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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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8 ACCO BRANDS, INC. d/b/a KENSINGTON
9 TECHNOLOGY GROUP,

No. C 04-03526 SI

10 Plaintiff,

v.

**ORDER RE: DEFENDANT'S MOTION
TO DISMISS ANTITRUST
COUNTERCLAIM WITHOUT
PREJUDICE [Docket No. 261]**

11 PC GUARDIAN ANTI-THEFT PRODUCTS,
12 INC. and FELLOWES, INC.

13 Defendants.
14 _____/

15 Defendant PC Guardian has filed a motion for leave to dismiss its antitrust counterclaim without
16 prejudice. The motion is scheduled for hearing on December 19, 2008. Pursuant to Civil Local Rule
17 7-1(b), the Court finds this matter appropriate for resolution without oral argument, and hereby
18 VACATES the hearing and the case management conference scheduled for the same day. Having
19 considered the papers submitted, and for good cause shown, the Court rules as follows.

20 On September 12, 2008, plaintiff filed a motion for summary judgment on, *inter alia*, PC
21 Guardian's counterclaim for violation of the Sherman Act. [Docket No. 250] On September 26, 2008,
22 rather than putting forward evidence in support of its counterclaim, PC Guardian filed the instant
23 motion, in which it seeks leave to dismiss its Sherman Act claim without prejudice. [Docket No. 261]
24 PC Guardian argues that the counterclaim should be dismissed without prejudice because it is "not now
25 ripe for adjudication." Def. Mot. to Dismiss, at 2. PC Guardian's claim is based on its assertion that
26 plaintiff has attempted to "corner the computer security lock market" using fraudulently obtained
27 patents, including the '794 patent (at issue in this case) and the '125 and '403 patents (at issue in an
28 ongoing case in Illinois). *See id.* PC Guardian seeks to dismiss without prejudice now so that if it


1 prevails in this lawsuit and in the Illinois case, it can refile the claim at a later date “to recover for the
2 damages associated with these unfair lawsuits” brought by plaintiff. *Id.*

3 Plaintiff opposes the motion, arguing that PC Guardian’s counterclaim should be adjudicated
4 in plaintiff’s favor and dismissed with prejudice. The Court agrees. It should have been apparent to PC
5 Guardian when it filed the Sherman Act counterclaim that this issue could not be adjudicated in this
6 proceeding. PC Guardian provides no authority for its contention that it can avoid its burden on
7 summary judgment by filing a motion to dismiss without prejudice. PC Guardian’s citation to *Kinzli*
8 *v. City of Santa Cruz*, 818 F.2d 1449, 1457 (9th Cir. 1987), is inapposite; that case holds that the trial
9 court reached the wrong conclusion in its ripeness analysis and therefore should have dismissed a claim
10 for lack of jurisdiction rather than granting summary judgment. The Court finds that PC Guardian has
11 failed to meet its burden on summary judgment because it has not designated “specific facts showing
12 that there is a genuine issue for trial” on its Sherman Act counterclaim. *See Celotex Corp. v. Catrett*,
13 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)).

14 Accordingly, PC Guardian’s counterclaim under the Sherman Act is dismissed with prejudice.

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16 **IT IS SO ORDERED.**

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18 Dated: 12/5/08

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21 SUSAN ILLSTON
22 United States District Judge
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