

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

GODO KAISHA IP BRIDGE 1,)

Plaintiff,)

v.)

Civil Action No. 15-634-JFB-SRF

TCL COMMUNICATION TECHNOLOGY)

HOLDINGS LIMITED, a Chinese)

Corporation, TCT MOBILE LIMITED, a)

Hong Kong Corporation, TCT MOBILE)

(US), INC., a Delaware Corporation, and)

TCT MOBILE, INC., a Delaware)

Corporation,)

Defendants.)

REPORT AND RECOMMENDATION

I. INTRODUCTION

Presently before the court in this patent infringement action are three motions: (1) plaintiff Godo Kaisha IP Bridge 1's ("IP Bridge") motion to dismiss TCT Mobile (US), Inc. and TCT Mobile, Inc.'s (together, "TCT") amended counterclaims pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) or, in the alternative, to strike the improper joinder of Panasonic Corporation ("Panasonic"); (2) counterclaim-defendant Panasonic's motion to dismiss TCT's amended counterclaims, or, in the alternative, to strike the improper joinder of Panasonic; and (3) TCT's motion for leave to file a sur-reply in opposition to Panasonic's motion to dismiss the amended counterclaims. (D.I. 236; D.I. 260; D.I. 275)¹ For the following reasons, I recommend that the court grant IP Bridge's motion to dismiss TCT's amended counterclaims and motion to strike the joinder of Panasonic. As such, the court declines to address Panasonic's motion to

¹ All briefing and declarations associated with these motions can be found at D.I. 237; D.I. 238; D.I. 246; D.I. 249; D.I. 260; D.I. 265; D.I. 270; D.I. 271; D.I. 275; D.I. 276; D.I. 280.

dismiss, or, in the alternative, to strike the improper joinder of Panasonic, and recommends denying as moot TCT's motion for leave to file a sur-reply in opposition to Panasonic's motion.

II. BACKGROUND

A. Procedural History

IP Bridge filed this action on July 24, 2015 against TCL Communication Technology Holdings Limited ("TCL Holdings"), TCT Mobile Limited ("TCT Mobile"), and TCT Mobile (US), Inc. (collectively, together with TCT Mobile, Inc., "defendants"), asserting causes of action for the alleged infringement of three of its patents owned by assignment.² (D.I. 1) The patents-in-suit are directed to technology declared essential to the global second generation ("2G"), third generation ("3G"), and fourth generation ("4G") telecommunications standards established by the European Telecommunications Standards Institute ("ETSI"). (D.I. 224 at 11, ¶ 11)³ On December 11, 2015, TCT Mobile (US), Inc. answered the complaint (D.I. 16), and TCT Mobile and TCL Holdings filed a motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) (D.I. 17). While the motion to dismiss for lack of personal jurisdiction was pending, IP Bridge filed an amended complaint on July 14, 2016, adding TCT Mobile, Inc. as a defendant (collectively with the other defendants, "TCL"). (D.I. 63) The parties stipulated that this amendment would have no bearing on the substance of the Rule 12(b)(2) motion to dismiss. (D.I. 62) The amended complaint alleges that defendants infringed the patents-in-suit by designing, manufacturing, using, marketing, importing, offering for sale, and selling mobile phones and tablets under the brands "Alcatel OneTouch" and "TCL"

² The patents-in-suit include United States Patent Nos. 7,373,295 ("the '295 patent"), 8,351,538 ("the '538 patent"), and 8,385,239 ("the '239 patent") (collectively, the "patents-in-suit").

³ The paragraphs cited herein at D.I. 224 refer only to those under the heading of "Counterclaims," which begins at p. 9.

(the “Accused Products”). (D.I. 63 at ¶ 7) TCT Mobile (US), Inc. and TCT Mobile, Inc. filed an answer to the amended complaint on August 3, 2016, adding counterclaims for breach of contract, violations of the Sherman Act, 15 U.S.C. §§ 1, 2, and patent misuse. (D.I. 68)

On August 17, 2016, this court issued a Report and Recommendation, which recommended denial of TCT Mobile and TCL Holdings’ Rule 12(b)(2) motion to dismiss. (D.I. 72) The court entered a Memorandum Order adopting the Report and Recommendation on September 29, 2016. (D.I. 103) On August 22, 2016, IP Bridge filed a motion to dismiss the TCT’s counterclaims. (D.I. 74) On February 27, 2017, this court issued a Report and Recommendation, which recommended granting the motion to dismiss, with leave for TCT to amend its counterclaims in accordance with the Report and Recommendation. (D.I. 194) The court entered a Memorandum Order adopting the Report and Recommendation on March 20, 2017, dismissing TCT’s counterclaims, but granting TCT leave to file amended counterclaims within thirty days to address the pleading deficiencies identified in the Report and Recommendation. (D.I. 216)

On April 6, 2017, TCT filed its amended answer, defenses, and counterclaims (“amended counterclaims”). (D.I. 224) The amended counterclaims only assert violations of Section 1 and Section 2 of the Sherman Act, and add Panasonic as a new party. (*Id.*) On April 20, 2017, IP Bridge filed the instant motion to dismiss the counterclaims asserted by TCT, or, in the alternative, to strike the improper joinder of Panasonic. (D.I. 236) On June 16, 2017, Panasonic filed the instant motion to dismiss the counterclaims asserted by TCT, or, in the alternative, to strike the improper joinder of Panasonic. (D.I. 260) On July 28, 2017, TCT filed the instant motion for leave to file a sur-reply in opposition to Panasonic’s motion to dismiss the counterclaims, or, in the alternative, to strike the improper joinder. (D.I. 275)

B. Factual Background

IP Bridge’s predecessor-in-interest, Panasonic, committed to licensing the patents-in-suit on “fair, reasonable and non-discriminatory terms” (“FRAND”) as essential patents to the global 2G, 3G, and 4G cellular telecommunications standards. (D.I. 224 at ¶ 13) Panasonic made this commitment to ETSI in return for inclusion of the patents on ETSI’s roster of “standard essential patents” (“SEPs”). (*Id.* at ¶¶ 11-13) TCL sells mobile devices in the United States that comply with global telecommunication standards including the W-CDMA and LTE standards. IP Bridge’s patents-in-suit, which are part of a wider patent portfolio, are essential to these standards. Accordingly, TCL’s mobile devices infringe the patents-in-suit by virtue of their use of these standards. (D.I. 63 at ¶ 30) TCL derives significant profits through its unauthorized use of IP Bridge’s patents-in-suit because without the patented technology, TCL would be unable to sell W-CDMA- and LTE- compliant phones in the United States. (*Id.* at ¶¶ 18, 30)

Prior to filing the original complaint, IP Bridge attempted to engage in licensing negotiations with TCL Holdings. (D.I. 63 at ¶¶ 18-26) According to IP Bridge, TCL failed to respond to IP Bridge’s repeated attempts to license its patent portfolio on FRAND terms. (*Id.*) TCT contends that Panasonic’s contractual commitments with ETSI to license the technology on FRAND terms were binding on IP Bridge as successor-in-interest. (D.I. 224 at ¶ 42) TCT pleads that IP Bridge has breached its obligations by attempting to license its entire patent portfolio for more than a FRAND royalty. (*Id.* at ¶ 39) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

III. LEGAL STANDARD

A. Rule 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) authorizes dismissal of a complaint for lack of jurisdiction over the subject matter, or if the plaintiff lacks standing to bring its claim. Motions brought under Rule 12(b)(1) may present either a facial or factual challenge to the court's subject matter jurisdiction. See *Lincoln Ben. Life Co. v. AEI Life, LLC*, 800 F.3d 99, 105 (3d Cir. 2015) (quoting *Common Cause of Pa. v. Pennsylvania*, 558 F.3d 249, 257 (3d Cir. 2009)). In reviewing a facial challenge under Rule 12(b)(1), the standards relevant to Rule 12(b)(6) apply. In this regard, the court must accept all factual allegations in the complaint as true, and the court may only consider the complaint and documents referenced in or attached to the complaint. See *Church of Universal Bhd. v. Farmington Twp. Supervisors*, 296 F. App'x 285, 288 (3d Cir. 2008); *Gould Elec., Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000). In reviewing a factual challenge to the court's subject matter jurisdiction, the court is not confined to the allegations in the complaint. See *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). Instead, the court may consider evidence outside the pleadings, including affidavits, depositions and testimony, to resolve any factual issues bearing on jurisdiction. See *Gotha v. United States*, 115 F.3d 176, 179 (3d Cir. 1997). Once the court's subject matter jurisdiction over a complaint is challenged, the plaintiff bears the burden of proving that jurisdiction exists. See *Lincoln*, 800 F.3d at 105; *Mortensen*, 549 F.2d at 891.

B. Rule 12(b)(6)

Rule 12(b)(6) permits a party to move to dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). When considering a Rule 12(b)(6) motion to dismiss, the court must accept as true all factual allegations in the complaint and view

them in the light most favorable to the plaintiff. *Umland v. Planco Fin. Servs.*, 542 F.3d 59, 64 (3d Cir. 2008). “[C]ourts use the same standard in ruling on a motion to dismiss a counterclaim under Rule 12(b)(6) as they do in assessing a claim in a complaint.” *Identix Pharms., Inc. v. Gilead Sciences, Inc.*, 2014 WL 4222902, at *5 (D. Del. Aug. 25, 2014) (citing *Tyco Fire Prods. LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 898-99 (E.D. Pa. 2011)).

To state a claim upon which relief can be granted pursuant to Rule 12(b)(6), a complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Although detailed factual allegations are not required, the complaint must set forth sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). A claim is facially plausible when the factual allegations allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 663; *Twombly*, 550 U.S. at 555-56.

When determining whether dismissal is appropriate, the court must take three steps.⁴ *See Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir. 2010). First, the court must identify the elements of the claim. *Iqbal*, 556 U.S. at 675. Second, the court must identify and reject conclusory allegations. *Id.* at 678. Third, the court should assume the veracity of the well-pleaded factual allegations identified under the first prong of the analysis, and determine whether they are sufficiently alleged to state a claim for relief. *Id.*; *see also Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011). The third prong presents a context-specific inquiry that “draw[s] on

⁴ Although *Iqbal* describes the analysis as a “two-pronged approach,” the Supreme Court observed that it is often necessary to “begin by taking note of the elements a plaintiff must plead to state a claim.” 556 U.S. at 675, 679. For this reason, the Third Circuit has adopted a three-pronged approach. *See Santiago v. Warminster Twp.*, 629 F.3d 121, 130 n.7 (3d Cir. 2010); *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011).

[the court's] experience and common sense." *Id.* at 663-64; *see also Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). As the Supreme Court instructed in *Iqbal*, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not 'show[n]' - 'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

The court's determination is not whether the non-moving party "will ultimately prevail," but whether that party is "entitled to offer evidence to support the claims." *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 302 (3d Cir. 2011). This "does not impose a probability requirement at the pleading stage," but instead "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of [the necessary element]." *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 556). The court's analysis is a context-specific task requiring the court "to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 663-64.

When addressing antitrust claims, the standard for dismissal is somewhat higher, because "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962); *see also Rolite, Inc. v. Wheelabrator Env'tl. Sys., Inc.*, 958 F. Supp. 992, 995 (E.D. Pa. 1997). Courts liberally construe antitrust complaints at this stage of the proceeding. *See Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 179 (3d Cir. 1988). "[I]n antitrust cases ... dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976). Nonetheless,

the antitrust plaintiff must allege facts sufficient to overcome a motion under Rule 12(b)(6). *See PepsiCo*, 836 F.2d at 179.

IV. DISCUSSION

A. IP Bridge's Motion to Dismiss TCT's Counterclaims

IP Bridge alleges that TCT's amended antitrust counterclaims should be dismissed, with prejudice: (1) for failure to state a claim under Sections 1 and 2 of the Sherman Act; and (2) for lack of standing for failing to allege a plausible injury in fact. (D.I. 237 at 9-10) Specifically, IP Bridge argues that TCT failed to identify the relevant market, market power, anticompetitive behavior resulting in antitrust injury and harm to competition, a conspiracy that imposed an unreasonable restraint on trade as required by Section 1, and anticompetitive acts by IP Bridge, or a conspiracy between IP Bridge and Panasonic to commit such acts, as required by Section 2. (*Id.*) In response, TCT alleges that its amended counterclaims "conform with all of the points raised by Judge Fallon in her [first] Report and Recommendation." (D.I. 246 at 11) TCT claims that it has amended its counterclaims, and specifically its Section 1 counterclaim, to identify Panasonic as IP Bridge's co-conspirator and to plead facts showing how the two companies conspired to "renege" on Panasonics' FRAND commitment to ETSI. (*Id.*) Moreover, TCT claims that it amended its Section 2 counterclaim to allege that Panasonic falsely represented to ETSI and the Third Generation Partnership Project ("3GPP")⁵ that it would license the asserted patents on FRAND terms, and to allege that these organizations relied on that representation. (*Id.*) Finally, TCT argues that it also amended its counterclaims to describe in more detail the

⁵ 3GPP, like ETSI, is a standard setting organization ("SSO") which "establishes global standards for mobile communications technologies, including mobile phone location technologies." *TruePosition, Inc. v. LM Ericsson Tel. Co.*, 899 F. Supp. 2d 356, 358 (E.D. Pa. 2012).

“relevant technology market” in which Panasonic and IP Bridge have attempted to assert monopoly power in violation of antitrust laws. (*Id.* at 11-12)

1. Relevant Market and Market Power

Assessing antitrust injury necessarily involves consideration of the relevant product and geographic markets. See *Bocobo v. Radiology Consultants of South Jersey, P.A.*, 305 F. Supp. 2d 422, 425 (D. N.J. 2004), *aff'd*, 477 Fed. Appx. 890 (3d Cir. 2012). The antitrust claimant has the burden of defining both of these markets. See *Queen City Pizza v. Domino's Pizza*, 124 F.3d 430, 436 (3d Cir. 1997) (citing *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482 (1992)). The relevant product market is determined by examining “the reasonable interchangeability of use or the cross-elasticity of demand between the product itself” and its substitutes. *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 325 (1962). “Interchangeability implies that one product is roughly equivalent to another for the use to which it is put; while there may be some degree of preference for the one over the other, either would work effectively.” *Queen City Pizza*, 124 F.3d at 437 (quoting *Allen-Myland, Inc. v. Int'l Bus. Mach. Corp.*, 33 F.3d 194, 206 (3d Cir. 1994)). Where the antitrust claimant fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in the antitrust claimant's favor, the relevant market is legally insufficient and a motion to dismiss may be granted. *Queen City Pizza*, 124 F.3d at 436; See, e.g., *Tower Air, Inc. v. Federal Exp. Corp.*, 956 F. Supp. 270 (E.D.N.Y. 1996) (“Because a relevant market includes all products that are reasonably interchangeable, [claimant]'s failure to define its market by reference to the rule of reasonable interchangeability is, standing alone, valid grounds for dismissal.”); *B.V. Optische Industrie De*

Oude Delft v. Hologic, Inc., 909 F. Supp. 162 (S.D.N.Y. 1995) (dismissal for failure to plead a valid relevant market; claimants failed to define market in terms of reasonable interchangeability or explain rationale underlying narrow proposed market definition); *Re-Alco Industries, Inc. v. Nat'l Center for Health Educ., Inc.*, 812 F. Supp. 387 (S.D.N.Y. 1993) (dismissal for failure to plead a valid relevant market; claimant failed to allege that specific health education product was unique or explain why product was not part of the larger market for health education materials); *E. & G. Gabriel v. Gabriel Bros., Inc.*, 1994 WL 369147 (S.D.N.Y. 1994) (dismissal for failure to plead valid relevant market; proposed relevant market legally insufficient because it clearly contained varied items with no cross-elasticity of demand).

In dismissing TCT's original Sherman Act counterclaims, this court held that TCT's amended Section 2 counterclaim should "clearly define the relevant telecommunications standard." (D.I. 194 at 14) TCT's original Section 2 counterclaim referenced the Relevant Technology Market without defining the term in its counterclaims. (*Id.*) TCT's original counterclaims also described the patents-in-suit as essential to the global 2G, 3G, and 4G telecommunications standards, but did not expressly define these standards as the "Relevant Technology Market." (*Id.*) The court gave TCT leave to amend its Sherman Act counterclaims in order to fix this deficiency, and TCT argues that it has now "followed Judge Fallon's roadmap for pleading a relevant market." (D.I. 246 at 15)

The court finds that TCT's amended counterclaims fail to define the scope of the relevant market. For both Sherman Act claims, TCT asserts in a conclusory fashion that the relevant market is "Relevant Technology Markets represented by the 2G, 3G [*i.e.*, W-CDMA], and 4G [*i.e.*, LTE] telecommunications standards when 3GPP and ETSI incorporated Panasonic's SEPs, including the [patents-in-suit]." (D.I. 224 at ¶ 43) However, standards are not markets and do

not represent particular products. TCT fails to identify any products, explain the geographic market for such products, the products' interchangeability, or any cross-elasticity of demand. *Queen City Pizza*, 124 F.3d at 436-37. As such, no antitrust market is pleaded. The court also rejects TCT's argument that it "followed Judge Fallon's roadmap for pleading a relevant market... by, for example, defining the 2G, 3G and 4G telecommunications standards as the 'Relevant Technology Market.'" (D.I. 246 at 15) In the Report and Recommendation, the court was not defining the relevant market. Rather, it highlighted the fact that TCT's original Section 2 counterclaim did not clearly label, let alone define, the relevant telecommunications standard, a fundamental first step. (D.I. 194 at 14) Simply labeling a standard as "the relevant market" does not alone adequately plead a relevant market for purposes of a Sherman Act claim.

As to the amended counterclaims, TCT argues that incorporation of a patent into a standard makes the scope of the relevant market congruent with that of the patent. (D.I. 246 at 15) (citing *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 315 (3d Cir. 2007) ("In an antitrust suit based upon allegations that a SSO adopted a standard incorporating the defendant's technologies, thus eliminating substitute or alternative technologies, the relevant market may be defined as 'congruent with the scope of' the defendant's patents.")). A standard, "by definition, eliminates alternative technologies," making pleading such alternatives redundant. *Research In Mot. Ltd. v. Motorola, Inc.*, 644 F. Supp. 2d 788, 793 (N.D. Tex. 2008). TCT argues that defining the relevant market in a standard essential patent context does not require anything more than showing that the patent was declared essential by an SSO. *Funai Electric Co., Ltd. v. LSI Corp.*, 2017 WL 1133513, at *7 (N.D. Cal. Mar. 27, 2017). As such, TCT avers that a firm excluded from using the standard is excluded from participating in the market defined by the standard – here, from providing 2G, 3G, or 4G wireless connectivity. (D.I. 224 at ¶ 17)

However, TCT improperly aggregates all three telecommunication standards together with no explanation of how devices complying with one of the identified standards would be in the same market (or interchangeable) as devices complying with another identified standard, or a combination thereof. Nor does TCT allege that the relevant market is congruent with the patents-in-suit. In *Broadcom*, the court accepted the complaint's definition of the relevant market as "the market for Qualcomm's proprietary WCDMA technology" (*i.e.*, chipsets that use Qualcomm's patented technology) because the SSO in that case incorporated the patented technology into a standard, which made the markets congruent with the SEPs. *Broadcom*, 501 F.3d at 315. The court did not, however, accept the entire WCDMA (or LTE) telecommunications standard as the relevant market, much less all three standards as a single market. Similarly, the *Funai* court defined the scope of the relevant markets as "congruent with each of the allegedly essential patents," not the standards for which those patents were essential. *Funai*, 2017 WL 1133513, at *7. Likewise, *Research in Motion* did not involve a market definition that was synonymous with any standard. *Research in Mot.*, 644 F. Supp. 2d at 793.

TCT has also failed to plausibly allege that IP Bridge or Panasonic have market power in any antitrust market. To sustain its antitrust claims, TCT "must define market power clearly, [which] it cannot do without a sufficiently precise definition of the relevant market." *CCPI Inc. v. Am. Premier, Inc.*, 967 F. Supp. 813, 818 (D. Del. 1997). TCT argues that, pursuant to *Research in Motion*, every owner of a SEP has "market power" because it can "hold up" companies that wish to practice the standard by demanding a non-FRAND royalty. (D.I. 246 at 15) However, there are no allegations of the purported role that Panasonic's SEPs have in conferring market power in TCT's alleged market. The amended counterclaims do not explain the specific connection between the alleged market and Panasonic's SEPs, or indicate how

Panasonic's SEPs relate to any other products within the alleged market. TCT makes nothing more than a conclusory assertion that IP Bridge or Panasonic automatically has market power with respect to entire standards comprising thousands of technologies based on ownership of three SEPs. (See D.I. 224 at ¶¶ 40-41, 43)

Because TCT has failed to define the relevant market, which precludes an assessment of market share and the ability to affect competition, TCT's Sherman Act claims are fatally deficient.

2. Anticompetitive Behavior that Resulted in Antitrust Injury

A Sherman Act claimant must prove harm not just to a single competitor, but to competition itself. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 139 (1998). As the Third Circuit explained in *Broadcom*, "(1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with an SDO's reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct." *Broadcom*, 501 F.3d at 314.

In the first Report and Recommendation dismissing TCT's original counterclaims, this court rejected TCT's argument that the very act of demanding non-FRAND royalties for use of a SEP and/or seeking an injunction for infringement of such a patent may give rise to anticompetitive harm. (D.I. 194 at 11-13) In applying the *Broadcom* test to TCT's original counterclaims, the Report and Recommendation noted that "[t]he transfer of the patents-in-suit from Panasonic to IP Bridge occurred after Panasonics entered into the agreement with ETSI." (*Id.* at 12) Thus, the court reasoned that TCT's original antitrust counterclaim against IP Bridge could not survive because IP Bridge did not make any false promises to ESTI. (*Id.* at 12-13)

The court declined to expand the *Broadcom* decision to reach violations of FRAND commitments occurring after the standard's adoption. (*Id.* at 13)

The court finds that TCT's amended counterclaims do not adequately plead harm to competition. The amended counterclaims allege that Panasonic and IP Bridge harmed competition by transferring the patents [REDACTED] [REDACTED] (D.I. 224 at ¶¶ 41, 47) TCT claims that, therefore, the amended counterclaims adequately allege anticompetitive behavior that harmed competition. (D.I. 246 at 14) However, the transfer of patent rights is not sufficient to allege harm to competition where, as here, IP Bridge and Panasonic were not in competition for the licensing of the transferred patents. TCT would have the court speculate that higher licensing revenues can only be explained as the product of anticompetitive conduct excluding all other licensing strategies. TCT also asserts, without citation, that in the first Report and Recommendation "Judge Fallon found that the [original] pleadings show conduct with anticompetitive effects." (*Id.* at 7-8) But, this court's Report and Recommendation contains no such finding. (*See* D.I. 194) TCT's answering brief does not cite to any allegations in the amended counterclaims that support harm to the competitive process, but rather makes a recitation of the four-part test set forth in *Broadcom*. (D.I. 246 at 16) To the extent that TCT again argues that "the very act of demanding non-FRAND royalties for use of a SEP, and/or seeking an injunction for infringement of such a patent" sufficiently alleges anticompetitive behavior that harms competition, the court has already rejected that argument. Here, IP Bridge did not make any false promises, and *Broadcom* cannot be expanded to reach FRAND violations after the standard's adoption. Nor does TCT allege that Panasonic dictated the terms IP Bridge offered to license the patents after the patent transfer.

Therefore, the court finds that TCT's amended counterclaims fail to allege any anticompetitive behavior that harmed competition under the Sherman Act.

3. Section 1 of the Sherman Act

Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust, or conspiracy in restraint of trade.” 15 U.S.C. § 1. Courts construe Section 1 to prohibit unreasonable restraints on trade. *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010). To properly plead a Section 1 claim, a plaintiff must plead two elements: (1) “that the defendant was a party to a contract, combination . . . or conspiracy;” and (2) “that the conspiracy to which the defendant was a party imposed an unreasonable restraint on trade.” *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 315 (3d Cir. 2010) (internal citations and quotation marks omitted). The Supreme Court has explained that the party asserting a Section 1 claim must show “a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.” *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). “Unilateral activity by a defendant, no matter the motivation, cannot give rise to a section 1 violation.” *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 159 (3d Cir. 2003). A plaintiff may plead an agreement by alleging direct or circumstantial evidence, or a combination of the two. *W. Penn Allegheny Health Sys.*, 627 F.3d at 99. If a complaint includes non-conclusory allegations of direct evidence of an agreement, a court need go no further on the question whether an agreement has been adequately pled. *Ins. Brokerage*, 618 F.3d at 323 (“Allegations of direct evidence of an agreement, if sufficiently detailed, are ... adequate.”); *see also Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 219-20, n. 10 (3d Cir. 2008); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 466 (3d Cir. 1998).

In TCT's original counterclaims against IP Bridge, TCT did not identify any other entity involved in IP Bridge's alleged efforts to circumvent its FRAND obligations. (D.I. 68 at ¶¶ 4; 10-14; 23-26) Therefore, in its Report and Recommendation, the court did not find any allegation that IP Bridge schemed with its predecessor-in-interest, Panasonic, to avoid the FRAND commitment, and dismissed the Section 1 claim without prejudice. (D.I. 194 at 10) Specifically, the court rejected TCT's argument that [REDACTED] [REDACTED] (Id.) (citing *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 2011 WL 4948567, at *7 (N.D. Cal. Oct. 18, 2011) ("A Plaintiff cannot state a claim under section 1 absent an allegation that it acted in concert with another party; it is not sufficient to allege that it acted alone in a collaborative forum."); *Vizio, Inc. v. Funai Elec. Co. Ltd.*, 2010 WL 7762624, at *6 (C.D. Cal. Feb. 3, 2010) (concluding that Section 1 claim was sufficiently pleaded where a patent owner and its predecessor-in-interest acted in concert to circumvent a FRAND commitment to a standard setting organization)). TCT contends that its amended counterclaims now sufficiently plead, and describe in detail, the conspiracy between IP Bridge and Panasonic for purposes of Section 1. (D.I. 246 at 13)

The court finds that TCT has failed to adequately plead concerted action. TCT argues that its amended pleadings now "describe in detail the conspiracy between Panasonic and IP Bridge to violate Panasonic's FRAND commitment." (D.I. 246 at 13) Specifically, that "TCT's amended Section 1 counterclaim states that [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] (D.I. 246 at 15) TCT provides little factual context as to the nature of the conspiracy, but argues that discovery will bring it to light. (Id. at 14-15)

However, TCT does not identify any agreement to conspire, any exercise of market power by the conspiracy, or how the conspiracy allegedly exercised such power in an anticompetitive manner. The amended counterclaims allege the following: Panasonic transferred the patents-in-suit to IP Bridge; [REDACTED]

[REDACTED] and IP Bridge maintains that TCT's refusal to negotiate a FRAND license rate rendered it ineligible for such a rate. (D.I. 224 at ¶¶ 23, 25-26, 34-37) [REDACTED]

[REDACTED]

[REDACTED] Further, to the extent IP Bridge's demand for a reasonable royalty allegedly results in a supra-FRAND rate from TCT, this cannot constitute anticompetitive activity under Section 1 because it is, at most, unilateral action on the part of IP Bridge. "Unilateral activity by a defendant, no matter the motivation,

⁶ In Panasonic's reply brief to its motion to dismiss, [REDACTED]

However, the court reaches the conclusion that TCT failed to adequately plead concerted action as required by Section 1 [REDACTED]

cannot give rise to a Section 1 violation.” *InterVest*, 340 F.3d at 159. [REDACTED]

[REDACTED]

The court finds that TCT’s amended Section 1 counterclaim also fails to adequately plead that [REDACTED] *Ins. Brokerage*, 618 F.3d at 315. TCT cannot do so because, as discussed in § IV(A)(1), *supra*, it has failed to define a cognizable market, which precludes ascertaining the effect of any alleged restraint on competition. *CCPI Inc.*, 967 F. Supp. at 818. Nor does TCT allege facts that would support a claim that Panasonic and IP Bridge conspired to affect the market or achieve supra-FRAND licensing rates. TCT’s only allegation about restraining trade is a conclusory statement that [REDACTED]

[REDACTED] (D.I. 224 at ¶ 39) Again, this conclusory allegation does not support the inference that Panasonic and IP Bridge agreed to seek supra-FRAND royalties in this action.

Therefore, the court finds that TCT’s amended counterclaims fail to allege any violation under Section 1 of the Sherman Act.

4. Section 2 of the Sherman Act

Liability under Section 2 of the Sherman Act requires: (1) the possession of monopoly power in the relevant market, and (2) a showing that the monopolist achieved monopoly power through anticompetitive conduct. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). Defining the scope of the market is a question of fact on which the counterclaimant bears the burden of proof. *Broadcom*, 501 F.3d at 307 (citing *Queen City Pizza*, 124 F.3d at 436; *Weiss v. York Hosp.*, 745 F.2d 786, 825 (3d Cir. 1984)). Anticompetitive conduct “is generally defined as conduct to obtain or maintain monopoly power as a result of

competition on some basis other than the merits.” *Broadcom*, 501 F.3d at 308 (citing *LePage’s Inc. v. 3M*, 324 F.3d 141, 147 (3d Cir. 2003)). “Conduct that merely harms competitors . . . while not harming the competitive process itself, is not anticompetitive.” *Id.* (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993)).

In its original counterclaims, TCT alleged that “by asserting to ETSI and 3GPP that the asserted patents . . . are standard-essential patents, IP Bridge has established itself in a position of monopoly power in the Relevant Technology Market,” and “by refusing to license the asserted patents to TCT US on FRAND terms, should it prevail in this litigation, IP Bridge has abused that monopoly power and engaged in uncompetitive conduct toward TCT US.” (D.I. 68 at ¶¶ 24-25) In its Report and Recommendation, the court dismissed TCT’s original Section 2 counterclaim because it found that TCT’s allegation that IP Bridge “engaged in uncompetitive conduct toward TCT US” did not adequately plead the requisite anticompetitive harm. (D.I. 194 at 12) TCT’s Section 2 claim against IP Bridge could not survive because IP Bridge did not reach the agreement with ETSI – Panasonic did – and its actions therefore did not cause anticompetitive harm in the context of Section 2 of the Sherman Act. (*Id.*)

As to TCT’s amended counterclaims, the court finds that TCT has failed to properly plead that IP Bridge achieved a monopoly through fraudulent promises to license SEPs. In the context of the wrongful exploitation of SEPs, “[t]o state a claim under Section 2 of the Sherman Act, Third Circuit precedent requires that an intentionally false promise be made to a SSO, and the SSO must rely on the false promise when including the technology in the standard.” (*Id.*) (citing *Broadcom*, 501 F.3d at 314). *Broadcom* discusses at length the interplay between SEPs and the anticompetitive harm that can occur if a patent owner participates in the setting of the standard but does not disclose that it owns a patent for a key feature of that standard and,

therefore, is positioned to compel supra-competitive royalties from industry participants locked-in to the standard. *Broadcom*, 501 F.3d at 310. To avoid this consequence, most SSOs require firms supplying essential technologies for inclusion in a prospective standard to commit to licensing the proprietary technologies on FRAND terms. *Id.* at 313. Distorting choices through deception obscures the relative merits of alternatives and prevents efficient selection of preferred technologies. *Id.* A standard, by definition, eliminates alternative technologies. When a patented technology is incorporated in a standard, adoption of the standard eliminates alternatives to the patented technology.

TCT argues that its amended Section 2 counterclaim meets these requirements. (D.I. 246 at 17) Specifically, TCT alleges that “IP Bridge’s predecessor-in-interest, Panasonic, entered into contractual commitments with ETSI, 3GPP, and their respective members, participants, and implements relating to the Mobile Cellular Standards. These commitments were binding Panasonic’s successors-in-interest, including IP Bridge.” (D.I. 224 at ¶ 42) Moreover, TCT has alleged that “when Panasonic made its FRAND commitments to the SSOs, Panasonic did not intend to adhere to those commitments.” (*Id.* at ¶ 45) Finally, TCT alleges that the SSOs “relied on Panasonic’s promises to adhere to the ETSI [Intellectual Property Rights] Policy,” and “relied on Panasonic to abide by its commitments to license the SEPs on FRAND terms,” thereby properly pleading a Section 2 counterclaim under *Broadcom*. (D.I. 224 at ¶ 44; D.I. 246 at 18) But, TCT’s amended Section 2 counterclaim only alleges that Panasonic, not IP Bridge, made all declarations to ETSI concerning the patents-in-suit. (D.I. 224 at ¶ 45) This court, in its first Report and Recommendation, rejected expansion of *Broadcom* to violations of FRAND commitments after the standard’s adoption, and so finds again. (*See* D.I. 194 at 13) Moreover, TCT fails to adequately allege any specific facts showing fraud. TCT simply assumes that

Panasonic's declarations to ETSI were fraudulent. (D.I. 224 at ¶ 40) ("To the extent that [Panasonic] refused to license any SEPs on FRAND terms, Panasonic could abuse that market power..."). TCT does not make any allegations that Panasonic ever refused to license the patents on FRAND terms, nor colluded with IP Bridge to do so.

The court finds that TCT has also failed to plead a conspiracy to monopolize. In order to sustain a Section 2 claim against IP Bridge, TCT must adequately allege a conspiracy with Panasonic. TCT's failure to adequately allege a conspiracy between Panasonic and IP Bridge for Section 1 purposes, *see* § IV(A)(3), *supra*, is also fatal to a Section 2 conspiracy claim.

Additionally, TCT fails to identify a specific intent to monopolize, which is essential to any conspiracy to monopolize. The only allegations TCT makes in support of a specific intent to monopolize is that the transfer of patents, [REDACTED]

[REDACTED] constitutes a conspiracy to monopolize. (D.I. 224 at ¶ 47) But, this allegation has no bearing on any specific intent by Panasonic or IP Bridge to engage in a conspiracy in furtherance of anticompetitive conduct. *See Carefusion Corp. v. Medtronic, Inc.*, 2010 WL 4509821, at *10 (N.D. Cal. Nov. 1, 2010) (where "allegations of specific intent are not connected to sufficient allegations of anticompetitive conduct... the [c]ourt will not infer specific intent based only on [claimant]'s conclusory allegations"). TCT argues that it is not required to plead more detailed facts showing Panasonic's intent to deceive ETSI and 3GPP, and cites to *Broadcom* as support. (D.I. 246 at 18) However, even when the court accepts as true TCT's general averment that Panasonic intended to deceive ETSI, this does not mean IP Bridge made any representation to an SSO, much less an intentionally false one. And, this court declines to extend *Broadcom* to alleged violations of FRAND commitments occurring *after* the standard's adoption.

Therefore, the court finds that TCT's amended counterclaims fail to allege any violation under Section 2 of the Sherman Act.

5. Injury In Fact

It is well established that, notwithstanding the broad literal language of the Sherman Act, Congress did not intend to allow everyone affected by an antitrust infraction to bring suit. *Int'l Raw Materials, Ltd. v. Stauffer Chem. Co.*, 978 F.2d 1318, 1327 (3d Cir. 1992). Standing to bring an antitrust claim requires at least an injury in fact. A claimant must show both "(1) harm of the type the antitrust laws were intended to prevent; and (2) an injury to the [claimant] which flows from that which makes defendant's acts unlawful." *Gulfstream III Assoc. Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 439 (3d Cir. 1993).

The court finds that TCT has failed to allege an injury in fact. The court agrees with IP Bridge that "TCT appears to rely on the court or jury creating an antitrust injury in the context of this litigation through the award of a supra-FRAND damages award." (D.I. 237 at 20) However, if TCT is successful with its FRAND defense, then TCT will not be awarded any damages at greater-than-FRAND rates. Or, if the court or jury imposes damages at higher than FRAND rates, then such damages would be lawfully awarded. Either way, there is no antitrust injury.

TCT argues that IP Bridge and Panasonic have engaged in a "hold up," forcing TCT to defend itself in this suit. (D.I. 246 at 19) However, this is not an injury. If TCT's FRAND defense is valid, then no supra-FRAND damages award will result. If TCT's FRAND defense is invalid, then the court can only impose lawful relief. TCT also contends that, as the *Research in Motion* court held, "when an entity side-steps [FRAND] safeguards in an effort to return the standard to its natural anti-competitive state, anti-competitive effects are inevitable." (*Id.*) (citing *Research in Motion*, 644 F. Supp. 2d at 796). However, *Research in Motion* did not address

standing requirements under Rule 12(b)(1) – rather, it discussed a motion to dismiss under Rule 12(b)(6). *Research in Motion*, 644 F. Supp. 2d at 792. In any event, TCT argues that this issue is not proper subject on a motion to dismiss because it needs factual development of complex facts, and cites to a number of district court cases. (*Id.*) These cases however, like *Research in Motion*, analyzed motions to dismiss brought pursuant to Rule 12(b)(6); they did not address standing requirements under Rule 12(b)(1). See *In re Gabapentin Patent Litig.*, 649 F. Supp. 2d 340, 346 (D.N.J. 2009); see also *Otsuka Pharm. Co. v. Apotex Corp.*, 2016 WL 6246801, at *1 (D.N.J. Aug. 26, 2016); *In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F. Supp. 2d 404, 407 (D. Del. 2007).

Therefore, the court finds TCT has failed to plead an antitrust injury, and its amended counterclaims should be dismissed pursuant to Rule 12(b)(1).

B. IP Bridge’s Motion, in the Alternative, to Strike the Improper Joinder of Panasonic

IP Bridge argues that, in the alternative, the court should strike TCT’s “untimely and improper joinder of non-party Panasonic,” and order TCT to “re-plead its claims within the proper scope of the court’s prior order.” (D.I. 237 at 8) TCT argues that it properly joined Panasonic as a counterclaim defendant under Federal Rules of Civil Procedure 13(h) and 20(a)(2). (D.I. 246 at 20) Rule 20(a) states that:

Persons...may be joined in one action as defendants if: (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrence; and (B) any question of law or fact common to all defendants will arise in the action.

Fed. R. Civ. P. 20(a)(2). TCT contends that “the antitrust claims asserted against Panasonic and IP Bridge arise out of the same transaction, occurrence, or series of transactions or occurrences,

namely, their conspiracy to renege upon their FRAND obligations and commitments.” (D.I. 246 at 20) Moreover, TCT argues that “neither this court’s local rules, nor the case law analyzing Rule 13(h), require a motion for joinder under Rule 13(h).” (*Id.*) Although the court finds that the amended counterclaims asserted against IP Bridge should be dismissed pursuant to Rules 12(b)(1) and 12(b)(6), *see* § IV(A), *supra*, Panasonic was wrongfully joined in this action and submitted to the court its own motion to dismiss, or, in the alternative, to strike. (D.I. 260) Thus, the court will address IP Bridge’s motion to strike Panasonic as a threshold matter before addressing Panasonic’s motion.

I recommend that Panasonic be stricken from TCT’s amended counterclaims because the attempted joinder was procedurally improper. Under Rule 13(h), additional persons not parties to the action may be made parties to a counterclaim pursuant to Federal Rules of Civil Procedure 19 and 20. Fed. R. Civ. P. 13(h). TCT sought to add Panasonic pursuant to Rule 20. However, TCT ignores the fact that adding new parties would be an amendment to the counterclaim under Federal Rule of Civil Procedure 15(a). *Satellite Fin. Planning Corp. v. First Nat. Bank of Wilmington*, 1987 WL 7189, at *1 (D. Del. Feb. 5, 1987). Pursuant to Rule 15, once a party’s deadline to amend as a matter of right has passed, amendments must be made “only with the opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2). Although TCT’s joinder of Panasonic may satisfy Rule 20, TCT did not seek IP Bridge’s consent, and did not move for leave of court to add another party. Notwithstanding Rule 20’s liberal amendment standards, leave to amend may be governed by Federal Rule of Civil Procedure 16 if an operative scheduling order sets a timeline for joinder. *Bell v. Lockheed Martin Corp.*, 2011 WL 1467365, at *4 (D.N.J. Apr. 18, 2011). Rule 16(a) requires the court to enter a scheduling order that limits “the time to join other parties, amend pleadings, complete discovery, and file

motions.” Fed. R. Civ. P. 16(a). Once the court enters a scheduling order pursuant to Rule 16(a), it may “not be modified except upon a showing of good cause and by leave of the [court].” Fed. R. Civ. P. 16(b); *see E. Minerals & Chems. Co. v. Mahan*, 225 F.3d 330, 340 (3d Cir. 2000).

In the case at bar, the court first issued a scheduling order on January 15, 2016, which required all motions to join other parties and to amend the pleadings to be filed on or before July 12, 2016. (D.I. 30) On January 4, 2017, the court issued an amended scheduling order, wherein the deadline for all motions to join other parties and to amend pleadings was still set for July 12, 2016, but the amended scheduling order provided April 7, 2017 as the deadline for motions to amend pleadings to assert inequitable conduct. (D.I. 153) The court issued a second amended scheduling order on June 12, 2017, which, for the third time, designated July 12, 2016 as the deadline to join other parties and to amend pleadings. (D.I. 259) This deadline expired almost nineteen months ago, and TCT did not file a motion for leave with the court to add Panasonic. This matter is currently scheduled for a ten day jury trial beginning on July 30, 2018. (D.I. 302) As such, the court recommends against adding another party at this stage of the case.

Moreover, when this court permitted TCT to amend its counterclaims in accordance with the first Report and Recommendation, TCT was instructed to amend its counterclaims “in accordance with [the] ruling.” (D.I. 194 at 17) Neither the Report and Recommendation, nor the court’s order adopting the Report and Recommendation, gave TCT leave to add a new party, or, specifically, Panasonic. (*See* D.I. 194; D.I. 216) The Report and Recommendation addressed the deficiencies in the original counterclaims, but did not advise TCT that adding Panasonic as a

party would cure them.⁷ District courts in the Third Circuit facing the situation where a party's amended pleading exceeds the scope of an allowed amendment have dealt with the matter in two ways. Some courts have held that when an amendment substantially differs from a proposed amendment, such filings violate Federal Rules of Civil Procedure 15(a) and 11, and sanctions against the party's attorney are appropriate.⁸ See *Dover Steel Co., Inc. v. Hartford Acc. and Indem. Co.*, 151 F.R.D. 570, 574-76 (E.D. Pa. 1993). Alternatively, other courts have held that "the failure to seek the required leave of court when adding a new allegation is grounds for striking that allegation" under Federal Rule of Civil Procedure 12(f). See, e.g., *Hellauer v. NAFCO Holding Co., LLC*, 1998 WL 472453, at *3 (E.D. Pa. July 28, 1998) (citing *Readmond v. Matsushita*, 355 F. Supp. 1073, 1080 (E.D. Pa. 1972)); *U.F.C.W. Local 56 Health & Welfare Fund v. J.D.'s Mkt.*, 240 F.R.D. 149, 154 (D.N.J. 2007); *Index Fund, Inc. v. Hagopian*, 107 F.R.D. 95, 97-98 (S.D.N.Y. 1985) (concluding that, under Rule 15(a), plaintiff's claim for punitive damages raised in its amended complaint would be stricken where plaintiff failed to first obtain leave of court); *McKeever v. Israel*, 476 F. Supp. 1370, 1374 (E.D. Wis. 1979) (pursuant to Rule 12(f), striking portions of plaintiff's amended complaint that exceeded scope of leave plaintiff was given).

I recommend that the court follow the approach advanced by the *Hellauer*, *Readmond*, and *U.F.C.W.* courts, and strike the amended counterclaims as to Panasonic pursuant to Rule 12(f) on grounds that TCT failed to obtain leave to amend their counterclaims in the manner in

⁷ For example, as to TCT's original Section 1 counterclaim, this court informed TCT that its "failure to plead that IP Bridge acted in concert with another entity" was fatal to its Section 1 cause of action. (D.I. 194 at 11) As to TCT's original Section 2 counterclaim, the court explained that TCT did not "adequately plead the requisite anticompetitive harm" and did not "clearly define the relevant telecommunications standard." (*Id.* at 12, 14)

⁸ The case at bar does not warrant consideration of sanctions under Rule 11.

which they amended it. Use of Rule 12(f) is appropriate here because “to hold otherwise would be to essentially ignore Rule 15(a) and the requirement that a [party] seek leave before amending its [pleadings].” *U.F.C.W.*, 240 F.R.D. at 154. If TCT had followed the proper procedure and filed for leave under Rule 15(a), IP Bridge and Panasonic would then have an opportunity to argue that TCT’s proposed counterclaims (1) would prejudice IP Bridge and Panasonic and (2) would be futile. *Id.* (citing *Adams v. Gould, Inc.*, 739 F.2d 858, 864 (3d Cir. 1984), *cert. denied*, 469 U.S. 1122 (1985)). Allowing TCT to add Panasonic as a counterclaim defendant deprives IP Bridge and Panasonic of this opportunity, and allows TCT to circumvent the scope of leave to amend this court provided in its first Report and Recommendation.

Thus, I recommend that the court strike the improper joinder of Panasonic as a counterclaim-defendant.

C. Panasonic’s Motion to Dismiss TCT’s Counterclaims, or, in the Alternative, Motion to Strike Its Improper Joinder

Panasonic filed a motion to dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6), or, in the alternative, to strike the improper joinder of Panasonic. (D.I. 260) Because the court recommends striking Panasonic as a counterclaim defendant because TCT failed to properly join Panasonic and amend its counterclaims, *see* § IV(B), *supra*, the court need not address Panasonic’s arguments that the amended counterclaims fail to state a claim upon which relief can be granted.⁹

V. CONCLUSION

⁹ Because the court need not address Panasonic’s motion to dismiss, or, in the alternative, to strike the improper joinder of Panasonic, TCT’s motion for leave to file a sur-reply in opposition to Panasonic’s motion should be denied as moot. (D.I. 275)

IP Bridge moves for dismissal of TCT's amended counterclaims with prejudice. (D.I. 237 at 8) The District Court first dismissed the amended counterclaims without prejudice, with leave to amend to address the pleading deficiencies identified in the Report and Recommendation. (D.I. 194; D.I. 216) However, TCT has failed, for a second time, to allege facts sufficient to support its claims under the Sherman Act. *Med. Diagnostic Labs., LLC v. Indep. Blue Cross*, 2017 WL 3776619, at *3 (E.D. Pa. Aug. 30, 2017). Because TCT still has not alleged any colorable antitrust violation, the court recommends dismissing with prejudice on the basis that "amendment would be futile." *LifeWatch Servs., Inc. v. Highmark, Inc.*, 248 F. Supp. 3d 641, 650 (E.D. Pa. 2017) (citing *Lake v. Arnold*, 232 F.3d 360, 373 (3d Cir. 2000)). Accordingly, for the foregoing reasons, I recommend granting IP Bridge's motion to dismiss the amended counterclaims and to strike the improper joinder of Panasonic, and dismiss the amended counterclaims with prejudice. (D.I. 236) Therefore, the court declines to address Panasonic's motion to dismiss (D.I. 260), and recommends denying as moot TCT's motion for leave to file a sur-reply in opposition to Panasonic's motion (D.I. 275).

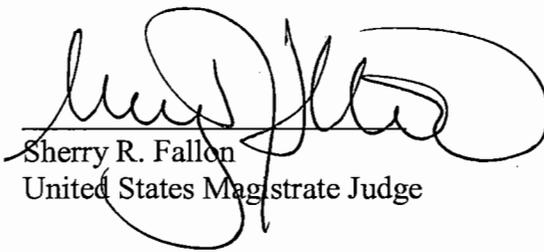
Given that the court has relied upon material that technically remains under seal, the court is releasing this Report and Recommendation under seal, pending review by the parties. In the unlikely event that the parties believe that certain material in this Report and Recommendation should be redacted, the parties should jointly submit a proposed redacted version by no later than **February 23, 2018**. The court will subsequently issue a publicly available version of its Report and Recommendation.

This Report and Recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b)(1), and D. Del. LR 72.1. The parties may serve and file specific written objections within fourteen (14) days after being served with a copy of this Report and Recommendation.

Fed. R. Civ. P. 72(b)(2). The objections and responses to the objections are limited to ten (10) pages each. The failure of a party to object to legal conclusions may result in the loss of the right to de novo review in the District Court. *See Sincavage v. Barnhart*, 171 F. App'x 924, 925 n.1 (3d Cir. 2006); *Henderson v. Carlson*, 812 F.2d 874, 878-79 (3d Cir. 1987).

The parties are directed to the court's Standing Order for Objections Filed Under Fed. R. Civ. P. 72, dated October 9, 2013, a copy of which is available on the court's website, <http://www.ded.uscourts.gov>.

Dated: February 12, 2018



Sherry R. Fallon
United States Magistrate Judge