

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

CMC MATERIALS, INC.,

Plaintiff,

v.

DUPONT DE NEMOURS, INC., et al.,

Defendants.

Redacted - Public Version

Civil Action No. 20-738-GBW

[REDACTED]

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MEMORANDUM OPINION

November 13, 2023
Wilmington, Delaware


GREGORY B. WILLIAMS
UNITED STATES DISTRICT JUDGE

Pending before this Court is Plaintiff CMC Materials Inc.'s ("CMC") Motion to Dismiss Counts 3-8 of the counterclaims filed by Defendants DuPont de Nemours, Inc., Rohm and Haas Electronic Materials CMP, LLC, Rohm and Haas Electronic Materials CMP Asia Inc. (d/b/a Rohm and Haas Electronic Materials CMP Asia Inc., Taiwan Branch (U.S.A.)), Rohm and Haas Electronic Materials Asia-Pacific Co., Ltd., Rohm and Haas Electronic Materials K.K., and Rohm and Haas Electronic Materials LLC (together, "DuPont"). D.I. 61. For the reasons below, CMC's Motion is DENIED.

I. BACKGROUND

DuPont and CMC manufacture and sell chemical mechanical planarization (CMP) slurries for use in semiconductor devices. D.I. 1, ¶ 2; D.I. 49 at 20, ¶ 8. [REDACTED]

[REDACTED] ultra-pure colloidal silica particles supplied by Fuso Chemical Co., Ltd. ("Fuso"). D.I. 49 at 19, ¶ 9. DuPont contends that Fuso [REDACTED]

[REDACTED]. *Id.* at 19, ¶¶ 10-13.

In June 2020, CMC initiated two actions against DuPont, one before this Court and another before the International Trade Commission (the "ITC Action" or "1204 Investigation"), alleging that DuPont and several of its subsidiaries manufactured and sold products that infringed U.S. Patent No. 9,499,721 (the "'721 Patent" or "Patent"). D.I. 70 at 1. The '721 Patent, issued to CMC on November 22, 2016, recites a CMP slurry that utilizes nitrogen-containing colloidal silica particles that result in slurries with lower pH levels. D.I. 23 ¶¶ 5-6. In each action, CMC alleged

that DuPont infringed its Patent by, *inter alia*, importing BS-3 particles that were supplied to DuPont by Fuso. *Id.* ¶¶ 8, 54.

Litigation before this Court was stayed on July 6, 2020, pending resolution of the ITC Action. D.I. 14. On December 16, 2022, the ITC found that DuPont's CMP slurries infringed the '721 Patent. D.I. 49 at 10-11, ¶ 52. The ITC issued an exclusion order requiring DuPont to cease its use and importation of BS-3 particles. D.I. 16 at 1. DuPont alleges that CMC initiated the ITC Action in bad faith as part of an ongoing and deliberate scheme to prevent DuPont from manufacturing competing CMP slurry products. D.I. 49 at 51, ¶ 86.

a. CMC's alleged anticompetitive conduct:

According to DuPont, CMC began engaging in anticompetitive conduct to interfere with DuPont's business relationship with Fuso [REDACTED]. *Id.* at 19, ¶¶ 9-10. As part of this scheme, DuPont alleges that [REDACTED]

[REDACTED] *Id.* at 21, ¶¶ 17-18. DuPont believes that the [REDACTED]

[REDACTED] *Id.* at 21, ¶ 19. DuPont further alleges that CMC was aware at that time of [REDACTED]

[REDACTED] *Id.* at 22, ¶ 20. To prevent its competitors from [REDACTED]

[REDACTED] *Id.* [REDACTED]

[REDACTED] *Id.* at 28, ¶ 38.

Instead, in [REDACTED] Fuso offered to supply DuPont with a colloidal silica particle [REDACTED], the BS-3 particle. *Id.* at 28-29, ¶¶ 39-40. DuPont alleges that it [REDACTED] [REDACTED]. *Id.* at 214, ¶ 83. According to DuPont, CMC learned that DuPont was using Fuso's BS-3 particles to manufacture CMP slurry products soon after, and CMC initiated litigation before this Court and before the ITC to hinder DuPont's use and access to BS-3. *Id.* In both actions, CMC alleged that DuPont's importation of BS-3 particles induced and contributorily infringed the '721 Patent. *Id.* CMC did not sue Fuso for supplying the BS-3 particles. *Id.*

b. CMC's alleged fraudulent procurement of the '721 Patent:

According to DuPont, CMC asserted the '721 Patent in the ITC Action and before this Court despite its knowledge that the '721 Patent was invalid and unenforceable. *Id.* at 92, ¶¶ 23. In particular, DuPont alleges that CMC procured the '721 Patent only after committing fraudulent misrepresentations before the PTO during prosecution of the '721 Patent. *Id.* at 29, ¶ 42. That is, DuPont contends that CMC inventors and prosecution attorneys intentionally concealed material prior art [REDACTED] from their patent application to overcome obviousness challenges asserted by the PTO. *Id.* at 29-50, ¶¶ 40-84. Once the '721 Patent was fraudulently procured, DuPont contends, CMC knowingly asserted it against DuPont before this Court and the ITC to interfere with its access to Fuso's BS-3 particles. *Id.* at 43, ¶ 71.

c. Stage of the Proceedings:

On June 1, 2022, CMC filed an amended complaint before this Court to reflect the outcome of the ITC Action. D.I. 23. DuPont filed its answer and counterclaims on June 15, 2022. D.I. 30. Shortly after, on July 5, 2022, CMC moved to dismiss counterclaims 3-8, D.I. 40, and DuPont

amended to the at-issue answer and counterclaims (“the Counterclaims”) shortly thereafter. D.I. 49.

In its Counterclaims, DuPont alleges that CMC engaged in deliberate and ongoing anticompetitive behavior and, as a result, “capitalize[d] on its market position in colloidal silica particles and CMP slurries [] to drive its competitors from the market to harm competitors and monopolize the CMP market.” D.I. 70 at 2. The Counterclaims assert multiple causes of action arising from CMC’s alleged monopolistic misconduct, including: Declaratory Judgment of Unenforceability of the ’721 Patent (“Count 3”); Unreasonable Restraint of Trade in Violation of the Sherman Act (“Count 4”); *Walker Process* Fraud, Bad Faith Prosecution of Patent Infringement Suits, and Attempted Monopolization in Violation of the Sherman Act (“Count 5”); Violation of Delaware Common Law Unfair Competition (“Count 6”); Delaware Tortious Interference with Prospective Business Relations (“Count 7”); and Unenforceability Due to Patent Misuse (“Count 8”). D.I. 49.

On August 16, 2022, CMC moved to dismiss Counts 4-7 of the Counterclaims on the grounds that each claim is barred by the applicable statute of limitations or, alternatively, that each of DuPont’s claims is barred by the *Noerr-Pennington* doctrine. D.I. 62 at 2. CMC also challenges Counts 3-8 on the grounds that DuPont has not alleged sufficient factual support to state a claim under each cause of action. *Id.*

II. LEGAL STANDARD

To state a claim on which relief can be granted, a pleading must contain “a short and plain statement of the claim showing that the pleader is entitled to relief” Fed. R. Civ. 8(a)(2). Such a claim must plausibly suggest “facts sufficient to ‘draw the reasonable inference that the defendant is liable for the misconduct alleged.’” *Doe v. Princeton Univ.*, 30 F.4th 335, 342 (3d

Cir. 2022) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). “A claim is facially plausible ‘when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’” *Klotz v. Celentano Stadtmauer & Walentowicz LLP*, 991 F.3d 458, 462 (3d Cir. 2021) (quoting *Iqbal*, 556 U.S. at 678). But the Court will “disregard legal conclusions and recitals of the elements of a cause of action supported by mere conclusory statements.” *Princeton Univ.*, 30 F.4th at 342 (quoting *Davis v. Wells Fargo*, 824 F.3d 333, 341 (3d Cir. 2016)). Under Rule 12(b)(6), the Court must accept as true all factual allegations in the pleading and view those facts in the light most favorable to the plaintiff. *See Fed. Trade Comm’n v. AbbVie Inc.*, 976 F.3d 327, 351 (3d Cir. 2020).

III. DISCUSSION

CMC asks the Court to dismiss Counts 4-7 of the Counterclaims on grounds that each claim fails to comply with the applicable statute of limitations or, alternatively, that each claim is barred by the doctrine of *Noerr-Pennington* immunity. D.I. 62 at 2. Additionally, CMC contends that Counts 3-8 of the Counterclaims should be dismissed for failure to plead adequate factual support for each counterclaim. *Id.* For the reasons stated below, CMC’s motion is denied.

a. Statute of Limitations

CMC asks this court to dismiss Counts 4-7 of DuPont’s Counterclaims on grounds that each claim is time-barred by the applicable statute of limitations. *Id.* Dismissal of a claim on grounds that the statute of limitations period has elapsed is appropriate only where “the complaint facially shows noncompliance with the limitations period.” *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1385 n. 1 (3d Cir.1994). The Court finds that such a showing is not made here.

Federal antitrust claims brought under the Sherman Act are subject to a four-year statute of limitations period. 15 U.S.C. § 15b. Similarly, Delaware imposes a three-year statute on the corresponding state antitrust causes of action. 10 Del. C. § 8106. Because DuPont filed its Counterclaims on June 15, 2022, CMC contends that any federal antitrust claims arising before June 15, 2018 and Delaware antitrust claims arising before June 15, 2019 are time-barred. D.I. 73 at 2. According to CMC, Counts 4-7 thus fail as a matter of law because the wrongful conduct alleged in support of each claim occurred no later than 2016, [REDACTED]

[REDACTED] *Id.* DuPont responds that the statutory period for Counts 4-7 had not elapsed before the Counterclaims' filing date because each Count arises out of CMC's anticompetitive conduct, which Dupont contends was ongoing. D.I. 70 at 11. For the following reasons, the Court finds that DuPont has pled sufficient facts to support this argument.

When a plaintiff alleges ongoing anticompetitive conduct, the accrual date for an antitrust cause of action restarts "each time [] plaintiff is injured by an act of the defendants." *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 106 (3d Cir. 2010). In such a case, any "injurious act within the limitations period" that is taken in furtherance of defendant's conspiracy "may serve as a basis for an antitrust suit." *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1172 (3d Cir. 1993).

Here, DuPont alleges that CMC used its market power over several years to prevent Fuso from conducting business with CMC's competitors, including DuPont. D.I. 49 at 24-28, ¶¶ 25-38. While CMC's [REDACTED] and its alleged fraudulent procurement of the '721 Patent are highlighted as two ways in which CMC unlawfully interfered with DuPont's business, DuPont alleges that "CMC continued to interfere" after 2016 by "fraudulently . . . enforcing the '721 [P]atent against [DuPont]." *Id.* at 82, ¶ 211. For instance, DuPont contends

that CMC “impermissibly [broadened] the physical or temporal scope of the ’721 [P]atent with an anticompetitive effect” during the ITC Action and “assert[ed] that the importation of Fuso BS-3 particles induced and contributed to the infringement of the ’721 [P]atent.” *Id.* at 83, ¶ 213. Accepting these allegations as true, as this Court must for purposes of this Motion, the Court finds that DuPont pleads at least one unlawful act, the filing of the ITC Action,¹ that occurred within the statute of limitations periods for Counts 4-7. Additionally, the Court is satisfied that DuPont is alleging ongoing anticompetitive conduct. Thus, at this stage of the pleadings, the Court cannot determine, as a matter of law, that Counts 4-7 are time-barred.

b. *Noerr-Pennington* Immunity

Alternatively, CMC asks the Court to dismiss Counts 4-7 on grounds that each claim is barred by “the First Amendment right to petition the government and the corresponding *Noerr-Pennington* doctrine.” D.I. 62 at 2. However, “[t]he law is well-established that ‘[a] court may decide the applicability of the *Noerr-Pennington* doctrine on a motion to dismiss . . . if no factual issues are present.’” *LKQ Corp. v. FCA US LLC*, No. CV 19-54-RGA-SRF, 2019 WL 13318371, at *6 (D. Del. Sept. 10, 2019). Because the Court finds that DuPont has alleged sufficient facts to plead that CMC’s infringement suits were based on a fraudulently obtained patent, the Court cannot determine, as a matter of law, that CMC is immune from suit under the *Noerr-Pennington* doctrine. *See id.* Thus, CMC’s Motion to Dismiss Counts 4-7 on grounds that the *Noerr-Pennington* doctrine applies is denied.

Under the *Noerr-Pennington* doctrine, “[a] party who petitions the government for redress generally is immune from antitrust liability.” *Cheminor Drugs Ltd. v. Ethyl Corp.*, 168 F.3d 119,

¹ Our courts have held that alleged sham litigation claims accrue “when the case is filed,” so the Court will use the date that the ITC Action was filed for purposes of determining whether alleged act occurred during the limitation periods for each claim. *See Med. Mut. of Ohio, Inc. v. Braintree Lab’ys*, No. CIV. 10-604-SLR, 2011 WL 2708818, at *4 (D. Del. July 12, 2011).

122 (3d Cir. 1999). This immunity is broad and may shield any “persons who petition all types of government entities—legislatures, administrative agencies, and Courts.” *Id.* However, under the *Walker Process* fraud exception, “[u]se of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust laws” notwithstanding *Noerr-Pennington* immunity. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 512 (1972) (citing *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 175-77 (1965)).² To plead the *Walker Process* fraud exception, a party must assert facts sufficient to establish that “(1) the patent at issue was procured by knowing or willful fraud on the USPTO; (2) the defendant was aware of the fraud when enforcing the patent; (3) there is independent evidence of a clear intent to deceive the examiner; (4) there is unambiguous evidence of reliance, i.e., that the patent would not have issued but for the misrepresentation or omission; and (5) the necessary additional elements of an underlying violation of the antitrust laws are present.” *Ritz Camera & Image, LLC v. SanDisk Corp.*, 772 F. Supp. 2d 1100, 1106 (N.D. Cal. 2011), *aff’d* 700 F.3d 503 (Fed. Cir. 2012). Because *Walker Process* claims raise allegations of fraud, such allegations must meet heightened pleading standards and “state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. 9(b).

² The parties dispute the related “sham litigation” exception. D.I. 62 at 7. The Third Circuit has held that “a material representation that affects the very core of a litigant’s [] case will preclude *Noerr-Pennington* immunity.” *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 123-24 (3d Cir. 1999). Therefore, the Court does not agree with CMC that “Third Circuit precedent . . . expressly declines to recognize a ‘misrepresentation’ exception to *Noerr-Pennington* immunity.” Because the Court finds that the *Walker Process* exception was sufficiently pled, the Court does decide the applicability of the sham litigation exception. See *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1071 (Fed Cir. 1998) (recognizing that where the “elements of *Walker Process* fraud, as well as the other criteria for antitrust liability, are met, such liability can be imposed without the additional sham inquiry”).

CMC claims that DuPont failed to plead *Walker Process* fraud because DuPont has not alleged that CMC engaged in “knowing or willful fraud.” D.I. 62 at 14. For the following reasons, the Court disagrees.

According to CMC, DuPont’s *Walker Process* claims should be dismissed because DuPont “generally allege[s] that CMC obtained its ’721 Patent by committing fraud on the PTO in 2015 and enforced that fraud through the present lawsuit and the [ITC Action].” *Id.* at 19. CMC contends that DuPont’s assertions are conclusory and thus insufficient to meet the heightened pleading standards required to allege knowing and willful fraud. *Id.* The Court disagrees. While *Walker Process* fraud requires evidence of more than inequitable conduct, courts have long recognized that “[d]irect evidence of intent to deceive or mislead the PTO is rarely available;” thus, fraudulent intent is often inferred from “evidence of the surrounding circumstances.” *Giuliano v. SanDisk LLC*, 705 F. App’x 957, 960 (Fed. Cir. 2017). Additionally, although “a mere failure to cite a reference to the PTO will not suffice,” evidence that the patentee failed to cite prior art, when coupled with other circumstantial evidence, can be sufficient to prove that the patentee acted intentionally and willfully. *Dippin’ Dots, Inc. v. Mosey*, 476 F.3d 1337, 1347 (Fed. Cir. 2007).

Here, DuPont has alleged with sufficient particularity its claim that CMC acted with the requisite intent to defraud the PTO. DuPont contends, for instance, that CMC withheld material information from the PTO during prosecution of the ’721 Patent, including the names of several Fuso prior art particles [REDACTED]. D.I. 70 at 14. According to DuPont, CMC did so intentionally in order to deceive the PTO into issuing the ’721 Patent. D.I. 49 at 29-31, ¶¶ 42-44. DuPont contends that the omitted Fuso particles, the [REDACTED] BS-2H, HL-2, [REDACTED] particles (hereinafter, the “Fuso Prior Art Particles”), disclosed key properties that were critical to

the examiner's finding that the '721 Patent was not patentable over the prior art. *See id.* at 27, ¶ 34.

In support of its claim that the Fuso Prior Art Particles were intentionally omitted, DuPont contends that CMC had knowledge of the particles before it filed the '721 patent application because Fuso was selling the particles to CMC and to CMC's competitors. *Id.* at 29-30, ¶¶ 41-42. Additionally, DuPont argues that the '721 Patent's named investors—Steven Grumbine, Jeffrey Dysard, Mary Cavanaugh, Ernest Shen—[REDACTED]

[REDACTED] *Id.* According to DuPont, "CMC's intentional and fraudulent deception is [further] exemplified" by the fact that CMC [REDACTED]

[REDACTED] D.I. 70 at 8. Finally, DuPont alleges that Example 2 of the '721 Patent compares the disclosed particles to three controls (Control 1, Control 2, and Control 3). D.I. 49 at 37, ¶ 59. Yet, only Control 1 and Control 3 are identified by their tradenames, and "[b]oth have reported internal nitrogen levels of <0.02." *Id.* DuPont alleges that "Control 2—the only control to have a zeta potential of greater than 15 mV—was not included" and "the '721 patent omits the nitrogen level of Control 2." *Id.* "[T]he '721 [P]atent's provisional application, however, specifically notes that Control 2 had a measured internal nitrogen level of 0.4—higher than the nitrogen level reported for any of the allegedly inventive colloidal silica particles." *Id.* DuPont alleges that Control 2 is [REDACTED] and CMC intentionally chose not to identify the particle and removed reference to its nitrogen level to keep the particle hidden from the PTO. *Id.*

Viewing this evidence as true and in the light most favorable to CMC, the Court finds that DuPont has alleged more than a mere omission, but rather that CMC acted with the affirmative

intent to conceal and omit the Fuso Prior Art Particles from the PTO. At this stage, DuPont's proffered evidence and allegations are sufficient to allege "knowing or willful fraud."

Because the Court finds that a factual dispute exists as to whether *Walker Process* fraud exception applies, the Court cannot find that Counts 4-7 are barred under the *Noerr-Pennington* doctrine.

c. Lack of adequate factual support

CMC asks this Court to dismiss Counts 3, 4, 5, 6, 7, and 8 on grounds that DuPont has failed to allege sufficient facts to support the various elements of each claim. D.I. 62 at 3. For the reasons detailed below, CMC's Motion to Dismiss as to Counts 3- 8 is denied.

i. DuPont alleges sufficient facts to support Count 3.

In Count 3 and its eleventh defense, DuPont alleges that CMC engaged in inequitable conduct during prosecution of the '721 Patent by making material misrepresentations to the PTO. D.I. 49 at 17, ¶ 73. According to CMC, DuPont raises two theories in support of its claims that CMC engaged in inequitable conduct: (1) that CMC inventors and prosecution counsel withheld information concerning the Fuso Prior Art Particles from the PTO and (2) that CMC inventors and prosecution counsel concealed the names of [REDACTED] who assisted in the development of the technology disclosed by the '721 Patent. D.I. 62 at 16. CMC contends that DuPont's inequitable conduct claims fail because DuPont has not pled sufficient facts to support either theory. *Id.* at 15-19. For the reasons discussed below, the Court disagrees.

For a claim of inequitable conduct to survive dismissal "the pleading must identify the specific who, what, when, where, and how of the material misrepresentation or omission committed before the PTO." *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1328 (Fed. Cir. 2009). The pleadings must provide sufficient information from which the Court can "infer

that a specific individual (1) knew of the withheld material information or of the falsity of the material misrepresentation, and (2) withheld or misrepresented this information with a specific intent to deceive the PTO.” *Id.* at 1328–29.

CMC contends that DuPont cannot plead sufficient facts to support a claim of inequitable conduct because each of DuPont’s theories were “vetted by extensive discovery” during the ITC Action, yet the ITC “found no deceptive intent, no but-for materiality, and no improper inventorship.” D.I. 62 at 16. However, as CMC concedes, this Court is not bound by the ITC’s holdings. *Id.* Moreover, a motion to dismiss requires the Court to accept all well-pled facts as true and to make all inferences in the light most favorable to DuPont. *Kaszuba v. Iancu*, 823 F. App’x 973, 980 (Fed. Cir. 2020) (“[O]n a motion to dismiss pursuant to Rule 12(b)(6), we are not concerned with whether [Defendant] can prove its allegations of fraud and intent to deceive on the merits. Instead, we look to whether [Defendant] has pled its fraud claim with particularity”). CMC’s arguments relying on the ITC’s prior findings prematurely challenge the merit of DuPont’s inequitable conduct claim or the likelihood that DuPont will ultimately succeed at trial. Finally, to the extent that CMC asks this Court “to assess evidence outside the scope of the complaint, its attachments, and matters of public record,” such extrinsic evidence cannot and will not provide a basis for this Court to evaluate the Motion to Dismiss. *IOENGINE, LLC v. PayPal Holdings, Inc.*, No. CV 18-452-WCB, 2019 WL 2121395, at *7 (D. Del. May 15, 2019).

CMC further contends that DuPont’s inequitable conduct claim and defense fail because DuPont has not specified “what” information regarding the colloidal silica particles was withheld from the PTO, “why” those particles were material, and “how” the information would have resulted in a rejection. D.I. 62 at 17-18. The Court disagrees. In the context of inequitable conduct, this Court has evaluated “[m]ateriality . . . by what a reasonable examiner would have

considered important in deciding whether to allow a patent application.” *Innogenetics, N.V. v. Abbott Lab’ys*, 512 F.3d 1363, 1378 (Fed. Cir. 2008). Here, DuPont has alleged sufficient facts to support its claim that an examiner would have considered the Fuso Prior Art Particles to be important to a determination of patentability.

According to DuPont, Fuso manufactured colloidal silica particles that predated the invention disclosed in the ’721 Patent and resulted [REDACTED]

[REDACTED]³ D.I. 49 at 30, ¶ 43. DuPont claims that CMC’s named inventors and prosecution counsel, (the “who”), were aware of the Fuso Prior Art Particles because [REDACTED]

[REDACTED]. *Id.* at 45, ¶ 75. Yet, during prosecution of the ’721 Patent, CMC’s inventors and prosecution counsel withheld the Fuso Prior Art Particles from the PTO, maintaining instead that the prior art failed “to disclose a colloidal silica particle with internal nitrogen.” *Id.* DuPont contends that CMC did so for two reasons (the “why”): (1) to overcome obviousness challenges raised by the PTO and (2) to claim each of the concealed prior art particles as a chemical species incorporated by the patent. *Id.* at 32, ¶¶ 43-46.

In support of its allegations that the withheld information was material, DuPont cites testimony provided to the PTO by CMC’s counsel affirming that the invention, unlike the prior art, teaches colloidal silica particle with internal nitrogen. *Id.* at 32-33, ¶¶ 46-47. DuPont also cites the PTO’s Notice of Allowance which followed shortly after and highlighted the “nitrogen containing compound” as persuasive evidence of patentability (the “how”). *Id.* Together, these facts, if true, support DuPont’s claims that CMC withheld information that would have resulted

³ According to DuPont, these particles include at least Fuso’s [REDACTED] BS-2H, BS-3, HL-2, and [REDACTED] colloidal silica particles. *Id.* at 47 ¶ 73.

in rejection of its patent application. Thus, the Court finds that DuPont has made a plausible claim that material information was withheld from the PTO.

CMC also contends that DuPont's assertion that CMC intentionally withheld the [REDACTED] from its application for the '721 Patent fails because DuPont does not specify "who" [REDACTED] were and "what" claim limitation these [REDACTED] conceived. D.I. 62 at 19. However, DuPont is not required to identify the alleged [REDACTED] in its Counterclaims. Rather, as the Federal Circuit held in *Exergen*, a claim of inequitable conduct must identify "who [] *knew* of the material information and *deliberately withheld* or misrepresented it." *Exergen*, 575 F.3d at 1329 (emphasis added). Here, DuPont identifies CMC's named inventors and prosecution counsel as specific parties who knew of and deliberately withheld the [REDACTED] D.I. 49 at 30 ¶ 41. Further, the Counterclaim explains how the withheld [REDACTED] could have resulted in a rejection of CMC's patent application. According to DuPont, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]" *Id.* at 72, ¶ 160. This in turn would put the PTO on notice of the Fuso Prior Art Particles that contained internal nitrogen. *Id.* As the Court explained above, DuPont plausibly asserts that disclosure of these nitrogen-containing particles would have resulted in a rejection of CMC's '721 Patent application. Accordingly, DuPont has sufficiently alleged that CMC wrongfully withheld the [REDACTED] from the PTO. CMC's Motion to Dismiss Count 3 of the Counterclaims is denied.

ii. DuPont alleges sufficient facts to support Count 4.

CMC argues that DuPont's claim that CMC unlawfully restrained trade should be dismissed because DuPont has failed to allege an illegal agreement and antitrust injury, as required under § 1 of the Sherman Act. D.I. 62 at 10-11. In support of this request for dismissal, CMC contends that its [REDACTED] cannot form the basis of an illegal agreement under Count 4 because exclusive agreements often "pose no competitive threat at all." *Id.* at 10-11 (quoting *Host Int'l, Inc. v. MarketPlace, PHL, LLC*, 32 F.4th 242, 251 (3d Cir. 2022)). Additionally, CMC maintains that the [REDACTED] did not result in antitrust injury since DuPont was able to purchase "feasible alternative particles," [REDACTED] [REDACTED] *Id.* at 11.

CMC's arguments fail, however, because DuPont has consistently alleged that CMC [REDACTED] [REDACTED]. D.I. 49 at 26-28, ¶¶ 29-38; 63, ¶¶ 123-125. While exclusive agreements do not constitute a competitive threat per se, the factual allegations made by DuPont here raise questions as to whether CMC's [REDACTED] were entered to restrain trade. *See ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012). [REDACTED] [REDACTED] [REDACTED] D.I. 49 at 21, ¶ 18.

DuPont further contends that [REDACTED] [REDACTED] *Id.* at 25, ¶ 26. DuPont also alleges that [REDACTED] [REDACTED] [REDACTED]

Id. at 22, ¶ 21; 28-29, ¶¶ 34-

36. The Court finds these facts are adequate to make this one of the “narrow circumstances” in which “a company with monopoly power enters into long-term exclusivity with a large enough body of key suppliers or customers that it effectively forecloses its smaller rivals from the market.” D.I. 62 at 10. The Court finds that DuPont has sufficiently pled an illegal agreement.

Furthermore, while CMC contends that DuPont had access to suitable alternatives for the

D.I. 49 at 28-29, ¶¶ 38-39; 73-74, ¶¶ 166-70. Viewing these facts in the light

most favorable to DuPont, the Court finds it plausible that CMC was able to restrain trade despite

Accordingly, the Court holds that DuPont has pled sufficient facts to support Count 4 of the Counterclaims, and CMC’s Motion to Dismiss Count 4 of the Counterclaims is denied.

iii. DuPont alleges sufficient facts to support Count 5.

CMC argues that Count 5, DuPont’s Walker Process fraud claim, should be dismissed because DuPont has failed to allege an “attempted monopolization” as required by § 2 of the Sherman Act. D.I. 162 at 11-13. “When the defendant in a patent infringement case alleges an antitrust violation based upon a fraudulently obtained patent it must satisfy the requirements of 15 U.S.C. § 2 as well as show fraud on the USPTO. . . . In order to prevail on a § 2 claim, the party must show ‘(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.’” *LG Elecs., Inc. v.*

ASKO Appliances, Inc., No. CIV.A. 08-828 (JAP), 2010 WL 1377255, at *4 (D. Del. Mar. 29, 2010).

To establish attempted monopolization under § 2, a claimant must allege “the defendant (1) had specific intent to monopolize the relevant market, (2) engaged in anti-competitive or exclusionary conduct, and (3) possessed sufficient market power to come dangerously close to success.” *Barr Lab ’ys, Inc. v. Abbott Lab ’ys*, 978 F.2d 98, 112 (3d Cir.1992). To survive a 12(b)(6) challenge, the claimant “must sufficiently allege the relevant market.” *Sun Microsystems, Inc. v. Versata Enters., Inc.*, 630 F. Supp. 2d 395, 403 (D. Del. 2009). However, “[a]lleging market share alone” is not enough. *Crossroads Cogeneration Corp. v. Orange & Rockland Utils.*, 159 F.3d 129, 141 (3d Cir. 1998). Claims of monopolization or threatened monopolization under § 2 require something more, which may include evidence of “the strength of competition, probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct, and the elasticity of consumer demand.” *Barr Lab ’ys*, 978 F.2d at 112.

According to CMC, DuPont relies only on conclusory statements to assert a relevant market and points to no “actual facts suggesting that CMC possessed sufficient power within any relevant market to come ‘dangerously close’ to monopolization” of that market. D.I. 62 at 11-13. The Court disagrees. “Generally, a relevant market can only be defined ‘after a factual inquiry into the commercial realities faced by consumers. . . . Therefore, courts will not usually define a relevant market on a motion to dismiss.’” *LG Elecs., Inc. v. ASKO Appliances, Inc.*, No. CIV.A. 08-828 (JAP), 2010 WL 1377255, at *4 (D. Del. Mar. 29, 2010). Here, DuPont identifies the relevant product market as “high-performance dielectric CMP slurry components and compositions for polishing silicon oxygen containing materials” and the relevant geographic market as the United States. D.I. 49 at 61, ¶¶ 114-115. Also, DuPont alleges that CMC has

obtained or is close to obtaining full control of the relevant market by eliminating its competition,

_____ and that CMC's anticompetitive behavior, including its bad faith enforcement of the '721 Patent, caused significant barriers to entry into this market. D.I. 49 at 61-62, ¶¶ 111-119.

The Court finds that DuPont sufficiently pleads that CMC gained possession of monopoly power in the relevant market. Thus, CMC's Motion to Dismiss Count 5 of the Counterclaims is denied.

iv. DuPont alleges sufficient facts to support Count 7.⁴

CMC contends that Count 7 should be dismissed because DuPont fails to allege two key elements of a state law tortious interference claim: causation and damages. D.I. 62 at 15. The Court disagrees. Count 7 alleges that, "[a]s a result of CMC's interference, DuPont was _____

_____ (3) required to litigate baseless claims of patent infringement at the ITC and in this Court, and (4) ordered, as a result of the 1204 Investigation, to cease importation of BS-3 particles, causing DuPont lost sales." D.I. 70

⁴ According to CMC, DuPont's Delaware state common law unfair competition claim, Count 6, fails for the same reasons as the federal claims because "Delaware's statute requires deference to federal precedent . . ." D.I. 62 at 14 n. 5. Because the Court has found that the federal claims do not fail, the Court finds that Count 6 similarly survives dismissal.

at 19 (citing D.I. 49 at 86-87 ¶ 228). These factual allegations are sufficient to plead causation and damages. Thus, CMC's Motion to Dismiss Count 7 of the Counterclaims is denied.

v. DuPont alleges sufficient facts to support Count 8.

Finally, CMC argues that Count 8 should be dismissed because DuPont has failed to allege relevant facts to support a claim of patent misuse. At the pleading stage, however, "all Defendant [is] required to allege" to maintain a patent misuse claim is that plaintiff "was enforcing a patent it knew was invalid, unenforceable, and/or not infringed." *Bayer CropScience AG v. Dow AgroSciences LLC*, No. CIV. 10-1045 RMB/JS, 2011 WL 6934557, at *4 (D. Del. Dec. 30, 2011). Time and time again, DuPont alleges precisely that. D.I. 49 at pp.46-49, ¶¶ 76-83 (alleging that the '721 Patent was fraudulently procured and invalid, and that CMC knew of the fraud). Accordingly, CMC's Motion to Dismiss Count 8 of the Counterclaims is denied.

IV. CONCLUSION

For the reasons stated above, CMC's Motion to Dismiss is denied.