

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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BIO-RAD LABORATORIES, INC. and))
PRESIDENT AND FELLOWS OF HARVARD))
COLLEGE,))
Plaintiffs,))
))
v.)	CIVIL ACTION
)	NO. 19-12533-WGY
10X GENOMICS, INC.,)	
)	
Defendant.)	
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YOUNG, D.J.

August 31, 2020

MEMORANDUM AND ORDER

I. INTRODUCTION

This motion to dismiss 10X Genomics' ("10X") antitrust counterclaims is the latest maneuver by Bio-Rad Laboratories ("Bio-Rad") in the multi-district struggle between these two competitors. The current engagement grows out of a complaint Bio-Rad filed in this Court on December 18, 2019, accusing 10X of infringing on one of its patents and two patents it licenses from the President and Fellows of Harvard College ("Harvard"). See generally Compl., ECF No. 1. This Court has already considered and denied 10X's motion to dismiss that complaint, ECF No. 24, though in so doing it transferred one of the three patents to the Northern District of California where the parties

have other ongoing litigation. See generally, Bio-Rad Labs., Inc. v. 10X Genomics, Inc., No. 19-12533-WGY, 2020 U.S. Dist. LEXIS 76156 (D. Mass. Apr. 30, 2020). Before the Court now is a set of antitrust counterclaims that 10X brought prior to that decision. See 10X Partial Am. Answer Bio-Rad and Pres. Fellow Harvard College Compl. and 10X Am. Counterclaims Bio-Rad ("Answer"), ECF No. 53; Antitrust Counterclaims ("Def.'s Counterclaims"), id.; Pl.'s Mot. Dismiss 10X Antitrust Counterclaims ("Pl.'s Mot. Dismiss"), ECF No. 68.¹

In its counterclaims, 10X paints Bio-Rad as an aggressor illegally exploiting its market power to harm competition in three distinct markets, corresponding to two types of genetic analysis, as well as the market for genetic droplet research technology generally. Def.'s Counterclaims ¶ 7. Bio-Rad moves for dismissal of the counterclaims under Federal Rule of Civil Procedure 12(b)(6), arguing 10X is trying to penalize it for successfully enforcing its patents. Pl.'s Mem. Supp. Mot. Dismiss 10X's Antitrust Counterclaims ("Pl.'s Mem."), ECF No. 69.

¹ 10X also brought a separate set of patent counterclaims in the same filing, which this opinion does not address. See Def.'s Counterclaims ¶ 152, Declaratory Judgment Counterclaims, id. ¶ 205, Patent Counterclaims. Harvard has realigned to 10X's side of the Patent Infringement Counterclaims. See Stip. Realign Harvard Counterclaim Pl. Certain Counterclaims, ECF No. 112; Order, ECF No. 114.

10X must allege only “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). It is therefore far too early to answer the question whether 10X has unearthed an illegal scheme on the part of Bio-Rad to establish a monopoly in life sciences analysis, or whether this suit is merely the parting shot of a competitor defeated one too many times in the field. It is enough to say that 10X has alleged sufficient facts to survive the motion to dismiss on some, but not all, of its claims, and save the moment of ultimate decision for summary judgment or trial.

For the reasons given below, the Court GRANTS the motion to dismiss as to counterclaim counts I, III, and IV, and DENIES the motion to dismiss with respect to counts II, V, VI, and VII.

A. Background and Procedural History

Bio-Rad and 10X are competitors in the market for life sciences tools. See Def.’s Counterclaims ¶¶ 7-9. Two particular types of genetic research tools are at issue in this case. The first is droplet digital polymerase chain reaction (“ddPCR”), a genetic sequencing tool that allows scientists to calculate the presence and quantity of a target DNA molecule in a sample. Id. ¶ 19. The second is what 10X terms “Next-Generation Sequencing” (“NGS”) sample preparation or “NGS Sample Prep,” a set of techniques for reading known or unknown

nucleotide sequences in DNA. Id. ¶¶ 7, 20. Bio-Rad competes in the ddPCR market, while both parties compete in the NGS Sample Prep market. Id. ¶¶ 56-59. Universities, pharmaceutical companies, hospitals, governments, and other customers of the \$50,000,000,000 annual market for life science tools require DNA sequencers such as the ones produced by both companies to conduct research and scientific operations. Id. ¶ 41.

The fates of 10X and Bio-Rad have been forever-entangled. In 2012, after Bio-Rad acquired the life sciences firm QuantaLife, three scientists from QuantaLife who briefly had been working for Bio-Rad left to form 10X. Answer ¶ 22. The two parties have since brought their disputes over intellectual property to courts around the country. Bio-Rad is the plaintiff in the underlying patent litigation before this Court. Bio-Rad has also prosecuted patent infringement cases against 10X in Delaware, see RainDance Techs., Inc. v. 10X Genomics, Inc., No. 15-152-RGA, 2016 WL 927143 (D. Del. March 4, 2016) vacated in part 2020 WL 4431893 (Fed. Cir. Aug. 3, 2020) (the "152 case"); Bio-Rad Labs., Inc. v. 10x Genomics, Inc., 322 F. Supp. 3d 537 (D. Del. 2018), and before the U.S. International Trade Commission, see Certain Microfluidic Devices, Inv. No. 337-TA-1068, 2019 WL 7049092 (U.S.I.T.C. Dec. 18, 2019) (the "1068 ITC Investigation"). Bio-Rad is the plaintiff pursuing patent claims in the Northern District of California, see Bio-Rad

Labs., Inc. et al. v. 10X Genomics, Inc., Civ. A. No. 3:17-04339 (N.D. Cal. July 31, 2017), while 10X is the patent plaintiff before a different session of that court, see Compl., 10X Genomics, Inc. v. Bio-Rad Labs., Inc., Civ. A. No. 4:18-cv-00209 (N.D. Cal. Jan. 9, 2018). 10X was also the plaintiff in a successful separate action against Bio-Rad before the ITC. See In the Matter of Certain Microfluidic Systems, Inv. No. 337-TA-1100, 2020 WL 748729 (U.S.I.T.C. Feb. 12, 2020) (the "1100 ITC Investigation"). The above list is not exhaustive, but demonstrates the parties' appetite for litigation is exhausting.

In 2017, Bio-Rad acquired the life sciences company RainDance Technologies, Inc. ("RainDance"), the owner of patents related to ddPCR analysis, one of the technologies at issue in these counterclaims. Def.'s Counterclaims ¶¶ 10, 19, 21. RainDance is the company which originally brought the Delaware patent litigation, the 152 case; Bio-Rad stepped into its shoes following the acquisition. See Bio-Rad, 322 F. Supp. 3d at 539.

10X brought these antitrust counterclaims on January 24, 2020, amended them on February 5, 2020, and submitted a second set of amended counterclaims on July 13, 2020 without further altering the antitrust portion. ECF Nos. 32, 53, 113. The parties have fully briefed the issues. See Pl.'s Mem.; Def.'s Opp'n Mot. Dismiss 10X's Antitrust Counterclaims ("Def.'s

Opp'n"), ECF No. 75; Pl.'s Reply Mot. Dismiss 10X's Antitrust Counterclaims ("Pl.'s Reply"), ECF No. 84. This Court's April 30, 2020 decision does not address these counterclaims but does summarize the underlying facts of the alleged patent infringement that gave rise to the current action. See Bio-Rad, 2020 U.S. Dist. LEXIS 76156, at *3-9.

B. Alleged Facts

10X alleges that Bio-Rad has engaged in illegal anticompetitive behavior in three markets, which it terms the ddPCR market, the Droplet Single-Cell Product market ("DSCP market"), and the Droplet Genetic Analysis Technology market ("DGAT market"). Def.'s Counterclaims ¶¶ 61-76.

The biological analysis technique of polymerase chain reaction ("PCR") uses the rapid heating and cooling of strands of DNA in order to make numerous copies. Id. ¶¶ 46-47. "Digital" PCR involves dividing the DNA into sub-units, then running tests on each of the subunits to see if they react for a desired genetic sequence, allowing for a quantitative count of that sequence. Id. ¶ 48. The technology at issue here uses droplets as sub-units, thus the first "d" in "ddPCR." Id. Bio-Rad developed its ddPCR patent portfolio by acquiring QuantaLife in 2011, and expanded it by acquiring RainDance in 2017, as Raindance had multiple patents in the field. Id. ¶¶ 49-52. 10X alleges that ddPCR is more accurate, sensitive, and easier to

use than other PCR analysis techniques, and thus customers do not view other techniques as reasonable substitutes. Id. ¶¶ 62-63. 10X alleges that Bio-Rad had a 90% market share in the ddPCR field prior to its acquisition of RainDance, and that it maintains over 90% control of the field after this acquisition. Id. ¶¶ 11, 65. 10X is a customer of Bio-Rad in the ddPCR market. Id. ¶ 27.

The Droplet Single-Cell Product Market ("DSCP market") is the market for tools that use droplets to analyze DNA sequences in single cells. Id. at 68. It is a sub-market of the larger NGS Sample Prep market. Id. ¶¶ 10, 20. 10X is in the business of NGS sample preparation through its Next GEM product line, and Bio-Rad competes in the NGS market through its ddSEQ product. Id. ¶ 16, 29. 10X claims it is impractical to conduct single-cell NGS sample preparation without using droplets, allowing no reasonable substitutes for DSCP market products. Id. ¶ 69. 10X alleges that the two companies together constitute a majority of the market. Id. ¶ 71.

The third market, the Droplet Genetic Analysis Technology Market ("DGAT market"), is upstream from the other two. It consists of the technology and intellectual property underlying all droplet-based genetic analysis. Id. ¶ 73. 10X alleges that, if Bio-Rad's patent rights are as broad as it claims, it would be a monopolist in this market, allowing it to charge

higher royalties because consumers would have no reasonable alternatives. Id. ¶ 74. 10X is a competitor in this market because it holds patents and markets products in the downstream DSCP Market, and is a customer because it licenses products in this market. Id. ¶ 76.

C. 10X's Claims

10X's counterclaims grow entirely from Bio-Rad's acquisition of RainDance. 10X claims this acquisition violated antitrust laws with regard to all three markets. Id. ¶¶ 10, 77. As evidence of the deal's illegality, 10X asserts that the acquisition of RainDance has allowed Bio-Rad to achieve near-monopoly market power in the ddPCR and DGAT markets by eliminating a competitor and consolidating RainDance's patents. Id. ¶¶ 77, 81, 84, 88.

10X points to specific anticompetitive practices in all three markets. In the ddPCR market, 10X alleges that Bio-Rad has eliminated RainDance's R&D and product lines, thus removing a potential competitor and reaping monopoly profits. Id. ¶¶ 78-81, 104-105. In the DGAT market, 10X asserts that the acquisition was part of a larger pattern of Bio-Rad snapping up competitors, and that the result has been that Bio-Rad owns a "thicket of patents" that make it difficult for competitors to enter the market or operate given the litigation risk, leading to an anticompetitive increase in patent licensing prices. Id.

¶¶ 85, 87, 89-90, 93-94, 105. Finally, regarding the DSCP market, 10X alleges that Bio-Rad has "specific intent" to drive 10X out of the market using its campaign of aggressive litigation. Id. ¶ 96.

Because many of Bio-Rad's actions in the current litigation stem from the patents it acquired in buying RainDance, 10X argues that the assertion of these patents itself represents a cognizable antitrust injury as an illegal attempt to monopolize. Id. ¶¶ 94, 96-99. 10X asserts that the 152 case is part of this pattern of anticompetitive behavior and would have resolved more in its favor but for Bio-Rad's illicit aggregation of market power. Id. ¶ 30 (citing RainDance Techs., 2016 U.S. Dist. LEXIS 33875). It views the current case as another example of Bio-Rad's aggressive use of litigation to hobble it as a competitor. Id. ¶¶ 96, 102.

Count I of the counterclaims alleges that Bio-Rad's acquisition of RainDance in the DSCP market was unlawful under Section 7 of the Clayton Act, 15 U.S.C. § 18, because it has lessened competition substantially and tended toward creating a monopoly in this market. Id. ¶¶ 114-117.

Count II alleges that, similarly, Bio-Rad's acquisition of Raindance has lessened competition and tended toward creating a monopoly in the upstream DGAT market, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Id. ¶¶ 119-120.

Count III alleges that Bio-Rad has attempted to monopolize the DSCP market, a violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, by engaging in predatory and anticompetitive conduct, including the unlawful acquisition of Raindance, refusing to license its patent at reasonable rates, and weaponizing its patent portfolio in litigation. Id. ¶¶ 123-126.

Count IV alleges that Bio-Rad's acquisition of RainDance, the filing of the current litigation, and the enforcement of the 152 case represent an illegal attempt to monopolize or attempt to monopolize the DGAT Market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, because, should they be successful, Bio-Rad will achieve monopolistic market share in this technology market space. Id. ¶¶ 131-133.

Count V alleges that Bio-Rad's acquisition of RainDance was unlawful under Section 7 of the Clayton Act, 15 U.S.C. § 18, with regard to the ddPCR market because it has consolidated an existing monopoly. Id. ¶¶ 134-137.

Count VI alleges that Bio-Rad has monopolized or attempted to monopolize the ddPCR market in a manner illegal under Section 2 of the Sherman Act, 15 U.S.C. § 2. Id. ¶¶ 138-142.

Count VII alleges unfair competition under the California Business and Professions Code § 17200 et seq. Id. ¶¶ 144-148. 10X contends that Bio-Rad's actions have harmed California

residents in the scientific and medical community who depend on innovation and competitive pricing in these markets. Id. ¶ 149.

10X requests that the Court declare that Bio-Rad acquisition of Raindance was unlawful, that it unlawfully monopolized or attempted to monopolize the three markets, and that it engaged in unfair competition. Id. at 85. It also seeks an injunction against continued unfair competition, an injunction requiring Bio-Rad to divest all patents, licenses, and products obtained from the RainDance acquisition, or alternatively an injunction requiring Bio-Rad to license at “competitive rates.” Id. at 86. It finally requests triple damages for the antitrust injuries it has incurred. Id.

II. LEGAL FRAMEWORK

A. Pleading standard

At the motion to dismiss stage the Court accepts all well-pleaded factual allegations in the complaint as true and draws all reasonable inferences in the plaintiff’s favor. See Langadinos v. American Airlines, Inc., 199 F.3d 68, 69 (1st Cir. 2000). The pleading standard for antitrust cases is no higher than the “plausibility” standard for other causes of action. See Twombly, 550 U.S. at 570. A party faces a heavy burden in moving to dismiss antitrust counterclaims, In re Nexium (Esomeprazole) Antitrust Litig., 968 F. Supp. 2d 367, 385 (D. Mass. 2013), but this Court need not allow claims to survive

when the well-pleaded facts fail reasonably to support the alleged legal conclusions. Ocasio-Hernandez v. Fortuño-Burset, 640 F.3d 1, 12-13 (1st Cir. 2011).

B. Antitrust Harm and Injury

Section 7 of the Clayton Act bans the acquisition of stock in a company when “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18; California v. American Stores Co., 495 U.S. 271, 284 (1990). Section 2 of the Sherman Act makes it a crime to “monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States.” 15 U.S.C. § 2. To plead monopolization, a plaintiff must allege “(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.” United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

Market power is defined in economic terms as “the ability to raise prices above those that would be charged in a competitive market.” Nat’l Collegiate Athletic Ass’n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 109 n.38 (1984). Monopoly power is defined as “the power to control prices or exclude competition,” and requires a heightened degree of market power. United States v. E. I. du Pont de Nemours & Co.

(Cellophane), 351 U.S. 377, 391 (1956). It is very common for firms to assert some market power without that market power rising to cognizance under the antitrust laws, and some degree of market power may be pro-competitive by granting firms excess profits to invest in research and development. See Erik Hovenkamp & Herbert Hovenkamp, Buying Monopoly: Antitrust Limits on Damages for Externally Acquired Patents, 25 Tex. Intell. Prop. L.J. 39, 70-71 (2017) ("Buying Monopoly").

A private plaintiff cannot merely allege that the defendant violated the Sherman or Clayton Acts, which is termed "anticompetitive harm" or "antitrust harm." That plaintiff has standing only if it suffered injury as a direct result of the alleged anticompetitive harm, and that type of injury is an "antitrust injury." Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 320-21 (3d Cir. 2007). An antitrust injury is defined as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (rejecting the argument that any economic injury, such as lost profits, stemming from a merger unlawful under the Clayton Act is actionable). For example, in American Sales Co., LLC v. AstraZeneca LP (In re Nexium (Esomeprazole) Antitrust Litig.), the First Circuit upheld a jury verdict finding that two drug companies had committed an antitrust violation through a

“reverse payment” scheme designed to keep the generic manufacturer out of the market, but that the plaintiffs, a class of retailers and purchasers, were not entitled to Clayton Act relief because they had failed to show they had suffered antitrust injury as a result. 842 F.3d 34, 60 (1st Cir. 2016).

III. ANALYSIS

A. Preliminary Matters

1. Fed. R. Civ. Proc. 13(a)

Bio-Rad argues that all counterclaims should be barred under Fed. R. Civ. Proc. 13(a) because they qualify as compulsory counterclaims that should have been brought in the 152 Case. Pl.’s Mem. 8 (citing McCaffrey v. Rex Motor Transp., Inc., 672 F.2d 246, 248-49 (1st Cir. 1982)).

Rule 13(a) directs that a counterclaim is compulsory when it “arises out of the same transaction or occurrence” as the original claim and “does not require adding another party over whom the court cannot acquire jurisdiction.” Fed. R. Civ. P. 13(a)(1). The Supreme Court held in Mercoird Corp. v. Mid-Continent Inv. Co. that antitrust counterclaims in a patent infringement case are permissive, rather than compulsory, and so may be brought in a separate case. 320 U.S. 661, 671 (1944). While many circuits have since cabined this ruling to the specific facts of the case, the First Circuit has not. Fowler v. Sponge Prods. Corp., 246 F.2d 223, 227 (1st Cir. 1957).

In Eon Labs., Inc. v. SmithKline Beecham Corp., 298 F. Supp. 2d 175, 180 (D. Mass. 2003), this Court cited approvingly to the Second Circuit's decision in Critical-Vac Filtration Corp. v. Minuteman Int'l Inc. which narrowed Mercoid by distinguishing between counterclaims for misuse of patents (such as anticompetitive behavior), which are permissive because they are based on a separate set of facts than the underlying case, versus counterclaims for invalidity of patents, derived from the same set of facts and thus properly falling under the Rule 13 compulsory framework, 233 F.3d 697, 703 (2d Cir. 2000). Unlike the counterclaims in Eon Labs, 10X's counterclaims in this case are all based on Bio-Rad's alleged misuse of its patents to engage in anticompetitive behavior, rather than their underlying validity, so they are permissive and not barred by Rule 13(a). See Amphastar Pharm., Inc. v. Momenta Pharm., Inc., 297 F. Supp. 3d 222, 230-231 (D. Mass. 2018) (Gorton, J.).

2. The Noerr-Pennington Doctrine

Bio-Rad argues that patent enforcement, unless brought in bad faith or as a result of fraud on the patent office, does not constitute anticompetitive harm or injury under the Noerr-Pennington doctrine. Pl.'s Mem. 10. Bio-Rad is essentially correct, though in the First Circuit litigation may constitute antitrust injury for purposes of standing and damages.

The Noerr-Pennington doctrine, propagated by the Supreme Court in Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 139-40 (1961), and in United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965), shields government petitioning activity from antitrust liability, including the enforcement of patents through litigation. United Food & Commer. Workers Unions & Employers Midwest Health Benefits Fund v. Novartis Pharm. Corp., 902 F.3d 1, 4 (1st Cir. 2018). There are only two exceptions: if the patent is obtained through fraud, or if the patent litigation is a "sham" covering impermissible anticompetitive conduct. Id. at 5 (citing Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965); Professional Real Estate Invs., Inc. v. Columbia Pictures Indus., 508 U.S. 49, 51 (1993) (holding that patent litigation is a "sham" only if it is "objectively baseless" and designed to interfere with a competitor's business relationships); see California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972). As a result, the Noerr-Pennington doctrine bars this Court from regarding litigation brought in good-faith as anticompetitive harm. See McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1561 (11th Cir. 1992).

10X contends the Noerr-Pennington Doctrine is inapplicable because it was the original acquisition of RainDance that caused anticompetitive harm as monopolization or attempt to monopolize.

Def.'s Opp'n at 6-7 (citing Amphastar Pharm. Inc. v. Momenta Pharms., Inc., 850 F.3d 52, 57 (1st Cir. 2017)).² Bio-Rad counters by saying that these lawsuits are immunized from antitrust scrutiny because lawful petitioning behavior is not illegal "either standing alone or as part of a broader scheme." Pl.'s Reply 7 (quoting Pennington, 381 U.S. at 670).

Insofar as 10X is arguing that non-baseless litigation by Bio-Rad can constitute anticompetitive harm, the Noerr-Pennington doctrine shields even litigation brought by a monopolist or aspiring monopolist with the subjective intent of harming a competitor, so long as it is not baseless. See Professional Real Estate, 508 U.S. at 59. For example, in P.R. Tel. Co. v. San Juan Cable Co. LLC, the court found that efforts by the accused monopolist to exclude a rival through government lobbying and repeated lawsuits could not constitute Sherman Act violations because none of the lawsuits was baseless. 196 F. Supp. 3d 207, 244 (D.P.R. 2016) (Woodcock, J.), aff'd, 874 F.3d 767 (1st Cir. 2017). Thus, non-baseless litigation cannot

² In the patent portion of this case, 10X does attack the validity of the RainDance patents as the product of inequitable conduct. See Answer Second Am. Counterclaims ¶¶ 99-105. 10X does not, however, argue that Bio-Rad's litigation campaign constituted misrepresentation or sham. See Def.'s Opp'n 6-7 ("Bio-Rad argues that under the Noerr-Pennington doctrine, patent litigation only violates the antitrust laws if it is a 'sham.' . . . But 10X's claim is that Bio-Rad's acquisition of RainDance patents was unlawful, not that the individual patent lawsuit on its own violates the antitrust laws.").

constitute anticompetitive harm under the Sherman Act for purposes of monopolization or attempted monopolization claims:

This is not to say that litigation is actionable under the antitrust laws merely because the plaintiff is trying to get a monopoly. He is entitled to pursue such a goal through lawful means, including litigation against competitors. The line is crossed when his purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself -- regardless of outcome -- of litigating.

Professional Real Estate Investors, 508 U.S. at 74-75 (Souter, J., concurring) (quoting Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 472 (7th Cir. 1982)).

A separate question is whether such litigation can constitute antitrust injury if an independent Clayton or Sherman Act violation exists. The starting point for analyzing this question is Amphastar, in which the First Circuit, after ruling that the plaintiffs had properly alleged antitrust harm by claiming the defendants had lied to a standard-setting organization, considered whether litigation by the defendant could constitute antitrust injury for purposes of calculating damages. 850 F.3d at 54, 57-58. The court concluded the plaintiff could receive antitrust treble damages for costs incurred, and that the injury caused by lawsuits could be considered antitrust injury when part of a larger scheme. Id. at 57. The court cited approvingly to McGuire Oil for the proposition that "the institution of state court litigation

against the Sherman Act plaintiff . . . could furnish the source of the antitrust injury . . . even if it could not provide a basis for a Sherman Act violation under the Noerr-Pennington doctrine.” Id. at 57 (omissions in original) (quoting 958 F.2d at 1561). This Court reads the quotation from McGuire Oil as indicating litigation can constitute antitrust injury, but not antitrust harm. See Premier Elec. Constr. Co. v. National Elec. Contractors Ass’n, Inc., 814 F.2d 358, 372-76 (7th Cir. 1987) (ruling cost of fighting litigation could constitute sole antitrust injury when the litigation resulted from a separate Sherman Act violation); McGuire Oil, 958 F.2d at 1561 (ruling litigation was not antitrust injury when there was no separate predicate anticompetitive act); see also Order Mot. Dismiss at 26, 29 Intel Corp. v. Fortress Inv. Grp., LLC, Civ. A. No. 19-07651 (N.D. Cal. July 15, 2020), ECF No. 190 (noting that litigation can constitute antitrust injury when used to enforce illegally-consolidated patents).

3. Divestiture

Bio-Rad argues that the doctrine of laches ought bar 10X from seeking the “draconian” remedy of divestiture. Pl.’s Mem. at 18. It accuses 10X of unreasonably delay in bringing the antitrust counterclaims given that they are based on the three-year-old RainDance merger. It also notes that leading scholars in the field favor a laches period of less than four years for

divestiture. Id. (citing Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application § 1205b (4th ed. 2018)).

The doctrine of laches is an affirmative defense which asks the court to consider “whether the plaintiff’s delay in bringing suit was unreasonable and whether the defendant was prejudiced by the delay.” Fleet Nat’l Bank v. Gray (In re Bankvest Capital Corp.), 375 F.3d 51, 61 (1st Cir. 2004). The burden to prove prejudice and unreasonable delay rests squarely on the shoulders of the moving party. Id. The laches defense is fact-intensive and typically not resolved at the pleading stage. Vineberg v. Bissonnette, 548 F.3d 50, 57 (1st Cir. 2008).

Bio-Rad argues that the alleged facts giving rise to 10X’s complaint arose three years ago, that there is no reasonable excuse for its delay, and that it would be unduly prejudiced by the remedy of divestiture because it has already fully integrated RainDance. Pl.’s Mem. 19. 10X points out that many of the antitrust injuries it alleges, including the present litigation, arose well after the RainDance merger, and that it is asking only for the divestiture of specific patents rather than the entirety of RainDance’s assets. Def.’s Opp’n. 18-19.

At the current stage this Court will adhere to the Ninth Circuit’s analysis that a maximum laches period of four years is appropriate because it is the statute of limitation contained in

Section 4 of the Clayton Act. See Solo v. SD-3C LLC, 751 F.3d 1081, 1086 (9th Cir. 2014). Bio-Rad may be able to show after developing the record that divestiture would be inequitable because of the amount of time that has passed, but this Court would note that as matter of law the laches period resets after each separate antitrust injury. Id.

Putting aside laches, 10X has made a prima facie case for divestiture. Divestiture is inappropriate when two firms have already integrated and where divestiture would require more than the separation of mere "stock or discrete tangible assets." Taleff v. Southwest Airlines Co., 828 F. Supp. 2d 1118, 1124 (N.D. Cal. 2011) (quoting Ginsburg v. InBev NV/SA, 623 F.3d 1229, 1234 (8th Cir. 2010)). Here, however, 10X is requesting the divestiture of specific Bio-Rad patents, see Def.'s Opp'n at 18, a lesser request than the untangling of entire companies, as was requested in Ginsberg, 623 F.3d at 1235. Thus, it is premature to bar the remedy of divestiture.

B. Market Definition

Bio-Rad argues that 10X's three market definitions are implausible. It points out that the 152 case defined ddPCR and Droplet Single-Cell Products as being in the same market of "products that perform genetic analysis on a droplet platform," and asks this court to find the same. Pl.'s Mem. 17 (quoting Bio-Rad, 2019 WL 3322322, at *2). It also argues that 10X's

definition of the DGAT market is insufficient because it does not plead the specific "metes and bounds" of the market or the firms' respective market shares. Id. at 3.

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962). At the pleading stage, a plaintiff plausibly must allege that the products in the defined market are not reasonably interchangeable for products outside the defined market, and that consumers are not likely to substitute other products if the given product becomes more expensive. See Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 437 (3d Cir. 1997). Once a plaintiff plausibly alleges a market, the determination whether the defined market is correct is a question of fact not suitable for dismissal under Rule 12(b)(6). See In re Nexium, 968 F. Supp. 2d at 388 (citing Todd v. Exxon Corp., 275 F.3d 191, 199-200 (2d Cir. 2001)).

10X argues it has sufficiently pleaded that the three different products perform different functions and should not be considered within the same market, and that it has met the technical pleading requirements by stating there are no reasonable substitutes and a potential monopolist could profitably increase prices. Def.'s Opp'n 12. It also argues

that Bio-Rad mischaracterizes the District of Delaware case, which merely found 10X and Bio-Rad were competing in the NGS Sample Prep space, a fact that does not contradict its market definitions. Id. (citing Bio-Rad, 2019 WL 3322322 at *2).

Bio-Rad is correct that the District of Delaware court defined the product market as encompassing both ddPCR and DSCP, as 10X itself acknowledged in its briefs appealing that case. See Pl.'s Mem., Ex. E, Brief of Appellant-Defendant 10X 74, Bio-Rad Inc. v. 10X Genomic Inc., Nos. 19-2255, -2285 (Fed. Cir. Oct. 18, 2019), ECF No. 69-6. The doctrine of collateral estoppel does not, however, require this Court to define the "market" in the same way as the 152 case because the type of market being defined here is not "the same as that involved in the earlier action." Ramallo Bros. Printing, Inc. v. El Dia, Inc., 490 F.3d 86, 90 (1st Cir. 2007). The Delaware court considered market definition for patent infringement rather than antitrust violations; it was asking the question of whether the two parties were direct competitors, not the question of whether their products were reasonably interchangeable with potential outside substitutes. Bio-Rad, 2019 WL 3322322 at *1-2; see also Herbert Hovenkamp, Markets in IP and Antitrust, Faculty Scholarship at Penn Law 2133, 2141-2143 (2011) (examining the similarities and differences between markets in IP law and antitrust). Once 10X and Bio-Rad have an opportunity to develop

the factual record to address specific antitrust indicia, this Court may, or may not, find the antitrust market to match the District of Delaware's definition of the patent infringement market. At the pleading stage, however, 10X sufficiently alleges the "metes and bounds" of the market as being defined by particular technological processes, and that available technological alternatives are inferior, and thus poor substitutes. Def.'s Counterclaims ¶¶ 62-63, 68-69;. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 482 (1992).

Despite Bio-Rad's arguments, 10X also sufficiently has pleaded the "metes and bounds" of the DGAT market, though hazily. A technology market is defined as "the smallest group of technologies and goods over which a hypothetical monopolist of those technologies and goods likely would exercise market power." Hynix Semiconductor Inc. v. Rambus Inc., Nos. CV-00-20905, C-05-00334, C-05-02298, C-06-00244, 2008 U.S. Dist. LEXIS 123822, at *15 (N.D. Cal. Jan. 5, 2008) (quoting U.S. Dept. of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 3.2.2 (1995)). This definition is conceptually similar to defining any other market. Id. Technology markets are certainly easier to discern when coextensive with a technological standard, see, e.g., Qualcomm, 501 F.3d at 315, but they may also be defined as the underlying technologies required to "manufacture, import or sell" a

specific downstream product. See Sandisk Corp. v. Kingston Tech. Co., No. 10-243-bbc, 2010 U.S. Dist. LEXIS 152534, at *9-10 (W.D. Wis. Nov. 15, 2010).

Here, 10X has defined the downstream market as "droplet-based genetic analysis products," which properly delineates the boundary of the upstream technology market with reference to the relevant product. Def.'s Counterclaims ¶ 72; cf. Sandisk Corp., 2010 U.S. Dist. LEXIS 152534, at *10. The fact that 10X has not specified the applicable patents or intellectual property is not fatal to its market definition, as a technology market may be defined by the economic cross-elasticity of substitute technologies rather than by reference to specific intellectual property. Hynix Semiconductor Inc., 2008 U.S. Dist. LEXIS 123822, at *17; see also U.S. Dept. of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 3.2.2 (2017). 10X incorporates this issue of economic substitution by pleading that "[a] hypothetical monopolist in the [DGAT market] could profitably impose a small but significant and non-transitory increase in price of that technology above the price in a competitive market." Def.'s Counterclaims ¶ 73. Its market definition is plausible as it describes droplet-based analysis as a specific discipline within the life sciences that encompasses ddPCR, DCSP, and other techniques for which there are no reasonable substitutes. Id.

¶¶ 19-20, 49, 56, 63-69. The defined technology market is also not so inherently broad that it becomes implausible by covering numerous unrelated technologies. Cf. Order Mot. Dismiss at 15, Intel Corp. Civ. A. No. 19-07651 (“The market as defined in the complaint covers all patents for ‘high tech’ (whatever that means exactly) electronic products”).

With that said, 10X’s market definitions -- particularly its definition of the technology market -- barely cross the required threshold of specificity. Cf. Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 13-cv-00740, 2013 U.S. Dist. LEXIS 177836, at *15-21 (E.D. Va. Dec. 18, 2013) (ruling plaintiff’s technology market definition implausible because, inter alia, it did not plead that there were no available substitutes). 10X has still pleaded the technical elements for its market definitions, though, and that is enough for now.

C. Clayton Act Violations

A private plaintiff may bring an action for a Clayton Act antitrust violation for monetary damages under the Section 4 of the Clayton Act, 15 U.S.C. § 15, or injunctive relief under Section 16, 15 U.S.C. § 26. To succeed, the plaintiff must show both a Clayton Act violation and an antitrust injury. See Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344 (1990).

1. Count I: Clayton Act Violation in Droplet Single-Cell Product Market

10X alleges that Bio-Rad violated the Clayton Act in the DSCP Market through its acquisition of RainDance. Def.'s Counterclaims ¶¶ 114-117. 10X alleges the acquisition of RainDance was an antitrust violation because it was likely to harm competition by excluding competitors with "superior products" and by reducing innovation in the market. Id. ¶ 116. It alleges it has suffered antitrust injury by being forced to fight Bio-Rad's litigation campaign, being denied "necessary" patents, and potentially being excluded from the market. Id. ¶ 117.

To allege that the acquisition of RainDance was a violation of the Clayton Act with respect to the DSCP market, 10X must provide facts indicating that the effect of the merger "may be substantially to lessen competition, or tend to create a monopoly." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 387 (1963) (quoting 15 U.S.C. § 7). Absent mitigating evidence, a merger will be found to substantially lessen competition when it produces a firm controlling an undue percentage share of the market, and results in a significant increase in the concentration of firms in that market. Id. at 363. A claimant must show a "reasonable probability" of violation, rather than a "mere possibility." United States v.

E. I. du Pont de Nemours & Co., 353 U.S. 586, 598 (1957)

(emphasis added). If a firm exerts market power at the time of suit, and that market power is traceable to a previous merger, a court may use that as evidence that the previous merger (even if it occurred well in the past) may have violated the Clayton Act. Id. at 592.

RainDance was never a major competitor in the DSCP market. Def.'s Counterclaims ¶ 15. In fact, "RainDance had . . . no product that competed with 10X in single-cell NGS Sample Prep." Id. ¶ 30. Furthermore, 10X alleges that Bio-Rad began competing in the NGS Sample Prep market only around the time it acquired RainDance. Id. ¶ 29. This alone undermines 10X's claim because it is generally implausible that the acquisition of patents violates the Clayton Act if the acquiring party is using such acquisition to enter a market where it did not previously compete. See SCM Corp. v. Xerox Corp., 463 F. Supp. 983, 1002 (D. Conn. 1978); SCM Corp., 645 F.2d at 1208 (affirming the lower court and holding that "whether limitations should be imposed on the patent rights of an acquiring party should be dictated by the extent of the power already possessed by that party in the relevant market into which the products embodying the patented art enter").

Furthermore, 10X alleges that it -- not Bio-Rad -- was the one with the leading share in the DSCP market at the time of

filing, and that the two firms between them provide “the majority of all products in the market” at the time of filing. Id. ¶ 71. In other litigation, 10X has claimed that it is an “established market leader in single cell genomics,” with its Chromium single-cell instruments used at “93 of the top 100 research institutions and 13 of the top 15 biopharmaceutical companies.” See Pl.’s Mem., Attach. 2, Am. Compl. ¶ 9, 10X Genomics, Inc. v. Celsee, Inc., Civ. A. No. 19-00862 (D. Del. Nov. 14, 2019), ECF No. 69-2. In this litigation, it never specifies Bio-Rad’s market share either at the time of filing or at the time of the RainDance acquisition. Thus, there is no way for this Court to evaluate market share to determine whether Bio-Rad is exerting unlawful market power in the DSCP market now or at the time of merger, while 10X’s proclamations in the Celsee case make such an inference implausible. See Spectrum Sports v. McQuillan, 506 U.S. 447, 455 (1993) (noting that the plaintiff must generally provide a definition of the relative market and examination of market power).

10X asserts that Bio-Rad’s acquisition of RainDance was unlawful because it allowed Bio-Rad to aggregate a large patent portfolio, forming the platform for future litigation. Def.’s Counterclaims ¶¶ 25-36. This argument is unavailing because the acquisition of patents through merger is not anticompetitive absent market power, as patents do not themselves inherently

confer market power over the downstream product. Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 46 (2006).

10X also fails plausibly to allege that the merger gave Bio-Rad market power in the DSCP market as its arguments are implausible or conclusory. First, it alleges that Bio-Rad's newly-combined post-merger patent portfolio allowed it to win the 152 Case, when RainDance lacked the leverage to achieve anything more than a settlement. Def.'s Counterclaims ¶¶ 30, 111-112. This is not evidence of improper market power in the DSCP market. That Bio-Rad's larger patent portfolio after the RainDance acquisition made it more likely to succeed in litigation -- even if credited as true -- provides no evidence of market power in the downstream DSCP product market, but only potential evidence that it had market power in its own corner of the aggregated technology market, which is tautological because patents are designed to provide a limited monopoly over the exact technology they describe. United States v. Univis Lens Co., 316 U.S. 241, 250 (1942).

Second, 10X alleges that Bio-Rad charges supracompetitive prices for its patent licenses in the DSCP market. The presence of supracompetitive pricing for licenses can be a strong indicator of market power. See Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995). Claiming that prices are supracompetitive is a legal conclusion rather

than a fact, however, and must be supported by specific factual allegations. See Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1340 (11th Cir. 2010). Here, 10X does not allege with specificity how the prices Bio-Rad charges for licensing are actually supracompetitive within the DSCP market. Furthermore, as this claim must be based on an allegation that the Raindance merger itself caused the supracompetitive pricing, SCM Corp., 645 F.2d at 1208, it is not plausible because Bio-Rad was not competing in this market at the time of the acquisition. See Def.'s Counterclaims ¶¶ 37, 74, 105, 126. Therefore, this argument cannot support an inference of market power within the DSCP Market.

Where 10X has failed to allege a viable Clayton Act violation, its claim that Bio-Rad's campaign of litigation was anticompetitive cannot provide a basis for liability because that litigation is protected Noerr-Pennington activity. See Professional Real Estate Investors, 508 U.S. at 59. Costs incurred in litigation can constitute antitrust injury only if there is an underlying anticompetitive harm. McGuire Oil Co., 958 F.2d at 1561.

Similarly, 10X cannot claim it suffered an antitrust injury from Bio-Rad's charging of increased prices or refusal to license the technology at issue in the 152 Case. Def.'s Counterclaims ¶ 110. "[T]here is no duty to aid competitors."

Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004). A patent, by design, grants a limited monopoly to the patent-holder, and refusal to license absent a separate violation of the law does not constitute an antitrust violation. See Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1186 (1st Cir. 1994), abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010).

Neither can it claim antitrust injury from its need to develop "costly" alternatives to licensing patents held by RainDance, which is simply the product of normal competition. Def.'s Counterclaims ¶ 110.

Taken as a whole, Bio-Rad's alleged actions in the DSCP market constitute nothing more than healthy competition. 10X has thus failed to state a claim for a Section 7 violation with respect to the DSCP market.

2. Count II: Clayton Act Violation in Droplet Genetic Analysis Technology Market

10X alleges that the RainDance merger violates the Clayton Act because it substantially lessens competition in the technology market. Id. ¶¶ 118-121. More specifically, 10X alleges that Bio-Rad's new-found monopoly on patents in the DGAT market has allowed it to raise licensing costs to supra-competitive levels, refuse to license patents to competitors, and foreclose competition. Id. ¶ 105. For the antitrust

injury, 10X alleges that it has had to pay increased prices for licenses, has been denied licenses, has had to develop new technologies to remain in the market, and faces exclusion from the market by virtue of the antitrust litigation. Id. ¶¶ 110, 121.

Unlike the DSCP product market, here 10X has plausibly alleged that Bio-Rad's acquisition of Raindance may have substantially reduced competition. Id. ¶ 119. 10X alleges that RainDance and Bio-Rad competed in the defined DGAT market (unlike the DSCP market), id. ¶ 82, and that the acquisition reduced competition for licenses by removing a potential competitor. Id. ¶ 87. The Clayton Act can bar the acquisition of patents if the effect of that acquisition would be to lessen competition substantially or create a monopoly. Eastman Kodak Co. v. Goodyear Tire & Rubber Co., 114 F.3d 1547, 1557 (Fed. Cir. 1997), overruled on other grounds by Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448 (Fed. Cir. 1998) (en banc).

The first step in the analysis is to ask whether the RainDance acquisition, at the time it occurred, plausibly could have allowed Bio-Rad to exert market power in the DGAT market. It is plausible that the acquisition of one competitor by another -- when both were active in the market -- substantially reduced competition in that market. SCM Corp., 645 F.2d at 1208. Neither party disputes that Bio-Rad currently possesses

broad patent rights in what 10X has defined as the DGAT market. Def.'s Counterclaims ¶ 74. A patent does not automatically confer market power, Illinois Tool Works, 547 U.S. at 46, but technology markets are defined by the ownership of intellectual property, so a court may infer that a firm holding a large percentage (typically over 65%) of patents in the defined market is exerting market power. See PNY Techs., Inc. v. SanDisk Corp., 2012 U.S. Dist. LEXIS 55965, at *23 (quoting Image Tech. Servs. v. Eastman Kodak Co., 125 F.3d 1195, 1206 (9th Cir. 1997)).

10X does not allege Bio-Rad's market share, instead stating that, if Bio-Rad's assertions in court of its patent rights in the DGAT market are true it "would be a monopolist in this market." Def.'s Counterclaims ¶ 74. The label of "monopolist" is conclusory, and this Court accords it no weight. 10X's allegation that Bio-Rad raised royalty prices due to the reduction in competition when it acquired RainDance, id. ¶¶ 12, 74, does, however, provide some indication of newly-acquired market power. See In re Nexium, 968 F. Supp. 2d at 389 (citing Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 196-97 (1st Cir. 1996)). Unlike in the DSCP market, RainDance, 10X, and Bio-Rad are plausibly alleged to have all been competitors in the same technology market. Def.'s

Counterclaims ¶ 12.³ 10X has therefore alleged facts from which this Court could infer both reduced output (the reduction in number of competitors providing licenses) and increased prices for a sustained period of time, which are the required elements to allege market power when the exact market share is not defined. See Rebel Oil Co., 51 F.3d at 1433-34. With that said, these two allegations barely pass the threshold of specificity required for the Court to evaluate them, and do so only because 10X has alleged a plausible mechanism of reduced competition. Cf. Intellectual Ventures I LLC, 2013 U.S. Dist. LEXIS 177836, at *12-28 (dismissing Sherman Act claims because of lack of specific allegations in the pleadings, and because plaintiff failed to explain why prices did not merely reflect defendant's lawful right to charge the patent license fee the market would bear).

As to whether 10X has alleged antitrust injury from this conduct, it has advanced plausible allegations of competitive injury in the payment of supracompetitive licensing fees. See In re Nexium, 968 F. Supp. 2d at 389.

³ 10X's allegation that the resolution of the 152 case in Bio-Rad's favor also indicates market power in the DGAT market, Def.'s Counterclaims ¶ 86, while possible in theory, is simply too tenuous to support a finding of market power as it relies on the unprovable speculation that RainDance itself could not have achieved the same outcome. See Twombly, 550 U.S. at 555.

10X has not, however, advanced a plausible theory of antitrust injury from the 152 case, because any injuries stemming from this litigation was not caused “by reason of anything forbidden in the antitrust laws.” Brunswick, 429 U.S. at 488. The facts alleged here are similar to Eastman Kodak, where the Federal Circuit dismissed a claim under the Clayton Act because the plaintiff “would have suffered these same injuries regardless of who had acquired and enforced the patent against it.” 114 F.3d at 1558. Here, if the RainDance merger had never happened, 10X would still be subject to the exact same claims of patent infringement, as illustrated by the fact that RainDance chose to sue prior to its acquisition. Def.’s Counterclaims ¶ 30. With that said, because 10X has alleged antitrust harm, the other lawsuits (including this one) brought by Bio-Rad could potentially qualify as antitrust injury for the purposes of damages. Amphastar, 850 F.3d at 57-58.

The Court therefore DENIES Bio-Rad’s motion to dismiss as to Count II.

3. Count V: Clayton Act Violation in ddPCR Market

10X alleges that Bio-Rad’s acquisition of RainDance violated the Clayton Act in the ddPCR market, arguing there was anticompetitive harm because 10X is a consumer in this product market and has been forced to pay supracompetitive prices. Def.’s Counterclaims ¶¶ 134-137.

10X alleges that Bio-Rad currently controls over 90% of the ddPCR market, id. ¶ 65, and that at the time of the acquisition, RainDance competed in the market with a share of less than 10%. Id. ¶ 51. It additionally alleges that there are now fewer products available in the ddPCR market. Id. ¶ 104. A firm increasing its market share above 90% through horizontal merger is a classic example of conduct that may negatively impact competition through monopolizing behavior. See Hewlett-Packard Co. v. Boston Sci. Corp., 77 F. Supp. 2d 189, 195-96 (D. Mass. 1999) (Saris, J.) (“For pleading purposes, an allegation of market share of 70 percent has been held to be an adequate basis for an inference of power in a relevant market.”) (citing International Audiotext Network, Inc. v. AT & T, 893 F. Supp. 1207, 1217 (S.D.N.Y. 1994))). Thus, 10X has properly alleged a violation of the Clayton Act.

10X claims antitrust injury in this market in having to pay supracompetitive prices for ddPCR products. See Def.’s Counterclaims ¶ 137. Bio-Rad argues that this claim is insufficiently precise to survive a motion to dismiss, as 10X does not allege any of the actual prices it has paid, nor whether RainDance’s prices were less expensive. Pl.’s Reply 4.

Bio-Rad further argues, id. at 11, that 10X’s allegations in this market are no more specific than pleadings that other courts have dismissed. See Tempur-Pedic Int’l, 626 F.3d at 1340

(holding an allegation insufficient that stated plaintiff's resale price fixing agreements "have unreasonably restrained, do unreasonably restrain, and will continue to unreasonably restrain trade and commerce in the visco-elastic mattress market . . . by eliminating price competition" (omission in original)); Intellectual Ventures, 2013 U.S. Dist. LEXIS 177836, at *20 (holding complaint to be insufficient when it made "conclusory allegations that [the defendant] has demanded and received 'supracompetitive prices'" without specifying the prices of royalties or licenses, or why those prices are supracompetitive). 10X distinguishes Tempur-Pedic by noting that, in that case, the plaintiffs had failed to explain the mechanism of anticompetitive harm, whereas 10X has clearly explained that mechanism in its complaint. Def.'s Opp'n 10-11. The same reasoning distinguishes Intellectual Ventures as well, though 10X does not specifically address it. See 2013 U.S. Dist. LEXIS 177836 at *20.

While the allegations are perhaps a bit lacking in specificity, they are plausible and sufficient to put Bio-Rad on notice of the alleged violation. Bio-Rad's motion to dismiss as to Count V is therefore DENIED.

D. Sherman Act Violations

A plaintiff claiming a violation of Section 2 of the Sherman Act must allege both "the possession of monopoly power

in the relevant market” and “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.” Grinnell Corp., 384 U.S. at 570-71.

The acquisition of patents can constitute monopolization when “the dominant competitor in a market acquires a patent covering a substantial share of the same market.” SCM Corp., 645 F.2d at 1205, 1210; see also Buying Monopoly, at 54-55 (noting that buying up all the patents in a field can constitute either anticompetitive conduct as a means of excluding rivals, or procompetitive conduct by enabling a firm’s internal innovation). Maintenance of monopoly power is barred only if it is done through anticompetitive conduct. See Trinko, 540 U.S. at 407. Conversely, “[c]onduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way may be deemed anticompetitive.” Qualcomm, 501 F.3d at 308 (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 604-05 (1985)).

To demonstrate an attempt to monopolize, the plaintiff must show “(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.”

Spectrum Sports, 506 U.S. at 456. Some conduct that is illegal for a monopolist is legal for an aspiring monopolist because it would not have an anticompetitive effect unless undertaken by a firm possessing monopoly power. United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3rd Cir. 2005). The showing of specific intent requires "a specific intent to destroy competition or build monopoly," not mere competition. Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 626 (1953). The showing of "dangerous probability" requires the same type of analysis as finding a monopoly in the relevant market, as well as the defendant's alleged ability to harm competition in that market. Spectrum Sports, 506 U.S. at 456.

Not all monopolies are necessarily anticompetitive. Trinko, 540 U.S. at 407 ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system."). The additional element required to prove a violation of the Sherman Act is called "predatory" or "exclusionary" conduct. See Dentsply, 399 F.3d at 186-87. This type of conduct is defined as conduct that is both illegal and is designed "to foreclose competition, gain a competitive advantage, or to destroy a competitor." Id. (quoting Eastman Kodak, 504 U.S. at 482-83).

Much of 10X's arguments for Sherman Act violations fall apart under this scrutiny. 10X argues, for all of its Sherman Act counts, that the predicate illegal act of monopolization was Bio-Rad's acquisition of RainDance. Def.'s Opp'n 1; Def.'s Counterclaims ¶¶ 122-133, 138-142. Yet, as discussed supra III.C.1, most of its theories of how it was harmed are not in fact examples of anticompetitive action.

Most importantly, Bio-Rad's entire campaign of litigation against 10X cannot constitute exclusionary acts because it is protected by the Noerr-Pennington doctrine. See supra II.C.3. The exception to this rule endorsed by the First Circuit, see Amphastar, 850 F.3d at 57-58, applies only to a finding of anticompetitive injury for purposes of liability or standing, not for the finding of an antitrust cause of action. Even were this Court to consider the litigation part of an anticompetitive "scheme" to monopolize, Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707 (1962), the Noerr-Pennington doctrine would still render it protected conduct for purposes of finding a violation of the Sherman Act. See Amphastar, 850 F.3d at 57; Abbott Labs. v. Teva Pharms. USA, Inc., 432 F. Supp. 2d 408, 428-30 (D. Del. 2006). Additionally, several of 10X's other theories of anticompetitive harm are unavailing because the alleged acts are not actually anticompetitive, such as

settling the 152 case on favorable terms, or forcing 10X to innovate alternatives to Bio-Rad's patents. See supra II.C.1.

1. Count III: Sherman Act Violation for Attempted Monopolization of Droplet Single-Cell Product Market

10X alleges that Bio-Rad engaged in anticompetitive conduct in violation of Section 2 of the Sherman Act through the following actions: "(a) Unlawfully acquiring RainDance and the RainDance patent portfolio. (b) Refusing to license its patent portfolios at reasonable rates, or at all. (c) Using that portfolio to file patent litigation against actual or potential competitors seeking to use technology for genetic analysis on a droplet platform." Def.'s Counterclaims ¶ 123.

10X pleads that these actions are anti-competitive because the lawsuits have imposed great costs on the company, the lack of access to patents is hampering its ability to innovate, and, should the lawsuit be successful, it will be "excluded" from the market. Id. ¶ 126. It alleges Bio-Rad's specific intent to monopolize in reference to statements by Annette Tumolo, Bio-Rad's Executive Vice President and President, Life Science Group, indicating that Bio-Rad intended to use litigation as a means of forcing 10X's acquisition, and by reference to Bio-Rad announcing the litigation in a manner designed to sabotage 10X's initial public offering. Id. ¶¶ 96, 99, 100, 124. Finally, it pleads that Bio-Rad's actions have created a dangerous

probability of allowing it to achieve monopoly power. Id. ¶ 126.

10X's arguments fail on the first prong of the attempted monopolization analysis. First, 10X does not allege that Bio-Rad had anything close to monopoly power (or even significant market power) in the DSCP market at the time of its merger with RainDance, see Pl.'s Reply 5, so the acquisition cannot be the unlawful predicate act of monopolization for a Section 2 violation. Cf. SCM Corp., 645 F.2d at 1205. Second, refusal to license to a rival is anticompetitive only when done by an existing monopolist, which Bio-Rad is not. CSU, L.L.C., 203 F.3d at 1329. Third and finally, Bio-Rad's litigation campaign cannot constitute the exclusionary act because it is protected by the Noerr-Pennington doctrine. Amphastar, 850 F.3d at 57-58.

Regarding the specific intent requirement, 10X must allege "a specific intent to destroy competition or build monopoly." Times-Picayune, 345 U.S. at 626 (1953). It has indeed alleged sufficient facts to draw an inference that Bio-Rad's litigation campaign may be taking place with the intent of driving 10X out of business, see Def.'s Counterclaims ¶ 96, but absent illegally-acquired market power, there is nothing anticompetitive about this intent.

Regarding the showing of a dangerous probability of achieving monopoly power, the litigation itself cannot serve as the predicate anticompetitive harm under Noerr-Pennington, so any acquisition of market power that Bio-Rad achieved through litigation must be treated as “growth or development as a consequence of a superior product, business acumen, or historic accident.” Grinnell Corp., 384 U.S. at 570-71.

10X has not pleaded sufficient facts to indicate anticompetitive conduct in the DSCP market. Count III therefore does not survive.

2. Count IV: Sherman Act Violation for Monopolization or Attempted Monopolization of Genetic Analysis Technology Market

10X alleges that Bio-Rad has monopolized or attempted to monopolize the DGAT market in violation of Section 2 of the Sherman Act. Def.’s Counterclaims ¶¶ 128-133. It articulates two theories. First, that Bio-Rad’s acquisition of RainDance constituted monopolization, maintenance of monopoly power, or attempted monopolization; and second, that Bio-Rad’s enforcement of its RainDance patent also constitutes monopolization or attempted monopolization because it obtained these patents illegally. Id.

10X alleges, similar to its Clayton Act claims, that the acquisition of RainDance was unlawful because it consolidated monopoly power through acquisition, rather than “superior

products, business acumen, or historic accident.” Def.’s Counterclaims ¶¶ 129-130. It further alleges that Bio-Rad’s continued defense of its victory in the 152 case, and its pressing of litigation in the case before this Court, represent an unlawful attempt to consolidate this monopoly. Def.’s Counterclaims ¶ 130. It alleges these actions are anticompetitive for the same reasons as in Count III, as the DGAT market is upstream from the DSCP market, so any consolidation in the DGAT market will drive up prices and lead to potential exclusion in the DSCP market. Id. ¶ 132. Additionally, 10X alleges attempted monopolization because, if the lawsuits are successful, Bio-Rad will effectively achieve monopoly power by forcing 10X to pay excessive royalties or forcing it out of the market. Id. ¶ 131.

As an initial matter, 10X cannot succeed on its theories that rely on Bio-Rad’s litigation as the mechanism of either monopolization or attempted monopolization because non-baseless litigation is protected under Noerr-Pennington. This is true even were this Court to find that the acquisition of RainDance violated the Clayton Act by reducing competition in the DGAT market, because that acquisition would be illegal only insofar as it increased Bio-Rad’s market power, and litigation is protected conduct regardless of the plaintiff’s market power. Cf. P.R. Tel. Co., 874 F.3d at 773-75 (Barron, J., concurring)

(analyzing extent of protections afforded by the Noerr-Pennington doctrine to litigation brought by a "monopolist").

Even more fatal to its case, 10X has failed plausibly to allege that Bio-Rad is an actual monopolist in the DGAT market either now or at the time of the RainDance acquisition. See Twombly, 550 U.S. 566. As discussed supra, III.C.2, 10X has nudged its Clayton Acts claims in the DGAT market across the threshold of plausibility by alleging facts that may indicate market power. It has not, however, alleged sufficient facts to indicate monopoly market power. As 10X itself noted in its brief, the standard for alleging monopoly is higher than the standard for alleging the degree of market power sufficient to state a claim under the Clayton Act. See Def.'s Opp'n 6 ("Acquisition by a monopolist [of competing patents] . . . should presumptively be a § 2 'exclusionary practice'" and "a patent is a productive asset [so] § 7 of the Clayton Act . . . may condemn such mergers even where the licensee is not a monopolist.'" (ellipses and alterations in original) (quoting Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law § 707 (4th ed. 2013-2018))).

In fact, the record of litigation between the parties and 10X's own statements make it implausible that Bio-Rad holds a monopoly in the market. 10X is a self-proclaimed "lead innovator" in the downstream DSCP sub-market and holds numerous

patents in that sub-market. Def.'s Counterclaims ¶¶ 71, 76. Furthermore, both parties have successfully enforced patents against the other, and both parties have been unsuccessful in the enforcement of other patents, indicating healthy competition. Compare the 1068 ITC Investigation (finding that 10X had infringed Bio-Rad's patent), with the 1100 ITC investigation (finding that Bio-Rad had infringed 10X's patents). In this context, 10X's barebones allegations that Bio-Rad reduced licenses and increased prices following the RainDance acquisition are insufficient plausibly to allege monopoly dominance. Cf. Intellectual Ventures, 2013 U.S. Dist. LEXIS 177836 at *19-20. 10X states that Bio-Rad "alleges that it has broad rights . . . [that] if true, would mean that Bio-Rad would be a monopolist in the market," Def.'s Counterclaims ¶ 74, but this statement is merely an unsupported legal conclusion.

10X has also failed to allege what percentage of the DGAT market it believes Bio-Rad either currently controls or controlled at the time of the RainDance acquisition. See Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act 21 (2015) (available at: https://www.justice.gov/sites/default/files/atr/legacy/2008/09/12/236681_chapter2.pdf) (noting that courts typically require a showing of at least 55-70% of the market to indicate the

presence of a monopoly, and that a share of the market below 50% is likely inadequate as matter of law). It also has failed to allege that there are "significant" barriers to entry preventing another firm from entering the market. 10X has not alleged there is anything unusual about this market that creates significant barriers to entry, as where one party controls a technological standard. Cf. Qualcomm Inc., 501 F.3d at 314. It does allege that Bio-Rad has created a "thicket of patents" that "requires innovators to obtain costly licenses or face the task of inventing newly designed products that are not alleged to be infringing," Def.'s Counterclaims ¶ 87, but forcing competitors either to pay for a license or innovate is the very purpose of patents. See Brullote v. Thys Co., 379 U.S. 29, 33 (1964) ("A patent empowers the owner to exact royalties as high as he can negotiate with the leverage of that monopoly."); Data Gen. Corp., 36 F.3d at 1186.

Finally, 10X's theories of attempted monopolization are unavailing because nothing that Bio-Rad is alleged to have done post-merger would constitute exclusionary conduct unless it was already a monopolist. The RainDance acquisition itself cannot constitute attempted monopolization absent exclusionary conduct. Spectrum Sports, 506 U.S. at 456. Its refusal to license to a rival (or charge whatever the market will bear) does not qualify as such conduct unless it is already a monopolist. Data Gen.

Corp., 36 F.3d at 1185. If Bio-Rad is not a monopolist, its subjective intent in refusing to license or enforcing its patents is "immaterial." CSU, L.L.C., 203 F.3d at 1327.

In conclusion, because it is not plausibly pleaded that Bio-Rad is a monopolist in the DGAT market, and because it has not taken any actions that -- lacking monopoly power -- would be exclusionary, the motion to dismiss as to Count IV is GRANTED.

3. Count VI: Sherman Act Violation for Monopolization of ddPCR Market

10X alleges that Bio-Rad has monopolized the ddPCR market through its unlawful acquisition of RainDance. Def.'s Counterclaims ¶¶ 138-142. It further alleges that it has suffered anticompetitive harm in the market by being forced to pay supracompetitive prices for ddPCR devices and consumables, having to defend against lawsuits, and having its ability to innovate hampered. Id. ¶ 141.

As with its Clayton Act claim, 10X has sufficiently alleged a Sherman Act Section 2 violation in the ddPCR market. 10X's allegation that Bio-Rad possesses a 90% market share at the time of the acquisition, and further increased its market share by acquiring RainDance, is sufficient to allege a Sherman Act violation because it indicates that a dominant competitor further entrenched its monopoly by consolidating its hold on the market. SCM Corp., 645 F.2d at 1205, 1210. The payment of

supracompetitive prices constitutes a valid antitrust injury for this claim, as well as Count V. Bio-Rad's motion to dismiss as to Count VI is therefore DENIED.

D. Count VII: Unfair Competition in Violation of California's Business & Professions Code § 17200

10X alleges violations of the California Unfair Competition law, section 17200 et seq. of the California Business and Professions Code, on the same grounds as its previous counts.

Section 17200 prohibits a variety of unfair practices, including antitrust violations. See Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 186-87 (1999) (holding that the word "unfair" in section 17200 encompasses "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition"). The standard for a violation of section 17200 is similar to the federal standard. Id. at 186. Conduct that a court rules does not constitute a violation under the federal antitrust laws will not support a finding under section 17200 either. LiveUniverse, Inc. v. MySpace, Inc., 304 Fed. Appx. 554, 557 (9th Cir. 2008).

Bio-Rad argues that, because 10X has failed to state a claim on any of its federal counts, this Court must also dismiss

the section 17200 claim. Pl.'s Mem. 18. Alternatively, Bio-Rad argues that 10X's arguments should be barred under California's anti-SLAPP provision, Cal. Civ. Proc. Code § 425.16., which guards First Amendment-covered activity including Noerr-Pennington protected patent petitioning. Pl.'s Mem. 18 n.12.

Both of Bio-Rad's arguments are unavailing. Because three of 10X's six counts survive the motion to dismiss, this court also DENIES the motion to dismiss as to Count VII.

III. CONCLUSION

For the reasons given above, this Court GRANTS Bio-Rad's motion to dismiss, ECF No. 68, with respect to counterclaim Counts I and III, and IV, and DENIES the motion to dismiss with respect to counterclaim Counts II, V, VI, and VII.

SO ORDERED.

/s/ William G. Young
WILLIAM G. YOUNG
U.S. DISTRICT JUDGE