of Luxpro and its products.”⁹⁹
- Apple’s statements were “false, or were at least misleading to the public, and were intended to be acted upon or to have an effect on Luxpro’s business partners (distributors, retailers, resellers, and suppliers and other business relationships).”¹⁰⁰
- Apple’s false and misleading statements include, but are not limited to, material misrepresentations about “the nature or characteristics of [Luxpro], its business practices and its products.”¹⁰¹
- Apple’s “false and misleading misrepresentations were made in commerce because they were spread and repeated directly to Luxpro’s distributors and retailers and throughout the worldwide MP3 market.”¹⁰²
- Apple’s false statements “were made in the context of commercial advertising or commercial promotion.”¹⁰³
- Apple’s false statements “caused extensive compensatory and consequential damages” to Luxpro and Luxpro’s products.¹⁰⁴

Apple’s false statement that Luxpro was selling cheap knockoffs or illegal copies of Apple’s MP3 players, as alleged in the SAC, constitutes a false description of Luxpro’s products and unfair competition under the Lanham Act because the Defendant, Apple: (1) made material misrepresentations and false disparaging statements about the nature or characteristics of the plaintiff, its business practices and its products; (2) those

⁹⁸ Dkt. No. 62 at ¶¶ 77, 40, 48.

⁹⁹ *Id.* at ¶¶ 77-78; also ¶¶ 40, 48.

¹⁰⁰ *Id.* at ¶ 79.

¹⁰¹ *Id.* at ¶ 77.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

false and misleading misrepresentations were made in commerce because they were spread and repeated directly to Luxpro's distributors and retailers and throughout the world-wide MP3 market; (3) and were made in the context of commercial advertising or commercial promotion since they were made in conjunction with threats of boycott and meritless litigation and, as such, Apple was putting the entire industry on notice that it should purchase Apple's products instead of Luxpro's; and (4) caused extensive compensatory and consequential damages to Luxpro and to the viability and marketability of its products.

In its motion, Apple offers only one argument regarding the commercial nature of the communications it made to Luxpro's business partners; that is, a "cease-and-desist" letter is not commercial advertisement as a matter of law.¹⁰⁵ Contrary to Apple's contention, courts have explicitly held the opposite.¹⁰⁶ Moreover, the authority Apple cites in support of its argument is both distinguishable and not controlling at the pleadings stage of the case. For instance, both *Futuristic Fences* and *M. Eagles Tool*, which Apple cites, were decided on summary judgment, not motions to dismiss.¹⁰⁷ Further, the Court in *Futuristic Fences* expressly stated that it would "not comment on whether a cease and desist letter can ever be found to be commercial speech."¹⁰⁸ Thus,

¹⁰⁵ Dkt. No. 67 at ¶38.

¹⁰⁶ See, e.g., *Carpenter Technology v. Allegheny Technologies*, 646 F.Supp.2d 726 n.9 (E.D. Pa. 2006)(rejecting *ISI Intern's* reasoning while noting "no other circuits [outside the Seventh] have . . . create[d] a per se rule as to when letters to consumers can be the basis of a Lanham Act claim."); also *Zinus Inc. v. Simmons Bedding Co.*, 2007 WL 4287391, *5 (N.D. Cal. Dec. 06, 2007)("The cease and desist letter is: (1) commercial speech; (2) made by a defendant in competition with the plaintiff."); and *Mobius Mgmt. Systems, Inc. v. Fourth Dimension Software, Inc.*, 880 F.Supp. 1005, 1021-22 (finding single letter to customer to be commercial speech).

¹⁰⁷ *Futuristic Fences, Inc. v. Illusion Fence Corp.*, 558 F.Supp.2d 1270, 1282 (S.D. Fla. 2008); *M. Eagles Tool Warehouse, Inc. v. Fisher Tooling Co., Inc.*, 2007 WL 979865, at *16 (D. NJ. 2007).

¹⁰⁸ *Futuristic Fences, Inc.*, 558 F.Supp.2d at 1282.

the court looked only to the particular facts of the case in concluding the plaintiff failed to show commercial advertisement or promotion under the Lanham Act.

Here, Apple's communications to Luxpro's business partners are purely commercial in nature. Although Apple maintains its communications were made for the purpose of protecting its alleged intellectual property rights, the SAC clearly demonstrates that Apple's false statements to Luxpro's distributors, retailers, and customers were made for the purpose of disparaging Luxpro's MP3 player in order to eliminate competition with the Apple iPod. Since they were threatened with boycott if they continued to purchase Luxpro's products, Apple's conduct constitutes "commercial promotion" and is actionable under the Lanham Act.¹⁰⁹

2. Apple's Communications Influenced Luxpro's Business Partners.

Apple's second argument is equally unavailing. Apple denies that it acted with the purpose of influencing Luxpro's distributors, retailers, and customers.¹¹⁰ Contrary to Apple's contention, Apple's communications to Luxpro's business partners were not used to protect any alleged intellectual property rights. Rather, they were used to eliminate a viable competitor from the marketplace through disparagement and misrepresentations.¹¹¹

In its SAC, Luxpro specifically alleges that Apple engaged in false representations to Luxpro's customers, retailers and distributors in connection with its

¹⁰⁹ See, e.g., *Logan Graphic Products, Inc. v. Textus USA, Inc.*, No. 02C-1823, 2002 WL 31507174, at *3 (N.D. Ill. Nov. 8, 2002)(holding that allegation of false statements "communicated . . . to 'retailers and distributors throughout the United States'" was "sufficient to withstand" the motion to dismiss).

¹¹⁰ Dkt. No. 67 at ¶29.

¹¹¹ Dkt. No. 62 at ¶7 See, e.g., ("Apple then used the litigation against Luxpro to threaten Luxpro's commercial partners . . . with similar suit that would seek civil fines, interruption to their businesses, financial losses to their businesses, litigation and even criminal penalties if they purchased, sold, or manufactured Luxpro's MP3 products that Apple continued to misrepresent as cheap knock-offs or illegal copies of the iPod MP3 player."); See also *id* ¶40, 48

commercial activities which disparaged both the commercial business and operations of Luxpro and its products and, therefore, constituted unfair business practices.¹¹² Apple knew that these misrepresentations and other statements were made, and the SAC points out that Apple knew the misrepresentations and other statements made to Luxpro's customers, distributors, retailers, and to the public were false, or were at least misleading to the public, and were intended to be acted upon or to have an effect on Luxpro's business partners (distributors, retailers, resellers and suppliers and other business relationships).¹¹³

The SAC also explains and alleges that Apple's unfair trade practices and influence on Luxpro's business partners did, in fact, cause extensive damage to Luxpro's business reputation and caused Luxpro economic losses and compensatory damages, together with special damages of loss of its goodwill and its inability to raise capital for the listing of its stock on the Gre-Tai stock exchange. Apple's illegal influence also resulted in the loss of working capital through investments from venture capitalists.¹¹⁴ These actions were taken by Apple with the knowledge of Luxpro's business relationships, both existing and prospective, and with the intent to cause economic harm to Luxpro. Therefore, Luxpro has alleged that it is entitled to recover compensatory damages as well as special damages and punitive damages.¹¹⁵ Luxpro believes it is entitled to disgorgement of profits that Apple took from Luxpro unlawfully as a result of its unfair trade practices and alleges in the SAC that it had a vested interest in those

¹¹² *Id.* at ¶¶ 8, 40-41, 47, 48, 60, 65-69.

¹¹³ *Id.* at ¶¶ 79, 40-43, 52-53, 61-63, 67 and 73.

¹¹⁴ *Id.* at ¶ 80.

¹¹⁵ *Id.*

profits unlawfully obtained by Apple by virtue of past relationships and distributor agreements already in place.¹¹⁶

In its attempt to convince the Court to dismiss Luxpro's SAC before discovery reveals more wrongful conduct, Apple continues to argue that its statements to Luxpro's business partners were made to protect its technology and intellectual property rights. To be clear, Apple did not invent the MP3 player; never claimed Luxpro infringed a registered copyright, patent or trademark (in Germany or Taiwan), and had no legal right to demand that a competitor simply withdraw its independently developed product from the market.¹¹⁷ Apple, therefore, cannot make false and misleading statements regarding its ownership of technology to further its anti-competitive behavior.¹¹⁸ False and misleading claims of intellectual property ownership fall squarely under the purview of the Lanham Act.¹¹⁹

3. Rule 8(a), Not Rule 9(b), Applies to Luxpro's Claims.

As the Court has already ruled in this case, a complaint, generally, must only meet the liberal standards of notice pleading under Fed. R. Civ. P. 8(a)(2). Under that standard, Luxpro is required to give a short and plain statement showing that it is entitled to relief.¹²⁰ In contrast, Apple demands that the Court apply a heightened pleading standard under Rule 9(b) of the Federal Rules of Civil Procedure.¹²¹ No heightened

¹¹⁶ See *Korea Supply*, 29 Cal 4th 1134, 1145 (Cal 2003).

¹¹⁷ *Id.* at ¶ 38.

¹¹⁸ *Id.* at ¶¶ 39 – 40. Apple's anti-competitive behavior against smaller competitors is well documented. See e.g., *Id.* at ¶¶ 21 – 26.

¹¹⁹ *International Technologies Consultants, Inc. v. Steward*, 554 F.Supp.2d 750, 758 (E.D. Mich 2008)(denying motion to dismiss where plaintiff alleged defendant falsely represented ownership of plaintiff's technology); *Animal Fair Inc. v. Amfesco Indus. Inc.*, 620 F.Supp.175 (D. Minn. 1985); aff'd, 794 F.2d 678 181, 190 (8th Cir. 1996)(finding defendant's advertising claim of exclusive rights to make a slipper product "grossly misleading").

¹²⁰ FED. R. CIV. P. 8(a)(2).

¹²¹ Dkt. No. 67 at ¶30.

pleading requirement applies to these allegations, because Luxpro has not alleged fraud as a cause of action anywhere in the SAC, and the misrepresentations to the public and customers of Luxpro are described as unfair and misleading business practices as defined by the Lanham Act.

Numerous courts have rejected rule 9(b)'s application in cases such as this one.¹²² Moreover, no federal district court in the Eighth Circuit has directly applied rule 9(b) to a false advertisement claim under the Lanham Act. To the contrary, federal district courts in this circuit have noted the various arguments for *rejecting* rule 9(b)'s heightened standard.¹²³

- “The making of a false statement is not *per se* one of those “Special Matters” that Rule 9 requires be specially pleaded.”¹²⁴
- “[N]othing in the language or history of Rule 9(b) suggests that it is intended to apply, willy-nilly, to every statutory tort that includes an element of false statement.”¹²⁵
- “No matter, how parsed, a claim of false advertising under the Lanham Act—one of a panoply of trademark torts created by the Act—is not identical to a claim of fraud.”¹²⁶

In spite of these holdings, Apple offers various cases, none of which are persuasive.¹²⁷ For example, the court in *Max Daetwyler Corp. v. Input Graphics, Inc.*,

¹²² See *Wellnx Life Sciences Inc. v. Iovate Health Sciences Research Inc.*, 516 F.Supp.2d 270, 283 n. 2 (S.D.N.Y. 2007)(“[c]ontrary to defendants’ contention, Rule 8(a)[], not Rule 9(b)[], applies to false advertising claims under the Lanham Act”); *Healthpoint, Ltd. v. Allen Pharmaceutical, LLC*, 2008 WL 728333, *2 n. 4 (W.D. Tex. March 18, 2008)(noting Fifth Circuit has not applied rule 9(b); *John P. Villano Inc. v. CBS, Inc.*, 176 F.R.D. 130 (S.D.N.Y. 1997)(a claim for false advertising “falls outside the ambit of rule 9(b) and may not be the subject of any heightened pleading requirement”); *Soilworks, LLC v. Midwest Industrial Supply, Inc.*, 2007, WL 704511, *2 (D. Ariz. 2007)(“Defendant has provided no controlling authority to support its argument that claims under the Lanham Act require the heightened pleading of Rule 9(b)”); *Interface Sec. Systems, L.L.C. v. May*, 2007 WL 1300394, *3 (E.D. Mo. 2007)(in assessing the sufficiency of a claim for false advertising, only a short and concise statement of the claim is required); 1 *Federal Unfair Competition: Lanham Act 43(a) §6:3*, n. 26.

¹²³ *Axcan Scandipharm, Inc. v. Ethex Corp.*, 585 F.Supp.2d 1067, 1084 (D. Minn. 2007)(noting the *Villano* court gave several “persuasive reasons why Lanham-Act claims should not be subject to any pleading-with-particularity rule.”)

¹²⁴ *John P. Villano Inc. v. CBS, Inc.*, 176 F.R. D. 130, 131 (S.D.N.Y 1997).

¹²⁵ *Id.*

¹²⁶ *Id.*

noted that a Lanham Act claim “is not a pure ‘fraud’ claim and, thus, need not satisfy all of the pleading requirements which have been imposed under Rule 9.”¹²⁸ Moreover, the opinion was decided at summary judgment, not on a motion to dismiss.¹²⁹ Next, the court in *Brosnan v. Tradeline Solutions, Inc.*,¹³⁰ applied the heightened standard only after noting the plaintiff alleged fraudulent conduct in support of its claim.¹³¹ Apple also relies on a factually inapposite case in *Pestube Systems, Inc. v. HomeTeam Pest Defense, LLC*.¹³² There, the plaintiff made only “bare allegations” to support its claim, rather than the detailed allegations provided in the SAC.¹³³ Even then, the court shunned dismissal and gave leave to amend.¹³⁴ Moreover, unlike the cases cited by Apple which involve allegations of fraudulent conduct, Luxpro’s claims are based on Apple’s disparagement of Luxpro and its products in the marketplace. Luxpro has not alleged a cause of action for fraud. Luxpro’s Lanham Act claim is based on unfair trade practices and misrepresentations of Luxpro’s products, not a claim for fraud.

However, even if the heightened pleading standard was required, Luxpro’s claims are pled with sufficient particularity. Rule 9(b) must be read in harmony with the principles of notice pleading under Rule 8, and the liberal spirit of the Federal Rules of Civil Procedure.¹³⁵ The purpose of this requirement is to provide sufficient information

¹²⁷ Dkt. No. 67 at ¶¶39-40.

¹²⁸ 608 F.Supp. 1549, 1556 (E.D. Pa. 1985).

¹²⁹ *Id.*

¹³⁰ 2009 WL 1604572, *4-5 (N.D. Cal. 2009)(For a Lanham Act false advertisement claim to “sound in fraud” the plaintiff must “allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of a claim.”);

¹³¹ *Id.* at 5-6.

¹³² 2006 WL 1441014 (D. Ariz. 2006) (dismissing claim without prejudice with leave to amend where plaintiff failed to allege the nature and content of the accusedly false statements).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See e.g., *Abels v. Farmers Commodity Corp.*, 259 F.3d 910, 920 (8th Cir. 2001).

for the defendant to respond to and prepare a defense against the asserted claims, not to require that *all* facts be pled at this stage of the proceedings.¹³⁶

A recent district court case in the Eighth Circuit demonstrates that Luxpro need not plead nearly the level of specificity demanded by Apple.¹³⁷ In *Axcan*, defendants urged the court to impose Rule 9(b) and dismiss the plaintiff's claims for lack of specificity.¹³⁸ But the court, while declining to adopt Rule 9(b), nevertheless found plaintiff satisfied its heightened standard by pleading that the defendants falsely represented to drug databases, wholesalers, and pharmacies since the late 1990's that their drugs were the generic equivalents to the plaintiff's drug and stated:

Rule 9(b) does not require that the exact particulars of every alleged instance of "false" advertising be specified in the Complaint. *See* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure: Civ. 2d* § 1297 (3rd ed. 2007). Rather, that Rule is satisfied if the plaintiff's complaint sufficiently apprises the defendant "of the nature of the claim and the acts . . . relied upon by the plaintiff" as constituting the unlawful conduct. *Id.*; *Accord Commercial Prop. Inv., Inc. v. Quality Inns Int'l, Inc.*, 61 F.3d 639, 644 (8th Cir. 1995). The Complaint here clearly apprises the Defendants of the acts relied upon by Axcan in support of its claims. Stated differently, Axcan has pleaded the "who [the Defendants], what [false advertising], where [in ads targeted to drug databases, wholesalers, and pharmacies], when [since the late 1990's], and how [falsely claiming their drugs are generic equivalents or substitutes]" of its claims. *Great Plains Trust Co v. Union Pac. R. Co.*, 492 F.3d 986, 995 (8th Cir. 2007). The sheer length and breadth of the Defendants' Memoranda indicate that they have been fully apprised of the nature of Axcan's claims and can adequately prepare responses thereto.¹³⁹

Luxpro's SAC goes far beyond conclusory allegations. In any event, Luxpro is not required to plead the exact particulars *of every* alleged instance of false

¹³⁶ *Commercial Prop. Inv., Inc. v. Quality Inns Int'l, Inc.*, 61 F.3d 639, 644 (8th Cir. 1995).

¹³⁷ *Axcan Scandipharm, Inc. v. Ethex Corp.*, 585 F.Supp.2d 1067 (D. Minn. 2007) (denying motion to dismiss Lanham Act false advertising claims while declining to adopt heightened pleading standard).

¹³⁸ *Id.*

¹³⁹ *Id.* at 1084.

representations of products alleged in the complaint.¹⁴⁰ Although Eighth Circuit precedent makes it clear that Luxpro does not have to plead under a heightened pleading standard, Luxpro's SAC is sufficiently specific to facilitate Apple's ability to respond and prepare a defense to the allegations in this case.¹⁴¹

E. Luxpro's Claim Under CAL. BUS. & PROF. CODE § 17200 Satisfies *Twombly's* Plausibility Pleading Standard Because Luxpro's SAC satisfies The Unfair Competition Statute's Three Distinct Prongs And Seeks Remedies Available Under The Statute.

Twombly requires Luxpro's complaint state a plausible claim under California's unfair-competition statute.¹⁴² That is, Luxpro's claim under section 17200 must plausibly demonstrate Apple's unlawful, unfair and fraudulent threats. Luxpro's First Amended Complaint stated a plausible claim for relief under FED. R. CIV. P. 8 and Supreme Court precedent.¹⁴³ The Court, in response to Apple's first motion to dismiss, requested further clarification. Luxpro's current complaint provides more details of Apple's attempts to squash Luxpro by spreading false statements about Luxpro and its products.¹⁴⁴ When Luxpro began competing with Apple, Apple issued threats to Luxpro's customers and partners based on Apple's misrepresentations and false claims of intellectual property, in an effort to discredit Luxpro and its products.

Apple actually confirmed Luxpro's allegations by repeating them at the hearing conducted by the Court on Sept. 1, 2009, stating that Luxpro "was selling knock-offs of a

¹⁴⁰ See 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE. CIV. § 1297 3d. (2007)

¹⁴¹ Dkt No. 62 at ¶¶ 30-34, 40-43, 52-59, 62-63, 67, 70, 73, and 75.

¹⁴² *Luxpro*, 658 F.Supp.2d at 926 (citing *Twombly*, 550 U.S. at 570)

¹⁴³ *Aschroft v. Iqbal*, 556 U.S. ____, 129 S.Ct. 1937 (2009); *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007).

¹⁴⁴ Dkt. No. 62 at ¶¶ 6, 12, 13, 15, 20, 25, 26 n.8, 38, 51, 62, 83.

product that Apple had designed, engineered, built and marketed.”¹⁴⁵ Because Luxpro’s claims are admitted by Apple, the Court should deny Apple’s second motion to dismiss.

1. Since Luxpro’s SAC Adequately Pleads Facts that Demonstrate Apple Violated Federal and State law, It Satisfies the “Unlawful” Prong of §17200.

Luxpro sufficiently pleads unlawful conduct under § 17200. California’s unfair-competition statute defines prohibited business practices:

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice [.]¹⁴⁶

Section 17200’s disjunctive language means the statute establishes three ways to plead a claim for unfair competition.¹⁴⁷

The California Supreme Court defined the California Legislature’s “sweeping language” simply as any “unlawful, unfair or fraudulent business practice[.]”¹⁴⁸ Section 17200 borrows federal, state, or local law violations and treats these violations as independently actionable under California’s unfair-competition statute’s “unlawful” prong.¹⁴⁹ In its SAC, Luxpro sufficiently pleads claims that Apple violated the Lanham Act¹⁵⁰ and committed common law torts.¹⁵¹ The SAC, therefore, alleges unlawful acts as the bases for its claim’s under the § 17200 “unlawful” prong.

¹⁴⁵ Hearing Transcript, September 1, 2009, Dkt. No. 59-2 at Page 10.

¹⁴⁶ CAL. BUS. & PROF. CODE § 17200.

¹⁴⁷ *Pastoria v. Nationwide Ins.*, 112 Cal.App.4th 1490, 1496 (Cal. Ct. App. 2003).

¹⁴⁸ *Bank of the West v. Superior Court*, 833 P.2d 545, 553 (Cal. 1992).

¹⁴⁹ *Pastoria*, 112 Cal.App.4th at 1496.

¹⁵⁰ Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

¹⁵¹ Dkt. No. 62 at ¶¶ 76-80.

2. Apple’s Incipient Acts also Establish Luxpro’s Claim Under § 17200’s “Unfair” Prong as Plausible.

Section 17200 also allows Luxpro to plead a claim under California’s unfair-competition statute’s “unfair” prong. The California Supreme Court guided courts, businesses and litigants with a test to measure “unfair” acts under the statute:

When a plaintiff who claims to have suffered injury from a direct competitor’s ‘unfair’ acts or practice invokes section 17200, the word “unfair” in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.¹⁵²

Clearly, § 17200 also allows Luxpro to plead a claim under the “unfair” prong if Apple’s threats were motivated by anticompetitive intent and were based on misrepresentations of its intellectual property rights, especially when Apple refuses to adequately define its “intellectual properties” in its briefing or in its remarks to the Court. Apple does not name one registered patent, trademark or copyright that Luxpro has violated, and did not do so when it started its campaign to destroy Luxpro. “Incipient” means “in the first stage of existence; just beginning to exist or to come to notice.”¹⁵³ Luxpro’s claim under § 17200 is tailor-made for the *Cel-Tech* test.

Apple’s wide-spread threats followed Luxpro from the Ce-Bit show in Germany to Taiwan. Even after Luxpro dropped the “Shuffle” name, complied with the German injunction, and mooted the issue, Apple filed another suit to enjoin Luxpro from manufacturing its entire product line. Apple used the litigation to launch an extensive

¹⁵² *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 973 P.2d 527, 544 (Cal. 1999).

¹⁵³ WEBSTER’S NEW WORLD COLLEGE DICTIONARY 682 (3d. ed. 1986).

campaign to disparage Luxpro to its existing customers and partners and threatened these same people with boycott and more lawsuits.¹⁵⁴

What would motivate Apple to chase Luxpro back to Taiwan after Luxpro acquiesced to Apple's demands made at Ce-Bit to not use "shuffle" with its products? Apple saw an emerging force in the world-wide MP3 player market from the swelling ranks of smaller MP3 makers like Luxpro. Cumulatively, smaller companies like Luxpro had been gaining a larger share in the world wide MP3 player market than Apple. These small companies, when viewed as one force, showed Apple its next threat to selling more higher-priced MP3 players like the iPod.¹⁵⁵ Accordingly, it's no wonder that Circuit City succumbed to Apple's pressure and destroyed Luxpro's MP3 players, under threat from Apple.¹⁵⁶

The California Supreme Court prohibits these threats as incipient conduct and violations directed toward the spirit of competition, and Luxpro states a plausible claim for unfair competition under § 17200's "unfair" prong.

3. Since Apple's Threats Deceived Luxpro's Customers and Partners, Luxpro has a Plausible Claim Under the "Fraudulent" Prong of § 17200.

Luxpro has, under the Court's directive, stated in the SAC specific misrepresentations made by Apple concerning Luxpro's business and products.¹⁵⁷ Luxpro cannot, however, possibly know the full extent of the threats and conversations between Apple and other third-parties without discovery. Apple continues to brashly

¹⁵⁴ Dkt. No. 62 at ¶ 7.

¹⁵⁵ *Id.* at ¶ 15.

¹⁵⁶ *Id.* at ¶ 31, 48, and 74.

¹⁵⁷ Dkt. No. 62 at ¶¶ 40, 44, 47-63.

defame Luxpro's products as "knockoffs" to this Court.¹⁵⁸ However, Apple didn't create the design utilized by most MP3 retailers. All MP3 players essentially look the same – rectangular in shape in order to store the memory drive for songs. Apple did not have a propriety design for MP3 players. Apple has provided no registered patent, no copyright, no trademark, and no supporting facts to substantiate the claim that it, somehow, owns the design for all MP3 players that have a slim, rectangular design with a touchpad on the face of the device. Indeed, there were *several* similarly-designed thumb-drive MP3 players on the market prior to Apple launching its Shuffle iPod product. Accordingly, Apple's claims are baseless.

In any event, the misrepresentations described by Luxpro in the SAC satisfy the plausibility standard for a § 17200 claim. Again, the California courts have provided explicit guidance that § 17200's "fraudulent" prong does not parallel common law fraud claims:

In order to state a cause of action under the fraud prong of the [unfair-competition statute] a plaintiff need not show that he or others were actually deceived or confused by the conduct or business practice in question. 'The 'fraud' prong of [the unfair-competition statute] is unlike common law fraud or deception. A violation can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage. Instead, it is only necessary to show that members of the public are likely to be deceived.'¹⁵⁹

Luxpro's claims under the unfair competition statute's "fraudulent" prong clearly meet this standard. The very detailed allegations in the SAC demonstrate the specific partners

¹⁵⁸ Dkt. No. 23, p. 1; Dkt. No. 24, p. 1; Dkt. No. 26, p. 1.

¹⁵⁹ *Schnall v. Hertz Corp.*, 78 Cal.App.4th 1144, 1168 (Cal. Ct. App. 2000) (quoting *Podolsky v. First Healthcare Corp.*, 50 Cal.App.4th 632, 647-8 (Cal. Ct. App. 1996)).

and customers who were actually deceived by Apple's claims and intimidated to the point of forgoing business with Luxpro by Apple's threats.¹⁶⁰

4. Luxpro's Requested Remedy for § 17200 Violations is Consistent with the Unfair Competition Statute's Purpose Because It Restores to Luxpro Money Apple Wrongfully Acquired

A court has "very broad" discretion to determine an appropriate remedy for Apple's wrongful conduct through restitution permitted under California's unfair competition statute.¹⁶¹ This remedy is both appropriate and consistent with the statute's goal because it restores to the plaintiff the amount that the defendant wrongfully acquired.¹⁶² The unfair competition statute also allows an individual to recover profits unfairly obtained as long as that remedy refers to the restitutionary form of disgorgement.¹⁶³ When Apple threatened Luxpro's customers and partners, Luxpro had existing distribution agreements, customers and partners, and the market had accepted its MP3 players.¹⁶⁴ These alleged facts mean Luxpro would have profited from, and had a vested interest in those profits that were reasonably expected from, the manufacture and sale of its MP3 players; instead, Apple wrongfully reaped the profits that belonged to Luxpro.¹⁶⁵ An award of restitutionary damages here that restores to Luxpro the profits Apple wrongfully acquired is consistent with and promotes the unfair competition statute's purpose.

¹⁶⁰ Dkt. No. 62 at ¶¶ 52-60.

¹⁶¹ *Wiener v. Dannon Co., Inc.*, 255 F.R.D. 658, 670 (C.D.Cal. 2009) (citing *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th 663, 695 (Cal. Ct. App. 2006)).

¹⁶² *Id.*

¹⁶³ *Korea Supply*, 29 Cal.4th 1134, 1148, 63 P.3d 937, 946-7.

¹⁶⁴ Dkt. No. 62 at ¶ 85.

¹⁶⁵ *Id.*

F. Luxpro’s Commercial Disparagement Claim Satisfies *Twombly*’s Plausibility Pleading Standard.

Twombly requires Luxpro’s complaint state a plausible claim for commercial disparagement. That is, Luxpro’s complaint must plausibly demonstrate Apple intended its statements to cast doubt on Luxpro’s business reputation and on the quality of its MP3 players.¹⁶⁶ When Luxpro began competing with Apple, Apple repeatedly described Luxpro’s products as “knockoffs,” “cheap copies,” and “illegal copies” to Luxpro’s customers and partners, the same statements Apple made in open court at the hearing held on September 1, 2009.¹⁶⁷ Because Apple’s falsehoods caused the MP3 player market to question Luxpro’s products’ quality, Luxpro states a plausible claim for commercial disparagement of Luxpro’s business reputation and of Luxpro’s products.

1. Apple's Admissions Show Luxpro has Pled a Plausible Claim for Commercial Disparagement.

As previously explained, Apple actually admits Luxpro’s claims that Apple called Luxpro’s products knockoffs and cheap copies to Tounsen, Orchard and Kaga Electronics.¹⁶⁸ Even though Apple admits to having made these misrepresentations to three entities named in the complaint, which satisfy the federal pleading standard, Apple insists that additional specific statements must be produced as to 30 other entities. Luxpro respectfully submits the Court must look at its commercial disparagement claims as a whole and not be lured into a “pick-and-choose” analysis of the defamatory statements at the beginning, or pleading stage, of this litigation.

Much like its arguments regarding Luxpro’s tortious interference claims, Apple tries to convince the Court that Luxpro’s complaint must read as if it resembles an

¹⁶⁶ RESTATEMENT (SECOND) OF TORTS § 629, 347-8 (1977).

¹⁶⁷ Hearing Transcript, Sept. 1, 2009, Dkt. No. 59-2 at p. 10.

¹⁶⁸ Dkt. No. 67 at p. 38.

announcer calling a boxing match, blow-by-blow or word-by-word. *Twombly* does not call for that type of analysis because the federal pleading standard under Rule 8 does not require detailed factual allegations to be sustained.¹⁶⁹ All the Court should determine is whether Luxpro's commercial disparagement claims meet the plausibility standard.

Luxpro's claims meet *Twombly*'s plausibility standard because they identify the disparaging statements, that Apple called Luxpro's products "knockoffs," "cheap copies," and "illegal copies."¹⁷⁰ *Twombly* does not require allegations of *all* the facts that support Luxpro's claims.¹⁷¹ All that is required is for the SAC to provide fair notice of Luxpro's claims that will allow Apple to prepare an answer to those claims. Again, Apple's arguments to the contrary invite the Court to commit error.

Discovery is necessary to provide Luxpro an opportunity to fully investigate all of Apple's disparaging statements. Apple opposes even starting discovery. Instead, Apple asks the Court to ratify a "hide and seek" strategy for defending Luxpro's claims. Luxpro has uncovered enough information about Apple's statements to satisfy the *Twombly* pleading standards. But, obviously, Luxpro was not privy to all of Apple's strategic plans and all of the statements made to Luxpro's business partners. Discovery will undoubtedly shed light, to a fuller extent, on Apple's statements. Then, and only then, the fact-finder will be able to judge Apple's liability for those statements under the claims asserted. Apple's requested dismissal ignores the proper course for adjudicating claims in federal court.¹⁷² Based on Apple's own admissions and the detailed pleadings that

¹⁶⁹ *Iqbal*, 556 U.S. ____, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555).

¹⁷⁰ *Twombly*, 550 U.S. at 570.

¹⁷¹ *Iqbal*, 556 U.S. ____, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555).

¹⁷² *See, e.g., Swierkiewicz*, 514 U.S. at 512-13, 122 S. Ct. 992, 997 (2002); *Doe v. School District of City of Norfolk*, 340 F.3d at 614 (8th Cir. 2003); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE. CIV. § 1215, p. 174, 190 (3d. 2004).

identify the specific disparaging statements made by Apple regarding Luxpro and its products, like “knockoff,” “cheap copies,” and “illegal copies,” the Court should deny Apple’s motion to dismiss.

2. Luxpro Also Identifies the Type of Damages Caused by Apple’s Disparagement.

Even the standard argued by Apple requires Luxpro only to identify the types of damages caused by Apple’s disparaging statements by description, not the amount of these damages.¹⁷³ The current complaint states Luxpro has suffered damages to its goodwill, product line, and the lost opportunity for a listing on the Gre-Tai Stock Exchange and additional investors in its company.¹⁷⁴ Apple calls for a premature evaluation or calculation of those damages. That evidence will necessarily come later, probably through expert opinion based on facts discovered during the development of this case for trial. Apple’s call for an exact determination of the amount of lost profits and other damage calculations again demonstrates its attempts to lead the Court too far afield from federal pleading standards and should not be tolerated at the pleadings stage of this case.

G. The Noerr-Pennington Doctrine is Inapplicable to Luxpro’s Claims.

As an initial matter, it is worth noting that dismissal is simply not appropriate at the pleadings stage—particularly due to the fact-intensive nature of Luxpro’s claims. Moreover, contrary to Apple’s assertions, and based upon overwhelming precedent on this issue, there simply is no heightened pleading standard in the Eighth Circuit for claims that may be subject to a *Noerr-Pennington* defense, but which do not involve allegations of fraud or mistake.

¹⁷³ *Great Am.Indem.Co. v. Brown*, 307 F.2d 306, 308 (5th Cir. 1962).

¹⁷⁴ *Id.* at ¶¶ 62-63.

Similar to its prior briefing efforts in this case, Apple’s argument in its second motion to dismiss that “Luxpro’s claims are all barred by the *Noerr-Pennington* doctrine” is wholly without merit, fails to account for recent binding precedent, and seeks to impermissibly gloss over the substance and breadth of Luxpro’s causes of action. Significantly, **none** of Luxpro’s claims are even susceptible to the *Noerr-Pennington* doctrine because Luxpro’s SAC contains no federal antitrust law claims, which, the Eighth Circuit has indicated, is a necessary prerequisite for any application of the *Noerr-Pennington* doctrine. Beyond this, *Noerr-Pennington* immunity is inapplicable for several additional reasons.

First, even if *Noerr-Pennington* immunity could apply in a non-antitrust case context, Apple still is not entitled to the defense because the conduct Luxpro alleged Apple committed simply does not qualify as “petitioning conduct.” Instead, Apple’s communications were directed—not to the government—but to private parties, including Luxpro’s customers, suppliers, business partners, and prospective customers and partners, were commercial in nature, and had nothing whatsoever to do with any litigation Apple filed against Luxpro.

Second, Apple cannot identify any “intellectual property” which it was attempting to protect and, thus, the entire premise of Apple’s *Noerr-Pennington* defense is without merit. Specifically, Apple did not invent the shape and design of its Shuffle iPod product. To that end, Apple has no patent, no design patent, no copyright, no trademark, and no trade dress related to the shape and design of its Shuffle iPod product registered in Germany, Taiwan, or the United States—nor could it, especially given that the Shuffle iPod’s shape and design were both (1) commonplace within the MP3 player market and

(2) used commercially in numerous MP3 players **prior to** the release of Apple’s “Shuffle.”

Third, many courts have held that foreign activities, including foreign legal actions, simply are not protected by the *Noerr-Pennington* doctrine. As the vast majority of Apple’s acts of which Luxpro has complained and is currently aware occurred in foreign countries, protection under the *Noerr-Pennington* doctrine is unavailable to Apple.

Finally, this Court has already concluded that *Noerr-Pennington* does not apply to a number of Luxpro’s claims. That conclusion is law-of-the-case and, thus, Apple is not permitted to re-litigate these issues.

In order to accept Apple’s position and thus conclude that the *Noerr-Pennington* doctrine applies, the Court must ignore controlling Eighth Circuit precedent and apply cases from district courts in other circuits. However, in the unlikely event the Court concludes that the doctrine should apply, Luxpro’s claims are nevertheless subject to the doctrine’s “sham litigation” exception—especially given the clear application of the “pattern exception” to the facts here. Further, all of Apple’s illegal acts that transpired after the Taiwanese civil court’s reversal of the initial, preliminary injunction are not immune under *Noerr-Pennington*, especially given that Apple *continued* to assert claims against Luxpro products (and communicate with Luxpro’s business partners, customers, suppliers, and prospective partners and customers) that (1) were not covered by the preliminary injunction and (2) could not, objectively, be subject to any intellectual property claim asserted by Apple.

In sum, Apple’s reliance on *Noerr-Pennington*—its chief argument in its second motion to dismiss—is misplaced, misrepresents the applicable law in the Eighth Circuit, and should be rejected by this Court.

1. Due to the Fact-Intensive Nature of Luxpro’s Claims and Apple’s Defenses, None of Luxpro’s Claims Should be Dismissed at the Pleadings Stage; No Discovery Has Been Conducted, so Summary Judgment Analysis is Not Appropriate.

As an initial matter, dismissal simply is not appropriate here. Luxpro has asserted claims that are inherently fact-intensive and thus cannot be decided at the pleadings stage. This is evident throughout the instant brief. For example, to decide Apple’s motion, the Court must determine whether Apple actually owns any “intellectual property” which it claims to have been protecting, and whether all of Apple’s alleged conduct occurred in foreign lands. It further must assess whether the “sham litigation” analysis is appropriate, which will require it to make several findings, including whether Apple’s complex, multi-faceted, multi-pronged scheme was directed towards Luxpro and designed to both forestall competition in the MP3 player industry and to destroy Luxpro’s MP3 player business. Additionally, the Court must determine whether Apple’s litigation against Luxpro was “objectively baseless.” These determinations (and many others) are better suited for a summary judgment motion after significant discovery has been conducted.¹⁷⁵

¹⁷⁵ See, e.g., *Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1549 (10th Cir. 1996) (noting that factual determination of when plaintiff had notice of the underlying events required an evidentiary finding and was the improper subject in the procedural context of a motion to dismiss; thus, “it would be more appropriate to make the necessary determination on summary judgment, or, if a genuine issue of material fact remains in dispute, after an evidentiary hearing”); *Rivera-Carrion v. U.S.*, No. 08-cv-1498, 2009 WL 453460, at *4 (D. Puerto Rico Feb. 19, 2009) (noting that fact-driven inquiry was “more appropriate as a motion for summary judgment after discovery has been completed”); *Downeast Ventures, Ltd. v. Washington County*, No. 05-cv-87-B-W, 2005 WL 3409483, at *3 (D. Me. Dec. 12, 2005) (“An asset by asset analysis would be more appropriate based on a summary judgment record, wherein Downeast Ventures will have to establish ownership or title and an absence of any reasonable basis to conclude that the asset in question was collateral for the loan.”); *Grillo v. John Alden Life Ins. Co.*, 939 F.Supp. 685, 687-88 (D. Minn. 1996) (“This court cannot determine whether Title VII ... provides a remedy [at the 12(b)(6) stage] without the

Finally, contrary to Apple’s assertions, and based upon prevailing precedent on this issue, there simply is no heightened pleading standard in the Eighth Circuit for a cause of action that may be subject to a *Noerr-Pennington* defense, but which fraud or mistake is not involved.¹⁷⁶

2. The *Noerr-Pennington* Doctrine Applies Only to Sherman Act Antitrust Claims; Thus, None of Luxpro’s Claims are Subject to Noerr-Pennington Immunity.

Not surprisingly, Apple fails to cite, even in passing, any controlling authority in the Eighth Circuit related to the scope of *Noerr-Pennington* protection. The reason for Apple’s omission is obvious; recent Eighth Circuit law provides that *Noerr-Pennington* immunity (to the extent all of the elements are satisfied) extends **only** to claims based on the Sherman Act. Luxpro has not alleged claims based on the Sherman Act. Thus, Apple is precluded from asserting *Noerr-Pennington* protection for **any** of Luxpro’s claims.

Indeed, in *Entergy Arkansas, Inc. v. Nebraska*,¹⁷⁷ a case that involved no antitrust claims, the Eighth Circuit rejected the State of Nebraska’s argument that its multiple lawsuits were protected by the First Amendment and thus, could not be considered evidence of its bad faith.¹⁷⁸ Specifically, the Eighth Circuit held that “Nebraska has not

benefit of [a] fully-developed factual record on which to base a decision ... it is obviously premature to accept defendant’s contention that any harassment suffered by plaintiff was insufficiently ‘severe or pervasive’ to be actionable.” (citations omitted).

¹⁷⁶See *In re NationsMart Corp. Securities Litigation*, 130 F.3d 309, 315-16 (8th Cir. 1997) (noting that “a pleading standard which requires a party to plead particular facts to support a cause of action that does not include fraud or mistake as an element comports neither with Supreme Court precedent nor with the liberal system of ‘notice pleading’ embodied in the Federal Rules of Civil Procedure. Federal Rule [of Civil Procedure] 8(a)(2) requires a plaintiff to plead only ‘a short and plain statement of the claim showing that the pleader is entitled to relief....’”) (citations omitted).

¹⁷⁷ 358 F.3d 528 (8th Cir. 2004).

¹⁷⁸ *Id.* at 552, n.19.

cited any authority which would extend the *Noerr-Pennington* doctrine from antitrust law to this type of action.”¹⁷⁹

Recent precedent in the Eighth Circuit is in accord with the *Entergy Arkansas* case. For example, relying on *Entergy Arkansas*, the District Court of Nebraska, in *Buck's, Inc. v. Buc-ee's, Ltd.*,¹⁸⁰ found, in considering the defendant's motion to dismiss the plaintiff's tort claims sounding in unfair competition and deceptive trade practices based on *Noerr-Pennington* immunity, that the application of *Noerr-Pennington* to claims other than those sounding in antitrust “without merit”:

The defendant also argues that the plaintiff's first two claims for relief should be dismissed because they are barred by the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine, however, protects only “[t]hose who petition government for redress [by granting them immunity] from antitrust liability.” *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 57, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993) (citing *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965)). When the United States Supreme Court first applied the *Noerr-Pennington* doctrine, the Court justified its creation by stating “that the Sherman Act does not punish ‘political activity’ through which ‘the people ... freely inform the government of their wishes.’” *Id.* (citing *Noerr*, 365 U.S. at 137). Thus, the “original formulation” of the *Noerr-Pennington* doctrine was one of “antitrust petitioning immunity.” *Professional* at 57.

To date, the Supreme Court has not yet expanded this doctrine to apply to cases outside of antitrust law. Likewise, the Eighth Circuit Court of Appeals has only noted the absence of “authority which would extend the *Noerr-Pennington* doctrine from antitrust law” to apply to other cases. *Entergy Arkansas, Inc. v. Nebraska*, 358 F.3d 528, 552 n.19 (8th Cir. 2004). As no precedent exists to apply the doctrine to a case such as the case presently before the court, the court finds the defendant's argument for the application of the *Noerr-Pennington* doctrine to be without merit. As a result, the court concludes that the defendant's 12(b)(6) motion should be denied.¹⁸¹

¹⁷⁹ *Id.*

¹⁸⁰ No. 8:08CV519, 2009 WL 1839007 (D. Neb. June 25, 2009).

¹⁸¹ *Id.*, at *9.

As detailed in the SAC, none of Luxpro’s claims are based on the Sherman Antitrust Act or antitrust law.¹⁸² Because Eighth Circuit law limits the scope of *Noerr-Pennington* immunity only to claims premised on the Sherman Act or antitrust law, Apple’s motion to dismiss premised on *Noerr-Pennington* immunity must be denied, and additional analysis on this issue immediately should cease.

3. Apple’s Interference With Luxpro’s Current and Prospective Customers, Suppliers, and Partners is Not Protected Under *Noerr-Pennington* Because it is Not “Petitioning Conduct.”

Even if the doctrine did apply to the claims Luxpro has pleaded, however, the doctrine is nevertheless inapplicable because Apple’s alleged conduct does not qualify as “petitioning conduct” such that it is afforded immunity from suit by the First Amendment.

The *Noerr-Pennington* doctrine was first recognized in two antitrust cases, *Noerr* and *United Mine Workers v. Pennington*.¹⁸³ The Supreme Court held that the railroads in *Noerr* were immune from suit because “the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws.”¹⁸⁴ In *Pennington*, the Supreme Court extended this immunity to the right to petition the executive.¹⁸⁵ Later, in *California Motor Transport Co. v. Trucking Unlimited*, the Supreme Court further extended the doctrine to cover petitioning the courts, the third branch of government.¹⁸⁶

¹⁸² See SAC, generally.

¹⁸³ 381 U.S. 657 (1965)

¹⁸⁴ *Noerr*, 365 U.S. at 138.

¹⁸⁵ 381 U.S. 657 (1965)

¹⁸⁶ 404 U.S. 508 (1972).

Noerr-Pennington immunity is based upon two grounds.¹⁸⁷ The first ground was based upon a statutory interpretation of the Sherman Act:

To hold that the government retains the power to act in [a] representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.¹⁸⁸

The second ground was predicated on the First Amendment right to petition:

Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.¹⁸⁹

As previously discussed, the Eighth Circuit has concluded that *Noerr-Pennington* is inapplicable when there are no antitrust claims involved. Thus, Apple's reliance upon antitrust cases, like *Coastal States Marketing, Inc. v. Hunt*,¹⁹⁰ and *McGuire Oil Co. v. Mapco, Inc.*,¹⁹¹ is altogether misplaced. "To the extent that Supreme Court precedent can be read to extend *Noerr-Pennington* outside of the antitrust context, it does so solely on the basis of the right to petition," or the second ground upon which the doctrine was predicated.¹⁹² For the reasons that follow, however, Apple cannot rely upon either ground for its claim of *Noerr-Pennington* immunity.

¹⁸⁷ See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 399 (1978) (noting the "two correlative principles" on which *Noerr* immunity was established)

¹⁸⁸ *Noerr*, 365 U.S. at 137.

¹⁸⁹ *Id.* at 137-38.

¹⁹⁰ 694 F.2d 1358 (5th Cir. 1983).

¹⁹¹ 958 F.2d 1552 (11th Cir. 1992).

¹⁹² See *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 889 (10th Cir. 2000) (citing, *inter alia*, *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 742-43 (1983) (immunizing employer's law suit from NLRB injunction under the right to petition); *NAACP v. Claiborne Hardware*, 458 U.S. 886, 913-14 (1982) (granting First Amendment immunity to a nonviolent business boycott seeking to vindicate economic and equal rights)). "[T]he Petition Clause protects objectively reasonable lawsuits from being enjoined, but requires a court to look at the underlying statute to determine whether the initiator of the suit can be held liable." *Cardtoons*, 208 F.3d at 890 n.4.

The Fifth Circuit, in *Coastal States Marketing*, rejected the plaintiff's argument that "because threats of litigation are not directed to a government, they do not fall within the rationale of petitioning immunity":

Given that petitioning immunity protects joint litigation, it would be absurd to hold that it does not protect those acts reasonably and normally attendant upon effective litigation. The litigator should not be protected only when he strikes without warning. If litigation is in good faith, a token of that sincerity is a warning that it will be commenced and a possible effort to compromise the dispute.¹⁹³

However, *Coastal States* was an antitrust case and thus, the decision to grant immunity to prelitigation threats was not based upon the right to petition. To that end, the *Coastal States* court altogether rejected the right to petition as a basis for *Noerr*: "*Noerr* was based on a construction of the Sherman Act. It was not a first amendment decision."¹⁹⁴ Moreover, the court specifically "reject[ed] the notion that petitioning immunity extends only so far as the first amendment right to petition and then ends abruptly."¹⁹⁵ Similarly, in *McGuire Oil*, another antitrust case, the Eleventh Circuit protected the threats of litigation under a specific interpretation of the Sherman Act when it held that "threats, no less than the actual initiation of litigation, do not violate the Sherman Act."¹⁹⁶

The instant case is not an antitrust case.¹⁹⁷ Thus, to the extent any basis for *Noerr-Pennington* protection exists, it must be predicated on the First Amendment right to petition.¹⁹⁸ However, as the Tenth Circuit has noted, "[t]he plain language of the First

¹⁹³ *Coastal States Marketing*, 694 F.2d at 1367.

¹⁹⁴ *Id.* at 1364-65 (footnote omitted).

¹⁹⁵ *Id.* at 1366.

¹⁹⁶ *McGuire Oil*, 958 F.2d at 1560.

¹⁹⁷ See *Entergy*, 358 F.3d at 552 n.19 (rejecting defendant's assertion that it was protected by the First Amendment in a case not involving antitrust law from consideration of other lawsuits as evidence of bad faith).

¹⁹⁸ *Noerr*, 365 U.S. at 137-38.

Amendment protects only those petitions which are made to ‘the government,’”¹⁹⁹ and, as discussed in detail herein and in the SAC, Apple’s conduct consisted of commercial-related communications with Luxpro’s current and potential customers, suppliers, and business partners—not the government. Accordingly, Apple’s communications do not amount to “petitioning conduct” and thus, are simply not afforded immunity from suit by the right to petition guaranteed by the First Amendment.²⁰⁰

4. *Noerr-Pennington* is Inapplicable Because Apple’s Conduct Does Not Relate to the Protection of Any Intellectual Property Owned by Apple.

Apple’s entire *Noerr-Pennington* defense relies on the faulty premise that its conduct should be protected because all of the communications with Luxpro’s customers, suppliers, business partners, and prospective customers and partners, as well as the initiation of the various lawsuits and legal proceedings against Luxpro, was done under the guise of protecting its “intellectual property.” Such a claim is without merit, and there is no evidence supporting any such notion.

Notably, Apple has made no showing, or even alleged, that it owns a registered, valid intellectual property right in either Germany or Taiwan related to the shape and design of the Apple iPod Shuffle product. Moreover, Apple has come forth with no facts to support any conception or reduction to practice regarding the shape and design of the Apple iPod Shuffle product—nor has it even alleged as much. Indeed, given that several thumb drive MP3 players were available in the market—long before Apple introduced its iPod Shuffle product, it is likely that any purported claim Apple has to intellectual

¹⁹⁹ See *Cardtoons*, 208 F.3d at 892.

²⁰⁰ See *id.* at 891 (holding that, in a case non-antitrust case, “prelitigation threats communicated solely between private parties” were not “afforded immunity from suit by the right to petition guaranteed by the First Amendment”).

property covering the shape and design of the Shuffle is altogether invalid and/or unenforceable.

Without identifying any method, apparatus, or design patent, or any copyright, trademark, or specific trade dress claim, or even any trade secrets, Apple argues generally that its conduct should be protected because it was merely defending its intellectual property rights. In addition, noticeably absent from its claims, Apple fails to identify any intellectual property it owns that was actually registered in the various countries from which Luxpro's claims originate.

As alleged in Luxpro's SAC, Apple had multiple illegal communications with Luxpro, as well as Luxpro's customers, suppliers, business partners, and prospective customers and partners, including communications claiming that Luxpro was violating intellectual property owned by Apple.

5. Actions Undertaken by Apple in Foreign Countries are Not Protected by *Noerr-Pennington*.

Apple is precluded from asserting any *Noerr-Pennington* defense for all the reasons discussed above, and, particularly because that doctrine only applies to Sherman Act antitrust claims. *Noerr-Pennington* immunity is further inapplicable, as numerous courts have held, because the vast majority (if not all) of the legal actions and communications with Luxpro's customers, suppliers, business partners, and prospective customers occurred outside of the United States.²⁰¹

²⁰¹ See, e.g., *U.S. Power Inc., v. Seimens Power Transmission & Distribution, L.L.C.*, No. 05-cv-525, 2006 WL 1876686 at *2 n.1 (D. Minn. July 5, 2006); *Laker Airways Ltd. v. Pan Am World Airways, Inc.*, 604 F. Supp. 280, 287-88 (D.D.C. 1984); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92, 108 (C.D. Cal. 1971), *aff'd on other grounds*, 461 F.2d 1261 (9th Cir. 1972) (*Noerr-Pennington* does not protect applications to governments of other nations); see also *Guessous v. Chrome Hearts, LLC*, 102 Cal.Rptr.3d 214, 218 (Cal. Ct. App. 2009) (holding that foreign petitioning not protected); *Bulkferts Inc. v. Salatin Inc.*, 574 F.Supp. 6, at *9 (S.D.N.Y.1983) (questioning applicability of *Noerr-Pennington* to foreign activities).

For example, in *U.S. Power*,²⁰² the District Court of Minnesota declined to consider the defendants' claim that its petitioning a municipality in a foreign country should be protected under the *Noerr-Pennington* doctrine specifically holding that "the parties have not offered, and the Court has not discovered, any reported case law on the issue of whether *Noerr-Pennington* applies where, as here, an alien is petitioning a foreign government."²⁰³

A detailed review of Luxpro's SAC reveals that nearly all (if not all) of the conduct complained of by Luxpro relates to actions taken by Apple on foreign grounds. Accordingly, such actions are not protected activity under the *Noerr-Pennington* doctrine.²⁰⁴

6. This Court Has Already Ruled That the Majority of Luxpro's Claims Can Proceed Even if *Noerr-Pennington* is Considered.

Apple's efforts to dominate the MP3 Player market and to drive Luxpro out of business because it competed successfully in the MP3 market against Apple's iPod products is not entitled to immunity under the *Noerr-Pennington* doctrine, particularly at the pleading stage of this litigation, as this honorable Court held in its opinion dated September 28, 2009.²⁰⁵ In that ruling, the Court found that Apple had not "shown that its post litigation conduct of sending warning letters, making threats and asserting pressure on Luxpro's clients were incidental to the prosecution of the foreign litigation."²⁰⁶ Due to Apple's failure to make such a showing, the Court also concluded that Apple's conduct

²⁰² See *U.S. Power*, 2006 WL 1876686 at *2 n.1.

²⁰³ *Id.*

²⁰⁴ See *id.*

²⁰⁵ *Luxpro Corp. v Apple, Inc.*, 658 F.Supp.2d 921, 929 (W.D. Ark. 2009).

²⁰⁶ *Id.*

was not “in any way related to its right to petition a court.”²⁰⁷ Nothing has occurred since that ruling that would change its effect on these proceedings.

7. In the Unlikely Event That the Court Considers *Noerr-Pennington*—Despite Controlling Eighth Circuit Precedent to the Contrary—both the “Sham Litigation” and “Pattern Exception” Apply to Preclude Apple’s Attempt to Assert the Defense.

Based on the foregoing, none of Luxpro’s claims are subject to *Noerr-Pennington* immunity. However, in the unlikely event that the Court entertains Apple’s *Noerr-Pennington* defense, the “sham litigation” exception to *Noerr-Pennington* nevertheless bars any such defense based on both (1) a conventional analysis of the two-step test enunciated by the U.S. Supreme Court in *Professional Real Estate Investors, Inc. v. Columbia Pictures*,²⁰⁸ and (2) the “pattern exception” line of cases, which, when applicable, lowers the standard for demonstrating that the “sham litigation” exception applies.²⁰⁹

²⁰⁷ *Id.*

²⁰⁸ 508 U.S. 49, 60 (1993) (“We now outline a two-part definition of ‘sham’ litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor through the use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.”) (internal citations, brackets, and quotations omitted).

²⁰⁹ Apple has argued, in its second motion to dismiss, that Luxpro should be precluded from arguing that the actual filing of the litigation in Taiwan and Germany constitutes “sham litigation.” See Dkt. No. 67 at 13. While the Court did note in its opinion that Luxpro did not, in its response, challenge the contention that the sham litigation was objectively baseless (See *Luxpro*, 658 F.Supp.2d at 928), Luxpro, here, would respectfully request either reconsideration of that holding and/or that Luxpro be allowed to re-raise the issue of “sham litigation” because, as demonstrated herein, Luxpro believes that it can easily satisfy both (1) that the “sham litigation” exception to the *Noerr-Pennington* doctrine applies and that, an issue that was not argued by either party during the initial motion to dismiss stage, and (2) that the “pattern exception” should apply, which would preclude Luxpro’s requirement to show that the litigation was objectively baseless. In any event, Apple has re-urged several points in its second motion to dismiss that the Court found in Luxpro’s favor as detailed in this Court’s Memorandum Decision. To the extent these contentions are not barred by the law-of-the-case, Luxpro respectfully requests the Court to consider Luxpro’s “sham litigation” and “pattern exception” arguments, as detailed herein.

**a. The “Pattern Exception” Applies to Luxpro’s Claims—
Thereby Precluding Application of a Strict *Noerr-Pennington*
Analysis.**

The “sham litigation” analysis is appropriate and clearly applicable, given that Luxpro’s pleadings are thorough, detailed, and provide substantial evidence of Apple’s complex, multi-faceted, multi-pronged scheme directed towards Luxpro and designed to both forestall competition in the MP3 player industry and destroy Luxpro’s MP3 player business. Where, as here, evidence that a competitor has invoked the petitioning process—and its concomitant burdens of expense and delay—repetitively, without regard to the merits, but simply to hamper a marketplace rival, courts apply a less stringent test for the “objectively-baseless” prong of the “sham litigation” exception test.

The origin of the “pattern exception” appears to emanate from Justice Stevens’ (joined by Justice O’Connor) concurrence in the seminal *Professional Real Estate Investors* case where the United States Supreme Court clarified the test applicable to the “sham litigation” exception to the *Noerr-Pennington* doctrine.²¹⁰

As relevant here, Justice Stevens wrote:

While I agree with the Court's disposition of this case and with its holding that “an objectively reasonable effort to litigate cannot be sham regardless of subjective intent,” ante, at 1926, I write separately to disassociate myself from some of the unnecessarily broad dicta in the Court's opinion. Specifically, I disagree with the Court's equation of “objectively baseless” with the answer to the question whether any “reasonable litigant could realistically expect success on the merits.” *There might well be lawsuits that fit the latter definition but can be shown to be objectively unreasonable, and thus shams. It might not be objectively reasonable to bring a lawsuit just because some form of success on the merits—no matter how insignificant—could be expected.* With that possibility in mind, the Court should avoid an unnecessarily broad holding that it might regret when confronted with a more complicated case.²¹¹

²¹⁰ *Professional Real Estate Investors*, 508 U.S. at 67.

²¹¹ *Id.* at 67-68 (emphasis added) (footnotes omitted).

* * * * *

As the Court recently explained, a “sham” *is the use of “the governmental process-as opposed to the outcome of that process-as an anticompetitive weapon.”* *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380, 111 S.Ct. 1344, 1354, 113 L.Ed.2d 382 (1991). *The distinction between abusing the judicial process to restrain competition and prosecuting a lawsuit that, if successful, will restrain competition must guide any court's decision whether a particular filing, or series of filings, is a sham. The label “sham” is appropriately applied to a case, or series of cases, in which the plaintiff is indifferent to the outcome of the litigation itself, but has nevertheless sought to impose a collateral harm on the defendant by, for example, impairing his credit, abusing the discovery process, or interfering with his access to governmental agencies. It might also apply to a plaintiff who had some reason to expect success on the merits but because of its tremendous cost would not bother to achieve that result without the benefit of collateral injuries imposed on its competitor by the legal process alone.*²¹²

* * * * *

Even in this Court, more complicated cases, in which, for example, the alleged competitive injury has involved something more than the threat of an adverse outcome in a single lawsuit, have produced less definite rules. *Repetitive filings, some of which are successful and some unsuccessful, may support an inference that the process is being misused. In such a case, a rule that a single meritorious action can never constitute a sham cannot be dispositive. Moreover, a simple rule may be hard to apply when there is evidence that the judicial process has been used as part of a larger program to control a market and to interfere with a potential competitor's financing without any interest in the outcome of the lawsuit itself.* It is in more complex cases that courts have required a more sophisticated analysis-one going beyond a mere evaluation of the merits of a single claim.²¹³

Citing an opinion by Judge Posner discussing the anti-competitive effect (and motives related thereto) of filing numerous, burdensome legal proceedings against a competitor,²¹⁴ Justice Stevens concluded: “It is important to remember that the distinction between ‘sham’ litigation and genuine litigation is not always, or only, the

²¹² *Id.* at 68-69 (emphasis added).

²¹³ *Id.* at 72-73 (emphasis added) (citations omitted).

²¹⁴ *Id.* at 74-75.

difference between lawful and unlawful conduct; objectively reasonable lawsuits may still break the law.”²¹⁵

Picking up on that theme, in *USS-POSCO Industries v. Contra Costa County Bldg. & Const. Trades*, the Ninth Circuit detailed the following test that is generally referred to as the “pattern exception” where multiple lawsuits and activities claimed to be protected by *Noerr-Pennington* are involved:

We reconcile these cases by reading them as applying to different situations. *Professional Real Estate Investors* provides a strict two-step analysis to assess whether a single action constitutes sham petitioning. This inquiry is essentially retrospective: If the suit turns out to have objective merit, the plaintiff can't proceed to inquire into subjective purposes, and the action is perforce not a sham. See 508 U.S. at ---- & n. 5, 113 S.Ct. at 1928 & n. 5. *California Motor Transport* deals with the case where the defendant is accused of bringing a whole series of legal proceedings. Litigation is invariably costly, distracting and time-consuming; having to defend a whole series of such proceedings can inflict a crushing burden on a business. *California Motor Transport* thus recognized that the filing of a whole series of lawsuits and other legal actions without regard to the merits has far more serious implications than filing a single action, and can serve as a very effective restraint on trade. When dealing with a series of lawsuits, the question is not whether any one of them has merit—some may turn out to, just as a matter of chance—but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival. The inquiry in such cases is prospective: Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?²¹⁶

The Second Circuit Court of Appeals is in accord. In *Primetime 24 Joint Venture v. National Broadcasting, Co., Inc.*, the court held:

This two-step inquiry, however, applies to determining ‘whether a single action constitutes sham petitioning.’ *USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, AFL-CIO*, 31 F.3d 800, 811 (9th Cir.1994) (interpreting *Professional Real Estate*). In cases in which ‘the defendant is accused of bringing a whole series of legal proceedings,’ the

²¹⁵ *Id.* at 75.

²¹⁶ 31 F.3d 800, 810-11 (9th Cir. 1994).

test is not ‘retrospective’ but ‘prospective’: ‘Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?’ *Id.* As the Ninth Circuit has noted, it is immaterial that some of the claims might, ‘as a matter of chance,’ have merit. The relevant issue is whether the legal challenges ‘are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival.’ *Id.*²¹⁷

In all, a substantial number of courts have acknowledged the “pattern exception” including courts in the Second Circuit, the Fifth Circuit, the Tenth Circuit, and the Eleventh Circuit.²¹⁸ It does not appear, however, that any courts in the Eighth Circuit have had the opportunity to specifically consider the “pattern exception” as defined first by the Ninth Circuit in the *USS-POSCO Industries* case.

Notably, however, in *Alexander v. National Farmers Organization*, the Eighth Circuit approved of viewing the entire course of conduct of a party (or parties), including serial litigation, threats of litigation, harassment, lobbying efforts, communications with industry participants, and other related conduct as part of a single campaign or pattern that is designed to destroy or cripple a competitor.²¹⁹ The *Alexander* case further stands for the proposition that communications, threats, and harassment to a party’s customers and business partners related to any litigation is both improper and illegal.²²⁰

²¹⁷ 219 F.3d 92, 100-101 (2d Cir. 2000).

²¹⁸ See e.g., *Primetime 24 Joint Venture v. Nat’l Broadcasting, Co., Inc.*, 219 F.3d 92, 100-102 (2d Cir. 2000); *In re DDAVP Direct Purchaser Antitrust Litigation*, 585 F.3d 677, 685 (2d Cir. 2009); *USS-POSCO*, 31 F.3d at 810-11; *Total Renal Care, Inc. v. Western Nephrology and Metabolic Bone Disease, P.C.*, No. 08-cv-00513, 2009 WL 2596493, *10 (D. Colo. Aug. 21, 2009); *Livingston Downs Racing Ass’n Inc. v. Jefferson Downs Corp.*, 192 F.Supp.2d 519, 537 (M.D. La. 2001); *In re Terazosin Hydrochloride Antitrust Litigation*, 335 F.Supp.2d 1336, 1366 (S.D. Fla. 2004).

²¹⁹ See *Alexander v. Nat’l Farmers Org.*, 687 F.2d 1173, 1193-1203 (8th Cir. 1982); see also *Aircapital Cablevision, Inc. v. Starlink Commc’ns Group, Inc.*, 634 F.Supp. 316, 325-26 (D. Kan. 1986).

²²⁰ *Alexander*, 687 F.2d at 1193-1203.

Significantly, the Eighth Circuit specifically found that such conduct directed towards the party's customers was not protected by *Noerr-Pennington*.²²¹

The *Aircapital* court summarized the Eighth Circuit's holding in *Alexander* as follows:

In *Alexander* ..., after filing a lawsuit against NFO alleging antitrust violations, the plaintiffs engaged in a broad pattern of litigation threats and harassment against NFO's customers. The court found that although the lawsuit itself was protected by the *Noerr-Pennington* doctrine, the conduct toward NFO's customers clearly constituted bad faith, unlawful harassment. The plaintiffs wrote threatening letters to NFO's customers. One such customer stated, "They [plaintiffs] told me that you buy milk from NFO and you are going to get yourself involved in some kind of a lawsuit spending all sorts of time involving yourself ..." 687 F.2d at 1202. The plaintiffs in fact did sue one of NFO's customers. The court found this suit was baseless and was a mere "springboard for threatening" other customers. The court also found substantial evidence that the plaintiffs' practice of threatening and harassing NFO's customers was planned as a strategy at board meetings. As a result of the plaintiffs' threats, NFO's customers discontinued buying from NFO. **The court found that "when this pattern of litigation, threats of litigation and related harassment" toward the competitor's customers was "viewed as a whole," it was clearly outside the *Noerr-Pennington* exemption.** 687 F.2d at 1203. However, the court specified, "There may be circumstances in which actions against a competitor's customers are in good faith." 687 F.2d at 1200.²²²

Based upon the foregoing, it is clear that Luxpro's claims fall squarely within the confines of the "pattern exception." First, the SAC details several legal proceedings filed by Apple against Luxpro, including: (1) the initial injunctive relief sought by Apple in Germany; (2) the injunctive relief sought by Apple in Taiwan; (3) the multiple appeals of that civil court action; and (4) the legal proceeding undertaken by Apple against Luxpro before the Taiwanese Trade Commission.²²³ In addition, prior to, during, and following the institution of the various legal proceedings against Luxpro, Apple engaged in a

²²¹ *Id*; *Aircapital Cablevision*, 634 F.Supp. at 325-26.

²²² *Aircapital Cablevision, Inc.*, 634 F.Supp. at 325-26 (emphasis added).

²²³ SAC ¶ 7.

strategic, illegal campaign to destroy Luxpro’s viability in the marketplace by communicating with Luxpro’s current and prospective customers, suppliers, and business partners (1) legal threats, (2) disparaging claims related to Luxpro and its products, (3) overbroad and incorrect claims related to Apple’s allegedly-owned intellectual property that Luxpro (and/or its customers or partners) was purportedly infringing, and (4) other illegal communications.²²⁴ Remarkably, as detailed in the second motion to dismiss, Apple argues that *all* of these activities are protected by the *Noerr-Pennington* doctrine.²²⁵

Notwithstanding, Luxpro has established (and specifically plead) that Apple’s conduct—including its various objectively baseless legal proceedings and communications with third parties, directed an illegal campaign against Luxpro that had an anticompetitive intent (and effect) to harass and overwhelm a small competitor who was unable to continue to compete with Apple (and would have had to ultimately withdraw from the market due to Apple’s onslaught).

Moreover, while Apple was initially successful in the German proceeding, albeit primarily because Luxpro chose not to expend the resources to fight, Apple was nevertheless unsuccessful in both its civil case in Taiwan²²⁶ and its case before the Taiwanese Trade Commission, including the multiple appeals Apple filed there.

²²⁴ See *id.*; see also SAC ¶¶ 24, 44, 47, 49, 52.

²²⁵ Dkt. No. at 11-16.

²²⁶ Apple’s claim in its second motion to dismiss that its lawsuit in Taiwan was successful because Luxpro was precluded from selling the “Super Shuffle” misrepresents the facts. Indeed, following the German proceeding, Luxpro—in an effort to resolve the dispute and comply with the German courts’ initial ruling, which is what Apple requested—*agreed* to remove the word “Shuffle” from its product and to change the design. Luxpro did just that. Apple’s lawsuit in Taiwan, and resulting injunction, relates **only to that Luxpro product that had the word “Shuffle” on it** and to the renamed “Super Tangent” product (i.e., the “Super Shuffle”), but only to those Super Tangent products sold with a white color.

Taken as a whole, and consistent with the allegations in the SAC, Luxpro has established that the “pattern exception” should apply and that the “objectively baseless” prong of the “sham litigation” exception to the *Noerr-Pennington* doctrine should be disregarded, thereby allowing Luxpro to proceed with its claims.²²⁷

b. Apple’s Legal Proceedings Were Objectively Baseless, and Therefore, Luxpro Can Establish That the “Sham Litigation” Exception Applies.

Apple’s legal proceedings in Germany and Taiwan were objectively baseless for several reasons. First, Apple misrepresented to the German court, the Taiwanese civil courts (including appellate courts), and the Taiwanese Trade Commission, that it owned intellectual property covering **all** of Luxpro’s MP3 products. Notwithstanding, it is undisputed that Apple has failed to identify a single valid patent, copyright, or trademark registered in either Germany or Taiwan that Luxpro ever infringed. Instead, Apple relies on vague (and baseless) trade dress arguments to claim that, somehow, Luxpro should be precluded from selling **all** of its MP3 players. Notably, however, Apple did not invent the shape or design of the iPod Shuffle product, which is the basis for Apple’s “trade dress” claim. To that end, Apple has made no showing, or even implied that it invented the shape or design of the iPod Shuffle product, nor could it, especially given that there were several thumb-drive MP3 players on the market *prior* to Apple’s commercial release of the iPod Shuffle that had the same shape and design.²²⁸ Based on this alone, it is apparent that Apple’s various legal proceedings against Luxpro were objectively baseless. Beyond this, it is well settled that misrepresentations to a governmental

²²⁷ See *Aircapital Cablevision*, 634 F.Supp. at 325-26.

²²⁸ As an aside, no one should be surprised that Apple is claiming ownership of intellectual property that it actually neither invented nor as to which it holds intellectual property. See *e.g.*, <http://www.dailymail.co.uk/news/article-1053152/Apple-admit-Briton-DID-invent-iPod-hes-getting-money.html>

authority, including a foreign judicial body, are not protected under the First Amendment and, therefore, would not be protected under the *Noerr-Pennington* doctrine.²²⁹

Second, assuming *arguendo*, that the “Super Shuffle” product, later renamed the “Super Tangent” product, somehow violated Apple’s “trade dress,” the balance of the MP3 player products that Apple sought to stop Luxpro from selling do not resemble Apple’s Shuffle iPod product in any way, shape, or form. For example, Luxpro’s EZ Tangent MP3 products that Apple sought to enjoin in Taiwan have an LED screen, different locations for the touchpad that controls the player, different shapes for the touchpad that controls the player, and the brand “LUXPRO” is emblazoned on the front of the device in a clear, distinct form. Despite these obvious differences, Apple nevertheless (1) filed a civil complaint seeking to enjoin Luxpro from producing and selling the EZ Tangent MP3 player (as well as others that simply bore no resemblance to Apple’s Shuffle iPod), (2) filed multiple appeals in which it continued to assert that the EZ Tangent (and other Luxpro MP3 players) infringed Apple’s trade dress, and (3) separately, and long after the Taiwanese district court had reversed Apple’s preliminary, temporary injunction (reached, essentially, on an *ex parte* basis), filed a complaint with the Taiwanese Trade Commission, again seeking to enjoin Luxpro from producing and selling the EZ Tangent (and other Luxpro MP3 players). Each piece of litigation, and each appeal (because the appeal continues the pattern of litigation and continues the assertion of baseless claims), is a separate example of sham litigation. In total, including appeals, Apple is liable for at least eight (8) examples of “sham litigation”—all of which were designed to destroy Luxpro’s MP3 player business.

²²⁹ See *Cardtoons*, 208 F.3d at 891 (holding that threats communicated solely between private parties, that were unrelated to litigation, was not afforded immunity from suit by the right to petition guaranteed by the First Amendment); see also *U.S. Power*, 2006 WL 1876686 at *2 n.1.

That Apple obtained an initial injunction on all of Luxpro's MP3 players is of no moment given the one-sided presentation and Apple's intentional misrepresentations of its intellectual property holdings. Ultimately, Apple was unsuccessful in Taiwan and, at the very least, its claims to cover Luxpro MP3 players other than the "Super Shuffle" (renamed the "Super Tangent") were objectively baseless because the other MP3 players bear no resemblance to Apple's "Shuffle" iPod.

Third, Apple's multiple examples of "sham litigation" were merely part of a broader scheme and pattern of anticompetitive activity designed to destroy Luxpro's MP3 player business, as alleged in the SAC and as detailed herein.

c. All of Apple's Continued Legal Proceedings and Communications with Luxpro Partners and Customers Following the Reversal of the Preliminary Injunction in Taiwan Are Objectively Baseless and Qualify as "Sham Litigation."

Apple's continued communications with current and prospective Luxpro customers, suppliers, and business partners, as well as all of its appeals from the civil lawsuit and the initiation of the legal proceeding before the Taiwan Fair Trade Commission (including appeals), were objectively baseless. This is particularly true because the conduct occurred after the Taiwanese civil court lifted the preliminary injunction against Luxpro. Thus, this conduct should not be subject to the objectively baseless prong of the "sham litigation" analysis because the "pattern exception" clearly applies.

Despite the Taiwanese court's order reversing the injunction against all but one of Luxpro's products, Apple *continued* to file sham litigation, illegally communicate with Luxpro's current and prospective customers and business partners related to products that

were not covered by the injunction that was no longer in effect and that, objectively, could not be covered by any intellectual property allegedly owned and/or asserted by Apple.

In any event, Apple is not entitled to *Noerr-Pennington* protection in this case because Luxpro's causes of action are not entirely premised on the fact that Apple filed two lawsuits in Germany and Taiwan. Instead, the claims asserted in the SAC are directed more to Apple's post-injunction conduct and, specifically, to the threats and warnings Apple issued to Luxpro's customers, retailers, distributors and other business partners—**after** the injunction in Taiwan had been overturned. By November 2005, the Taiwanese court determined, after examining all of the evidence submitted by Luxpro and Apple, that Luxpro had introduced other functionally superior products into the marketplace *prior* to Apple's roll-out of its so-called "next generation products with similar features."²³⁰ Therefore, Luxpro did not violate any of Apple's intellectual property rights as to those products. The same result occurred in the Taiwanese Trade Commission where Luxpro was found to not be in violation of Taiwan's Fair Trade Act.²³¹

Those rulings confirmed that Apple's claims were baseless. Nevertheless, Apple continued its unfair trade practices and scheme to destroy Luxpro's business by, *inter alia*, sending letters to Luxpro's business partners threatening: (1) similar baseless litigation against them; and (2) to boycott Luxpro's business partners by refusing them access to Apple's MP3 products unless they refused to do business with Luxpro. Even after Luxpro's Top Tangent and EZ Tangent products had been exonerated in court and

²³⁰ See SAC ¶ 41.

²³¹ See SAC ¶ 46.

in Taiwan’s administrative Fair Trade Commission, Apple nevertheless continued to disparage Luxpro’s products by spreading the word throughout the MP3 player market that Luxpro’s product’s were cheap “knock-offs” or illegal copies of Apple’s iPod products.²³² Thereafter, during the later part of 2005 and early 2006, all of the distribution agreements detailed in the SAC were terminated, and dozens of customers, retailers and resellers that had already purchased thousands of units of Luxpro’s MP3 products stopped doing business with Luxpro and cancelled existing orders.²³³ Apple’s post-litigation actions clearly were totally unrelated to any right Apple had to petition a court or administrative body and thus, are not entitled to *Noerr-Pennington* immunity.²³⁴

Moreover, Apple’s most recent efforts to re-characterize its post-litigation tactics to “pre-litigation” conduct simply because it continued to appeal decisions that overturned the injunctive relief granted in the Taiwanese court is equally unavailing. Apple’s continued efforts to appeal rulings relating to its claims against Luxpro were baseless and simply confirm Apple’s planned pursuit of a sham litigation strategy. None of the cases cited by Apple support its claims for immunity for the actions it took after the filing of the injunction suits because, among other things, the case at bar is not about a single act of litigation. Instead, Luxpro complains of a pattern of anti-competitive behavior and continuing acts of unfair trade practices and product disparagement **after** the Taiwanese court’s injunction was reversed.

²³² See SAC ¶ 48.

²³³ See SAC ¶ 49.

²³⁴ See *Int’l Motor Contest Assoc., Inc. v. Staley*, 434 F. Supp.2d. 650, 663 (N.D. Iowa 2006); *Laitram Mach v. Carnitech A/S*, 901 F. Supp. 1155, 1161 (E.D. La. 1995); *Venetian Casino Resort, LLC v. N.L.R.B.*, 484 F. 3d 610 (D.C. Cir. 2007).

Accordingly, *Omni Resource Development Corp. v Conoco, Inc.*,²³⁵ has no application to the facts presented in this case. Neither does *Theme Promotions Inc., v. News America Marketing FSI*, support Apple’s arguments. Notably, the *Theme Promotions* court did **not** hold that a plaintiff is absolutely barred from asserting claims based on a defendant’s demand letters sent to customers. Instead, the Ninth Circuit held that even “pre-suit letters” threatening legal action may be found unlawful where they include representations so baseless that the litigation would fall into the “sham litigation exception.”²³⁶ Thus, *Theme Promotions* merely concluded that the defendant’s pre-suit letters did not constitute sham litigation under the facts of that case. Unlike the facts in Apple’s cases, the contact with Luxpro’s customers, retailers and distributors occurred **after** the injunction suit—and many of them occurred after the injunction had been overturned.

In summary, while Luxpro believes its pleadings related to Apple’s claims of *Noerr-Pennington* immunity are more than adequate, to the extent the Court needs further clarification or briefing, Luxpro respectfully requests leave to amend or supplement its pleadings, especially given that, as detailed above, such re-pleading would not be futile, Apple would suffer no prejudice, and the relief would be consistent with the interests of justice.²³⁷

²³⁵ 739 F.2d 1412, 1414 (9th Cir. 1984) (concluding that case involving a single act of litigation was not a pattern of anti-competitive behavior).

²³⁶ *Theme Promotions Inc., v. News America Marketing FSI*, 546 F. 3d 991, (9th Cir. 2008).

²³⁷ To the extent the Court believes that Luxpro should re-plead its *Noerr-Pennington*-related pleadings, Luxpro would respectfully request that discovery be ordered by the Court to begin, especially given that Luxpro can, as detailed herein, easily amend its pleadings to allege plausible claims that would defeat all of Apple’s *Noerr-Pennington* defenses.

V. CONCLUSION

For the reasons stated herein, Luxpro respectfully requests that the Court deny Apple's second motion to dismiss in its entirety.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system, this 29nd day of March, 2010.

/s/ Phillip N. Cockrell _____
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