

REDACTED VERSION OF SEALED DOCUMENT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

INTEL CORPORATION, et al.,

Plaintiffs,

v.

SEVEN NETWORKS, LLC,

Defendant.

Case No. [19-cv-07651-EMC](#)

PUBLIC/REFILING

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' JOINT MOTION TO DISMISS AND TO STRIKE PLAINTIFFS' SECOND AMENDED COMPLAINT

Docket No. 244

United States District Court
Northern District of California

The above-referenced case is an antitrust case. The current operative complaint is the second amended complaint ("SAC"). The plaintiffs named in the caption of the SAC are Intel Corporation and Apple Inc. The defendants named in the caption are:

- (1) Fortress Investment Group LLC and Fortress Credit Co. LLC ("Fortress");
- (2) Uniloc 2017 LLC, Uniloc USA, Inc., and Uniloc Luxembourg S.A.R.L. ("Uniloc");
- (3) VLSI Technology LLC ("VLSI");
- (4) INVT SPE LLC and Inventergy Global, Inc. ("INVT"); and
- (5) IXI IP, LLC ("IXI").

The parameters of the SAC, however have shifted because, on June 21, 2021, Apple dismissed its claims against all of the defendants.¹ See Docket No. 263 (notice of voluntary dismissal). The Court asked the remaining parties to meet and confer to determine how Apple's dismissal impacted the instant case. The remaining parties agreed that, in light of Apple's

¹ All of the defendants, except one, were dismissed with prejudice. VLSI was dismissed without prejudice.

1 dismissal, “Intel currently only has claims” against Fortress and VLSI.² Docket No. 273 (St. at 1).
 2 Thus, at present, the Court now has an antitrust case brought by Intel only against Fortress and
 3 VLSI only.

4 Currently pending before the Court is (1) a joint motion to dismiss and strike the SAC and
 5 (2) INVT’s supplemental brief. Having considered the parties’ briefs and the oral argument of
 6 counsel, as well as the amicus briefs that were filed, the Court hereby **GRANTS** the motion to
 7 dismiss but **DENIES** the anti-SLAPP motion.

8 I. IMPACT OF APPLE’S DISMISSAL

9 As indicated above, the Court asked the parties (other than Apple) to meet and confer to
 10 discuss how Apple’s dismissal impacted the instant case. The parties agreed that, because of the
 11 dismissal, the only plaintiff remaining was Intel and that the only defendants remaining were
 12 Fortress and VLSI. The parties also agreed that, because of the dismissal, five of the nine product
 13 markets identified in the SAC were no longer at issue. *See generally* Docket No. 273 (St. at 1).

14 The parties, however, do have a few disputes in need of judicial resolution.

- 15 • **Product markets.** For the five product markets that are no longer at issue, Intel
 16 asks that claims based on these product markets be dismissed without prejudice; all
 17 of the defendants ask for a dismissal with prejudice. Both parties assert that their
 18 respective position is supported by the Court’s prior order of January 6, 2021. *See*
 19 Docket No. 229 (Order at 15). In that order, the Court noted that, for several
 20 product markets, Plaintiffs admitted that Defendants had not yet asserted patents in
 21 those markets and further failed to explain why there was a threat that Defendants
 22 would assert such patents – and against Plaintiffs specifically. The Court thus
 23 found that Plaintiffs lacked standing to assert antitrust claims based on the product
 24 markets. The dismissal of the claims based on the product markets was *with*
 25 prejudice because Plaintiffs did not provide any indication that they were capable
 26 of curing the deficiency on standing. However, the Court’s ruling did not “bar
 27

28 ² This is because only VLSI has sued Intel for patent infringement. .

1 Plaintiffs from initiating a new suit (including but not limited to a suit for
 2 declaratory relief) should circumstances change.” Docket No. 229 (Order at 15).
 3 Consistent with the Court’s January 6 order, the dismissal of the claims based on
 4 the five product markets shall be with prejudice; however, that does not bar Intel
 5 from initiating a new action should circumstances change.

- 6 • **Defendants.** Similar to above, Intel asks that the defendants who will be dismissed
 7 from the case (namely, Uniloc, INVT, and IXI) be dismissed without prejudice.
 8 Those defendants ask for a dismissal with prejudice. Consistent with the above, the
 9 Court dismisses with prejudice, but this does not bar Intel from initiating a new
 10 action should circumstances change.

11 **II. FACTUAL & PROCEDURAL BACKGROUND**

12 In the SAC, Intel alleges as follows.

13 “PAE” stands for patent assertion entity. PAEs are companies that “aggressively pursue
 14 meritless [patent infringement] litigation.” SAC ¶ 2. Over the years, “PAEs have evolved,” most
 15 notably, “partnering with investment firms to fuel their litigation.” SAC ¶ 6.

16 Having deep-pocketed investment firms standing behind them has
 17 made PAEs only more aggressive. Indeed, to meet the expectations
 18 of their new investors for high returns, PAEs must act ever more
 19 aggressively. These new investors are content to incur loss after
 20 loss so long as they have the chance to hit a windfall reward that
 21 will justify their investment. Patent assertion thus becomes simply a
 22 numbers game disassociated from the merits of the underlying
 23 patents, with PAEs and their investors betting that serial assertions
 24 with aggressive demands will strike a jackpot eventually making up
 25 for many other losses.

26 SAC ¶ 7.

27 Fortress is an investment firm that has partnered with PAEs. *See* SAC ¶ 8. Fortress has a
 28 “web of PAEs that [it either] owns or controls.” SAC ¶ 9. “Fortress has used its stable of PAEs to
 aggregate a massive . . . portfolio of patents.” SAC ¶ 9. That portfolio includes patents that are
 substitutes for each other (as well as complements). SAC ¶¶ 9, 41. “When patents are aggregated
 as Fortress has done, the dynamics for determining whether to assert a patent change and the
 options available to the target of the assertion also change.” SAC ¶ 40.

1 For example:

2 When the patents were held by their original owners, there was
3 competition and a prospective licensee could choose between
4 competing options (or forgo those options and design its product in a
5 different way), which had the effect of promoting competition and
6 restraining royalties. But now, with the patents under the control of
7 Fortress, the prospect of competition or redesigning products is
improperly diminished or disappears. Fortress and its PAEs can
thus threaten a target with the serial risk that the only or next best
alternative design to an asserted patent is also subject to a patent
claim by one of Fortress's PAEs.

8 SAC ¶ 41; *see also* SAC ¶ 12 (noting that, before aggregation, the patents were owned by
9 sophisticated companies that were willing to assert patents and had experience with asserting
10 patents, but the owners did not assert the patents because the patents “had insufficient expected
11 value to make the assertions worth the costs”); SAC ¶ 44 (alleging that the aggregation of
12 substitute patents harms “competition in the same way as any merger or combination of
13 competitors that lessens competition”).

14 As another example:

15 Before aggregation, there would be no incentive to assert [weak]
16 patents because there would be no expectation of a positive return
17 from asserting a weak patent because the patent could be expected to
18 be proven invalid, not infringed, or unenforceable in litigation, or
19 would be easily designed around, including because there were
20 alternatives available in the market. But, after aggregation and the
21 elimination of competitive alternatives, assertion of weak patents as
22 part of a wave of assertions against a target generates economic
23 value even if many of those assertions are defeated in litigation. By
24 increasing the volume of assertions a target faces, Fortress and its
25 PAEs cause targets to deploy licensing and litigation resources less
efficiently and thereby increase the value of litigation to Fortress
and its PAEs. In particular, Fortress and its PAEs increase the
likelihood that a weak patent will slip through litigation and be
found infringed, valid, and enforceable when it should not be.
Further, this strategy creates incentives for targets to settle with
Fortress-backed PAEs for amounts that exceed the value (if any) of
their patents to put an end to this risk. In this manner, Fortress's
patent aggregation enables the use of weak patents to force targets to
pay undeserved and inflated royalties.

26 SAC ¶ 42.

27 Intel acknowledges that “[t]here is nothing inherently illegal with owning many patents or
28 obtaining those patents through acquisition” but maintains that there is illegality where, *e.g.*,

1 licensing is not “based on the intrinsic value of those patents.” SAC ¶ 52; *see also* SAC ¶ 53
 2 (alleging that Defendants “extort supracompetitive royalties unrelated to the value (if any) of the
 3 Fortress-controlled patents”).

4 There are four markets at issue in this case where Defendants have aggregated patents.
 5 Those “patent markets” are as follows.

- 6 • The market for patents for preventing stalls for cache misses. *See* SAC ¶ 248.
- 7 • The market for patents for arbitrating multiple requests to access a memory bus.
 8 *See* SAC ¶ 283.
- 9 • The market for patents for third-party device authorization through limitation of
 10 information exchanged. *See* SAC ¶ 303.
- 11 • The market for patents for MOSFET channel fabrication. *See* SAC ¶ 390.

12 Based on, *inter alia*, the above allegations, Intel has asserted the following causes of action
 13 against Fortress and/or VLSI³:

- 14 (1) An agreement to restrain competition in patent licensing, in violation of § 1 of the
 15 Sherman Act (against Fortress only, not VLSI).
- 16 (2) Unlawful asset acquisitions, in violation of § 7 of the Clayton Act.
- 17 (3) Unfair competition, in violation of California Business & Professions Code §
 18 17200.⁴

19 **III. DISCUSSION**

20 A. Legal Standard

21 Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include “a short and plain
 22 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A
 23 complaint that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil
 24 Procedure 12(b)(6). *See* Fed. R. Civ. P. 12(b)(6). To overcome a Rule 12(b)(6) motion to dismiss

25 _____
 26 ³ Per the SAC, Fortress formed VLSI in 2016 and caused the transfer of patents to the company.
 27 *See* SAC ¶ 74. VLSI obtained some of its patents from a third party, NXP/Freescale, via a Patent
 Purchase and Cooperation Agreement. *See* SAC ¶ 76.

28 ⁴ This claim is derivative of the federal antitrust claims. *See* SAC ¶ 465 (alleging that Defendants
 engaged in unfair competition “by violating the Sherman and Clayton Acts”).

1 after the Supreme Court’s decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic*
 2 *Corp. v. Twombly*, 550 U.S. 544 (2007), a plaintiff’s “factual allegations [in the complaint] ‘must
 3 . . . suggest that the claim has at least a plausible chance of success.’” *Levitt v. Yelp! Inc.*, 765
 4 F.3d 1123, 1135 (9th Cir. 2014). The court “accept[s] factual allegations in the complaint as true
 5 and construe[s] the pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St.*
 6 *Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But “allegations in a
 7 complaint . . . may not simply recite the elements of a cause of action [and] must contain sufficient
 8 allegations of underlying facts to give fair notice and to enable the opposing party to defend itself
 9 effectively.” *Levitt*, 765 F.3d at 1135 (internal quotation marks omitted). “A claim has facial
 10 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
 11 inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “The
 12 plausibility standard is not akin to a probability requirement, but it asks for more than a sheer
 13 possibility that a defendant has acted unlawfully.” *Id.* (internal quotation marks omitted).

14 In the pending motion, Defendants make arguments that are similar to those made in their
 15 prior 12(b)(6) motions – *e.g.*, failure to allege product market, market power, and antitrust injury
 16 as well as failure to allege a § 1 claim specifically and a § 7 claim specifically.

17 B. Product Markets

18 In its prior order, the Court noted that,

19 [a]lthough “market definition is a deeply fact-intensive inquiry,
 20 [and] courts hesitate to grant motions to dismiss for failure to plead
 21 a relevant product market,” a product market must still be plausible.
 22 Here, the Court concludes that many, although not all, of the
 markets claimed by Plaintiffs are not plausibly stated because,
 facially, they are still overbroad.

23 Docket No. 229 (Order at 16). The markets as then pled by Plaintiffs were overbroad because
 24 they covered a general technical field rather than just a specific function within that field. *See*
 25 Docket No. 229 (Order at 17-19).

26 In the pending motion, Defendants assert that the four patents markets at issue, even as re-
 27 pled, are still not plausible.

28 For example, Defendants contend that “the new markets contain the exact same patents as

1 the markets that the Court dismissed.” Mot. at 9. But the fact that the new markets contain the
2 exact same patents as before is not, in and of itself, problematic per se. It is possible that the exact
3 same patents do not cover a general technical field but rather a specific function within that field.
4 As now more narrowly defined, the posited markets appear to be defined with sufficient
5 specificity to be plausible.

6 The bigger problem with the new markets is that Intel claims that the markets are made up
7 of both substitute patents *and* complementary patents. *See, e.g.*, SAC ¶ 255. But a product market
8 is generally about substitutes, not complements. For example, the Ninth Circuit has stated that a
9 product market “encompass[es] the product at issue as well as all economic substitutes for the
10 product.” *Newcal Indus., Inc. v. Ikon Office Soln.*, 513 F.3d 1038, 1045 (9th Cir. 2008). The court
11 has also noted: “The outer boundaries of a product market are determined by the reasonable
12 interchangeability of use or the cross-elasticity of demand between the product itself and
13 substitutes for it.” *Id.*; *see also Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 469
14 (1992) (indicating that cross-elasticity of demand refers to “the extent to which consumers will
15 change their consumption of one product in response to a price change in another”). The Areeda
16 & Hovenkamp antitrust treatise similarly underscores that a product market is made up of
17 substitute goods, not complements, even going so far as to say that “[g]rouping complementary
18 goods into the same market” is “economic nonsense” and would

19 undermin[e] the rationale for the policy against monopolization or
20 collusion in the first place. One “monopolizes” a market by
21 reducing output, and once certain output is removed from the
22 market, the remaining output experiences increased demand and a
23 rise in prices. Thus a monopolist might monopolize the market for
24 gasoline by reducing output from the competitive level of, say,
25 1,000,000 barrels, to a monopoly level of 700,000, with the result
26 that demand intensifies for that which remains and the market
27 clearing price rises. No such result obtains when one aggregates
28 complementary goods into the same market. For example, grouping
gasoline and tires into a “market” suggests that an output decrease in
gasoline would permit an increase in tire prices. In fact, it will do
just the opposite.

26 2B Areeda & Hovenkamp, Antitrust Law ¶ 565a.

27 Admittedly, there are cases in which courts have held that commercial realities weigh in
28 favor of putting what might appear to be different products or services into a single market. *See*

1 *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285-86 (2018) (stating that “courts should ‘combin[e]’
2 different products or services into ‘a single market’ when ‘that combination reflects commercial
3 realities”); thus, holding that “courts must include both sides of the platform – merchants and
4 cardholders – when defining the credit-card market”); *Image Tech. Servs. v. Eastman Kodak Co.*,
5 125 F.3d 1195, 1203-04 (9th Cir. 1997) (rejecting Kodak’s argument that, “because no two parts
6 are interchangeable, the relevant markets for parts consist of the market for each individual part
7 for Kodak photocopiers and each single part for Kodak micrographics equipment”;
8 “[c]onsideration of the ‘commercial realities’ in the markets for Kodak parts compels the use of an
9 ‘all parts’ market theory” – “[a]s the relevant market for service ‘from the Kodak equipment
10 owner’s perspective is composed of only those companies that service Kodak machines,’ the
11 relevant market for parts from the equipment owners’ and service providers’ perspective is
12 composed of ‘all parts’ that are designed to meet Kodak photocopier and micrographics equipment
13 specifications”). And arguably, there could be commercial realities such that complementary
14 patents should be considered part of the same market as substitute patents – *e.g.*, where a
15 complementary patent is essential to a combination with a subject patent to make the product and
16 there are no substitutes for that complementary patent. But here, Intel has not shown with any
17 specificity that commercial realities require that any of the markets at issue should be made up of
18 both substitute patents and complementary ones identified in the SAC – this in spite of the fact
19 that patents and their utility are publicly available information and nothing suggests Intel does not
20 have information to make such allegations. *See also* Areeda & Hovenkamp, Antitrust Law ¶ 565a
21 (asserting that “many ‘commercial realities’ describe a particular market situation, and their
22 invocation should not become an after-the-fact rationalization for a conclusion that is *completely*
23 *inconsistent with the economic rationale for defining markets*”) (emphasis added). Instead, Intel
24 has simply included certain complementary patents without any specific explanation of their
25 essentiality or substitutability in the market.

26 Perhaps in the attempt to get around this problem, Intel claims that the complementary
27 patents are “possibly substitutes.” *E.g.*, SAC ¶ 255 (addressing market for patents for preventing
28 stalls for cache misses). But that the patents are *possibly* substitute patents is not the same thing as

1 saying that the patents are *plausibly* substitutes. At the 12(b)(6) phase, possibility is not good
 2 enough; plausibility is required. In addition, Defendants are correct in arguing that *Staley v.*
 3 *Gilead Sciences, Inc.*, No. 19-cv-02573-EMC, 2020 U.S. Dist. LEXIS 167071 (N.D. Cal. July 29,
 4 2020), is of no help to Intel because that case presented a different situation. In *Staley*, the
 5 plaintiffs pled *facts* demonstrating that “cART drugs sometimes may be complements for one
 6 another but other times may be substitutes. See FACC ¶ 402 (alleging that the HHS Guidelines
 7 have recommended regimens that include NRTIs and third agents together, as well as regimens
 8 that include third agents and no NRTIs – *i.e.*, NRTIs and third agents sometimes are complements
 9 but other times may be substitutes).” *Id.* at *28. Here, Intel has not pled any specific facts to
 10 suggest that the complementary patents could plausibly be substitutes as well. Compare Areeda &
 11 Hovenkamp ¶ 565b (noting that “[a] few things capable of being used in variable proportions may
 12 function as both complements and substitutes” – *e.g.*, “[w]hile aftermarket parts and the labors of a
 13 service technician are complementary goods, they may act as substitutes when the technician has a
 14 choice between using more labor or a new part”).

15 Because the Court considers only substitute patents count for the markets, and not
 16 complementary patents (or patents that are “possibly substitutes”), Intel’s claim of unlawful patent
 17 aggregation is more limited in nature than what is suggested on the face of the pleading. Quite
 18 simply, there are few patents that Defendants have allegedly aggregated.

- 19 • **Market for patents for preventing stalls for cache misses.** Intel has identified
 20 only two substitute patents: the ‘437 patent (held by Uniloc) and the ‘009 patent
 21 (held by VLSI). The five complementary patents identified by Intel – including the
 22 ‘331 patent and the ‘014 patent – are not part of the market. See SAC ¶ 255.
- 23 • **Market for patents for arbitrating multiple requests to access a memory bus.**
 24 Intel has identified only two substitute patents: the ‘687 patent (held by Uniloc) and
 25 the ‘983 patent (held by VLSI). The one complementary patent identified by Intel
 26 is not part of the market. See SAC ¶ 290.
- 27 • **Market for patents for third-party device authorization through limitation of**
 28 **information exchanged.** Intel has identified seven substitute patents: the ‘242, and

1 '620 patents (held by INVT); the '395 patent (held by Seven); the '633 patent (held
 2 by VLSI); and the '976, '907 patent, and '616 patents (held by Uniloc). The ten
 3 complementary patents identified by Intel are not part of the market. *See* SAC ¶
 4 320.

- 5 • **Market for patents for MOSFET channel fabrication.** Intel has identified five
 6 substitute patents: the '452, '319, '232, and '149 patents (held by Uniloc); and the
 7 '303 patent (held by VLSI). There are no complementary patents identified.

8 Moreover, for the first patent market (preventing stalls for cache misses), Intel has not been
 9 sued for infringement of either of the substitute patents. Although Intel has been sued for
 10 infringement of the '014 patent (No. C17-5671 BLF (N.D. Cal.)) and the '331 patent (No. C-18-
 11 0966 (D. Del.)), those patents are complementary patents only. Intel thus lacks standing to bring
 12 any antitrust claim with respect to the first market. The Court dismisses all claims against
 13 Defendants based on the first patent market.

14 Finally, the Court notes that, for some of the markets, Defendants have argued that the
 15 alleged patent substitutes are not, in fact, substitutes. Also, Defendants have argued that, even if
 16 there is functional substitutability, Intel must still show economic substitutability. For purposes of
 17 this order, the Court need not address these arguments but assumes in Intel's favor that Defendants
 18 have simply raised factual disputes that cannot be resolved at the 12(b)(6) phase. As discussed
 19 below, the problem for Intel is that, even with these assumptions, its antitrust claims fail.

20 C. Market Power

21 In its prior orders, the Court indicated that Plaintiffs' antitrust claims, as pled, turned on
 22 anticompetitive effects resulting from the alleged patent aggregation. *See, e.g., Ohio v. Am.*
 23 *Express Co.*, 138 S. Ct. 2274, 2284 (2018) (noting that, in a § 1 claim, under the rule of reason, a
 24 plaintiff "has the initial burden to prove that the challenged restraint has a substantial
 25 anticompetitive effect that harms consumers in the relevant market"); 15 U.S.C. § 18 (providing
 26 that, in a § 7 claim, "no person . . . shall acquire the whole or any part of the assets of another
 27 person . . . , where in any line of commerce or in any activity affecting commerce in any section of
 28 the country, the effect of such acquisition may be substantially to lessen competition, or to tend to

1 create a monopoly”). Anticompetitive effects can be shown through either direct evidence or
2 indirect evidence. Direct evidence of anticompetitive effects would be “*actual detrimental*
3 *effects, such as reduced output, increased prices, or decreased quality in the relevant market.*”
4 Docket No. 229 (Order at 5) (emphasis in original). For indirect evidence, a plaintiff would need
5 to show the defendant’s market power, plus some evidence that the defendant’s conduct harms
6 competition. *See* Docket No. 229 (Order at 20); *see also* Docket No. 229 (Order at 19) (noting
7 that market power is simply a way to assess whether a defendant’s conduct has anticompetitive
8 effects).

9 The Court previously held that Plaintiffs had failed to adequately allege anticompetitive
10 effects. It noted that, even if supracompetitive pricing by itself, would be sufficient to show
11 anticompetitive effects (*i.e.*, without an additional showing of restricted output), “Plaintiffs [did]
12 not plausibly show[] that Defendants extracted supracompetitive royalties as a result of their
13 aggregation [of patents].” Docket No. 22 (Order at 24).

14 In the pending motion, Defendants contend that Intel has stilled failed to show
15 supracompetitive pricing, let alone supracompetitive pricing resulting from patent aggregation.
16 Defendants also argue that, for Intel to rely on direct evidence anticompetitive effects, it must
17 demonstrate not only supracompetitive pricing but also restricted output. The Court agrees with
18 Defendants that Intel has, in the SAC, failed to allege supracompetitive pricing tied to patent
19 aggregation.

20 In so holding, the Court does not take issue with the general theory being put forward by
21 Intel – *i.e.*, that aggregation of substitute patents could, in theory, harm “competition in the same
22 way as any merger or combination of competitors that lessens competition.” SAC ¶ 44. The
23 narrative told by the operative complaint, in principle, is compelling. It is not hard to imagine that
24 a person or entity could accrue market power by obtaining a dominant share of substitute patents
25 and threaten a barrage approach to litigation wherein an imperfect civil justice system may yield
26 an erroneous outcome, thus allowing legally unjustified leverage over licensees, a result which
27 could well constitute an unreasonable restraint of trade. The Court also acknowledges that this
28 case is still at the early stages of proceeding – 12(b)(6) – and not summary judgment. *Cf. Starr v.*

1 *Baca*, 652 F.3d 1202, 1217 (9th Cir. 2011) (stating that, “[i]f there are two alternative
 2 explanations, one advanced by defendant and the other advanced by plaintiff, both of which are
 3 plausible, plaintiff’s complaint survives a motion to dismiss under Rule 12(b)(6)[;] [p]laintiff’s
 4 complaint may be dismissed only when defendant’s plausible alternative explanation is so
 5 convincing that plaintiff’s explanation is implausible”). The problem for Intel is that the SAC
 6 lacks sufficient facts to demonstrate the narrative has been carried out against the company, at
 7 least at this juncture.

8 The Court acknowledges, as Intel argues, that the allegations in the SAC should be
 9 considered holistically. The holistic pictured painted by Intel includes the following:

- 10 • In spite of any competitive constraints (such as those identified in ¶ 49 of the prior
 11 first amended complaint), the prior owners of the patents at issue were willing to
 12 bring patent infringement suits – including against companies comparable to Intel
 13 (or Apple). However, the prior owners declined to bring infringement suits based
 14 on the patents at issue because it was not economically worthwhile (*i.e.*, comparing
 15 costs to benefits).
- 16 • When the patents at issue were transferred to the PAEs and then Fortress
 17 aggregated the patents by virtue of its control over the PAEs, the situation changed.
 18 Now the PAEs brought infringement suits based on the patents at issue. Moreover,
 19 the PAEs made astronomical demands for the alleged infringement, asking for
 20 billions in damages even though the cost of acquiring the patents paled by
 21 comparison. Even if the comparisons might not be a *precise* match (*e.g.*, Intel
 22 would compare a litigation demand made for one group of patents with the
 23 acquisition price of another group of patents, and the only overlap between the two
 24 groups would be one of the patents at issue), it can still be inferred from the large
 25 differential in price that there was significant price inflation for any given patent.
 26 And Intel *was* able to do a more specific price comparison for one patent – the ‘331
 27 patent. [REDACTED]

United States District Court
Northern District of California

1 [REDACTED].⁵ See SAC ¶ 274.

2 If the Court credits the allegations above,⁶ the allegations may tend to show that
3 supracompetitive prices were being charged for the patents at issue. Notably, that inference
4 requires a number of inferential leaps not free of alternative explanations; thus, even if a
5 reasonable inference of supracompetitive pricing could be drawn, Intel’s showing is not
6 compelling. But even if Intel may be deemed to have made a sufficient showing of plausibility
7 under Rule 12(b)(6), the critical question is whether Intel has plausibly shown that the
8 supracompetitive prices were the *result of patent aggregation*. Here, the Court finds Intel has not
9 made such a showing. There are several reasons.

10 As an example, for the ‘331 patent (which the Court notes is actually a complementary
11 patent in the first market), VLSI’s damages expert opined that a reasonable royalty for that patent
12 alone would be approximately [REDACTED]; however, there is no allegation in the SAC that the
13 expert reached that valuation *taking into account the fact that VLSI had aggregated substitutes for*
14 *the ‘331 patent*. See SAC ¶ 274 [REDACTED]

15 [REDACTED]
16 [REDACTED] (emphasis added). The
17 increase in value could have been based on development in technology and the market
18 independent of any aggregation.

19 More generally, although it is *possible* that the supracompetitive prices for the patents were
20 due, if only in part, to patent aggregation, Intel must show plausibility, not mere possibility under

21

22 _____
23 ⁵ Intel has argued (and alleged) that it could have brought more (and better) comparisons if
24 Defendants had agreed to let Intel use confidential information it obtained from the patent
25 infringement lawsuits brought by the PAEs. Although the Court is not without some sympathy for
26 Intel, it also notes that Intel could have brought antitrust counterclaims in those suits – where it
27 could have used that confidential information without issue.

28 ⁶ The Court acknowledges Defendants’ argument that the comparison involving the ‘331 patent is
not apt because [REDACTED] See Mot. at 20-21 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

1 *Iqbal/Twombly*. The problem for Intel is that the holistic picture painted in the SAC weighs
2 against this plausibility. For example, for the second market (for arbitrating multiple requests to
3 access a memory bus), Intel has identified only two substitute patents that were aggregated: one
4 held by Uniloc and the other held by VLSI. Given that Fortress and the *two* PAEs aggregated only
5 *two* substitute patents, it is implausible that it was the aggregation that enabled them to charge
6 supracompetitive prices – at least, where no other information is alleged about how many
7 substitute patents are in the market or that these two patents are key to products in the market –
8 *i.e.*, they constitute the “crown jewels” in the field. The Court has no idea how critical these two
9 substitute patents are and what alternative substitutes exist. Although the third and fourth markets
10 involve aggregation of more patents – seven and five, respectively – the aggregation is still quite
11 limited in scope,⁷ and, again, there is a complete absence of any allegations about mere essentiality
12 and their functional and economic importance. Notably, Intel was not without ability to make
13 those allegations. Although Intel has asserted that Defendants have obscured from the public what
14 patents they own or have control over, Intel should still be able to explain why the patents that it
15 knows Defendants have aggregated are, *e.g.*, the “crown jewels” of the field. In the prior order
16 dismissing the first complaint, the Court specifically invited Intel (and Apple) to include such
17 allegations. *See* Docket No. 229 (Order at 25) (stating that “[t]he ability to extract a
18 supracompetitive royalty is easier to infer if Defendants held the crown jewels, but no such
19 allegation is made in the FAC”). At the hearing on the instant motion, despite the repeated
20 invitation of the Court to elaborate on the qualitative allegations that would support an inference
21 of supracompetitive prices *being the result* of aggregation, Intel stated that it would stand on its
22 current complaint. Such qualitative information, while not necessarily the *sine qua non* of market
23 power, is material here where the showing of supracompetitive pricing is itself less than
24 compelling.

25 Furthermore, to the extent Intel’s patent aggregation theory involves Defendants’ assertion
26 of those patents against others – *e.g.*, in serial patent infringement litigation – here, Intel’s claim of

27
28 ⁷ The third market involves alleged aggregation by just four PAEs: INVT, Seven, VLSI, and Uniloc. The fourth market involves alleged aggregation by two PAEs only: Uniloc and VLSI.

1 serial litigation with respect to the markets at issue is premature:

- 2 • For the second patent market (arbitrating multiple requests to access a memory
3 bus), Intel has been sued for infringement of the ‘983 patent in two cases (No. C-
4 19-0426 (D. Del.) and No. C-19-0256 (W.D. Tex.). The two cases, however, are
5 not true “serial” cases because VLSI dismissed the Delaware suit approximately a
6 month after initiating it and chose to bring three suits (including No. C-19-0256) in
7 Texas instead. Intel has not yet been sued for the other substitute patent in the
8 market (*i.e.*, the ‘687 patent).
- 9 • For the third patent market (third-party device authorization through limitation of
10 information exchanged), Intel has been sued for infringement of the ‘633 patent
11 (No. C-18-0966 (D. Del.)). Intel has not been sued for any of the other six
12 substitute patents.
- 13 • For the fourth patent market (for MOSFET channel fabrication), Intel has been
14 sued for infringement of the ‘303 patent (No. C-17-5671 (N.D. Cal.)). Intel has not
15 been sued for any of the other four substitute patents.

16 In short, Intel has not alleged sufficient facts establishing it has been subject to the
17 unreasonable restraint of trade in the form of serial suits strategically brought to extract
18 compensation not reflective of the merits or that it has been faced with the dilemma of being
19 confronted with an aggregated portfolio of patents leaving it with no viable alternatives in a
20 particular market.

21 Because the Court concludes that Intel has failed to allege that supracompetitive pricing
22 was a result of the patent aggregation, Intel’s antitrust claims are hereby dismissed. As Intel also
23 made clear at the hearing that it would stand on the allegations made in the SAC, the dismissal is
24 with prejudice. The Court need not address Defendants’ remaining arguments, including but not
25 limited to whether Intel must show restricted output in addition to supracompetitive pricing to
26 establish direct evidence of anticompetitive effects.

27 D. Anti-SLAPP Motion

28 Previously, the Court declined to address arguments specific to Plaintiffs’ UCL claim

1 because the claim was derivative of the federal antitrust claims. *See* Docket No. 187 (Order at 34).
 2 However, Defendants make clear in the pending motion that, if the Court rules against Intel, then
 3 it must address their anti-SLAPP motion with respect to the UCL claim because, if that motion is
 4 successful, they can be awarded their fees.

5 “SLAPP” stands for strategic lawsuit against public participation. California has an “anti-
 6 SLAPP” statute designed “to allow early dismissal of meritless . . . cases aimed at chilling
 7 expression [or the right to petition] through costly, time-consuming litigation.” *Verizon Del., Inc.*
 8 *v. Covad Comms. Co.*, 3i77 F.3d 1081, 1090 (9th Cir. 2004). The statute provides in relevant part
 9 as follows: “A cause of action against a person arising from any act of that person in furtherance
 10 of the person’s right of petition or free speech under the United States Constitution or the
 11 California Constitution in connection with a public issue shall be subject to a special motion to
 12 strike, unless the court determines that the plaintiff has established that there is a probability that
 13 the plaintiff will prevail on the claim.” Cal. Code Civ. Proc. § 425.16(b)(1).

14 "The analysis of an anti-SLAPP motion proceeds in two steps." At
 15 step one, "the court decides whether the defendant has made a
 16 threshold showing that the challenged cause of action is one arising
 17 from protected activity." When a claim is mixed, meaning that it is
 18 based on allegations of both protected and unprotected activity, the
 19 unprotected activity is disregarded at the first step. Only if the Court
 20 determines that relief is sought based on protected activity [**14]
 21 does it reach the second step.

22 At step two, "the burden shifts to the plaintiff to demonstrate that
 23 each challenged claim based on protected activity is legally
 24 sufficient and factually substantiated." The Court "will review anti-
 25 SLAPP motions to strike under different standards depending on the
 26 motion's basis." "[W]hen an anti-SLAPP motion to strike
 27 challenges only the legal sufficiency of a claim, a district court
 28 should apply the Federal Rule of Civil Procedure 12(b)(6) standard
 and consider whether a claim is properly stated." . . .

"[W]hen an anti-SLAPP motion to strike challenges the factual
 sufficiency of a claim, then the Federal Rule of Civil Procedure 56
 standard will apply." . . .

If the plaintiff ultimately fails to meet its burden at the second step,
 the claim based on protected activity is stricken and "[a]llegations of
 protected activity supporting the stricken claim are eliminated from
 the complaint, unless they also support a distinct claim on which the
 plaintiff has shown a probability of prevailing."

Ramachandran v. City of Los Altos, 359 F. Supp. 3d 801, 810-11 (N.D. Cal. 2019).

1 The critical threshold issue in the instant case is whether Defendants have shown that the
2 UCL/antitrust claim arises from protected activity (*i.e.*, the filing of patent infringement lawsuits).
3 Defendants acknowledge that the Court previously held that Plaintiffs’ lawsuit was “not covered
4 by the *Noerr-Pennington* doctrine,” Reply at 24 – *i.e.*, because the heart of the suit was about the
5 aggregation of patents, and the patent infringement suits were, in effect, secondary. *See* Docket
6 No. 187 (Order at 26) (stating that, under *Noerr-Pennington*, “liability cannot be predicated on
7 petitioning activity but if a defendant engages in anticompetitive conduct which does not
8 constitute petitioning activity, it cannot immunize itself from liability for litigation-related
9 damages if it asserts or tries to assert its unwarranted accumulation of market power through
10 litigation”). But Defendants argue that

11 the question of whether Intel’s suit is covered by California’s Anti-
12 SLAPP statute presents a separate and distinct legal question.
13 Moreover, “the protections afforded by the Anti-SLAPP statute are
14 not coextensive with the categories of conduct or speech protected
15 by the First Amendment.” Thus, “courts determining whether
16 conduct is protected under the anti-SLAPP statute look not to First
17 Amendment law,” but to the text of the statute.

18 Reply at 24.

19 Defendants’ argument, however, is without merit. The text of the anti-SLAPP statute is as
20 follows: “A cause of action against a person arising from any act of that person *in furtherance of*
21 *the person’s right of petition or free speech* under the United States Constitution or the California
22 Constitution in connection with a public issue shall be subject to a special motion to strike”
23 Cal. Code Civ. Proc. § 425.16(b)(1) (emphasis added). Section 425.16(e) provides:

24 As used in this section, “act in furtherance of a person’s right of
25 petition or free speech under the United States or California
26 Constitution in connection with a public issue” includes: (1) any
27 written or oral statement or writing made before a legislative,
28 executive, or judicial proceeding, or any other official proceeding
authorized by law, (2) any written or oral statement or writing made
in connection with an issue under consideration or review by a
legislative, executive, or judicial body, or any other official
proceeding authorized by law, (3) any written or oral statement or
writing made in a place open to the public or a public forum in
connection with an issue of public interest, or (4) any other conduct
in furtherance of the exercise of the constitutional right of petition or
the constitutional right of free speech in connection with a public
issue or an issue of public interest.

1 *Id.* § 425.16(e).

2 In light of the text above, the Court’s *Noerr-Pennington* analysis equally applies here.
 3 There is no basis, in this context, to apply a different interpretation of what constitutes protected
 4 activity.⁸ *See Select Portfolio Servicing v. Valentino*, 875 F. Supp. 2d 975, 988 (N.D. Cal. 2012)
 5 (stating that “[t]he first part of the anti-SLAPP inquiry is substantially the same as the inquiry into
 6 whether the *Noerr-Pennington* doctrine applies”; “[i]n the anti-SLAPP context, the critical point
 7 is whether the plaintiff’s cause of action itself was based on an act in furtherance of the defendant’s
 8 right of petition or free speech”). The “true” conduct that Intel claims is anticompetitive is the
 9 aggregation of patents; that is not an act in furtherance of the right of petition or free speech, as
 10 defined in § 425.16(e). *See Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 66 (2002)
 11 (stating that “the act underlying the plaintiff’s cause or the act which forms the basis for the
 12 plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free
 13 speech”) (internal quotation marks omitted).

14 Implicitly recognizing this problem, Defendants contend that there is an independent
 15 reason why the “‘arising from’ prong is . . . satisfied”: “Intel is seeking to enjoin Defendants’
 16 protected infringement suits, which amounts to a prior restraint on Defendants’ protected activity.”
 17 Reply at 24. *See, e.g., Equilon*, 29 Cal. 4th at 67 n.4 (noting that Equilon sought “injunctive relief
 18 that expressly would restrict Consumer Cause’s exercise of petition rights”). But it is not clear
 19 from the SAC that Intel is seeking to enjoin any patent infringement suits per se. Certainly, the
 20 prayer for relief in the SAC does not refer to such relief. *See SAC*, Prayer ¶¶ (a), (c) (asking *in*
 21 *general terms* that “Defendants’ unlawful conduct be declared [an antitrust] violation” and that an
 22 order be issued “directing the termination of the anticompetitive conduct and injunctive relief that
 23 restores competition to the markets at issue”). Defendants suggest that Intel must be seeking such
 24 relief because, in its opposition, it refers to “Defendants’ patent aggregation *and assertion*
 25 *scheme.*” Opp’n at 40 (emphasis added). But this mere reference to patent assertion does not
 26 clearly establish that Intel is seeking an injunction that would bar Defendants from filing patent

27 _____
 28 ⁸ Defendants do not contend that the California constitution applies a standard different from
Noerr-Pennington.

1 infringement lawsuits.

2 **IV. CONCLUSION**

3 For the foregoing reasons, the Court grants Defendants' motion to dismiss (with prejudice)
4 but denies its anti-SLAPP motion to strike.

5 The Clerk of the Court is ordered to enter a final judgment in accordance with the above
6 and close the file in the case.

7 The Clerk of the Court is also instructed to file under seal Part III of this order – at least on
8 a temporary basis. The parties are ordered to meet and confer to determine which portions of Part
9 III need to be filed under seal. The request to seal should be narrowly tailored and should be
10 supported by a declaration. The sealing request shall be filed within a week of the date of this
11 order.

12 This order disposes of Docket No. 244.

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14 **IT IS SO ORDERED.**

15
16 Dated: September 28, 2021

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19 EDWARD M. CHEN
20 United States District Judge

United States District Court
Northern District of California

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