

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

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

**Plaintiff, )**

**Civil Action No. 4:08-CV-04092-HFB**

**v. )**

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

**Defendant. )**

**DEFENDANT APPLE INC.'S REPLY IN SUPPORT OF ITS  
MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

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## INTRODUCTION

The *Noerr-Pennington* doctrine is a complete bar to all of Luxpro's claims.<sup>1</sup> The Second Amended Complaint ("SAC"), even more clearly than the prior complaint, establishes that the harm Luxpro claims in this case was the direct result of injunctions lawfully obtained by Apple in Taiwan and Germany — injunctions that this Court has already ruled are protected by *Noerr-Pennington*. Luxpro expressly alleges in multiple paragraphs of the SAC that it suffered damage as a result of the business interruption supposedly caused when Apple obtained injunctive relief against Luxpro in Taiwan. (*See, e.g.*, SAC ¶¶ 41, 43.) These allegations concede that Luxpro's claims against Apple are based on nothing more than Apple's conduct in enforcing its intellectual property rights, and leave no doubt that the SAC should be dismissed in its entirety under *Noerr-Pennington*.<sup>2</sup>

Forced to confront that the conduct it alleges is covered by *Noerr-Pennington*, Luxpro resorts to a series of ill-founded arguments in an attempt to avoid the doctrine's impact. Each of Luxpro's arguments is flat wrong. Luxpro contends, for example, that *Noerr-Pennington* applies only to Sherman Act claims. This argument is contrary to decades of case law applying the doctrine to the very types of non-Sherman Act claims that Luxpro asserts here. Not surprisingly, the only support Luxpro can muster is a footnote from one case (a footnote that Luxpro badly

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<sup>1</sup>Apple files this reply brief pursuant to the Court's Order dated April 13, 2010. By complying with this Court's scheduling order, Apple does not waive its right to transfer of this Action to the United States District Court for the Northern District of California pursuant to the writ issued by the Eighth Circuit on April 19, 2010.

<sup>2</sup> Luxpro makes two inappropriate arguments in its brief, both of which should be disregarded. First, Luxpro claims that Apple waived the arguments in its Motion to Dismiss by not responding to Luxpro's motion for leave to file the SAC. (*See* Luxpro Corporation's Response to Apple Inc.'s Second Motion to Dismiss ("Opp.") at 3.) But as Luxpro is certainly aware, Apple signed a stipulation with Luxpro regarding Luxpro's motion to amend, which expressly stated that Apple was not waiving any arguments or defenses to matters contained in the SAC. (Stipulation re Motion for Leave to File SAC, Docket No. 60.) Second, Luxpro contends that Apple's previous motion to dismiss — which the Court granted in large part — was brought solely for the purposes of delay. A motion to dismiss that is granted is hardly evidence of improper delay tactics.

misreads). Luxpro next claims, against the great weight of authority, that *Noerr-Pennington* does not apply to foreign proceedings. Courts — including this Court in its prior decision on Apple’s motion to dismiss — apply *Noerr-Pennington* to conduct occurring outside the United States.

Luxpro also attempts to argue that the so-called “pattern” exception to *Noerr-Pennington* applies. There is serious doubt as to whether the “pattern” exception exists. As set forth below, it has been rejected by a number of courts and has never been recognized in this Circuit. In any event, the SAC alleges nothing close to the manifold proceedings (a *minimum* of nine separate lawsuits) found by a few courts to constitute a “pattern” of baseless proceedings. Finally, Luxpro contends that Apple’s communications with Luxpro’s purported customers are not protected by *Noerr-Pennington*. That argument fails as a matter of law. Numerous courts hold that pre-litigation cease-and-desist communications — which is all the SAC alleges — fall squarely within *Noerr-Pennington*. In contrast, Luxpro relies on a single case that has been described as an “outlier” and “inconsistent with the weight of authority.”

Luxpro’s attempts to avoid dismissal of particular claims are also meritless. The tortious interference claims in the SAC contain the same defects that this Court identified in dismissing the First Amended Complaint (“FAC”). Luxpro glosses over these defects, arguing that the Court should look at the claims “in their entirety,” rather than on an entity-by-entity basis as the Court did in granting in part the motion to dismiss the FAC. The Court should evaluate Luxpro’s claims just as it did before, and reject Luxpro’s attempt to use vague allegations regarding Apple’s supposed interference with unnamed and unknown entities to state an interference claim. The Court should also reject Luxpro’s attempted sleight of hand: Luxpro claims that it has alleged particular elements of a tortious interference claim for a particular entity, but Luxpro

cites to allegations regarding a *different* entity. Luxpro cannot cobble together a claim by alleging one element for entity X, another element for entity Y, and a third element for entity Z.

Luxpro's Lanham Act claim also fails. As courts have repeatedly held, communications by a defendant that allegedly threaten suit against a company are not "commercial advertising or promotion." Luxpro also cannot avoid the fact that its Lanham Act claim is grounded in fraud, thereby triggering Rule 9(b)'s requirements. Luxpro does not even attempt to demonstrate how its allegations meet those requirements. They do not.

Luxpro's Unfair Competition Law ("UCL") claim fails as well. Luxpro has not adequately pled a violation of a statute or a common law tort, and thus has not pled a claim under the "unlawful" prong of the UCL. Luxpro also has failed to plead a claim under the "unfair" prong, because it has not alleged an actual or incipient violation of the antitrust laws. Luxpro alleges facts that at most demonstrate harm to itself, not harm to competition. The California Supreme Court has expressly held that the law protects *competition*, not competitors such as Luxpro. Finally, the SAC does not allege sufficient facts to state a claim under the "fraudulent" prong of the UCL, particularly under the heightened pleading standard of Rule 9(b) which applies to such claims.

Luxpro's "commercial disparagement" claim must also be dismissed. Luxpro does not even attempt to meet the requirements for pleading such a claim. Instead, it relies on a mischaracterization of Apple's arguments, the misguided contention that the claim should be viewed "as a whole," and arguments that this Court has already rejected in dismissing the FAC. None of these contentions rescues its claim.

The SAC should be dismissed with prejudice.

## ARGUMENT

### I. LUXPRO MISCHARACTERIZES ITS PLEADING BURDEN AND IMPROPERLY REQUESTS DISCOVERY TO CURE ITS PLEADING DEFECTS

Luxpro incorrectly claims that all it must do is show that its claim can be “considered plausible.” (Opp. at 11.) Luxpro must do more than that, however — it must plead sufficient *facts* to establish that its claims are plausible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). Although Luxpro is not required to plead *all* facts supporting its claims, it must plead *sufficient* facts to satisfy each element of each of its claims.<sup>3</sup> Luxpro fails to do so.

Luxpro repeatedly attempts to excuse this failure by claiming that it needs discovery. (See, e.g., Opp. at 11, 33, 37, 41, 62 n.237.) But both *Twombly* and *Iqbal* hold that a claim must be well-pleaded *before* a plaintiff can obtain discovery: “Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” *Iqbal*, 129 S. Ct. at 1950; see also *Twombly*, 550 U.S. at 557-59. Even before *Twombly*, the Eight Circuit held that discovery is not “a device to enable a plaintiff to make a case when his complaint has failed to state a claim.” *Kaylor v. Fields*, 661 F.2d 1177, 1184 (8th Cir. 1981); see also *United States ex rel Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 822 (8th Cir. 2009) (upholding district court’s rejection of plaintiff’s request for time to conduct discovery to satisfy Rule 9(b)’s particularity requirement). District courts have also held that the need for discovery is no excuse for a deficiently pleaded complaint: “[plaintiffs] are not entitled to ‘conduct a fishing expedition for

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<sup>3</sup> Luxpro’s authority fails to demonstrate otherwise. *Aten v. Scottsdale Ins. Co.*, 511 F.3d 818 (8th Cir. 2008), applied the “no set of facts” standard rejected by *Twombly*. Both *Patrick v. Henderson*, 255 F.3d 914 (8th Cir. 2001), and *Doe v. School Dist. of City of Norfolk*, 340 F.3d 605, 614 (8th Cir. 2003), pre-date *Twombly* and *Iqbal*, and are thus irrelevant to the pleading standard at issue here. *Huggins v. FedEx Ground Package Sys., Inc.*, 592 F.3d 853 (8th Cir. 2010), also does not assist Luxpro, because it did not discuss the *Twombly* or *Iqbal* standard and held that plaintiff had failed to sufficiently allege its claim.



discovery, and only then amend [their] complaint in order finally to set forth well-pleaded allegations.” *In re Medtronic Inc. Sprint Fidelis Leads Prod. Liab. Litig.*, No. 08-1905 (RHK/JSM), 2009 U.S. Dist. LEXIS 9236, at \*7 (D. Minn. Feb. 5, 2009); *see also Jackson v. First Fed. Sav. of Ark., F.A.*, 709 F. Supp. 863, 884 (E.D. Ark. 1988) (discovery “may not be used to fish around in the hopes that currently unsuspected facts will turn up” which allow a claim to be pleaded).<sup>4</sup>

Thus, Luxpro must plead sufficient facts to establish each element of each of its claims, and cannot use the need for discovery as an excuse for its failure to do so.

## **II. LUXPRO’S COMPLAINT SHOULD BE DISMISSED IN ITS ENTIRETY BASED ON THE NOERR-PENNINGTON DOCTRINE**

### **A. Noerr-Pennington Bars Claims Based on a Party’s Legitimate Attempts to Enforce Its Intellectual Property Rights**

Under Supreme Court authority, a party’s enforcement of its intellectual property rights is protected by *Noerr-Pennington*, and claims based on such conduct are barred unless the plaintiff can establish that the defendant’s conduct was merely a sham. *See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 53 (1993). In *Professional Real Estate*, the Supreme Court set forth a rigorous test for determining whether a lawsuit is a sham, equating the standard to that used for malicious prosecution actions. *Id.* at 62. As a threshold requirement, sham litigation must be “objectively baseless,” meaning that “no reasonable litigant could realistically expect success on the merits.” *Id.* at 60. The existence of probable cause to sue, or a “reasonable belief that there is a chance that a claim may be held valid upon

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<sup>4</sup> Luxpro’s reliance on *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002), for the proposition that its claims are better suited for summary judgment after discovery is misplaced. *Twombly* explicitly discounted summary judgment and discovery as effective tools to weed out flawed claims: “It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through ‘careful case management’ . . . And it is self-evident that the problem of discovery abuse cannot be solved by ‘careful scrutiny of evidence at the summary judgment stage[.]’” *Twombly*, 550 U.S. at 559.

adjudication,” precludes a finding of objective baselessness. *Id.* at 62-63. Only if the party arguing that the litigation is “sham” meets this high standard does the litigant’s motivation for the suit become relevant. *Id.* at 60-61.

To avoid chilling a litigant’s exercise of the right to petition, the *Professional Real Estate* test should be applied as a matter of law at the pleading stage. *See Twin City Bakery Workers & Welfare Fund v. Astra Aktiebolag*, 207 F. Supp. 2d 221, 223 (S.D.N.Y. 2002) (citing *Thomas Info. Servs., Inc. v. Lyons Commercial Data, Inc.*, No. 97 Civ. 7716 (JSR), 1998 U.S. Dist. LEXIS 5579 (S.D.N.Y. 1998)); *Caplan v. Am. Baby, Inc.*, 582 F. Supp. 869, 871 (S.D.N.Y. 1984)).

As demonstrated in the following sections, Luxpro has alleged conduct that falls squarely within *Noerr-Pennington*, and Luxpro cannot satisfy the *Professional Real Estate* test to take any of the alleged conduct outside the bounds of the doctrine.

## **B. Apple’s Alleged Conduct Falls Squarely Within *Noerr-Pennington***

This Court has already held that Luxpro’s claims related to the litigation in Germany and Taiwan are barred by *Noerr-Pennington*. Luxpro does not ask the Court to revisit that holding. Instead, Luxpro focuses its arguments on Apple’s contacts with Luxpro’s alleged customers. Luxpro, however, cannot avoid *Noerr-Pennington* by refocusing its claims. The SAC admits that Luxpro’s claims are all based on Apple’s litigation against Luxpro; moreover, the case law is clear that Apple’s communications with customers are protected.

### **1. The SAC’s Express Admissions Preclude Any Claim Based on Contact with Luxpro’s Purported Customers**

The SAC includes multiple, express allegations establishing that Apple’s litigation against Luxpro is the sole basis of Luxpro’s alleged harm. (*See* Apple’s Brief in Support of its Motion to Dismiss the SAC (“Mot.”) at 13-14.) The SAC explicitly alleges that the supposed

harm to Luxpro is the direct result of the business interruption supposedly caused when Apple obtained injunctive relief against Luxpro in Taiwan. (*See id.* (quoting several passages from SAC).) Luxpro offers no response to this point in its opposition brief.

These admissions in the SAC are dispositive of Luxpro’s entire complaint, because the Court has already ruled that Apple’s suits against Luxpro are protected by *Noerr-Pennington*. *See Luxpro*, 658 F. Supp. 2d at 927-28. Even if Luxpro were right that *Noerr-Pennington* does not apply to customer letters (and Luxpro is clearly wrong on this point), it would be irrelevant since Luxpro *admits* that the harm it suffered is a direct result of the *litigation*, not the letters.

## **2. *Noerr-Pennington* Clearly Protects Apple’s Communications With Purported Luxpro Customers**

Luxpro asserts that Apple’s alleged conduct — communications with Luxpro’s customers — “does not qualify as ‘petitioning conduct’ such that it is afforded immunity” under the *Noerr-Pennington* doctrine. (Opp. at 44.) Luxpro is wrong as a matter of law. It is clear from the SAC that Apple’s alleged communications with Luxpro’s purported customers were pre-litigation demand letters. (*See Mot.* at 16-17 (citing SAC ¶¶ 7, 47, 52).) Luxpro does not deny this. The law is clear that *Noerr-Pennington* immunity applies equally to demand letters sent to third parties as it does to demand letters sent to the plaintiff (Luxpro). (*See Mot.* at 17-18 (citing *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991 (9th Cir. 2008); *U.S. Philips Corp. v. Princo Corp.*, No. 02 Civ. 246 (CLB), 2005 U.S. Dist. LEXIS 6820, \*14-15 (S.D.N.Y. Jan. 24, 2005); *Avery Dennison Corp. v. ACCO Brands, Inc.*, No. CV 99-1877 DT (MEX), 2000 U.S. Dist. LEXIS 3938, \*67 (C.D. Cal. Feb. 22, 2000); *Matsushita Elecs. Corp. v. Loral Corp.*, 974 F. Supp. 345, 359 (S.D.N.Y. 1997); *Melea Ltd. v. Quality Models, Ltd.*, 345 F. Supp. 2d 743, 749, 758-59 (E.D. Mich. 2004); *Storage Tech. Corp. v. Custom Hardware Eng’g & Consulting, Ltd.*, No. 02-12102-RWZ, 2006 U.S. Dist. LEXIS 43690, \*112-13 (D. Mass. June 28, 2006); *Coca-*

*Cola Co. v. Omni Pac. Co.*, No. C98-078451, 1998 U.S. Dist. LEXIS 23277, at \*5, 28-29 (N.D. Cal. Dec. 9, 1998).)

Luxpro’s argument that *Noerr-Pennington* does not apply to Apple’s letters ignores the authority cited in Apple’s motion on this point.<sup>5</sup> Instead, Luxpro relies on a Tenth Circuit case — *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 208 F.3d 885 (10th Cir. 2000) — which has been described as “an outlier, inconsistent with the weight of authority relevant to First Amendment status of presuit litigation-related conduct.” *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 937-38 (9th Cir. 2006). The *Cardtoons* court, over a vigorous dissent, rejected the decisions of several other courts and held that threats to third parties were not protected by *Noerr-Pennington*. *Cardtoons*, 208 F.3d at 891-93.

This Court should not follow *Cardtoons*, because it is against the majority rule on the issue and has been expressly rejected by numerous courts — all of which hold that *Noerr-Pennington* applies to threats of litigation, including demand letters. *Sosa*, 437 F.3d at 937 (holding, consistent with the “*law of the majority of other circuits that have considered the issue*,” that *Noerr-Pennington* immunity extends to “presuit demand letters”) (emphasis added); *see also Glass Equip. Dev., Inc. v. Besten, Inc.*, 174 F.3d 1337, 1343-44 (Fed. Cir. 1999) (threat of patent enforcement litigation could not subject patent holder to antitrust liability); *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1560 (11th Cir. 1992) (threats of litigation are protected under *Noerr-Pennington*); *In re IBP Confidential Bus. Doc. Litig.*, 755 F.2d 1300, 1310 (8th Cir. 1985) (right to petition “necessarily includes those activities reasonably and normally attendant to effective petitioning”); *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367-68 (5th Cir.

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<sup>5</sup> Luxpro discusses only one of these cases — *Theme Promotions*. (Opp. at 62.) Luxpro does not dispute that *Theme Promotions* held that letters to customers could be protected by *Noerr-Pennington*. Instead, it claims that in *Theme Promotions*, the threatened litigation was not baseless and that Apple’s threatened litigation was baseless. As demonstrated below, this is incorrect.

1983) (extending petitioning immunity to generalized threats to litigate to protect claim to oil assets); *Atlantic Recording Corp. v. Raleigh*, No. 4:06-CV-1708 CEJ, 2008 U.S. Dist. LEXIS 62977, at \*12 (E.D. Mo. Aug. 18, 2008) (*Noerr-Pennington* bars claims based on demand letters); *Premier Med. Mgmt. Sys., Inc. v. Calif. Ins. Guar. Ass’n*, 136 Cal. App. 4th 464, 479, 39 Cal. Rptr. 3d 43, 54 (2006) (immunity extends to actions taken “in anticipation of, or during” litigation).<sup>6</sup>

Luxpro offers no basis on which this Court could disregard the majority rule, which is the law of this Circuit. Instead, Luxpro contends that the Court has already ruled that Apple’s communications with customers were “post-litigation” and thus not protected. (Opp. at 49-50 (citing *Luxpro*, 658 F. Supp. 2d at 928-29).) But Luxpro is wrong for three reasons. First, the SAC, unlike the FAC, now concedes that Apple’s communications with alleged customers were cease-and-desist communications that threatened lawsuits, i.e., *pre-litigation* contact with these customers. (See, e.g., SAC ¶¶ 7, 47, 52.) The SAC thus makes clear that Apple’s conduct was directly related to its “right to petition a court” and protected by *Noerr-Pennington*. Second, Apple’s communications were also not “post-litigation” with respect to the litigation against Luxpro, because that litigation did not conclude until July 7, 2009. (Declaration of Thomas R.

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<sup>6</sup> Luxpro relies on two other cases, neither of which follows *Cardtoons* or supports Luxpro’s argument. *Laitram Mach., Inc. v. Carnitech A/S*, 901 F. Supp. 1155 (E.D. La. 1995), does not stand for the broad proposition that pre-litigation contacts with potential customers are automatically outside the protections of *Noerr-Pennington*. The *Laitram* court found that *Noerr-Pennington* did not immunize one defendant for sending letters to the plaintiff’s customers, but those letters did not assert the intellectual property rights of that defendant. *Id.* at 1161 & n.5; see also *id.* at 1157 (explaining that intellectual property rights at issue were assigned to defendant who was no longer in the case). Moreover, at least one court has criticized *Laitram* on the grounds that it cited no authority for its conclusion and failed to address a contrary holding of the same court. *Matsushita*, 974 F. Supp. at 359 n.28. Luxpro’s other case, *Venetian Casino Resort, LLC v. Nat’l Labor Relations Bd.*, 484 F.3d 601 (D.C. Cir. 2007), has no relevance at all to this case. *Venetian Casino* concerned the application of *Noerr-Pennington* to loud-speaker warnings and citizen’s arrests by an employer in the context of a labor protest. *Id.* at 612. It does not concern pre-litigation demand letters. Indeed, the *Venetian Court* discussed, and then distinguished, the *Sosa* opinion for this very reason. *Id.* at 613.

La Perle in Support of Defendant Apple Inc.’s Motion to Dismiss the Second Amended Complaint (“La Perle Decl.”), Ex. 6; Declaration of Meihua Shi in Support of Defendant Apple Inc.’s Motion to Dismiss the Second Amended Complaint (“Shi Decl.”), Ex. B.) Finally, Luxpro fails to respond to Apple’s authority demonstrating that the timing of alleged communications to customers is irrelevant for purposes of *Noerr-Pennington*, and that it thus makes no difference whether the letters are characterized as “pre” or “post” litigation. (*See Mot.* at 16-19.)

Rather than confront the clear weight of authority showing *Noerr-Pennington* applies to the customer communications, Luxpro now for the first time contends that the communications were a “sham.” (*See Opp.* at 59-60.) But to establish this, Luxpro must meet *Professional Real Estate*’s high standard of objective baselessness. Luxpro does not even come close to doing so. The SAC makes clear that the letters about which Luxpro complains threatened the same type of litigation that this Court has already found to be covered by *Noerr-Pennington* immunity. (*See Mot.* at 19 (citing SAC ¶¶ 7, 40, 47, 52, 60).) As demonstrated below, Luxpro cannot establish that the litigation was a sham because Apple successfully obtained injunctions against it — injunctions that are still in place. (*See La Perle decl. Exs. 2-6; Shi Decl. Exs. A & B; Declaration of Michael Hofhine in Support of Defendant Apple Inc.’s Motion to Dismiss the Second Amended Complaint, Ex. A.*) Because the underlying litigation is not a sham, demand letters threatening similar suits also cannot be objectively baseless. (*See id.* at 19.)

Luxpro contends that the alleged communications were objectively baseless because they were related to products not covered by the injunction, and were made after the Taiwanese trial court lifted the preliminary injunction as to certain Luxpro products. (*Opp.* at 59-60.) Luxpro cites no allegations to support these contentions, because there are none. The SAC does not allege that Apple identified any particular products in its purported communications. Further,

the SAC demonstrates that these alleged communications were made while the Taiwanese litigation was ongoing, alleging that “Apple used *the pendency of the lawsuit*” as the basis for its communications, and that Apple continued to make alleged threats “based on *the pendency of the sham litigation*.” (See SAC ¶¶ 47, 50.) Indeed, the SAC expressly alleges that the communications occurred while appeals were ongoing. (SAC ¶ 48.) Thus, the alleged communications with customers were not objectively baseless and are protected by *Noerr-Pennington*.

### C. Luxpro’s Argument that *Noerr-Pennington* Applies Only to Sherman Act Antitrust Claims Is Wrong

Luxpro’s assertion that “Eighth Circuit law provides that *Noerr-Pennington* immunity . . . extends only to claims based on the Sherman Act” (Opp. at 42 (emphasis in original)) is flat wrong, and ignores decades of Eighth Circuit case law to the contrary. See *Hufsmith v. Weaver*, 817 F.2d 455, 458-59 (8th Cir. 1987) (noting that Court has long recognized application of *Noerr-Pennington* outside of antitrust, and applying doctrine to bar Arkansas state law claims for tortious interference with contract); *In re IBP Confidential Bus. Documents Litig.*, 755 F.2d at 1312 (acknowledging doctrine has been extended to claims for tortious interference and conspiracy); *Missouri v. Nat’l Org. for Women, Inc.*, 620 F.2d 1301, 1318-19 (8th Cir. 1980) (doctrine applicable to claim of tortious infliction of economic harm); *South Dakota v. Kansas City S. Indus., Inc.*, 880 F.2d 40, 50-52 (8th Cir. 1989) (doctrine applicable to South Dakota state claims of tortious interference with contracts).<sup>7</sup>

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<sup>7</sup> Eighth Circuit law is consistent with the law of other Circuits, which have extended *Noerr-Pennington* to tort and other claims. See, e.g., *Sosa*, 437 F.3d at 934-36 (RICO); *Herr v. Pequea Township*, 274 F.3d 109, 115-18 (3d Cir. 2001) (civil rights claim); *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000) (same); *Int’l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc.*, 196 F.3d 818, 826 (7th Cir. 1999) (RICO); *Cheminor Drugs Ltd. v. Ethyl Corp.*, 168 F.3d 119, 128 (3d Cir. 1999) (tortious interference); *Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 649 (7th Cir. 1983) (same); *Baltimore Scrap Corp. v. David J. Joseph Co.*, 81 F. Supp. 2d 602, 620 (D. Md. 2000),

Indeed, in a multitude of cases over the years, the Eighth Circuit and district courts within the Circuit have applied *Noerr-Pennington* to a variety of non-antitrust claims, including tort, state law unfair competition, RICO, and civil conspiracy. *See, e.g., Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1080 n.4 (8th Cir. 1999) (malicious prosecution); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614-15 (8th Cir. 1980) (section 1983 civil rights); *Atlantic Recording*, 2008 U.S. Dist. LEXIS 62977 at \*7-12 (*Noerr-Pennington* bars tort and conspiracy claims where copyright infringement suits were not “sham litigation”); *C&A Plus, Inc. v. Plastic Specialties Mfg., Inc.*, No. 01-1428 ADM/RLE, 2003 U.S. Dist. LEXIS 12754, \*42-45 (D. Minn. July 23, 2003) (tort); *Datascope Corp v. Vascular Solutions, Inc.*, 165 F. Supp. 2d 933, 936 (D. Minn. 2001) (tortious interference and unfair competition); *Surgidev Corp. v. Eye Tech., Inc.*, 625 F. Supp. 800, 804-805 (D. Minn. 1986) (tortious interference).

Accordingly, there is no question that *Noerr-Pennington* applies to Luxpro’s tort claims. Nor is there any question that the doctrine applies to Luxpro’s UCL claim. *See Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 21-22, 43 Cal. Rptr. 2d 350, 360 (1995) (*Noerr-Pennington* doctrine retains “full vitality” under California law and applies to “virtually any tort, including unfair competition and interference with contract”); *Premier Med.*, 136 Cal. App. 4th at 470-71 & 478 (doctrine bars Section 17200 claim and tort claim). It also applies to Luxpro’s Lanham Act claim. *See, e.g., Melea*, 345 F. Supp. 2d at 760 (Lanham Act claim barred by *Noerr-Pennington*); *Santana Prods. v. Bobrick Washroom Equip.*, 249 F. Supp. 2d 463, 469 (M.D. Pa. 2003) (same), *rev’d on other grounds*, 401 F.3d 123 (3d Cir. 2005).

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*aff’d*, 237 F.3d 394 (4th Cir. 2001) (malicious process, abuse of process, tortious interference, fraud, and conspiracy). Courts hold that *Noerr-Pennington* applies to *all* claims where the right to petition is at stake. *See, e.g., White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000) (doctrine “applies equally in all contexts”; to “say that one does not have *Noerr-Pennington* immunity is to conclude that one’s petitioning activity is unprotected by the First Amendment”).



Luxpro's sole authority is a footnote from an Eighth Circuit case, which Luxpro badly misconstrues. Luxpro incorrectly asserts that *Entergy Ark., Inc. v. Nebraska*, 358 F.3d 528, 522 n.19 (8th Cir. 2004), holds that *Noerr-Pennington* cannot apply to non-antitrust claims in the Eighth Circuit. (Opp. at 42-43.) The footnote, which does not address or purport to overrule decades of Eighth Circuit case law, does not even say what Luxpro contends it says. The footnote states only that the defendant in *Entergy Arkansas*, the State of Nebraska, "has not cited any authority which would extend the *Noerr-Pennington* doctrine . . . to this type of action." *Entergy Arkansas*, 358 F.3d at 552 n.19 (emphasis added). *Entergy Arkansas* involved an equitable claim under the Central Interstate Low-Level Radioactive Waste Compact, a congressionally-sanctioned agreement among five states. *Id.* at 542. Thus, at most, the footnote is authority for the proposition that *Noerr-Pennington* may not apply to equitable claims under the Waste Compact — a proposition that has no relevance here.<sup>8</sup>

**D. Luxpro's Argument that *Noerr-Pennington* Does Not Apply to Conduct Outside the United States Is Wrong**

Luxpro turns to yet another footnote, this time in a district court decision, to argue that *Noerr-Pennington* is inapplicable to conduct occurring outside the United States. (Opp. at 49-50 (citing *U.S. Power, Inc. v. Siemens Power Transmission & Distrib., L.L.C.*, No. 05-525 (JRT/FLN), 2006 U.S. Dist. LEXIS 45919, \*5 n.1 (D. Minn. July 5, 2006)).) But the footnote Luxpro cites provides no authority regarding the reach of *Noerr-Pennington*. It notes only that the *U.S. Power* court "declines to consider the applicability of *Noerr-Pennington*" to foreign petitioning activity, because the parties in that case "have not offered, and the Court has not

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<sup>8</sup> The only other case Luxpro cites, *Buck's, Inc. v. Buc-ee's, Ltd.*, No. 8:08CV519, 2009 U.S. Dist. LEXIS 53861 (D. Neb. June 25, 2009), relies on the *Entergy Arkansas* footnote and confirms that there the Eighth Circuit has "only noted" the absence of authority to extend *Noerr-Pennington* to the claim at issue in *Entergy Arkansas*. *Id.* at 24. *Buck's* does not, and could not, overrule the Eighth Circuit cases holding that *Noerr-Pennington* applies well beyond the antitrust laws.

discovered, any reported case law on the issue . . . .” *U.S. Power*, 2006 U.S. Dist. LEXIS 45919 at \*5 n.1 (emphasis added).<sup>9</sup>

In fact, however, reported cases on the issue do exist, and they hold that *Noerr-Pennington* applies to conduct occurring abroad. *See, e.g., Coastal States*, 694 F.2d at 1366-68; *Carpet Group Int’l v. Oriental Rug Importers Ass’n*, 256 F. Supp. 2d 249, 266 (D.N.J. 2003) (“lobbying of foreign governments, whether performed at home or abroad, is protected from antitrust liability under *Noerr-Pennington*”). In *Coastal States*, the seminal case on the issue, the Fifth Circuit “reject[ed] the notion that petitioning immunity extends only so far as the First Amendment right to petition and then ends abruptly.” *Coastal States*, 694 F.2d at 1366. Thus, the court saw “no reasons why acts that are legal and protected if done in the United States should in a United States court become evidence of illegal conduct because performed abroad.” *Id.*

Luxpro offers no reason, nor any persuasive authority, why this Court should decline to follow the principle that conduct occurring abroad is entitled to the same protection under *Noerr Pennington* as conduct occurring in the United States.

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<sup>9</sup> Luxpro’s other cases are equally inapplicable. The court in *Laker Airways Ltd. v. Pan Am World Airways, Inc.*, 604 F. Supp. 280, 287-88 (D.D.C. 1984), addressed the obligations of a United States court to refrain from taking action that would interfere with an alien’s right to petition a foreign government; the court did not address the rights of American citizens to petition abroad under *Noerr-Pennington*. The decision in *Guessous v. Chrome Hearts, LLC*, 179 Cal. App. 4th 1177, 1183-84, 102 Cal. Rptr. 3d 214, 218 (2009) does not even mention the *Noerr-Pennington* doctrine, much less consider the merits of a *Noerr-Pennington* defense. The court in *Bulkferts Inc. v. Salatin Inc.*, 574 F. Supp. 6 (S.D.N.Y.1983), questioned the applicability of *Noerr-Pennington* to foreign activities, but did not decide the issue. *Id.* at 9. Finally, the narrow view of *Noerr-Pennington* expressed in *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), has been rejected repeatedly since the case was decided. *See, e.g., Coca-Cola*, 1998 U.S. Dist. LEXIS 23277 at \*29-30 (noting criticism of *Occidental Petroleum* and applying *Noerr-Pennington* to petitions made to Taiwan customs officials).

**E. As A Matter of Law, Neither the “Sham Litigation” Exception Nor the “Pattern” Exception Apply**

Luxpro argues in the alternative that even if *Noerr-Pennington* applies to its claims (which it does), Luxpro’s claims fit within one of two exceptions to the doctrine — the “sham litigation” exception recognized in *Professional Real Estate*, and the “pattern” exception adopted by the Ninth Circuit in *USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council*, 31 F.3d 800 (9th Cir. 1994). (Opp. at 50.) These exceptions are inapplicable as a matter of law.

**1. The “Sham Litigation” Exception Cannot Apply, Because Apple Obtained Injunctive Relief Against Luxpro**

As Luxpro acknowledges, the Court has already found the sham litigation exception inapplicable to Luxpro’s claims. *Luxpro*, 658 F. Supp. 2d at 927-28 (noting that Luxpro “does not challenge” Apple’s showing that litigation was not sham). Luxpro nonetheless requests either “reconsideration” of the issue or that it be allowed to “re-raise” the issue. (Opp. at 50 n.209.) “Motions for reconsideration serve a limited function: to correct errors manifest errors of law or fact or to present newly discovered evidence.” *Dismuke v. Connor*, No. 05-CV-1003, 2008 U.S. Dist. LEXIS 2030, \*2 (W.D. Ark. Jan. 10, 2008) (quoting *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988).) Luxpro has failed to meet this standard, and provides no other basis for the Court to disregard its prior ruling.

Even if the Court reconsiders the sham litigation issue, the result must be the same. Luxpro fails to offer any legal authority to support its argument, fails to discuss or counter any of Apple’s authority, and entirely misses the point of the sham litigation exception. (See Opp. at 57-59.) The thrust of Luxpro’s argument is its contention that Apple relied on a “vague” and “baseless” trade dress theory in the German and Taiwanese litigations, and “misrepresented” to these courts that Apple owned intellectual property covering Luxpro’s products. (*Id.* at 57.) But

this argument is nothing more than an improper attempt to re-litigate issues already decided in the prior actions — an attempt precluded by *Professional Real Estate*. A party's success in litigation conclusively establishes that the suit was not a sham. *Prof'l Real Estate*, 508 U.S. at 61 n.5 (“A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham.”).

Luxpro concedes that Apple achieved success in the prior litigation: the Taiwanese District Court granted Apple's request for an injunction as to all of Luxpro's products; the Taiwanese appellate courts upheld the grant of the injunction as to Luxpro's Super Tangent (formerly known as the “Super Shuffle”); and Apple won an injunction in Germany, which is still in place today. The case thus falls squarely within *Professional Real Estate*. Indeed, the mere grant of a preliminary injunction establishes as a matter of law that the litigation is not objectively baseless. (Mot. at 15 (citing *Omni Resource Dev. Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1414 (9th Cir. 1984); *Coca-Cola*, 1998 U.S. Dist. LEXIS 23277 at \*26 n.2; *Sugar Busters, LLC v. Brennan*, No. 98-1562 S3, 1999 U.S. Dist. LEXIS 2289, \*13 (E.D. La. Feb. 19, 1999).) Luxpro fails to respond to any of these cases, and they are dispositive of its purported “sham” claim.<sup>10</sup>

Furthermore, Luxpro's assertions regarding Apple's alleged subjective motivation to “harass” a competitor and drive Luxpro out of business (Opp. at 56) cannot save its claims. As Luxpro concedes (Opp. at 50 n.208), because Apple's litigation against Luxpro was not objectively baseless, Apple's subjective intent in bringing the litigation is immaterial and cannot be considered by the Court. (See Mot. at 15 (citing *Prof'l Real Estate*, 508 U.S. at 57-60).)

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<sup>10</sup> Luxpro's suggestion that Apple needed to have succeeded on its claims with respect to all of Luxpro's products to satisfy *Professional Real Estate* (Opp. at 58-59) is wrong. The fact that Apple won preliminary injunctive relief as to all products is more than sufficient to bar Luxpro from demonstrating that the Taiwanese litigation was objectively baseless.

Because Apple achieved success in the underlying cases in Taiwan and Germany, Luxpro cannot demonstrate that the sham litigation exception applies. Successful litigation cannot, as a matter of law, be a sham under *Professional Real Estate*. The inquiry should end there.

**2. Luxpro’s Purported Challenge to Apple’s Intellectual Property Rights Is Nothing More than an Assertion of the Sham Litigation Exception and Fails as a Matter of Law**

Luxpro contends that the *Noerr-Pennington* doctrine cannot apply, because Apple has not sought to protect any legitimate intellectual property rights. (Opp. at 47-48.) Luxpro claims that “Apple has made no showing . . . 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.” (*Id.* at 47.) Luxpro’s challenge to Apple’s underlying intellectual property rights is nothing more than a sham litigation argument under *Professional Real Estate*. See *Honeywell Int’l, Inc. v. Univ. Avionics Sys. Corp.*, 343 F. Supp. 2d 272, 325 (D. Del. 2004) (claim that patent holder knew patents were invalid when it filed lawsuits is part of “sham litigation” analysis); *IDX Sys. Corp. v. Epic Sys. Corp.*, 165 F. Supp. 2d 812, 821 (W.D. Wis. 2001), *aff’d and rev’d on other grounds*, 285 F.3d 581 (7th Cir. 2002) (claim that defendant did not have trade secrets part of “sham litigation” analysis).

As demonstrated above, the sham litigation exception fails in this case as a matter of law. Luxpro ignores the fact that the Taiwanese and German courts held that the shape and design of Apple’s iPod Shuffle was protected intellectual property. The *Noerr-Pennington* doctrine applies to efforts to protect trade dress, just as it does to efforts to protect all intellectual property. See, e.g., *Letica Corp. v. Sweetheart Cup Co.*, 790 F. Supp. 702, 704-05 (E.D. Mich. 1992) (applying *Noerr-Pennington* to dismiss claim based on defendant’s protection of trade dress in disposable drink cups).

### 3. The “Pattern” Exception Fails as a Matter of Law

Luxpro’s alternative argument — that the “pattern” exception to *Noerr-Pennington* allows its claims to proceed to discovery — is meritless. First, it is questionable whether the “pattern” exception even exists. The “pattern” exception has been rejected by a number of courts, including courts in the Eighth Circuit. *See, e.g., Travelers Express Co. v. Am. Express Integrated Payment Sys.*, 80 F. Supp. 2d 1033, 1042 (D. Minn. 1999) (holding that the “appropriate inquiry is to determine whether each of the prior lawsuits was objectively baseless”). Moreover, the pattern exception is not pled in the SAC and has never before been raised by Luxpro; Luxpro cannot raise it now. *Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (“In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff’s moving papers, such as a memorandum in opposition to a defendant’s motion to dismiss.”).

In any event, Luxpro cannot allege a pattern here. The “pattern” exception, generally associated with the Ninth Circuit’s decision in *USS-POSCO*, applies only where a defendant has brought “a whole series of legal proceedings.” *USS-POSCO*, 31 F.3d at 810-11 (twenty-nine actions). A “series” means more than just a few lawsuits; it means “a large volume of repeated, consistently baseless litigation.” *In re Fresh Del Monte Pineapple Antitrust Litig.*, No. 04 MD 1628 (RMB)(MHD), 2007 U.S. Dist. LEXIS 1372, \*54 n.19 (S.D.N.Y. Jan. 4, 2007) (two lawsuits insufficient).

There is no “pattern” here. Apple commenced one action against Luxpro in Germany and another in Taiwan.<sup>11</sup> It also commenced an administrative proceeding in Taiwan. The case

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<sup>11</sup> Luxpro attempts to add to the number by counting the appeals in the Taiwan litigation. There is no basis for counting appeals separately, since they are obviously part of the same proceeding. *Cf. Amarel v. Connell*, 102 F.3d 1494, 1519 (9th Cir. 1996) (counterclaim containing same allegation as earlier suit not counted as separate litigation).

law discussed above establishes that two court cases and one administrative proceeding cannot constitute a “pattern.” See *Coca-Cola*, 1998 U.S. Dist. LEXIS 23277 at \*24 (four cases not a pattern); *Ludwig*, 37 Cal. App. 4th at 29 n.33 (same). Indeed, in the cases Luxpro cites, the lowest number of proceedings found to constitute a pattern is nine. See *Livingston Downs Racing Ass’n Inc. v. Jefferson Downs Corp.*, 192 F. Supp. 2d 519, 539 (M.D. La. 2001); cf. *Primetime 24 Joint Venture v. NBC*, 219 F.3d 92, 101-102 (2d Cir. 2000) (thousands of statutory challenges against a single competitor constituted pattern).

Even if the “pattern” exception did apply, Luxpro would still have to demonstrate the “objective baselessness” of the lawsuits. *Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 959 (S.D. Cal. 1996); *USS-POSCO*, 31 F.3d at 811 (success in 15 of 29 actions was confirmation that defendants were not filing suits “willy-nilly”); *In re Terazosin Hydrochloride Antitrust Litig.*, 335 F. Supp. 2d 1336, 1367 (S.D. Fl. 2004) (no sham litigation where party was successful in seven of eleven lawsuits). Luxpro cannot do so.<sup>12</sup>

**F. Luxpro’s Assertion that *Noerr-Pennington* Raises Inherently Factual Issues that the Court Should Not Resolve at the Pleading Stage Is Without Merit**

Providing little reasoning or explanation, Luxpro argues that “dismissal simply is not appropriate here,” because Luxpro’s claims “are inherently fact-intensive and thus cannot be

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<sup>12</sup> Luxpro attempts to expand the recognized boundaries of the “pattern” exception by relying on *Alexander v. Nat’l Farmers Org.*, 687 F.2d 1173 (8th Cir. 1982), and *AirCapital Cablevision, Inc. v. Starlink Commc’ns Group, Inc.*, 634 F. Supp. 316 (D. Kan. 1986). (Opp. at 54-55.) Neither case, however, involved the “pattern” exception to *Noerr-Pennington*. In *Alexander*, the Court found that threats and harassment of plaintiff’s customers designed to put customers in the middle of a “membership dispute” was not immune from antitrust liability. *Alexander*, 687 F.2d at 1200-01. The alleged communications in *Alexander* thus were not in the nature of cease and desist letters regarding intellectual property rights, as they were in this case. See *id.* The latter are clearly protected under *Noerr-Pennington*. The *AirCapital* court distinguished *Alexander* on this very ground. The court found *Alexander* inapplicable because it involved conduct unrelated to the protection of legitimate rights related to an underlying, non-sham lawsuit. *Air Capital*, 634 F. Supp. at 325-26. The holding of *AirCapital* thus supports Apple’s position, not Luxpro’s.

decided at the pleading stage.” (Opp. at 41.) To the contrary, the Court can and should decide that *Noerr-Pennington* bars Luxpro’s claims as a matter of law, for all the reasons stated above.<sup>13</sup>

Luxpro ignores *Noerr-Pennington* in identifying factual issues that supposedly preclude dismissal. Luxpro says the Court must “determine whether Apple actually owns any ‘intellectual property’” (Opp. at 41), but, as set forth above, Apple’s success in the Taiwanese and German litigation conclusively establishes that Apple was engaged in legitimate activity to protect its intellectual property. Luxpro says the Court must resolve “whether all of Apple’s alleged conduct occurred in foreign lands” (Opp. at 41), but *Noerr-Pennington* applies no matter where Apple’s conduct occurred. (*See, supra*, Part II. D.) Luxpro says the Court must determine whether Apple’s “scheme” was directed towards Luxpro and designed to forestall and destroy competition in the MP3 player industry. (Opp. at 41.) But Apple’s subjective intent is irrelevant under *Professional Real Estate* since Apple’s litigation against Luxpro was not objectively baseless. Finally, Luxpro says the “Court must determine whether Apple’s litigation against Luxpro was ‘objectively baseless,’” a finding Luxpro says is “better suited” for summary judgment. (Opp. at 41.) This contention ignores the authority that Apple’s success in the underlying litigation establishes, *as a matter of law*, that the litigation was not objectively baseless. (*See, supra*, Part II.E.1.)<sup>14</sup>

In sum, Luxpro fails to identify any factual issue precluding application of *Noerr-Pennington*.

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<sup>13</sup> Luxpro also claims that there is no heightened pleading standard in the Eighth Circuit for claims implicating *Noerr-Pennington*, citing *In re NationsMart Corp. Sec. Litig.*, 130 F.3d 309 (8th Cir. 1997). That case does not discuss *Noerr-Pennington*, however.

<sup>14</sup> Luxpro cites a string of cases denying motions to dismiss where factual issues were raised (Opp. at 41 n.175), but none of them involves *Noerr-Pennington* or resembles this case in any way.



### **III. LUXPRO HAS NOT STATED A CLAIM FOR TORTIOUS INTERFERENCE WITH CONTRACT OR PROSPECTIVE ECONOMIC ADVANTAGE**

Although the *Noerr-Pennington* doctrine disposes of all of Luxpro's claims, the claims also fail for numerous other reasons. Further, Luxpro's claims fail regardless of whether California or Arkansas law applies. It is clear, however, that California law applies, because California, not Arkansas, has the most significant relationship to the parties and the issues here. (Mot. at 20-21.) Luxpro fails to rebut or even address this argument.

#### **A. Luxpro's Argument that its Tortious Interference Claims Should be Viewed "As a Whole" Has no Merit**

In its previous order, the Court dismissed Luxpro's tortious interference claims because they lacked specific factual allegations establishing various elements of the claims as to certain entities. *Luxpro*, 658 F. Supp. 2d at 930-33 (dismissing claims as to Kaga Electronics, Orchard Company, Web Worker, Carrefour, EUPA, 3C, ET Mall and Compu Import Co.). Luxpro does not cure this defect in the SAC, but instead piles on several additional entities in the apparent hope that the number of companies mentioned will disguise the SAC's defects.<sup>15</sup> Merely adding entities cannot remedy the pleading deficiencies identified by the Court. As established in Apple's opening brief, for *each* of the entities Luxpro has named — including those newly added in the SAC — Luxpro has failed to plead facts that are required to satisfy one or more elements of a tortious interference claim. (See Mot. at 22-27.)

Luxpro glosses over the SAC's deficiencies by arguing that the Court should view Luxpro's claims "in their entirety." (Opp. at 13.) Luxpro cannot state a tortious interference claim by making general allegations regarding unnamed and unknown entities. It must allege the

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<sup>15</sup> In fact, in the case of Starbucks Japan and Apple's suppliers, Luxpro has provided *less* detail in the SAC. (See Mot. at 22, 23 n.5.)

requisite facts regarding the specific, identified entities on which it bases its claims. *See, e.g., Tempur-Pedic Int'l, Inc. v. Waste to Charity, Inc.*, No. 07-2015, 2007 U.S. Dist. LEXIS 55150, \*9 (W.D. Ark. July 27, 2007) (tortious interference claim dismissed because plaintiff failed to identify particular contract or business expectancy); *Larry Hobbs Farm Equip., Inc. v. CNH Amer., LLC*, No. 2:08CV00049 JLH, 2008 U.S. Dist. LEXIS 64844, \*14-15 (E.D. Ark. Aug. 22, 2008) (tortious interference claim dismissed because complaint failed to identify third parties with which defendant allegedly interfered). Thus, Luxpro's claims must be evaluated on an entity-by-entity basis, as this Court did in its order dismissing the FAC.

### **B. Luxpro Fails to Address the Pleading Deficiencies Identified in Apple's Brief**

Luxpro has not alleged sufficient facts to demonstrate the required elements of a tortious interference claim as to any of the entities identified in the SAC. Instead, Luxpro engages in an attempted sleight of hand, claiming that it has sufficiently pled an element of its claim as to one entity by pointing to allegations regarding a *different* entity. It does this for the following elements: an act of interference<sup>16</sup>; disruption of a contract or economic relationship<sup>17</sup>; and existence of an economic relationship or contract.<sup>18</sup> Luxpro cannot state a tortious interference

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<sup>16</sup> *Compare* Mot. at 23-24 (discussing Seitec; Beijing Big Boss; Longda Tech.; AboCom Systems; Golden View; Gajah; Datapool Systems; Best Buy; RadioShack; Wal-Mart; Elecom; Gre-Tai; Starbucks Japan; Tounsen; Beijing Huaqi; Beijing Qian Kun; TCL Digital Electronics; Victor Japan; Laos; N.A.K.S. Asia; Funai; Keller Trading; Broadman; Twister Sound; Japan Airlines; Bruder; and Nikko VC) *with* Opp. at 15-16 (discussing InterTAN; Dai-Ichi Denki; TKEC 3C; ET-Mall TV Shopping; Bruder; and Carrefour).

<sup>17</sup> *Compare* Mot. at 24 (discussing Seitec; Beijing Big Boss; Longda; AboCom; Golden View; Gajah; Datapool; Best Buy; RadioShack; Wal-Mart; Starbucks Japan; Bruder; Fatech; Dai-ichi Denki; TKEC 3C; and ET-Mall TV Shopping) *with* Opp. at 16-17 (discussing Carrefour, Nikko VC, InterTAN and the companies listed in paragraph 30 of the SAC), 17-18 (citing general allegations regarding Luxpro's purported damages and its abandonment of efforts to be listed on the Gre-Tai stock exchange).

<sup>18</sup> *Compare* Mot. at 25 (discussing Best Buy, RadioShack, Wal-Mart, Elecom, Fatech, Dai-Ichi Denki, TKEC 3C, ET-Mall TV Shopping, Bruder) (economic relations), (InterTAN; Gre-Tai; Kaga Electronics; Seitec; Beijing Big Boss; Longda; AboCom; Golden View; Orchard; Gajah; DataPool; WebWorker; Elecom; Best Buy; RadioShack; Wal-Mart; Starbucks Japan; Japan Airlines; Fatech; Carrefour; Dai-ichi

claim by alleging that it had a contract with entity X, Apple threatened entity Y, and Luxpro lost entity Z's business.

Luxpro is unable to demonstrate that it satisfies the elements of an interference claim for any entity named in the SAC. With respect to seven of the twenty-seven entities as to which the SAC fails to allege an act of interference by Apple, Luxpro simply repeats the allegations in the SAC and fails to show how those allegations meet the element at issue.<sup>19</sup> (Opp. at 16-17 (discussing Elecom, Best Buy, RadioShack, Wal-Mart, Starbucks Japan, Japan Airlines, and Nikko VC).) Similarly, Luxpro claims that Apple had knowledge of Luxpro's business relationships with twenty-nine entities because Apple allegedly threatened them. (Opp. at 17 (citing SAC ¶¶ 30, 33, 43, 48, 52-58, 67, 73).) But none of the allegations Luxpro cites (or any other allegation in the SAC) pleads sufficient facts establishing that Apple did anything at all with regard to those entities, much less threaten them.

Finally, Luxpro fails to identify any independently actionable or improper conduct by Apple as to any of the companies identified in the SAC. Luxpro points to its Lanham Act and UCL claims as independently actionable conduct. (Opp. at 20.) But, as described above, the conduct Luxpro relies on in alleging these claims consists of nothing more than Apple's lawful attempts to protect its intellectual property rights, and is thus protected by the *Noerr-Pennington* doctrine. Moreover, Luxpro has not stated a claim for violation of either the Lanham Act or the UCL.<sup>20</sup>

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Denki; TKEC 3C; ET Mall TV Shopping; Bruder; and Nikko VC) (contract) *with* Opp. at 14-15 (discussing entities listed in paragraphs 30 and 33 of the SAC).

<sup>19</sup> Notably, Luxpro fails to explain why it abandoned its previous allegation that Apple "pressured" Starbucks Japan and did not allege any other acts of interference by Apple. The only explanation is that it cannot allege any such acts.

<sup>20</sup> Although California law clearly applies, Luxpro attempts to rely on the absence of an "independently actionable conduct" requirement under Arkansas law. (Opp. at 18.) That argument fails, because Luxpro

In sum, Luxpro has not sufficiently pled the elements of a tortious interference claim for any of the entities identified in the SAC. The claim should be dismissed with prejudice.

#### **IV. LUXPRO'S LANHAM ACT CLAIM FAILS**

##### **A. Luxpro Has Failed to Show That Any of Apple's Alleged Statements are Actionable under the Lanham Act**

In asserting that it has properly pled a Lanham Act claim, Luxpro argues that Apple's communications were "commercial advertising or promotion" because they "influence[d] Luxpro's business partners." (Opp. at 24-25 (citing SAC ¶¶ 7, 8, 40-43, 47-48, 52-53, 60-63, 65-69, 73, 79).) But, as Luxpro admits, to be actionable under the Lanham Act, the communications must have been designed to influence Luxpro's purported business partners *to buy Apple's goods or services*. (See Opp. at 21.) Alleged threats of litigation and criminal prosecution are not statements designed to induce anyone to purchase anything from Apple. Luxpro's own authority so holds. See *Zinus Inc. v. Simmons Bedding Co.*, 2007 WL 4287391, \*5 (N.D. Cal. Dec. 6, 2007) (cease and desist letters are not designed to influence plaintiffs' customer to buy defendant's products); see also *Avery Dennison*, 2000 U.S. Dist. LEXIS 3938 at \*25 ("Avery would not urge its attorney to send letters threatening lawsuits against its own customers as a way to promote Avery's own business"); *White Mule Co. v. ATC Leasing Co. LLC*, 540 F. Supp. 2d 869, 898 (N.D. Ohio 2008); *Futuristic Fences Inc. v. Illusion Fence, Corp.*, 558 F. Supp. 2d

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has not alleged "improper conduct," which Arkansas law does require. Luxpro contends Apple engaged in "improper conduct" by making misrepresentations, threatening its purported business partners with litigation, and applying "economic pressure." (Opp. at 19.) None of these allegations is sufficient. Rule 9(b) requires Luxpro to plead any alleged misrepresentations with particularity, which Luxpro has not even attempted to do. Also, Apple had probable cause to file suit against Luxpro and to threaten suit against Luxpro's customers, and thus its conduct was not improper. See *Tempur-Pedic*, 2007 U.S. Dist. LEXIS 55150 at \*8-9 (contention that counterdefendant filed claims in bad faith and for an improper motive was insufficient to establish that its conduct was improper). Finally, the alleged economic pressure here — threats of boycott — is explicitly permitted so long as it is not an unlawful restraint of trade. See Restatement (Second) of Torts § 768, cmt. e. Luxpro does not properly allege an unlawful restraint of trade.

1270, 1281 (S.D. Fla. 2008). Luxpro does not point to any statement by which Apple sought to persuade any entity to purchase anything.

Instead, Luxpro claims that Apple's threats of litigation and boycott put "the entire industry on notice that it should purchase Apple's products instead of Luxpro's." (Opp. at 23.) Tellingly, Luxpro cites to no allegation or authority to support this theory. There is none: such a rule would make any company that seeks to enforce its intellectual property rights liable under the Lanham Act.

Luxpro does not address *Avery Dennison* or *White Mule Co.* in its opposition, and its attempt to distinguish Apple's other authority fails. Luxpro attempts to distinguish *Futuristic Fences* on the grounds that the case left open the question of whether cease and desist letters can ever be commercial speech. (Opp. at 23.) But there is no need to answer that question here, because the letters at issue in the present case are essentially identical to those that the *Futuristic Fences* court held were *not* commercial speech. *Futuristic Fences*, 558 F. Supp. 2d at 1281 (defendant sent letters to plaintiff's customers stating they were infringing defendant's patents and demanding that they stop selling the products or face a lawsuit).<sup>21</sup>

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<sup>21</sup> Luxpro's cases do not support its position, because they do not involve cease and desist letters, address a different type of Lanham Act claim, or fail to discuss the requirement at issue here. *See Mobius Mgmt. Sys., Inc. v Fourth Dimension Software, Inc.*, 880 F. Supp. 1005, 1011 (S.D.N.Y. 1995) (statements consisted of misleading comparison between the two party's products); *Animal Fair Inc. v. Amfesco Indus. Inc.*, 620 F. Supp. 175 (D. Minn. 1985) (false designation of origin case); *Logan Graphic Prod., Inc. v. Textus USA, Inc.*, No. 02C-1823, 2002 U.S. Dist. LEXIS 21801, at \*8 (N.D. Ill. Nov. 8, 2002) (discussing requirements of falsity, sufficient dissemination, and likelihood of harm). Luxpro's other cases are factually distinguishable. In *Carpenter Tech. Group v. Allegheny Tech. Inc.*, 646 F. Supp. 2d 726, 731, 737 (E.D. Pa. 2009), the complaint suggested that the letters included offers of patent licensing agreements, and the court found that the defendant sent the letters to improve its own business. Similarly, in *Int'l Tech. Consultants, Inc. v. Steward*, 554 F. Supp. 2d 750, 755-56 (E.D. Mich 2008), the court found that the intent of defendant's letter was to suggest that the customer hire defendant for the project in question, not the plaintiff.

Because Luxpro has failed to establish that Apple’s alleged statements were “commercial advertising or promotion,” its Lanham Act claim fails. The claim should be dismissed with prejudice.

**B. Luxpro Fails to Allege Any Representations to Several Entities**

Because Luxpro has not demonstrated that any of Apple’s alleged statements were “commercial advertising or promotion,” its Lanham Act claim fails as to all the entities identified in the SAC. As to twenty-six of the entities identified in the SAC, the claim fails for another reason: Luxpro has failed to plead a representation by Apple. (Mot. at 30.) Luxpro does not address this argument in its opposition, thereby conceding it. Thus, Luxpro’s Lanham Act claim as to all but three<sup>22</sup> of the entities listed in paragraphs 30 and 33 of the SAC; Elecom; Best Buy; RadioShack; Wal-Mart; Starbucks Japan; Japan Airlines; Bruder; Nikko VC; and Gre-Tai should be dismissed with prejudice for this additional reason.

**C. Luxpro’s Lanham Act Claim Does not Meet Rule 9(b)’s Requirements**

**1. Rule 9(b) Applies to Luxpro’s Lanham Act Claim**

Luxpro’s contention that Rule 9(b) does not apply to its Lanham Act claim has no merit. At most, Luxpro establishes that there is a split of authority as to whether Rule 9(b) applies to *all* Lanham Act claims.<sup>23</sup> What is clear, however, is that where, as here, a plaintiff chooses to ground its Lanham Act claim in fraud, the claim must be pled with particularity.

The case on which Luxpro primarily relies, *John P. Villano Inc. v CBS Inc.*, 176 F.R.D. 130 (S.D.N.Y. 1997), found that Rule 9(b) does not apply to Lanham Act claims because the Act

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<sup>22</sup> Tounsen, Kaga, and Orchard.

<sup>23</sup> More courts than those cited in Apple’s opening brief have applied Rule 9(b) to Lanham Act claims. For example, the treatise Luxpro cites in its brief, *Federal Unfair Competition: Lanham Act § 43(a)*, lists fourteen other opinions that applied a heightened pleading standard to claims under the Lanham Act. 1 *Federal Unfair Competition: Lanham Act § 43(a)*, § 6.3(a), n.27.

does not *require* “fraudulent intent.” But Luxpro has chosen to plead that Apple *did* have fraudulent intent, thereby triggering Rule 9(b)’s requirements.<sup>24</sup> Indeed, Luxpro admits this when it states that Apple allegedly made false statements, knew the statements were false, and intended that Luxpro’s purported business partners rely on those statements. (*See* Opp. at 24-25.) Thus, Luxpro has grounded its claim in fraud.<sup>25</sup>

Luxpro’s attempts to distinguish Apple’s authority fail. Luxpro claims that *Brosnan v. Tradeline Solutions, Inc.*, No. C-08-0694 JCS, 2009 U.S. Dist. LEXIS 48262, \*11-12 (N.D. Cal. June 5, 2009), does not apply because there, the plaintiff alleged fraudulent conduct in support of its claims. (Opp. at 28.) Luxpro also alleges fraudulent conduct, however. (*See, e.g.*, SAC ¶ 51 (alleging that Apple engaged in a scheme to destroy Luxpro that was “premised on an illicit campaign of fraud, misrepresentation, and thuggish intimidation tactics”).) Luxpro claims that the fact that it made “detailed” allegations in the SAC distinguishes this case from *Pestube Sys., Inc. v. HomeTeam Pest Def., LLC*, No. CIV-05-2832-PHX-MHM, 2006 U.S. Dist. LEXIS 34337, \*14-15 (D. Ariz. May 24, 2006). But Luxpro’s “detailed” allegations are not those required by Rule 9(b): the “who, what, when, where, and how” of the alleged fraudulent statements. *Max Daetwyler Corp. v. Input Graphics, Inc.*, 608 F. Supp. 1549, 1556 (E.D. Pa. 1985), found that the Lanham Act claim in that particular case was not a “pure” fraud claim, but

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<sup>24</sup> Courts have distinguished *Villano* on this ground. *See Volunteer Firemen’s Ins. Servs., Inc. v. McNeil and Co., Inc.*, 221 F.R.D. 388, 393 n.4 (W.D.N.Y. 2004) (Lanham Act claim that defendant “brazenly, willfully, and wantonly” misrepresented that nature of the parties’ products was subject to Rule 9(b)).

<sup>25</sup> Luxpro’s authority does not establish otherwise. *Interface Sec. Sys., L.L.C. v. May*, No. 4:07CV369 HEA, 2007 U.S. Dist. LEXIS 32416 (E.D. Mo. May 20, 2007) does not mention 9(b) at all. *Axcan Scandipharm Inc. v. Ethex Corp.*, 585 F. Supp. 2d 1067, 1084 (D. Minn. 2007) noted *Villano*’s reasoning, but did not hold that Rule 9(b) was inapplicable. Instead, it assumed the rule applied. *Healthpoint Ltd. v. Allen Pharm., LLC*, No. SA-07-CA-0526 XK, 2008 U.S. Dist. LEXIS 20971, \*8 n.4 (W.D. Tex. March 18, 2008) and *Soilworks, LLC v. Midwest Indus. Supply, Inc.*, No. 06-2141-PHX-DGC, 2007 U.S. Dist. LEXIS 15832, \*7 (D. Ariz. March 5, 2007), declined to apply the rule without discussion, merely noting the lack of controlling authority. Finally, *Wellnx* did not involve any false statements, and was not grounded in fraud. *Wellnx Life Sci. Inc., v. Iovate Health Sci. Research Inc.*, 516 F. Supp. 2d 270, 285-88 (S.D. NY 2007).

nevertheless stated, “the policies which underlie Rule 9’s requirement that the nature of an alleged misrepresentation be pleaded with specificity are equally applicable to the type of misrepresentation claim presented in plaintiffs’ Lanham Act claim.”<sup>26</sup>

Having grounded its claim in fraud, Luxpro must meet Rule 9(b)’s requirements.

## **2. Luxpro Has Failed to Explain How the SAC Pleads the Lanham Act Claim with Particularity**

Luxpro has not met the requirements of Rule 9(b). In order to do so, Luxpro must plead the “who, what, when, where, and how” — as well as the circumstances indicating fraudulent conduct. *See Vess v. CIBA-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003); *BJC Health Sys. v. Columbia Casualty Co.*, 478 F.3d 908, 917 (8th Cir. 2007). Luxpro utterly fails to establish how the SAC satisfies these requirements.

In an attempt to excuse its deficient pleading, Luxpro contends that it is not required to plead “the exact particulars of every [] instance” of alleged misrepresentations. (Opp. at 29-30.) But Luxpro does not plead the required particulars for *any* instance of alleged misrepresentations in the SAC. Because Luxpro comes nowhere near meeting Rule 9(b)’s requirements, the Court should dismiss the claim.

## **V. LUXPRO FAILS TO STATE A UCL CLAIM**

### **A. Luxpro Fails to State a Claim Under Any Prong of the UCL**

#### **1. Luxpro Fails to Allege “Unlawful” Conduct**

Because Luxpro cannot establish that Apple violated any statutes or committed any common law torts, it has failed to establish that Apple committed any “unlawful” business practice under the UCL. *Jackson v. Roe*, 273 F.3d 1192, 1203 (9th Cir. 2001); *Daly v. Viacom*,

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<sup>26</sup> Further, because Rule 9(b) is a pleading standard, the fact that the case involved a motion for summary judgment is irrelevant.



238 F. Supp. 2d 1118, 1126 (N.D. Cal. 2002). Luxpro’s claim under this prong of the UCL thus fails.

## **2. Luxpro Fails to Allege “Unfair” Conduct**

Luxpro’s claim under the “unfair” prong of the UCL fails as well. To allege “unfair” conduct under the UCL, Luxpro must establish that Apple’s conduct was an antitrust violation or an incipient antitrust violation. *Cel-Tech Comm’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548 (1999); *Sybersound Records Inc. v. UAV Corp.*, 517 F.3d 1137, 1151-52, 1153 (9th Cir. 2008). Luxpro does not dispute that to meet this standard, it must demonstrate harm to *competition*, not just to itself (a competitor). *Cel-Tech*, 20 Cal. 4th at 186 (antitrust laws “were enacted for ‘the protection of *competition*, not *competitors*”). Luxpro’s opposition makes clear, however, that Luxpro is only complaining about harm to itself. It claims that “Apple’s wide-spread threats followed *Luxpro*,” that Apple filed suit against *Luxpro*, that Apple engaged in a campaign to disparage *Luxpro*, and that “Circuit City succumbed to Apple’s pressure and destroyed *Luxpro*’s MP3 players.” (Opp. at 32-33 (emphasis added).) None of these allegations, or any other allegation in the SAC, pleads facts establishing harm to competition. Thus, Luxpro has failed to allege an “unfair” claim under the UCL.<sup>27</sup>

## **3. Luxpro Fails to Sufficiently Allege “Fraudulent” Conduct**

Luxpro claims that its allegations meet the “plausibility standard” for a claim under the fraudulent prong of the UCL. Not only does Luxpro fail to do so; it must also meet the higher standard of Rule 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). Luxpro does not dispute that Rule 9(b) applies, but does not even attempt to demonstrate how the SAC

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<sup>27</sup> Luxpro’s claim fails for an additional reason. Conduct that is permitted under the antitrust laws, such as the conduct here, cannot be an “unfair” business practice under the UCL. *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375, 113 Cal. Rptr. 2d 175, 184 (2001); *G. Fruge Junk Co. v. Oakland*, 637 F. Supp. 422, 425 (N.D. Cal. 1986). Luxpro does not dispute or address this argument.

satisfies the rule’s requirements. Luxpro simply claims that the SAC contains “very detailed allegations,” and cites to eight paragraphs in of the SAC (Opp. at 34-35 n.160 (citing SAC ¶¶ 52-60).) Neither these allegations nor any other allegation establish the “who,” “what,” “when,” “where,” and “how” of the allegedly fraudulent acts.<sup>28</sup> The claim should be dismissed.

**B. Because Luxpro Has Failed to Establish an Ownership Interest in Apple’s Profits, its Prayer for “Restitution” Should Be Stricken**

If the claim is not dismissed, Luxpro’s prayer for restitution under the UCL should be stricken. The authority on which Luxpro relies, *Korea Supply*, conclusively establishes that a plaintiff may only recover defendant’s profits where the profits are money that defendant took directly from the plaintiff. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1148, 131 Cal. Rptr. 2d 29, 41 (2003). Luxpro fails to meet this standard. While Luxpro claims that “Apple wrongfully reaped the profits that belonged to Luxpro” (Opp. at 35), nothing in the SAC establishes that Apple obtained any money directly from Luxpro, or even indirectly. Thus, Luxpro cannot seek disgorgement of Apple’s profits, and the Court should strike Luxpro’s request for “restitution” under the UCL.

**VI. LUXPRO FAILS TO PLEAD A “COMMERCIAL DISPARAGEMENT” CLAIM**

**A. Luxpro Does Not Even Attempt to Meet the Requirements for Pleading Defamation or Trade Libel**

Luxpro has had two chances to plead the basic requirements for its “commercial disparagement” claim, and it has failed to do so. Luxpro’s opposition does not even try to demonstrate how the SAC pleads those requirements. Instead, Luxpro claims that Apple has admitted that it defamed Luxpro to Tounsen, Orchard, and Kaga, and that this is somehow

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<sup>28</sup> The case that Luxpro relies on in its argument, *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 93 Cal. Rptr. 2d 439 (2000), is a California state case that did not involve the question of whether fraudulent conduct was pled with specificity under Rule 9(b) or otherwise. It is thus irrelevant.

sufficient to plead its claim. (Opp. at 36 (citing Mot. at 38).) Apple has admitted nothing of the sort. (See Mot. at 35-38.) Moreover, the fact that Luxpro has pled some sort of a statement to three entities does not excuse Luxpro's failure to plead the other required details as to those entities, or its failure to plead *any* of the required details as to the other companies discussed in the SAC.<sup>29</sup> Luxpro cannot gloss over these pleading defects by claiming that the Court should look at its claims "as a whole."

With respect to the requirement that it plead special damages in order to establish a claim for trade libel Luxpro contends that it is only required to identify damages by description, not by amount. (Opp. at 38.) This is nearly identical to the argument it made in opposition to Apple's previous motion to dismiss, which this Court found unpersuasive. *Luxpro*, 658 F. Supp. 2d at 935-36.

**B. Luxpro Fails to Allege a Writing, and Thus Cannot Plead a Libel or Trade Libel Claim**

Luxpro does not dispute that it has failed to plead that the alleged defamatory statements were made in writing and that it can thus only assert a claim for slander. (Mot. at 38.) Luxpro also does not dispute, or even address, the argument that its claim is either time-barred or has not been pled with sufficient detail to demonstrate that it is not time-barred. By ignoring this argument, Luxpro concedes it. The claim should be dismissed for this reason as well.

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<sup>29</sup> Indeed, for numerous entities discussed in the SAC, Luxpro fails to plead that Apple made *any* statements to them. Luxpro has not demonstrated otherwise.

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in Apple's opening brief, Luxpro's Second Amended Complaint should be dismissed in its entirety, with prejudice.

Respectfully submitted,

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**ECF ATTESTATION**

I, Stuart C. Plunkett, am the ECF User whose ID and Password are being used to file this:

**DEFENDANT APPLE INC.'S REPLY IN SUPPORT OF ITS MOTION TO  
DISMISS THE SECOND AMENDED COMPLAINT**

I hereby attest that Kevin A. Crass has concurred in this filing.

Dated: April 29, 2010

MORRISON & FOERSTER LLP

By: /s/ Stuart C. Plunkett  
Stuart C. Plunkett

**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 29<sup>th</sup> day of April, 2010.

/s/ Stuart C. Plunkett  
Stuart C. Plunkett