

1 following reasons, Actividentity's motions to dismiss are GRANTED
2 in part and DENIED in part.

3 On October 1, 2008, Actividentity filed suit against
4 defendants alleging infringement of United States Patent No
5 6,575,360 (the "'360 Patent"). Doc #1. The '360 Patent covers
6 certain technologies for remotely updating smart cards. Doc #1-1.
7 Defendants filed their answers and counterclaims on January 16,
8 2009. Docs ##16, 17. Actividentity moved to dismiss the
9 counterclaims, Doc #18, and in response, defendants filed amended
10 answers and counterclaims, see Doc #22. Actividentity withdrew its
11 initial motion to dismiss, Doc #26, and filed the instant motions
12 to dismiss under FRCP 12(b)(6) on May 15, 2009, Docs ##31, 32.

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14 I

15 To survive a motion to dismiss under FRCP 12(b)(6),
16 defendants' counterclaims must "contain sufficient factual matter,
17 accepted as true, 'to state a claim to relief that is plausible on
18 its face.'" Ashcroft v Iqbal, -- US --, 129 Sct 1937, 1949 (2009)
19 (citing Bell Atlantic Corp v Twombly, 550 US 544, 570 (2007)). A
20 plausible pleading contains "factual content that allows the court
21 to draw the reasonable inference that the [defending party] is
22 liable for the misconduct alleged." Iqbal, 129 Sct at 1949.
23 "Threadbare recitals of the elements of a cause of action,
24 supported by mere conclusory statements, do not suffice." Id. The
25 complaint "does not need detailed factual allegations," but instead
26 only needs enough factual allegations "to raise a right to relief
27 above the speculative level." Twombly, 550 US at 555. At this
28 stage, the court accepts all factual statements in the claims as

1 true but need not "accept as true a legal conclusion couched as a
2 factual allegation." *Id.* While Twombly involved antitrust claims,
3 the "plausibility" standard is applicable to "all civil actions"
4 under FRCP 8. Iqbal, 129 S Ct at 1953.

5 Iqbal outlined a two step process for analyzing whether a
6 claim can survive a motion to dismiss under FRCP 12(b)(6). *Id.* at
7 1950-51. First, the court identifies all legal conclusions "that
8 are not entitled to the assumption of truth." *Id.* at 1949-51.
9 Second, the court draws "on its judicial experience and common
10 sense" to determine in the specific context of the case whether the
11 facts, if taken as true, establish a plausible claim for relief.
12 *Id.* at 1950.

13 A claim for fraud must "state with particularity the
14 circumstances constituting fraud." FRCP 9(b). The claim must be
15 pled with "a high degree of meticulousness." Desaigouder v
16 Meyercord, 223 F3d 1020, 1022 (9th Cir 2000). The particularity
17 requirement is satisfied if the pleading "identifies the
18 circumstances constituting fraud so that the [defending party] can
19 prepare an adequate answer from the allegations." Moore v Kayport
20 Package Express, Inc, 885 F2d 531, 540 (9th Cir 1989). Statements
21 of the "time, place and nature" of the alleged fraud are
22 sufficient; "mere conclusory allegations of fraud" are not. *Id.*
23 The pleading must give the responding party adequate notice of
24 "particular misconduct." Semegen v Weidner, 780 F2d 727, 731 (9th
25 Cir 1985). The particularity standard applies to all allegations
26 of "fraudulent conduct," even if fraud is not the basis of the
27 claim, but only the fraud allegations need to be stated with
28

1 particularity. Vess v Ciba-Geigy Corp USA, 317 F3d 1097, 1103-05
2 (9th Cir 2003).

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4 II

5 A

6 Although Intercede Group and Intercede filed separate
7 answers and counterclaims, both answers contain a counterclaim for
8 a declaration of unenforceability. Because Actividentity moves to
9 dismiss both unenforceability counterclaims, and because the
10 counterclaims are substantially similar, the court will discuss the
11 motions together. Doc #31.

12 For purposes of the motion, the court accepts factual
13 allegations but not legal conclusions as true. The defendants'
14 unenforceability claims allege that Actividentity is a member of a
15 Standards Setting Organization ("SSO") called GlobalPlatform Inc,
16 and that Actividentity had obtained the '360 Patent before the SSO
17 developed a standard for remote application management of smart
18 cards. Doc #21 at 9 ¶16. Defendants allege that as a member of
19 the SSO, Actividentity had an obligation to disclose its '360
20 Patent before the SSO issued the remote application management
21 standard in November 2008 and before the SSO issued certain other
22 standards that the '360 Patent might read on. Id. Additionally,
23 defendants allege that Actividentity has a continuing obligation to
24 disclose the '360 Patent while the SSO develops new standards, but
25 that Actividentity never made the required disclosures. Id.
26 Defendants allege that the obligation to disclose arises in part
27 because Actividentity "has asserted that the '360 Patent has a
28 scope broad enough to encompass all practice of certain smart card

1 standards and specifications adopted by [the SSO]." Id.

2 A claim for unenforceability can be based on a patent
3 owner's waiver due to failure to disclose its patent rights to an
4 SSO. Qualcomm Incorporated v Broadcom Corporation, 548 F3d 1004,
5 1024 (Fed Cir 2008). The claim must plead: (1) the existence of a
6 disclosure duty; (2) the scope of the disclosure duty; and (3)
7 breach of the disclosure duty. Id at 1011-12.

8 Actividentity argues that the defendants' claims for
9 unenforceability fail to plead facts to support the elements stated
10 in Qualcomm, 548 F3d at 1011-12. Doc #31 at 14. To the contrary,
11 however, the claims contain factual allegations sufficient to make
12 the defendants' claim for relief plausible. First, the claims
13 state that as a member of GlobalPlatform Inc, Actividentity has a
14 duty to disclose "intellectual property necessary to comply with
15 the smart card standards and specifications already adopted by
16 GlobalPlatform, Inc and * * * to comply with the smart card
17 standards and specifications proposed for adoption." Doc #20 at 9
18 ¶16; Doc #21 at 9 ¶16. This factual allegation states both the
19 existence of a duty to disclose and the scope of the disclosure
20 obligation arising from membership in the SSO. Defendants also
21 allege that Actividentity "has never disclosed the '360 Patent to
22 GlobalPlatform, Inc and its members in relation to either adopted
23 or proposed standards or specification." Id. This factual
24 allegation alleges that Actividentity breached its disclosure duty.
25 Accordingly, defendants' unenforceability counterclaim states a
26 claim for relief that is plausible.

27 Actividentity asserts that defendants' allegations
28 "necessarily constitute fraud" and must therefore satisfy the

1 Accordingly, Actividentity's motion to dismiss this alternative
2 ground for unenforceability is GRANTED.

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4 III

5 Actividentity moves to dismiss Intercede's fourth
6 counterclaim for monopolization under the Sherman Act, 15 USC § 2,
7 and fifth counterclaim for attempted monopolization under Section 2
8 of the Sherman Act. For the following reasons, the court finds
9 Intercede's counterclaims to be pleaded adequately and therefore
10 DENIES Actividentity's motion to dismiss.

11
12 A

13 The offense of monopolization has two elements: "(1) the
14 possession of monopoly power in the relevant market; and (2) the
15 willful acquisition or maintenance of that power as distinguished
16 from growth or development as a consequence of a superior product,
17 business acumen, or historic accident." United States v Grinnell
18 Corp, 384 US 563, 570-571 (1966). Failure to disclose intellectual
19 property rights to an SSO can lead to violation of Section 2 of the
20 Sherman Act. Rambus Inc v Federal Trade Commission, 522 F3d 456,
21 463 (DC Cir 2008); Broadcom Corp v Qualcomm Inc, 501 F3d 297, 305,
22 310 (3d Cir 2007). A monopolization claim based on failure to
23 disclose to an SSO claim must allege: (1) the defendant was
24 obligated to disclose its intellectual property rights to the SSO
25 and failed to do so; (2) the failure to disclose was deceptive; (3)
26 the SSO developed a standard that reads on defendant's intellectual
27 property rights and has been adopted by the relevant market; and
28 (4) but for the failure to disclose, the SSO would have developed a

1 different standard. Rambus, 522 F3d at 463. The defendant need
2 not have encouraged the SSO to adopt its proprietary standard for a
3 claim of monopolization to stand; it is sufficient that the
4 defendant's conduct was deceptive and that the SSO adopted a
5 standard it would not have but for the deception. Broadcom, 501
6 F3d at 305, 310. Monopolization and attempted monopolization
7 claims "are not akin to fraud" and are thus subject to the pleading
8 standards in FRCP 8, not FRCP 9(b). Id.

9 In its monopolization claim, Intercede defines the
10 relevant market as "the market for software products that handle
11 the issuance and management of smart cards used in distributed
12 applications and small centralized single sites for identification
13 purposes, which are sold to the United States Government or sold
14 pursuant to U S Government specifications." Doc #20 at 10 ¶20.
15 Intercede claims that Actividentity has "approximately 90%" of that
16 market. Id at 11 ¶24. Intercede claims that Actividentity failed
17 to disclose its intellectual property rights to the SSO after
18 standards regarding smart card technology were adopted but before
19 those standards "garnered significant market acceptance." Id at 13
20 ¶38. Intercede alleges that Actividentity claims the '360 Patent
21 reads on those standards and that had Actividentity disclosed its
22 rights, the SSO would have altered the standards to avoid the '360
23 Patent before the standards became entrenched. Id at ¶39.

24 Actividentity argues that Intercede's monopolization
25 claim is insufficient because it alleges that Actividentity did not
26 fail to disclose until after the standard had been adopted. Doc
27 #32 at 20. But Actividentity fails to explain why a monopolization
28 claim requires disclosure prior to the issuance of a standard. In

1 this case, Intercede claims that the SSO would have changed the
2 recently-adopted standard but for Actividentity's failure to
3 disclose, and that as a result of its failure to disclose,
4 Actividentity obtained a monopoly market share as the market became
5 "locked in" to the standard. See Doc #20 at 13 ¶38. This is
6 sufficient to state a monopolization claim under Rambus and
7 Broadcom, and accordingly, Actividentity's motion to dismiss the
8 fourth claim for monopolization is DENIED.

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10 B

11 A claim for attempted monopolization must allege "(1)
12 that the defendant has engaged in predatory or anticompetitive
13 conduct with (2) a specific intent to monopolize and (3) a
14 dangerous probability of achieving monopoly power." Spectrum
15 Sports, Inc v McQuillan, 506 US 447, 456 (1993); Broadcom, 501 F3d
16 at 317 (internal citations omitted). A specific intent to
17 monopolize can be demonstrated with business conduct "not related
18 to any apparent efficiency." Aspen Skiing Company v Aspen
19 Highlands Skiing Corp, 472 US 585, 608 n 39 (1985).

20 The alleged relevant market in Intercede's attempted
21 monopolization claim is "software products that handle the issuance
22 and management of smart cards used in distributed applications and
23 small centralized single sites for identification purposes." Doc
24 #20 at 14 ¶53. Intercede pleads that Actividentity currently has
25 "over 50%" of the market, but that its market share will increase
26 due to its failure to disclose the '360 Patent to the SSO. Id at
27 ¶58. Intercede alleges that Actividentity failed to disclose its
28 intellectual property rights to the SSO despite its obligation,

1 that it did so with anticompetitive intent, and that because of its
2 conduct, there is a likelihood that, as the standards set by the
3 SSO are adopted and the market becomes locked in, Actividentity
4 will consolidate its monopoly power in the relevant market.
5 Intercede's simple factual statements are sufficient because the
6 claim is not subject to a heightened pleading standard.
7 Accordingly, Actividentity's motion to dismiss Intercede's fifth
8 claim for attempted monopolization is DENIED.

IV

11 Actividentity moves to dismiss Intercede's sixth
12 counterclaim for fraud and seventh counterclaim for violation of
13 Cal Bus & Prof Code § 17200. Doc #32. Because these counterclaims
14 are not well-pled, Actividentity's motion to dismiss them is
15 GRANTED.

16 Intercede's fraud claim is subject to the pleading
17 standards in FRCP 9(b). Intercede must plead with particularity
18 when, where and how the fraud occurred but can allege
19 Actividentity's state of mind generally. FRCP 9(b). Intercede may
20 plead elements of the claim "on information and belief" but must
21 indicate the reasonable basis for the information or belief.
22 Exergen Corp v Wal-Mart Stores, Inc, -- F3d --, 2009 WL 2366535,
23 *15 (Fed Cir Aug 4, 2009). A fraud claim for failure to disclose
24 intellectual property rights to an SSO in light of a duty disclose
25 must indicate a "firm basis for the disclosure duty," as "vaguely
26 defined expectations" of disclosure cannot form the basis of a
27 fraud claim. Rambus Inc v Infineon Technologies AG, 318 F3d 1081,
28 1102 (Fed Cir 2003). Intercede states "on information and belief"

1 that Actividentity had a duty to disclose to the SSO based on its
2 membership but does not explain the basis for this assertion as
3 required by the pleading standard. Doc #20 at 16 ¶64.

4 Accordingly, Actividentity's motion to dismiss Intercede's fraud
5 claim is GRANTED.

6 Intercede's claim under Section 17200 is pled very
7 generally and only with reference to "above-described conduct."
8 While the claim is not subject to a heightened pleading standard,
9 Vess v Ciba-Geigy Corp USA, 317 F3d at 1105, Intercede's claim must
10 make clear the basis for its claim. Because the section 17200
11 claim does not make clear which "above-described conduct" triggers
12 liability under section 17200, the claim is insufficient.
13 Intercede does not clarify what specific factual allegations
14 trigger liability. Instead, Intercede simply concludes that the
15 "conduct" triggers Section 17200 liability. As Intercede does not
16 explain what specific facts are relevant for this claim,
17 Actividentity's motion to dismiss the section 17200 claim is
18 GRANTED.

19
20 v

21 Defendants argue that they should be granted leave to
22 amend their dismissed claims because they "stand[] ready and
23 prepared" to plead additional factual allegations to support their
24 claims. Doc #41 at 6. Because it appears conceivable that
25 defendants could remedy the deficiencies described above, the court
26 GRANTS defendants leave to amend the dismissed portion of their
27 unenforceability counterclaims and GRANTS Intercede leave to amend
28 its sixth and seventh counterclaims. Any amendment must be filed

1 not later than September 30, 2009. Actividentity should file a
2 responsive pleading not later than ten days after the deadline for
3 defendants' amended pleading

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5 VI

6 For the foregoing reasons, Actividentity's motion to
7 dismiss Intercede Group's third counterclaim, Doc #31, is GRANTED
8 in part and DENIED in part. Actividentity's motion to dismiss
9 Intercede's third through seventh counterclaims, Doc #32, is
10 GRANTED in part and DENIED in part as explained above. Any
11 amendment to the dismissed counterclaims must be filed not later
12 than September 30, 2009.

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15 IT IS SO ORDERED.

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18 VAUGHN R WALKER
19 United States District Chief Judge
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