IN Tll F.. UNITED STATES DISTRJCT COURT
FOR THE DISTRICT OF DELAWARE

SILICON ECONOM1CS. lNC.. CIVI L ACTION

Plaintiff.

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FlN A NCIAL ACCOUNTI NG £·0UN DATION. and FINANCIAL ACCOUNT ING STANDARDS BOARD. NO. 1 1-163

Defendants.

MEMORAND U M ON MOTION TO DISMISS

Bayl son, J. **August 17,2011**

Silicon Economics. Inc. (..SET") filed this net ion seeking damages and clari rication of ils ownersh i p interest in its inven tion, 'Emnings Powcr Accou nti ng.••which is the subject of U.S. Patent 7.620.573 (the ·1nvcmion"). SE1 claims that the Financial Accounting Foundation ("f-AF..) and the Financial Accounti ng Stnn<lnrds Board (..FASB:·collectively with FAF, "'Defendants"). have unJawful ly claimed a royalty-free l icense in the I nvention and refuse Lo release any ownershi p interest in the Invent ion. SEJ claims violations or federa l antitrust law ru1d Cali fornia's Un l'i.1ir Competition Law. SFI also seeks declaratory rel ief under Cali forilla law.

Defendants have moved to dismiss pursuant to federal Rule of Civil Procedure 12(b)(I) for lack of standing and under Ru le I 2(h)(6) for insufficient pleadi ng of each claim. (Mot. to Dismiss, ECf No. J 8.) Aller careful considerali<.m Or Dcfcudan1s· 'vlotion and the parties' bricling and oral argw11ent nn August 1 1, '.201 1, the Cou rt wi l l grant Dcfendmlls' Motion, allowing SEl leave to amend the Complaint.

I. Factual and Procedural History

According tu the Complaint in this matter. FASB is "'Lhe principal (.)rganizalion in the private sector for establishing standards Or linancial accounting which govern 1hc preparation Or fimmciaJ statements by public companies in the Uni ted Stutes." (Comp!.. ECF No. I 9.) F/\F is a private. non-governmental. non-profit foundation that governs r ASB. (Jd. 4.)

SET alleges UtaF/\SB .has at least 90% of the market for establishing and decreeing financial accounting standards in the Unitc<l States ·and the remainder of the market consists of indivi<lunls, academics. govcmmem bodies, corporations. and accounting firms that articulate accounting standards. as well as the International Accounting Standards Board. (J<l. 10.)

SE! is one of these other participants and is attempting to establish more elJectivc accounting standards in direct competition with rASB. (hl:⁴ 13.) To that enc.I. SEI developed the Invention. an equation that 'impro\ jcsl the uccuracy of net income measuremenl and embraces nrnrk-to-markct accounting of asset an<l liability values fto] yield[luccurate and current balance sheets:· (ld. i 19.) SEI contends the [nvenlion resolves the fundamental accounting problem. i.e. e1Lher th balance sheet or the im:ome sheet can be accurate and useful, but nol boUi. (.l.St 14. 19.)

Pertinent to this litigation. on Jul) 6, 2006. F/\SB requested public comments ..com:erning the most basic objects for financial reporting and how to accomplish such objects:' (kl 20.) FAS13's invitation also stated that -all comments received by the FASA are considered public infonnation. fhosc commcnL'i will he posted to the FASB"s website and will be included in the project's public record."' (l!L. 21.) SFI prO\ided commnts, including briefing on the lnveotion. *(IQ.,* i22.) SEI then participated in a roundlablc discussion and SEJ's

founder. Joel Jameson ("'Jameson"). privately met with the FASB regarding the Invention. (Id.)

Several months later. Jameson became awnrc of certain tenns mu conditions on FASB's website. namely:

> ..Any information or material you lransmit ...by ... sending an e-mail ... including information such as personal data. C()mments and suggestions (whether in response to a specific query or otherwise) will be treated as non-confidential and non-proprictary . . . Unless we agree in writing in advance. anything you transmit. whether electronically or in hard copy may be used by the FAF/F/\SB and its afliliates for any purpose. including, but not limited lo. reproduction. disclosure, transmission. rublieation, broadcast and posting. This means that the FAF/FASB may use the ideas, concepts. lmow-how or techniques you transmit . . . :·

(ill if 23) (the "Website Terms"'). Unaware of the Website Terms prior to submitting his comments in July 2006. Jameson contacted FASB to claril)·and confim11-- ASB did not claim any ownership interest in the Invention. (lil 24) After receiving no response for more than two years. Jameson again contacted FASB tluougb legal counsel. (Id. 25.) In response, FASB "claimed that it ha(sj a royalty-free ownership interest in the SEI Invention . . . and categorically refused to release any such intl.!resL· (Id.)

After another few months passed. Sl:.l filed suit in California foderal court. but lhe complajnt was dismissed for lack of personal jurisdiction over Defendants. (lei. 26); see Silicon Econ., inc. v. Fin. Accoun ting Pound., Nc.1. 10-1939, 20I 0 WL 4942468, at *7 (N.D. Cal. Nov. 24. 2010). During the course of that litigatic>n. however. counsel for Dcfondants expressly uisavov,red a license lo practice the lnvention or any claim or ownership interest therein. and affinned Defendants have no intention of claiming any ownership i11tcrcst. (Compl. 27.) ·'Despite these admissions. lDcfcndants havcl refused to release [their! purported ownership clnims in the [Invention]:' tWJ

SLill seeking clarity. SEl fiJed the instant Complailll asserting claims for restraint of trade and monopol izat ion i n violation of the Sherman Act, 15 U.S.C. §§ I. 2; a claim for declaratory rel ief under Cali fornia law: and a claim for unli.li r competition under California law. (Comp!.ri 28-44.) On J\priJ 29. 201 1, Defendants filed the instant Motion to Dismiss Plaintiff's ComplainL With Prejudice for lack of jurisdiction and for failure to state a claim upon which relief can be granted. SEI also filed a Motion for a Prcli minnry Injunction (Mot., ECf No. 6). but agreed the Court should first rule on Defendants· Motion LO Dismiss (Order, ECff No. 16).

ll . .Jurisdiction and Standard of Review

A.. .J uf"is<liction

The Court hasjurisdict ion over SErs antitrust claims pursuant to 28 U.S.C. *§§* 133I and 1337. and supplemental ju risdiction over its Cal ifornia law claims under 28 U.S.C. g I367(a). SEI contends venue is proper pursuan t to I 5 U.S.C. * 22. Defendan ts have not objected to venue in this District.

B. Standard of Review

A Rule I2(b)(**1**) mot ion to dismiss for lack of subject matter jurisdiclion presenls either a facial attack or a facLUal attack. CNA v. Unilcd States, 535 r.Jd 132. l39 {Jc.l Cir. 2008); sec Fed. R. Civ. P. I2(b)(I). A facial attack concerns an alleged pleading deficiency, whereas a factual attack concerns the actual fail ure of a plainti ff's clain1 to compon factually with the ju risdictional prerequisi tes. CNA, 535 F.3d at 139.

On a facial attack, the Cotut must consider the allegations of the com plain t as true. Mortensen v. First Fed. Sav. & Loan Ass'n. 549 I'.'.1d 884, 891 (Jd Cir. 1977). In contrast. there are three important C(mscquenccs of a factual attack: (1) there is no presumpt ion of truthfi.1lncss:

(2) Lhe plaintiff bears the burden of proving subjc:ct matter jurisdict ion: and (3) the Court has uulhority to make factual findings on the issue. and can look beyond the plead ings lo do so. CNA, 535 F.Jd ::n 145. Defendants appear t<. be making a facial attai..:k against SEl's complaint. In their Openi ng Brief. Defendants assume the vcracily or SErs allegations and challenge the suf1icienc) of those allegations. (Opening Br.. l".CI·No. 19 at 7-9); see also Danvers Motor Co. v. Ford Motor Co.. 432 F.Jd 286. 292 (3d Cir. 2005) (evaluating sunicienq of plainti ff s factua l allegations in complaint on stand ing challenge).

As for Defendan ts' Motion pursuant to Ruic 12(b)(6). the court must ilCcepl as true all well-pleaded factual allegations and must construe them in the light most favorable to the non-moving party. Phill ips v. County of Allegheny. 515 F.Jd 224. 228 (J<l Cir. 2008).

Accord ing lo the Third Circuit, Twom bl y v. Bell Atlantic Corp., 550 U.S. 544 (:2007). und Ashcrotl v. Iqbal. 129 S. Ct. 1937 (2009). establish a three-pronged approach for evaluat ing the sulliciency of pleadi ngs in all civil aclioos: lirst. the court must itlenti fy the dements the plaintiff must plead to state a claim: second. thc court asks whether Lhc complai nt sets forth factual allegations or conclusory statements t hi rd, i r the complai n t sets fonh factual allegations, the court must assume thei r veracity and <..lraw reasonable inferences in favor o*C* the non-movi ng party, but then must determi ne \.Vhelhcr the factua l allegations plausibly give rise to an entitlement to relief. Sec Santiago v. Wanninster I '-"P··629 F.3d 121. 130 & n.7 (3d Cir. 2010); sec IqbaJ 129 S.Ct. at 1950, 1953. For the second step, the court should separate the factual and legal elements of the claims. must accept the well-pleaded facts as true, and may disregard any legal conclusions. Fowler v. UPMC Shadyside. 578 F.J<l 203, 210-1 1 (Jcl Cir. 2009).

The plainti rr s com plaint must comain a short and plain statement or the claim showing

that the pleader is entitled to relief. W. Penn Alleghcnv Health Sys. v. UPMC. 627 F.3d 85. 98 (3d Cir. 20I0). The complaint must state factual allegations that. taken as a whole. render the plaintiff s entiLlcmcnt to relief plausible. ill This docs not impose a probability requirement. but insteud calls for enough facts Lo raise a reasonable expectation that discovery will reveal evidence of the necessary clcnlcnts. ML *A* claim *has* facial plausibility v,,hen the plaintiff pleads factual content that allows the court tu reasonably infer that lhe defendant is liable for the misconduct alleged. Gelman v. State Fann Mut. Auto. lns. Co.. 583 F.3d 187. 190 (3d Cir. 2009).

'[.Illudging the sufficiency of a pleading is a context-dependent exercise. Some claims require more factual explication Lhan others tn slate a plausible claim for relief.'· UPMC, 627 F.JJ at 98 (reversing district court's application of heightened scrutiny in antitrust context) {citation omitted).

Accordingly, the Court considers the factual allegations in SEI's complaint as true for all purposes or Defendants· Motion.

Ill. Discussion

Defendanls argue the Court shmLld dismiss SEl's Complaint because SEJ lacks standing un<lcr Arlicle Ill and has failed to sufficiently plead its claims for relief. Defendants also argue the Court should decline to exercise supplemental jurisdiction over SET's state law claims if the Court dismisses SEl"s federal claims.

A. Standing

Dclen<lants contend that SET has failed to eslablish an actual case or controversy exists in this matter because it cannot satisfy the ..injury-in-face and 'fairly traceable' elements of constitutional standing. Nisuch they argue the Court lacks jurisdiction over this case. SET

opposes Defendants· Mot ion and argues iL'\ claims arc justiciable because Ddendants' rcfhsal to release its claimed ownershi p interest in Shi's patent has created unce11ainty regarding SEJ's ownershi p i nterest. In reply, Defendants con tend any alleged harm is only theoretical because they have not made any use or the In vention and thul SEI has failed to sufliciently allege any harm. The Court agrees with Defendants.

In its Opposi tion, SEl conflmes Defendants' Article Ill and Cali fornia declaratory relief arguments, but Cali l'ornia law regardi ng decla ratory rel ief is inapposilc to the q uestion of Article lllstanding. Article Il l or the Consti tutioo limits the exercise of fec.lera l judicial power to adjudication of actual cases or controversies. Toll Bros.. lac. v. T"' p. t. r Readi ngton. 555 f .3d 131. 137 (3d Cir. 2009). This limiLation is enforced through several justiciability doctrines. incl ud i ng, standing, mootncss. iipeness. the polilicul-q ucstion doclri ne, and t he prohi bition on tidvisory opinions. ill

Perhaps the most i mporlttnt of these doctri nes is Slandi ng. kl rhe ..irreduci ble constitutional minimum .. or Article lllstand ing consists of three elements: (I) the plaintiff must have suffered a concrete. particularized injury-i n-fact. which must be actual or i mminent, not conjectural or hypothcticnl: (2) the injury must be fairly traceable to the chal lenged action of the defCndanL and not Lhc resul t or independen t action or some third party not before lhe Court: and (3) the plainti IT must also establish that a fovurnblc decision would likely redress the alleged i njury. ld. at 137-38. Dercndan ts argue SEJ has foiled to establish the lirst two clements.

SEL as the pa1ty i nvok i ng federa l ju risd ict ion. bears the burden of establishing these clements. See Lu jan v. Defenders or Wildl i lc. 504 lJ.S. 555. 561 (1992). Each clement must be supported in Lhe same way as any other matter on which SET bears the burden of proof. i.e. "'with

the manner and degree or evidence required at Lhc successive stages ofthc litiganon:' ld. On a motion to dismiss. allegations may suffice because they are assumed true. kl. Thus, to state an injury-in-fact sufficient to survive a motion to dismiss. SEl must sutlicien tly plead that it has suffered some concrete harm because of Dclcndnn ts· conduct. Sec N..1. Physicians. inc. v. President of the Uni ted States._ F.Jd _ .No. 10-4600. 2011 WL 3366340. at *3 (Jd Cir. Aug. 3. 201 1) (no1ing "standi ng cannot be inferred argw11entatively from nvcm1cnts in the pleadings bu rather must artinnative ly appear in the record") (quotations omi lled).

To satisfy the injury-i n-fact element. Lhe plai ntiff must have suffered a pa lpable and Jistinct bann that affects the plaintiff in a personal and individ ual way. .lsl. at *3: Toll Bros., 555 F.Jd at 138. ln an act ion for declarntory relier.the plai ntiff need not suffer the full harm expected, so long as there is a substantial controversy, between parties havi ng adverse legal in terests, of sufliei cnt im mediacy and reali ty lo warrant issuance or a declaratory jud gment. Khodara EnvtL. Inc. v. Blakey, 376 F.3d 187. I 93-94 (3d Cir. 2004) St. Thomas-St. John Hotel & Tourism Ass·n v. Virgi n Islands.2 18 F.3d 232, 240 (3d Cir. 2000)

The injury must be concrete and part icularized. and actual or imminent. Lujan. 504 U. at 564 n.2 N.J. Physicians, 20 1 1 WL 3366340. at *3 (slating plai nti ff must sufficiently al lege bolh elements to establish standing). Intentions. wi thout concrete plans. du not support a finding of actual or imminen t injury. Lujan, 504 U.S at 564 n.2 1f there is no actual injury. the injury must be at least im minen t. Id. Although an elast ic concept. it cannot be stretched beyond its pmpose which is to ensure the al leged injury is not too speculative but is "'certainl y impending." ill Allegations or injury are insufficient when the plaintiff alleges injury at some future Lime and the acts necessary to make the injury happen arc at least partly within the plai nti lrs control. .1!h

Nonetheless. 'liJnju ry-i n-fact is nm Mount Everest.'" Danvers, 432 F.3d at 294. The contours or the req uiremen t. though not precisely defined, are very generous. requ iring only allegations of some speci fic, iden tifiable trifle or injury. liL (citing Bowman v. Wilson, 672 F.2d 1 145, 1 151 (3d Cir. 1982)).

In its Complaint. SEI alleges Defendants have created uncertainty regarding SEI's exclusive 1ights in the In vention, which has harmed SEJ's reputation and goodwil l. (Cmnpl. 32.) SEJ raises two otii.er alleged injuries in its Opposition – SEr's clispule wiU1 Defendants has impeded its ability lo seek financing and has had 'substantial and immediate impact on the busi ness of SEI"-but 'li It is axiomatic that the complaint may not be amended by tbe briefs in opposi tion to a motion to dismiss.'· (Opp'n at 5, 7); see Pennsylvania ex rel. Zi mmerman v. Pepsico. Inc., 836 F.2d 173, 181 (3d Cir. 1988) (quotations omitted).

Injury to reputation, i ncl uding commercial repu tation, may consti tute a cognizable injury-in-facL for Article W stand ing. See fore1icb v. U nited States, 351 F.Jd 1 198, 1211 (D.C. Cir. 2003) (citing Meese v. Keene. 481 U.S. 465, 473-77 (1987)) GTE Sylvania Inc. v. Consumer Prod. Safety Comm 'n, 404 F. Supp. 352. 366 (D. Del. 1975). As for the alleged 'uncertainty." the Court finds a decision from the Eastern District of Virgi nia instructive on the issue.

In Robishaw Engineeri ng, Inc. v. Uni ted States, a patent-holder, who was negotiating a license agreement wilh the Uni led States Army, filed suit against the U nited States claimi ng that the Army's assertion of a royalty-free licem;e put a cloud on the patent and diminished its market value. 891F Supp. 1 134= 1 137 (E.D. Va. 1995). Judge Ellis acknowledged Lhat patents represent legal righls. namely the right lo exclude parties other than the govemmenl. Id. at 1 149. He also recognized the "sim ple tru ism t.hat the val ue of any legal right depends on the likelihood

of successfi.1lly enforci ngt." .!£l Thus. any cloud or uncertainty regard i ng enforceabili ty diminishes the property's market value. and any party who seeks a judicial declarat ion to el i minate that uncertainty can poin t to the dimi nution in val ue as an i njury-in-fact. lQ.,_ But f that uncerta inty is always deemed sunicien t, standing would become a meani ngless requi rement. .!£l

To exclude the possibility of rendering standing meaningless, Judge Ellis determined that standi ng req uires the cloud or uncertai nty to consist of a sutliciently immediate, definite, and concrete threat to the legal righ t at issue. kl. Thus. the question is whether the defendant has Laken definite and concrete steps to assert u claim or has at least threatened to assert a claim adverse to the plaintiff's interests. Id. at 1150. Tn Robishaw, the Army took no fmn posi tion, onJy suggesting that it may have a royal ty-free license. Td. Therefore. Judge Ell is concluded the plaintiff had failed to su[ficienlly allege an injury-in-fact based on a cloud on its patent. ld. SEJ has similarly failed to sufficientl y allege an injury in fact.

As for the alleged harm to reputation and goodwill. SEl offers only bald assertions or injury. SEI has not offered any factual allegations on which it bases its contention it has suffered hann to reputation or goodwill. Failing to meet its burden or al leging stancti ng at this stage of the litigation. the Comi will dismiss SEl's Com plaint without prejudice to SEI amending its Complaint. [1]

The cases SEI relies on do not persuade the Court otherwise. In Leonard Carder. LLP v. Patten, Faith & Sandford. Lhe Ca li fomia Court or Appeals found an actual controversy justilying ju risdjction over the claim for state-law declaratory rel ief. 116 Cal. Rptr. 3d 652, 653 (Cal. Ct. App. 2010). Two law fim1s were disputing the al location oflegal fees from setilement of a class action. .!£l at 654. The money was held in trust and the defendant claimed it was owed fo1ty percent based on a prior agreement. Id. The plaintiff disputed the ex.istence of the agreement and sent a check for the significantly lower lodestar am0tmt, wilh a note that the paymen t was in "final setllemcn L., Id. Before cashi ng the check, the defendant amended the memo line to reflect the payment was "'credit toward final settlement.·· Id. Unlike in this case.

B. Antitrust Claims

Defendants offer two arguments in favor of dismissal of SEI's antitrust claims. FirsL they contend they are not engaged in trade or commerce and, therefore, the She1man Act does not apply to them. Defendants also argue SEI has failed to sufficient ly plead a relevant product market because no market exists; it has not sufficient ly pied an antitrust injury because Defondants and SEl do not com pete; Defendants maintain a monopoly thrnugh the Securities and Exchange Commission ("'SEC') not any unti-competilive conduct in violation of § 2: and Defendants have engaged in unilateral conduct. not any com bi nation in violation of § 1.

In response, SE1 focuses on establishi ng that Defendants ' non-profit status is not dispositive of the trade or commerce issue. Further. SEI contends lhere is com merce in vol ved because Defendants allegedly misappropriated SEI's patent and SEI is a commercial entity. As for the substance of the claims, SEI argues it sufficiently pied antitrust i njuries of reduced i nnovation and excluded competition. As for the relevant market. SEl argues the Court must also consider potential markets, and SEI could polentiaJly compete with Defendants. For its § 2 claim, SEl contends Defendan ts are unlawfully maintaining their monopoly by taking SEI's

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each party had taken a fim1 posit ion on the an1ount due the defendant, which created an ongoing controversy warranting declaratory rel ief. See id. at 656-57.

la Principal LiJ.e 1nsurance Co. v. Robinson, the Nin th Circu it concluded an actual <l ispule existed regarding the calculatjon of rent under a lease agreement. 394 F.3d 665. 668 (9th Cir. 2005). The plaintiff had previously attem pted to sel l its interest in the lease. but the dispute regarding the rent calculation widermined the deal. hb. The Ni nth Circuit found this past difficuJty suggested the plaintiff would continue to have difficulty. which warranted declaratory relief. kl at 672. SEl, however, has noc alleged any such past difficulties or experiences with tbe Invention, maki ng only conclusoJy assertions that its ti tle is llilcertain and that is has suffered harm to reputation. and goodwill. Without more facts, SEJ's circumstances are distinguishable from those in Leona.rd Carder and Principal Life.

property. and for Lhe § I claim. SEI argues the Wchsllc Tcnns may fonn an agreement in restraint of trade and both patties to ruiagreement need not share anti-competitjvc intent.

ln reply, Defondants argue U1ey arc not engaged i_n trade or com merce because their accounting standards are freely available to anyone i n the „,, orld and arc available wi thout charge and without payment 10 Dctendanls. save for sales of bounded vol w11es and unrelated licensing arrangements. They further contend that U1c cha llenged conduct, i.e. adoption or and adherence to the Wehsi tc Terms. is not motiva ted by commercia l objectives or advantages despite recei pt or government funds. In addi tion. Defendants argue they are not part icipan ts in the commercial market for accounting standards and SEI only alleges i njuries to itself rather than lo competition. Further, Defendants maintain they did not t:ngagc in concerted action. but unilaterally adopted the Website Terms.

I. "Trade or Commerce"

The purpose or antiLrusl law is to regulate commerce. which enta ils determining lhe applicability of ant itrust laws by consideri ng the nature of Lhe activity bei ng chaUeaged, not the nature of the organi n1t ion engaged in the acti vi ty. I B Phillip E. Arceda & Herbert Hovcnkam p. Antitrust Law] 260. at 158, 161 (3d ed. 2006); see Apex Hosiery Co. v. Lead er, 310 U.S. 469, 493 n.1 5. 495 (1 940): sec nlso Uni ted Stales v. 8rown Univ .. 5 F.3d 658. 665 (3d Cir. l 993) (find ing antitrust lav.s apply to non-profit organizations engaged in commerce}. Thus. the

threshold issue is whet her t he ant i trust laws even apply to the challenged conduct. Brown Univ.. 5 F.3d at 665.

lt is axioma1ic t hat antilrust laws regulate only transactions that are com mercia l in natu re. Id. Courts classify a t ransaction as commerciul in nature based on the nnrurc of the challenged

conduct in light of the totality of the sun-ow1di ng circumstances. Id. at 666: see Areeda & Iloven.kamp, supra 262a. at t 77 (endorsing objective test which asks whether antitrust defendan ts are likely lo receive direct economic benefi t as a resu l t of any red uct ion in competition in market i.n which taJget lirms operate). An effect on prices is not essential. Klor·s, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7 (1959). The Third Circuit's approach does not encompass restrai nts that resu l t in incidental economic effects. See Pocono [nvitational Sports Camp, Inc. v. NCAA, 31.7 F. Supp. 2cl 569, 584 (E.D. Pa. 2004) (Brody, J.).

On a motion to dismiss, the Court should determine whether the chalJenged conduct is commercial based on the factual aUegat ions in the complaint. See Hamilton Chapter of Alpha Delta Phi. lnc. v. I-Lami lton Coll., 128 F.3<.I 59. 66 (2d Cir. 1997). In this case, SEJ is challengi ng Defendants· adoption of and adherence to the Website Terms. particularly the reservalion of rights to use any submitted ideas for any purpose, and subsequent refusal to release any ownershi p interest. (Compl. 20, 27.)[2] SEJ aUcges lhat Defendants have llnlawfulJy claimed a proprietary interest for Ule purpose O r excl udi ng SEI as a competitor in the market for establishing accounting standards in the United States. (Id. i37.) SEJ contends Defendants' cond uct lessens com petition, discourages public comment. discourages innovation, and entrenches Defendants· monopoly. (ld. iJi J 38, 40.)

It is .important at the outset to define the apparent scope of SErs antitrust claims against Defendants. SEI is not challenging FASB's conduct in setting standards, which is a more common subject of antitrust review. Instead. SEl is challenging Defendants' Websi te Tem1s

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As noted below, Defendants' counsel's uncond itional recantation of an ownership i nterest at oral argument must be given tiOme weight in assessing Plaintiff s allegations. whicb will presumably be clarified in an amended complai nt.

which apply to voluntary submissions of solicited comments.

Federal courts have experience with the ..trade or commerce'·issue. particularly in the context of the NCAA's regulation of student athletics. Comts have concluded U1al when the chaJlenged conduct consists of academic rules or player-eligibili ty requirements. the conduct is non-commercial in nature. E.g.. Smith v. NCA A, 139 F.3d 180. I 85-86 (3d Cir. 1998) (holding Sherman Act docs not apply to NCAA rules aml eligibility requirements that primarily seek lo ensure fair co111µetition in collegiate sports, not to provide the NCAA with 11 commercial advantage). rev'd on other grounds, NCAA v. Smith, 525 U.S. 459 (1999); Pocono lnvitationaL 317 F. Supp. 2d al 583-84 (concluding rules relating to recruitment at summer camps are like eligibility rules and were enacted in spirit or promoting amateurism in keeping with NCAA s general goals); Collegiate Athletic Placement Scrv. Inc. v. NCAA, No. 74-1 144. 1974 WL 998, at *4-5 (D.N.J. Aug. 22, 1974) (linding NCAA policy against for-profit companies that find athletic scholarships for student-athletes was motivated by intent 1o ensure academic standards and amateurism, not by ami-compclitive mutivc or intent).

Bul when the challenged conduct restrains revenue. output, or saluries. the rules are almost always commercial. E.g., NCAA v. Bd. ()f Regents of Univ. or Okla.• 468 U.S. 85. 113 (1984) (finding NCAA ·s television plan amounte<l to unlawful horizontal restraint on members· ability to sell television rights to their games because it operated to raise prices and reduce output) Law v. NCA A. 34 P.3d 10I0. 1012 (10th Cir. 1998) (affinning injunction against NCAA 's enforcement of rule that limited salaries of enLry-level coaches as unlawful borizontaJ restraint on trade). The Coun finds these cases useful in this case because they suggest a spectrum of conduct to evaluate Defendants· alleged conduct.

Compared to this range or conduct, SEI has not sufficiently alleged that Defendants' conduct is commercial _in nature. Consideri ng the totality of circumstances and SEJ's allegations, rASB sought voluntary comments from the public in an effo11 to establish and promulgate accounting standards for public companies within the United States. which is FASB's exclusive prerogative.[3] Defendants also adopted the Website Terms to reserve FASB's right to use any submissions for any purpose. incluc Li ng reproduction, disclosure, and publicat ion. SEl's allegations do nol suggest conducl that is commercial in nature -there is no sale. no exchange. and no production. Compare. e.g., Brown Univ.. 5 F.3d at 668 (determi ning financial assistance for students is part and parcel of price-setti ng process and, lbus, is a commercial transaction), wi th. e.g., Apex Hosiery. 310 U.S. at 501-02 (concl udi ng labor union strike intended to com pel company to accede to demands not Lrnde or conm1crcc despite delaying interstate shipment of goods); Marjorie Webster Junior ColL lnt:. v. Middle States Ass'n of Coils. & Sccondaiy Schs.. 432 F.2d 650. 654-55 (D.C. Cir. 1970) (findi ng non-profil organization's decision to deny accreditation to for-profit school not commercial absent intent or purpose to affect commercial aspects).

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[3] The SEC has recognized FASB as the only entity whose work-product can be recognized as 'gellcrally accepted" for the pu rpose of public companies· financial reporti ng. Commission Statement of Pol icy Reaffirming the Status of the FASB as a Designated Private-Seclor Standard Setter, 68 Fed. Reg. 23,333, 23.333-34 (May I , 2003); see Sarbanes-Oxley Act of 2002, Pub. L. No. l 07-204, § 108, 1 16 Stal. 745, 768-69 (codified al 15 U.S.C. § 77s). Congress also ensuJed FASB would remai n im.lependent from the targets of its standards by creating an independent source of fondi ng for FASB so that it no longer had to depend on voluntary t;Ontributions or sales of its standards. Donna M. Nagy. Playing Peekaboo with Constitutional Law: The PCAOB and Its Public!Private Status. 80 Notre Dame L. Rev. 975. 987-89 (2005): see Sarbanes-Oxley Act § 109 (codi fied at 15 U.S.C. § 7219).

SEl comends F/\SB·s cond uct is commercia l because SEI itself is a commercial enterprise and Defendnnt s misappropriated its patented lnvention. But it is the aalure of the cond uct that controls. not lhc nature ol" lhc organi zat ions. The alleged cond uct enables FASB to solicit voluntary submissions of accounti ng-standard proposals. and lhcn perform its function of establishing and promulgnting those slam.lards "ithout being hamstrung b) subsequent intellectual property claims. *.1\ny* economic conseq uence is an indirect by-product of these efforts. SEI has not al leged 1hat Defenda nts dt:ri vc uny economic bcncli t from the Website Terms – it does not alK>w them to control product ion, innovation. or c1uulity by asserti ng an exclusive right in submilled concepts and it docs not pemiiL them to set a price. All the Website l'crms appear to do is faci l i tate FA'B's consideration and promulgation of appropriate accowlliog standards for public companies in the UniLcd Slates. SEl's allegations suggest nothi ng more.

For the foregoing reasons. lhe Court concl ude$ that SEI has failed to sufficiently allege that Defendants are subject to anti tmst scruli ny because it has failed to allege facts showing the challenged conduct is commercial in aaturc. The Court will grant SEI leave to amend its complaint to address these defici encies. n1c Court reser ves decision on ee11ain other legal arguments made by Defendants unlil SF! has amended its Complaint.

C. Ca li fornhl Law Claims

The Court will reserve decision on exercising supplemental ju risd iction w1til SET has t he opportuni ty to amend tho se claims over which the Court has original jurisd iction. me Court will dctem1ine at that lime whether lo exercise supplemen tal jurisdiction over Sl Ts Cali fornia low claims. Sec 28 U.S.C. § 1367(a). (c).

IV. Court's Review of Discussion at Oral Argument

Prior to oral argument. the Cowt posed questions in a letter to counsel, including whether the parties wouJd agree to expedite the hearing on U1e declaratory judgment aspect of the case and stay the antitrust claims. Plaintiff s counsel indicated that Plaintiff was interested in such a proposal. Defendants would prefer a decision on the grounds stated in its Motion to Dismiss before entertaining such an agreement.

After discussing whetl1er Plaintiff sufiicie11tly pleaded its claims. it became obvious lo the Court that Plaintiff wou ld welcome the chance to amend the complaint, if only to provide more factual allegations, as now required by Twombly ancl Iqbal. The Court indicated it would grant that relief.

The argument contained many good points about the value of standard-setting organizations having an open mind to suggestions and ideas put forward by segments of the industry the organization serves. Defendants assert vigorousJy that iL must have the abil ity to learn from submissions. such as those made by Plaintiff. and to consider and possibly use them in evolving fomrnlations of industry standards. The Court believes that this is sound pubLic poLicy and that the antitrust laws were not designed lo interfere with such a process.

It also become clear that Plainti ff, as of yet. has not tried lo gain commercial value from its patent, but understandabl y reserved the right to do so in the future.

At the argument, defense counsel uncondi tionally renounced any ownership interest by Defendants in Plaintifrs TnvenLion. After tbe argumen t. the Court indicated it would grant leave to Plaintiff to amend its Complaint. The Court also noted that the positions of the part ies should be amenable to a setllement of this dispute, and that a prolonged litigation over such issues as

st.anding, relevant markets, and anti-competitive intent do not seem to be necessary for Defendants to continue their work. and for Plainti ff lo, if ii so desires. use its patent in a commercial scttmg. The Court encouraged lhe panics to work towards a written agreement and. if requested. the undersigned will be available after September 18th to meet with counsel, assumi ng they have made some progress towards agreemen t on a written statement and both are desirous of com pleting the agreement as a means Or settl ing this case.

For the above reasons, Pla intiff is granted leave to file an amended complaint by Septe mber 30. 20I I .

V. Conclusion

Par the foregoing reasons. the Court will **grant** in part and **deny** in part Defendants· Motion to Dismiss. The Court will grant SEI Leave to amend its Complaint in conformity '' lh this Memorandum hy September JO. 20I I .

An appropriate Order will follow.

O·\CIVIL 11-12\11-163 Silocon v. Financial /\ccounung\SU - MTD Memo 8-17-11.wpd

IN THE UNITED STATES DISTIUCT COURT
FOR THE DISTRI CT OF DELA WARE

SILICON ECONOMICS. INC.. — CIVIL ACTION

Plainti ff,

v .

FINANCIl\L ACCOUNTING fOlJNDATION. and FIN/\NCIAL ACCOUNTING STANDA RDS BOARD. — NO. 11-163

De fondants.

ORDER

AND NOW. on this *f* *jJ*___ day of A ugust. 20I I, upon careful consideration of Defendants' Motion lo Dismiss (ECF No. 18). tbc parties· briefi ng. and oral argwnent on the Motion, it is hereby ORDERED as follo\.\ s:

I. Defendants' Motion is GRANTED in part and DENIED in part in accordance with the accompanyi ng Memorandum.

2. Pla inti ff Silicon Economics, Lnc. is granted lea ve to fi le an amem.led com plaint to cure the ue liciencies identi fied i n tht.: accompanyi ng Mcmnrru1dum by September 30. 201 1.

3. Defendants shaLI have twenty-one (21) clays from service of an amended complai nt to answer, move, or otherwise plead.

4. Plainli ff shall respond to any dcfcm;e motion or other pleadi ng within twenty-one (21) days or service of such motion or pleadi ng.

5. Defendants shall reply. if at all. \\ 1thin fourteen {14) days of service.

BY 11IL· COUR T:

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1chael M. Ba) lt .LI.S.D.J.

O.DE Cii:>Cs 11-163 s1111011 .. fo'inanc1alSEI - M I D Order.\\ pl.I