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 TELECOMMUNICATIONS AMERICA, LLC
 15

16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

18 APPLE INC., a California corporation,
 19 Plaintiff,
 20 vs.
 21 SAMSUNG ELECTRONICS CO., LTD., a
 Korean business entity; SAMSUNG
 22 ELECTRONICS AMERICA, INC., a New
 York corporation; SAMSUNG
 23 TELECOMMUNICATIONS AMERICA,
 LLC, a Delaware limited liability company,
 24 Defendants.
 25

CASE NO. 11-cv-01846-LHK

**SAMSUNG'S MOTION TO DISMISS AND
 STRIKE APPLE'S COUNTERCLAIMS**

Date: September 22, 2011
Time: 1:30 p.m.
Place: Courtroom 4, 5th Floor
Judge: Hon. Lucy H. Koh

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NOTICE OF MOTION AND MOTION

TO THE COURT AND TO ALL PARTIES:

PLEASE TAKE NOTICE that on Thursday, September 22, 2011, at 1:30 p.m., or as soon thereafter as the matter may be heard by the Honorable Lucy H. Koh in Courtroom 4, United States District Court for the Northern District of California, Robert F. Peckham Federal Building, 280 South 1st Street, San Jose, CA 95113, Defendants Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Telecommunications America, LLC (collectively “Samsung”) shall and hereby do move the Court for an order dismissing Counts XXVII to XXXII of “Apple Inc.’s Counterclaims in Reply” filed on July 21, 2011, pursuant to Fed. R. Civ. P. 12(b)(6) and 12(f), with prejudice and without leave to amend, on the grounds that they fail to state facts sufficient to state a claim and/or are duplicative of other affirmative defenses or counterclaims alleged.

This motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities that follows, the pleadings on file in this action, and any further evidence or argument that the Court may properly receive at or before the hearing.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Apple’s strategy throughout this litigation has been to unfairly maximize the burden on
4 Samsung, by asserting every position its attorneys can imagine and then quickly jettisoning those
5 positions after Samsung has invested the time and effort needed to defend against them. Apple,
6 for example, requested expedited discovery, including discovery on unreleased Samsung products,
7 allegedly to prevent a threat of actual “confusion as to source, and . . . sponsorship or approval of
8 Samsung products” stemming from Samsung’s purported trademark and trade dress infringement.
9 (D.N. 34.) Shortly thereafter, Apple withdrew its claims of product confusion in an amended
10 complaint (see D.N. 75) and, almost two months after its initial request, filed a preliminary
11 injunction motion that did not address the future products Apple had originally insisted were at
12 issue, or even assert trade dress or trademark infringement. Apple’s strategy amounts to little
13 more than an attempt to smother its most prominent rival and the largest manufacturer of Android
14 smartphones and to intimidate mobile phone carriers under an avalanche of meritless, rapidly
15 evolving legal threats, rather than fairly competing in the marketplace.

16 Apple now attempts this same tactic in its Counterclaims in Reply. (D.N. 124). Instead
17 of responding directly to Samsung’s ground-breaking patents, Apple endeavors to confuse and
18 complicate the issues by asserting a hodgepodge of poorly pled non-patent counterclaims,
19 including monopolization under Section Two of the Sherman Act, concerted action under Section
20 One of the Sherman Act and the California Cartwright Act, unfair competition under California
21 law, and multiple declaratory judgment claims. These counterclaims all loosely relate to
22 Samsung’s involvement with standard-setting organizations, specifically, the European
23 Telecommunications Standards Institute and alleged commitments to license patents on fair,
24 reasonable, and non-discriminatory (FRAND) terms. Because Apple’s antitrust and declaratory
25 judgment counterclaims fail to plead actionable claims, they must be dismissed.¹

26
27 ¹ Based on Federal Rule of Civil Procedure 12(a)(4), this motion extends the time for Samsung to answer
28 Apple’s counterclaims even though Samsung does not move as to every counterclaim. This Court has previously
held that a party is not required to file an answer to causes of action that it does not move to dismiss while the motion
to dismiss is pending. See, e.g., Batdorf v. Trans Union, No. C 00-0501, 2000 U.S. Dist. LEXIS 6796, at *12-13

1 First, Apple's antitrust counterclaims fail to state a claim upon which relief can be granted.
2 All three counterclaims relating to antitrust and competition law (the twenty-seventh, twenty-
3 eighth and twenty-ninth counterclaims) either fail to plead necessary elements of the claim or else
4 fail to plead facts sufficient to plausibly assert the claim as required by federal pleading standards.
5 See Fed. R. Civ. P. 8(a); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56 (2007). These
6 counterclaims must be dismissed pursuant to Rule 12(b)(6).

7 Second, Apple's non-patent declaratory judgment counterclaims (the thirtieth, thirty-first,
8 and thirty-second counterclaims) are duplicative of affirmative defenses and counterclaims already
9 asserted in this proceeding. Furthermore, the declaratory judgment counterclaims serve no
10 purpose, provide no additional obtainable relief, and raise no factual or legal issues that will not
11 already be resolved by this Court in addressing the affirmative defenses and other counterclaims.
12 Thus, the Court should strike these counterclaims pursuant to Rule 12(f).

13 **FACTUAL AND PROCEDURAL BACKGROUND**

14 **I. PROCEDURAL HISTORY**

15 Apple filed its Complaint on April 15 (and subsequently amended it on June 16), alleging
16 that Samsung infringes trademarks, trade dress and patents related to Apple's iPhone and other
17 products. (D.N. 1; D.N. 75.) Of the 29 Samsung products that Apple specifically identifies as
18 allegedly infringing its intellectual property rights, all of them are Samsung mobile devices
19 (including 27 mobile phones). (D.N. 75 at ¶ 92). Among other things, Apple accuses Samsung
20 of infringing patents relating to user interface elements of mobile devices.

21 On July 1, Samsung filed its Answer, Affirmative Defenses, and Counterclaims to Apple's
22 Amended Complaint. (D.N. 80.) Samsung's counterclaims included infringement claims based
23 on twelve Samsung utility patents. These patents all relate to mobile devices, including use of
24 Universal Mobile Telecommunications System (UMTS) technology and the Wideband Code-
25 Division Multiple Access (W-CDMA) cellular communication protocol, as well as user interface
26 elements and user features of mobile devices.

27
28 (N.D. Cal. May 16, 2000). Samsung will file answers to any remaining counterclaims after the instant motion has
been resolved by the Court.

1 On July 21, Apple filed its Answer, Defenses, and Counterclaims in Reply to Samsung’s
2 Counterclaims. (D.N. 124.) In addition to counterclaims for declaratory judgment of
3 noninfringement and invalidity on each patent asserted by Samsung, Apple’s counterclaims also
4 included claims for breach of contract, promissory estoppel, violations of the Sherman Act, the
5 California Cartwright Act, and California unfair competition law, and declaratory judgment
6 counterclaims regarding the enforceability of Samsung’s counterclaim patents. These claims all
7 relate to Samsung’s activities before standard-setting organizations (“SSOs”), such as the
8 European Telecommunications Standards Institute (“ETSI”). Samsung now moves to dismiss or
9 strike Apple’s twenty-seventh through thirty-second counterclaims.

10 **II. THE PARTIES’ INVOLVEMENT IN STANDARD-SETTING ORGANIZATIONS**

11 Apple is a California corporation that designs and manufactures handheld mobile devices,
12 personal computers, and portable media players.² (D.N. 75 at ¶ 13.) Apple’s mobile devices
13 include chipsets that enable users to communicate with carrier networks. Apple purchases these
14 chipsets from third parties, such as Qualcomm, which license patents essential to that technology
15 from Samsung. (D.N. 124 Counterclaims ¶¶ 64-65.)

16 Samsung and Apple both participate in SSOs that develop the Universal Mobile
17 Telecommunications System (UMTS) standard, which is implemented by the communication
18 chipsets used by Apple’s mobile devices at issue in this litigation. (Id. ¶¶ 52, 60.) Specifically,
19 Apple and Samsung are both members of ETSI. (Id.)

20 Technology standards are critical to the development of wireless data and
21 telecommunications technologies by facilitating interoperability among cellular networks, carriers
22 and devices. (Id. ¶¶ 20-21.) Once standards are established, competing manufacturers and
23 carriers can offer their own standards-compliant products and services. (Id.) Standards also
24 serve other procompetitive purposes, such as reducing costs for suppliers and purchasers,
25

26
27 ² This section is primarily based on the allegations set forth in Apple’s Amended Complaint and Counterclaims
28 in Reply, as well as any documents cited in those pleadings. Samsung does not accept as true any allegations set
forth in Apple’s pleadings, but relies on them in this motion to demonstrate that Apple’s non-patent counterclaims
should be dismissed.

1 increasing manufacturing volume, and increasing competition among suppliers within a given
2 standard. (Id. ¶ 22.)

3 Although standards result from coordination and compromise among competitors, certain
4 aspects of a standard may be – and often are – covered by patents, including multiple patents
5 owned by Samsung and asserted in this action. (Id. ¶ 23.) Samsung has declared its asserted
6 UMTS patents as essential to the practice of the UMTS standard. (Id. ¶ 40.)

7 **III. THE RELEVANT INTELLECTUAL PROPERTY RIGHTS POLICIES**

8 In accordance with its standard-setting activities, ETSI promulgates an IP Rights policy to
9 address standards contributions that utilize patented technology. (Id. ¶ 47.) For example, Clause
10 4 of the ETSI Policy requires that members use “reasonable endeavors” to inform ETSI “in a
11 timely fashion” of any patents that might be essential to the standard. (Id. ¶ 48.) Clause 6 of the
12 ETSI Policy further dictates that an ETSI member owning essential patents will be asked to offer
13 licenses to essential patents on FRAND terms. (Id. ¶ 49.)

14 According to Apple’s allegations, Samsung failed to disclose the ‘516 Patent, the ‘941
15 Patent and the ‘001 Patent to ETSI during the standardization process. (Id. ¶ 54). Apple
16 additionally alleges that Samsung has filed FRAND declarations but refused to offer FRAND
17 licenses on its asserted standards-essential patents. (Id. ¶ 57.)

18 Apple further alleges that after it filed this action, Samsung, by letter dated April 21, 2011,
19 excluded Qualcomm’s sales of chipsets to Apple from the coverage of covenants in its license
20 agreements with Qualcomm not to assert essential patents against Qualcomm customers. (Id. ¶
21 65.)

22 **ARGUMENT**

23 **I. LEGAL STANDARD OF DISMISSAL**

24 **A. Fed. R. Civ. P. 12(b)(6): Dismissal of Implausible Claims**

25 Pursuant to Rule 12(b)(6), the Court may dismiss any claim that does not contain sufficient
26 factual matter to state a facially plausible claim for relief. Fed. R. Civ. P. 12(b)(6); Bell Atl.
27 Corp. v. Twombly, 550 U.S. 544, 555-56 (2007). In doing so, the Court must “construe all
28 allegations of material facts in the light most favorable to the nonmoving party.” Livid Holdings

1 Ltd v. Salomon Smith Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005). Dismissal may be either
2 for “lack of a cognizable legal theory” or “the absence of sufficient facts alleged under a
3 cognizable legal theory.” Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1988).
4 The nonmoving party, however, must plead facts that, if regarded as true, establish more than a
5 mere “speculative” right to relief. Twombly, 550 U.S. at 555. A plaintiff must make a
6 “‘showing,’ rather than a blanket assertion, of entitlement to relief.” Id. at 556 n.3. “A claim has
7 facial plausibility when the plaintiff pleads factual content that allows the court to draw the
8 reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal,
9 129 S. Ct. 1937, 1949 (2009) (citing Twombly, 550 U.S. at 556). “[C]onclusory allegations” of
10 illegal conduct do not satisfy this requirement. Twombly, 550 U.S. at 557.

11 **B. Fed. R. Civ. P. 12(f): Striking Redundant Claims**

12 Pursuant to Rule 12(f), the Court may strike any “insufficient defense” or material that is
13 “redundant, immaterial, impertinent or scandalous” from a pleading. Fed. R. Civ. P. 12(f). A
14 Rule 12(f) motion serves to “avoid the expenditure of time and money that must arise from
15 litigating spurious issues by dispensing with those issues prior to trial.” Fantasy, Inc. v. Fogerty,
16 984 F.2d 1524, 1527 (9th Cir. 1993), rev’d on other grounds, 510 U.S. 517 (1994). Specifically
17 as concerns declaratory judgment claims, a Rule 12(f) dismissal is appropriate for claims that are
18 “repetitious of issues already before the court.” Stickrath v. Globalstar, Inc., 2008 WL 2050990,
19 at *3 (N.D. Cal. May 13, 2008) (quoting Ortho-Tain, Inc. v. Rocky Mountain Orthodontics, Inc.,
20 No. 05 C 6656, 2006 WL 3782916, at *3 (N.D. Ill. Dec. 20, 2006)). Such claims can be
21 identified by “the complete identity of factual and legal issues between the complaint and the
22 counterclaim.” Id. at *4 (quoting Pettrey v. Enterprise Title Agency, Inc., 2006 WL 3342633, at
23 *3 (N.D. Ohio Nov. 17, 2006)).

24 **II. CLAIMS UNDER § 2 OF THE SHERMAN ACT MUST PLEAD ACTUAL FACTS**
25 **OF MONOPOLY CONDUCT AND ANTITRUST INJURY OR FACE DISMISSAL**

26 Apple’s twenty-seventh counterclaim alleges that Samsung has violated Section Two of
27 the Sherman Act by unlawfully monopolizing the markets on technologies implementing each of
28 the functions claimed in Samsung’s standards-essential patents, which Apple defines as the “Input

1 Technologies Markets.” (See D.N. 124 Counterclaims ¶ 84.) Apple's counterclaim is fatally
2 defective, however, because it offers only conclusory assertions of monopoly power, unlawful
3 activity and antitrust injury rather than facts establishing a plausible claim. It must thus be
4 dismissed under Twombly.

5 A claim of unlawful monopolization under Section Two of the Sherman Act requires
6 showings of “(1) the possession of monopoly power in the relevant market and (2) the willful
7 acquisition or maintenance of that power as distinguished from growth or development as a
8 consequence of a superior product, business acumen, or historic accident.” United States v.
9 Grinnell Corp., 384 U.S. 563, 570-71 (1966). Additionally, a private party asserting a Section
10 Two cause of action must also demonstrate antitrust standing, see 15 U.S.C. § 15(a), which, under
11 Ninth Circuit jurisprudence, involves the following factors: “(1) the nature of the plaintiff’s
12 alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the
13 directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative
14 recovery; and (5) the complexity in apportioning damages.” Am. Ad Mgmt., Inc. v. Gen. Tel. Co.
15 of Cal., 190 F.3d 1051, 1054 (9th Cir. 1999). Greater weight is typically given to the first factor,
16 antitrust injury, which is “necessary, but not always sufficient, to establish standing under § 4 [of
17 the Clayton Act].” Id. at 1055 (quoting Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104,
18 110 n.5 (1986)).

19 The Ninth Circuit has identified four requirements for antitrust injury in the context of a
20 private § 2 cause of action: “(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that
21 flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws
22 were intended to prevent.” Id. Furthermore, the party claiming injury must “be a participant in
23 the same market as the alleged malefactors.” Bhan v. NME Hosps., Inc., 772 F.2d 1467, 1470
24 (9th Cir. 1985).

25 **A. Apple Has Not Pled Facts to Support a Finding of Monopoly Conduct**

26 Apple offers only conclusory assertions that Samsung obtained monopoly power in the
27 Input Technologies Markets and that any monopoly power was obtained by unlawful,
28

1 anticompetitive means. Apple does not plead any facts sufficient to state a plausible claim, as
2 required by Twombly. Twombly, 550 U.S. at 555-56.

3 At the heart of Apple’s § 2 counterclaim is the allegation that Samsung deceived ETSI by
4 failing to disclose essential patents during the standardization process and by making false
5 promises to license essential patents on FRAND terms. (D.N. 124 Counterclaims ¶ 177.)
6 Because Apple’s counterclaim alleges fraud on the part of Samsung, it must satisfy the heightened
7 and exacting pleading requirements of Fed. R. Civ. P. 9(b), in addition to the minimal pleading
8 standards of Twombly. See, e.g., In re Netflix Antitrust Litig., 506 F. Supp. 2d 308, 316-17
9 (N.D. Cal. 2007) (applying Rule 9(b) pleading standards in antitrust context). Rule 9(b)
10 specifically requires a party alleging fraudulent conduct to “state with particularity the
11 circumstances constituting fraud.” Fed. R. Civ. P. 9(b). The heightened pleading standard
12 necessarily requires more than just “the neutral facts necessary to identify the transaction.” In re
13 GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc). The party alleging fraud
14 must specifically plead “the ‘who, what, when, where, and how’ that would suggest fraud”
15 Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997) (quoting DiLeo v. Ernst & Young, 901 F.2d
16 624, 627-28 (7th Cir. 1990)). This includes specifying the “time, place and content of any alleged
17 misrepresentations” and “the identities of the parties to the misrepresentation” ASM
18 America v. Genus, Inc., 2002 WL 24444, at *2 (N.D. Cal. Jan. 9, 2002).

19 Apple pleads that Samsung obtained monopoly power in the Input Technology Markets as
20 a result of fraudulent representations to ETSI regarding the existence of essential patents and its
21 willingness to license on FRAND terms, but it does so in purely conclusory terms and fails to do
22 so with the particularity required under Rule 9(b). Specifically, Apple fails to identify, for each
23 asserted standards-essential patent, who from Samsung should have, but did not, disclose the
24 patent, or made an allegedly false FRAND commitment; or when the patents should have been
25 disclosed, or when the allegedly false FRAND commitment was made. Because Apple’s
26 counterclaim does not satisfy the heightened pleading requirements of Rule 9(b), it must be
27 dismissed.

28

1 Further, Apple’s allegations do not even satisfy the minimal pleading requirements set
2 forth in Twombly. As discussed in Section I.A above, Apple must plead facts sufficient to
3 establish a plausible cause of action, not merely a speculative one. This requirement is especially
4 critical in antitrust cases, where “the costs of modern federal antitrust litigation and the increasing
5 caseload of the federal courts counsels against sending the parties into discovery when there is no
6 reasonable likelihood that the plaintiffs can construct a claim from the events related in the
7 complaint.” Twombly, 550 U.S. at 558 (quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d
8 1101, 1106 (7th Cir. 1984)).

9 In this case, Apple fails to allege any facts demonstrating actual anticompetitive effect as a
10 result of Samsung’s alleged acts. Apple first argues that the standardization of Samsung’s
11 patented technology eliminates competition by excluding alternatives. (D.N. 124 Counterclaims
12 ¶ 89.) This is an argument against standard setting generally, however, and has been rejected in
13 present-day antitrust law. See, e.g., Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 309 (3d
14 Cir. 2007) (“The adoption of a standard does not eliminate competition among producers but,
15 rather, moves the focus away from the development of potential standards and toward the
16 development of means for implementing the chosen standard.”). Courts have similarly refused to
17 find § 2 liability based solely on deception or misrepresentation before a standard-setting body.
18 In Rambus Inc. v. FTC, 522 F.3d 456, 464-66 (D.C. Cir. 2008), for example, the D.C. Circuit held
19 that a § 2 monopolization claim predicated on misrepresentations to a standard-setting
20 organization must show that a different technology would have been adopted into the standard *but*
21 *for* the defendant’s misrepresentation. See also Townshend v. Rockwell Int’l Corp., 2000 WL
22 433505, at *11 (N.D. Cal. Mar. 28, 2000) (finding no anticompetitive effect where plaintiff did not
23 assert that the standard-setting organization “could have adopted a . . . standard which did not
24 encompass [defendant’s] technology”). The mere alleged act of deception itself cannot “form the
25 basis of a monopolization claim.” Rambus, 522 F.3d at 464. Although Apple has generally
26 alleged that ETSI would not have incorporated Samsung’s patented technology into the UMTS
27 standard had Samsung disclosed its essential patents or refused to license on FRAND terms, such
28 allegations are conclusory at best. (See D.N. 124 Counterclaims ¶ 55.) Apple offers no facts to

1 suggest that its allegation is anything more than speculation. Apple does not allege that
2 alternative viable technology had been proposed, or that the standard could be implemented
3 without Samsung’s technology. Apple does not even allege that ETSI would not incorporate
4 technology into a standard without a FRAND commitment—nor can it, because ETSI’s IP policy
5 has no such absolute requirement. Without a plausible allegation of anticompetitive effect, Apple
6 has not sufficiently pled a § 2 violation, and Apple’s twenty-seventh Counterclaim must be
7 dismissed.

8 **B. Apple Has Not Pled Facts to Support a Finding of Antitrust Injury**

9 In order to state a § 2 monopolization claim, Apple must allege that Samsung’s allegedly
10 unlawful behavior harms competition, and not just competitors. Am. Ad Mgmt., 190 F.3d at
11 1055. Apple’s allegations, however, focus on specific harm that it has suffered, such as
12 “imminent loss of profits, loss of customers and potential customers, and loss of goodwill and
13 product image.” (D.N. 124 Counterclaims ¶ 180.) They thus only describe harms to Apple as a
14 competitor, and not harms to competition. Apple exclusively lists the same harms that it would
15 suffer at the hands of a superior competitor in the marketplace under circumstances where
16 competition is not harmed. See Les Shockley Racing, Inc. v. Nat’l Hot Rod Ass’n, 884 F.2d 504,
17 508 (9th Cir. 1989) (holding that market exclusion, loss of income, and the resulting elimination
18 of a competitor does not necessarily equate with injury to competition). In addition, even these
19 harms are alleged in a conclusory fashion, rather than allegations of facts establishing a plausible
20 claim and thus do not satisfy the Twombly pleading requirement.

21 Apple further alleges anticompetitive injury because reasonable substitutes have been
22 excluded from the relevant markets, but, as discussed in Section II.A above, the elimination of
23 alternatives as a result of standardization is not, in itself, an anticompetitive harm. See
24 Broadcom, 501 F.3d at 309. Apple otherwise fails to state any facts presenting a plausible claim
25 that Samsung’s technology would not or could not have been incorporated into the standard under
26 any other circumstances. See Rambus, 522 F.3d at 464-66.

27 Finally, Apple asserts that it incurred substantial costs in defending against Samsung’s
28 patent infringement claims. (D.N. 124 Counterclaims ¶ 180.) But once again this demonstrates

1 injury to Apple only, and not to competition. See Chip-Mender, Inc. v. Sherwin-Williams Co.,
2 No. C 05-3465, 2006 WL 13058, at *5 (N.D. Cal. Jan. 3, 2006) (“A claim of injury in the form of
3 attorneys' fees in defending against a patent infringement suit is not an injury to ‘competition’ or
4 the type of injury that the antitrust laws were designed to protect against, but is rather a purely
5 individual economic injury to [defendant] that has no effect on competition in the relevant market.
6 Such allegations are insufficient to state a claim under the Sherman Act.”).

7 Absent any plausible and factual allegations of harm to competition, Apple has failed to
8 allege that it has suffered an antitrust injury, and Apple’s twenty-seventh Counterclaim must be
9 dismissed.³

10 **III. THE ACTIONS OF A SINGLE MEMBER OF A STANDARD-SETTING**
11 **ORGANIZATION CANNOT VIOLATE § 1 OF THE SHERMAN ACT**

12 Apple’s twenty-eighth counterclaim asserts that Samsung’s actions within standard-setting
13 organizations constitute concerted action in restraint of trade in violation of Section One of the
14 Sherman Act, 15 U.S.C. § 1, and the California Cartwright Act, Cal. Bus. & Prof. Code § 16720 *et*
15 *seq.* Apple, however, fails to allege any collusion or cooperation between Samsung and any
16 members or officials of any standard-setting organization in carrying out its allegedly
17 anticompetitive acts. Because the independent actions of a single entity cannot constitute grounds
18 for a claim under Section One of the Sherman Act or under the California Cartwright Act, the
19 Court must dismiss Apple’s counterclaim.

20 Section One of the Sherman Act bars any “contract, combination . . . or conspiracy, in
21 restraint of trade or commerce” 15 U.S.C. § 1. Courts have long understood this to require
22 unreasonable or anticompetitive conduct on the part of accused violators. See, e.g., Texaco Inc.
23 v. Dagher, 547 U.S. 1, 5 (2006) (“[T]his court presumptively applies rule of reason analysis, under

24 _____
25 ³ The facts pled in Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297 (3d Cir. 2007), are instructive with respect
26 to the requirements governing Apple's antitrust injury allegations. There, Broadcom alleged in its complaint that,
27 among a plethora of other examples of anticompetitive conduct, Qualcomm (i) leveraged over 1400 patents to acquire
28 a 90% market share in the CDMA chipset market, see First Amended Complaint ¶¶ 62-64, Broadcom, 501 F.3d 297
(No. 505CV03350) ; (ii) imposed exclusive dealing requirements on customers by discriminating with respect to
royalty rates, see id. ¶¶ 17, 74, 92-98; (iii) abused its dominant position to fix prices, restrict output, undermine
competing technologies, see id. ¶¶ 20, 65; (iv) demanded non-FRAND licenses from multiple licensees, see id. ¶¶
103-105; and (v) manipulated standard-setting organizations by threatening licensees if they did not vote for
Qualcomm’s preferred technologies, see id. ¶¶ 75-80.

1 which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact
2 unreasonable and anticompetitive before it will be found unlawful.”); Am. Soc’y of Mech. Eng’rs,
3 Inc. v. Hydrolevel Corp., 456 U.S. 556, 572 (1982) (“A principal purpose of the antitrust private
4 cause of action . . . is, of course, to deter anticompetitive practices.”). Furthermore, § 1 requires
5 concerted action by two or more entities— “[t]he conduct of a single firm is governed by § 2 alone
6 and is unlawful only when it threatens actual monopolization.” Copperweld Corp. v.
7 Independence Tube Corp., 467 U.S. 752, 767 (1984). Thus, a § 1 violation must allege actions by
8 two or more actors to inhibit competition.

9 Similarly, the California Cartwright Act prohibits unlawful trusts, where a trust “is a
10 combination of capital, skill or acts by two or more persons” for anticompetitive purposes. Cal.
11 Bus. & Prof. Code §§ 16720, 16726. As with the Sherman Act, the Cartwright Act extends only
12 to anticompetitive conduct perpetuated by multiple actors; procompetitive ventures and unilateral
13 action cannot be the basis for a claim. See Cal. Bus. & Prof. Code § 16720 (requiring “two or
14 more persons”), § 16725 (declaring lawful combinations that “encourage or increase
15 competition”). Additionally, for the purposes of interpreting the Cartwright Act, California courts
16 have repeatedly held that the Act should be construed according to precedent under the Sherman
17 Act. See, e.g., Partee v. San Diego Chargers Football Co., 34 Cal. 3d 378, 392 (1983)
18 (“[B]ecause the Cartwright Act was patterned after the Sherman Act, both laws have identical
19 objectives and are harmonious with each other; thus, decisions under the latter act are applicable in
20 construing the former.” (citations omitted)); Alameda Cnty. Builders’ Exch. v. F. P. Lathrop
21 Constr. Co., 4 Cal. 3d 354, 362 n.3 (1971) (“Because the Cartwright Act is patterned after the
22 federal Sherman Act and both have their roots in the common law, federal cases interpreting the
23 Sherman Act are applicable in construing the Cartwright Act.”).

24 Federal jurisprudence recognizes that standard-setting organizations promote, rather than
25 hamper, competition. In multiple decisions over the past century, courts have held that standard-
26 setting activities benefit industry and consumers and do not violate Section One of the Sherman
27 Act and, by extension, the Cartwright Act. See, e.g., Allied Tube & Conduit Corp. v. Indian
28 Head, Inc., 486 U.S. 492, 501 (1988) (“When, however, private associations promulgate safety

1 standards . . . through procedures that prevent the standard-setting process from being biased by
2 members with economic interests in stifling product competition . . . those private standards can
3 have significant procompetitive advantages.”); Maple Flooring Mfrs.’ Ass’n v. United States, 268
4 U.S. 563, 566 (1925) (“The defendants have engaged in many activities to which no exception is
5 taken by the government and which are admittedly beneficial to the industry and to consumers;
6 such as . . . the standardization and improvement of the product.”); Broadcom Corp. v. Qualcomm
7 Inc., 501 F.3d 297, 308-09 (3d Cir. 2007) (discussing procompetitive benefits of standard-setting
8 organizations); Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 297 (5th Cir.
9 1988) (refusing to review standard-setting activities under Sherman Act because it would
10 “discourage the establishment of useful industry standards”); Int’l Norcent Tech. v. Koninklijke
11 Philips Elecs. N.V., No. CV 07-00043, 2007 WL 4976364, at *12 (C.D. Cal. Oct. 29, 2007)
12 (holding that “setting an industry standard, without more, does not constitute an actionable
13 restraint of trade”). The few exceptions to this principle included cases where officials of a
14 standard-setting organization conspired to restrict competition, or where members of a standard-
15 setting organization colluded to eliminate competitors from the market. See, e.g., Allied Tube,
16 486 U.S. 492 (1988) (finding § 1 liability where members of standard-setting organization stacked
17 vote to adopt standards that excluded competing products); Am. Soc’y of Mech. Eng’rs, Inc. v.
18 Hydrolevel Corp., 456 U.S. 556 (1982) (finding standard-setting organization liable under § 1
19 where officials manipulated standards to exclude competitors).

20 In its counterclaim, Apple alleges neither that ETSI or its agents influenced the
21 standardization process so as to harm competition, nor that Samsung conspired with other
22 members of ETSI to restrict competition. Instead, Apple merely alleges that the standards-setting
23 process “constitutes concerted activity” and that Samsung’s alleged breach of ETSI rules subjects
24 it to § 1 and Cartwright Act liability. (D.N. 124 Counterclaims ¶¶ 182-83.) Even assuming
25 purely for the purposes of this motion that Apple’s allegations are taken as true, these facts cannot
26 form the basis for a claim under Section One of the Sherman Act or the California Cartwright Act.
27 Specifically, standard-setting activities alone cannot create antitrust liability, see Allied Tube, 486
28 U.S. at 501; Cal. Bus. & Prof. Code § 16725, and any allegedly anticompetitive acts committed by

1 Samsung alone cannot constitute concerted action, see Copperweld Corp. v. Independence Tube
2 Corp., 467 U.S. 752, 767 (1984). Because Apple’s allegations are insufficient to warrant relief
3 under Section One of the Sherman Act and under the California Cartwright Act, the Court should
4 dismiss Apple’s twenty-eighth counterclaim.

5 Additionally, Section One of the Sherman Act is subject to the same antitrust standing
6 requirement as Section Two. See 15 U.S.C. § 15(a). As discussed in Section II.B above,
7 Apple’s counterclaims fail to plead facts sufficient to demonstrate antitrust injury. Samsung
8 hereby incorporates and reiterates the arguments in Section II.B in response to Apple’s twenty-
9 eighth counterclaim. On these grounds alone, Apple’s twenty-eighth counterclaim must be
10 dismissed.

11 **IV. APPLE’S CLAIMS UNDER UNFAIR COMPETITION LAW MIRROR ITS**
12 **ANTITRUST CLAIMS AND SHOULD BE DISMISSED**

13 Apple’s twenty-ninth counterclaim alleges unfair competition under Cal. Bus. & Prof.
14 Code § 17200 *et seq.* (D.N. 124 Counterclaims ¶ 186). The specific conduct alleged by Apple
15 mirrors the alleged anti-competitive conduct that forms the basis for Apple’s counterclaims under
16 the federal and state antitrust laws. Specifically, Apple alleges that Samsung committed unlawful
17 business acts by violating Sections One and Two of the Sherman Act and the California
18 Cartwright Act (*id.* ¶ 188); engaged in fraudulent conduct by failing to disclose essential patents
19 and making false promises to license on FRAND terms (*id.* ¶ 189); and committed unfair business
20 acts by failing to disclose essential patents and failing to offer FRAND licenses (*id.* ¶ 190).
21 Because this counterclaim mirrors the corresponding Sherman Act and California Cartwright Act
22 counterclaims, it should be dismissed for the same reasons discussed above.

23 Additionally, to the extent that Apple contends that California’s unfair competition laws
24 offer broader protection than the federal and state antitrust laws, that argument has been rejected
25 by the California Supreme Court. Cel-Tech Commc’ns, Inc. v. L.A. Cellular, 20 Cal. 4th 163,
26 186-87 (1999) (holding that “unfair” in Cal. Bus. & Prof. Code. § 17200 “means conduct that
27 threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those
28 laws because its effects are comparable to or the same as a violation of the law, or otherwise

1 significantly threatens or harms competition.”); see also Townshend v. Rockwell Int’l Corp., No.
2 C99-0400, 2000 WL 433505, at *14-15 (N.D. Cal. Mar. 28, 2000) (construing § 17200 in light of
3 Cel-Tech). Thus, any conduct also alleged under federal or state antitrust laws should be
4 dismissed for the reasons set forth in Sections III and IV above, and any conduct not also alleged
5 under federal or state antitrust laws should be dismissed because of Apple’s failure to plead that
6 such conduct “threatens an incipient violation of the antitrust laws, violates the policy or spirit of
7 one of those laws, or otherwise significantly threatens or harms competition.” Townshend, 2000
8 WL 433505, at *15.

9 **V. DUPLICATIVE DECLARATORY JUDGMENT CLAIMS MUST BE DISMISSED**

10 The Declaratory Judgment Act requires a plaintiff to show “that there is a substantial
11 controversy, between parties having adverse interest, of sufficient immediacy and reality to
12 warrant issuance of declaratory judgment.” Scott v. Pasadena Unified Sch. Dist., 306 F.3d 646,
13 658 (9th Cir. 2002) (quoting Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981)).
14 A declaratory judgment claim should thus be dismissed under Rule 12(b)(6) as “not ripe for
15 adjudication if it rests upon ‘contingent future events that may not occur as anticipated, or indeed
16 may not occur at all.’” Swartz v. KPMG LLP, 476 F.3d 756, 766 (9th Cir. 2007) (quoting
17 Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1044 (9th Cir. 1999)). Alternatively, the Court
18 may strike a declaratory judgment counterclaim under Rule 12(f) when it is “redundant of
19 affirmative defenses” or otherwise “serve[s] no useful purpose.” Stickrath v. Globalstar, Inc., No.
20 C07-1941, 2008 WL 2050990, at *3 (N.D. Cal. May 13, 2008).

21 Apple’s non-patent declaratory judgment counterclaims seek the same relief and serve the
22 same purpose as Apple’s affirmative defenses and other counterclaims. Apple’s thirtieth
23 counterclaim seeks a declaration that Apple “is licensed to Samsung’s Declared-Essential Patents
24 by virtue of Samsung’s FRAND commitments or, in the alternative, Apple has the irrevocable
25 right to be licensed on FRAND terms under those patents”; Apple’s thirty-first counterclaim seeks
26 a declaration that “Samsung is not entitled under any circumstances to seek injunctive relief
27 preventing Apple from practicing the UMTS standard, and that Samsung is not otherwise entitled
28 to use its purported essential patents to pursue injunctive relief”; and Apple’s thirty-second

1 counterclaim seeks a declaration that “Samsung’s purported essential patents, including the
2 Declared-Essential Patents, are unenforceable by virtue of Samsung’s waiver of its right to enforce
3 its purported essential patents, including the Declared-Essential Patents.” (D.N. 124 Prayer for
4 Relief ¶¶ f-h.)

5 Apple has not identified any relief that it would be entitled to on these counterclaims that it
6 could not already be granted under its breach of contract, promissory estoppel, or antitrust
7 counterclaims, nor has Apple identified any factual or legal issues uniquely raised by its
8 declaratory judgment counterclaims which would not otherwise be addressed by the Court in
9 ruling on its affirmative defenses or other counterclaims. Specifically, the breach of contract,
10 promissory estoppel and antitrust counterclaims will already require this Court to determine
11 whether Apple is licensed or has the right to a license to any essential patents, whether Samsung is
12 entitled to injunctive relief on its essential patents, and whether Samsung’s standards-essential
13 patents are enforceable. Apple’s thirtieth, thirty-first, and thirty-second counterclaims are thus at
14 best duplicative and should be stricken.

15 **CONCLUSION**

16 For the foregoing reasons, Samsung’s Motion to Dismiss and Strike Apple’s
17 Counterclaims should be granted.

18

19 DATED: August 15, 2011

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