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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

NERO AG,

Plaintiff,

v.

**MPEG LA, L.L.C., and DOES 1
through 10, inclusive,**

Defendants.

Case No. 10-cv-3672-MRP-RZ

**ORDER RE: DEFENDANT MPEG LA,
L.L.C.’S MOTION TO DISMISS AND
PLAINTIFF’S MOTION TO STRIKE
EVIDENCE**

I. INTRODUCTION

Plaintiff Nero AG (“Nero”) brings this antitrust lawsuit against Defendant MPEG LA, LLC¹ (“MPEG LA”) for anticompetitive conduct in MPEG LA’s licensing of patent pools related to industry standards for consumer electronics. The Complaint makes a number of allegations against MPEG LA, some of which bear no relevance to its Section 2 monopolization claim. The allegations that are relevant to the Section 2 claim are nothing more than speculation. Because Nero has failed to state a claim upon which relief can be granted, the Court **GRANTS** MPEG LA’s motion to dismiss with leave to amend.

II. BACKGROUND

The Court takes the following allegations as true and draws all reasonable inferences in the plaintiff’s favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

¹ MPEG is an acronym for the Moving Pictures Experts Group.

1 MPEG LA licenses patent pools relating to industry standards for consumer
2 electronics. Compl. ¶ 5. In 1988, the International Organization for Standardization
3 established MPEG to create standards for audio and video compression. Compl. ¶ 24.
4 The standards ensure compatibility and interoperability of devices manufactured by
5 different companies in the digital video technology industry. Compl. ¶ 5-6. The
6 standards at issue in this case are the MPEG-2, MPEG-4 Visual, and AVC standards. *Id.*

7 MPEG LA is not an innovator; it does not own any patents and it does not use the
8 patented technology to provide products to consumers. Compl. ¶ 33. MPEG LA created
9 the first modern-day patent pool, “a product that is a substitute to the impractical
10 licensing of individual licenses,” to meet the MPEG-2 standard. Compl. ¶¶ 26, 33. In a
11 patent pool, patentees agree to collectively license their patents relating to a particular
12 technology to licensees to save time and money and to give licensees some assurance that
13 their ability to use the technology will not be blocked by a single patent holder. Today,
14 “MPEG LA licenses patent pools relating to standards necessary to virtually every
15 company operating in the digital video technology industry,” and thus, “wields
16 significant power over the industry.” Compl. ¶ 23.

17 Nero alleges that MPEG LA collects royalties from the sale and/or distribution of
18 “almost every personal computer (and related software), DVD, DVD player, digital
19 television set, mobile television receiver, TV set-top box, Blu-ray video optical disc, Blu-
20 Ray Disc player/recorder, media player, still camera, video camera, iPhone, BlackBerry,
21 and pay-per-view video service in the world.” Compl. ¶ 12. As a creator of liquid media
22 technology software, Nero must comply with the MPEG standards to sell software
23 products in the area of multimedia. Compl. ¶¶ 7, 19-21. Plaintiff Nero is a licensee of
24 the MPEG LA patent pools. Compl. ¶¶ 7, 21-22.

25 In 1997, MPEG LA obtained a Business Review Letter from the Department of
26 Justice (“DOJ”) regarding its MPEG-2 patent pool. The letter stated that DOJ was “not
27 presently inclined to initiate antitrust enforcement action” regarding the licensing
28 arrangement. Compl. ¶¶ 8, 27. According to Nero, DOJ expressly conditioned its

1 decision on MPEG LA's representations that it would protect against potential
2 anticompetitive effects of its licenses by implementing certain safeguards. *Id.* Those
3 safeguards include: (1) engaging an independent expert to ensure only essential patents
4 were placed in the MPEG-2 pool, and (2) formulating and enforcing fair, reasonable and
5 nondiscriminatory licensing terms. *Id.* At the time of the Business Review Letter,
6 MPEG LA represented to DOJ that the MPEG-2 patent pool accounted for 27 essential
7 patents. Compl. ¶ 28. Today, there are over 800 patents in the MPEG-2 patent pool. *Id.*
8 The Complaint details DOJ's skepticism toward the patent pool and whether the "patent-
9 expert mechanism" was sufficient to make evaluation of patents entirely independent.
10 Compl. ¶ 31. According to Nero, the DOJ took a "wait-and-see approach regarding the
11 independence of the patent expert." *Id.*

12 Nero alleges, contrary to MPEG LA's promises, once MPEG LA created its patent
13 pools, it unlawfully used its lawfully-obtained monopoly power in the relevant
14 technology markets to willfully maintain or extend its monopolies for years beyond their
15 natural expiration and to administer its licenses in an unfair, unreasonable and
16 discriminatory manner. Compl. ¶¶ 10, 35, 46. According to Nero, MPEG LA has failed
17 to implement the promised pro-competitive safeguards and is abusing its monopoly
18 power in violation of Section 2 of the Sherman Act.

19 **A. INDEPENDENT EXPERT**

20 MPEG LA's independent expert is Kenneth Rubenstein. Nero alleges Rubenstein
21 is not independent because he has a financial interest in and serves as a compensated
22 advocate for MPEG LA. Compl. ¶¶ 11(a), 47-50. Specifically, Nero alleges Rubenstein
23 is MPEG-LA's patent counsel who, among other things: helped form MPEG LA with its
24 founder, was involved in drafting the first MPEG LA license agreements, deals with
25 questions from licensees about the interpretation of MPEG LA license agreements, and
26 testified before Congress on behalf of MPEG LA. Compl. ¶¶ 11(a), 48.

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1 **B. NON-ESSENTIAL PATENTS**

2 Nero alleges that MPEG-LA added hundreds of newer patents to its MPEG-2,
3 MPEG-4 Visual and AVC patent pools—approximately 800, 1,000, and 1,300 patents,
4 respectively—for the purpose of extending the duration of the licenses. Compl. ¶¶ 11(b),
5 37, 40, 51-52. Nero theorizes that because the older patents are expiring, MPEG-LA
6 added hundreds of newer *non-essential* patents to the pool to prolong its monopoly
7 beyond its natural duration and scope. *Id.* Nero claims “it is infeasible, economically
8 and practically, today to negotiate individual licenses with the 26 owners of the more
9 than 800 MPEG-2 patents now claimed to be essential.” Compl. ¶ 53. Nero alleges that
10 “a technology innovator would have to conduct its own patent-essentiality investigations
11 of the 800-plus patents in the pool. This would be prohibitively time-consuming and
12 expensive. . . . MPEG LA’s practice leaves no viable alternative but to license the entire
13 pool.” *Id.* Nero alleges that “no developer or manufacturer of MPEG-2, MPEG-4
14 Visual, or AVC products has met the standards or attempted to meet the standards by
15 acquiring only individual patent licenses directly from patent owners.” Compl. ¶ 55.

16 **C. UNFAIR, UNREASONABLE AND DISCRIMINATORY LICENSING TERMS**

17 According to Nero, MPEG LA imposes unfair, unreasonable and discriminatory
18 licensing terms in several ways.

19 **a. Royalty Rates**

20 Nero alleges that MPEG LA charges licensees different royalty rates for the same
21 MPEG-2 license, and has failed to make a “downward adjustment to the MPEG-2 royalty
22 rates commensurate with the rapid and dramatic decrease in cost of the products
23 implementing the MPEG-2 standard—*i.e.*, DVD players, digital and flat screen
24 televisions, and the software that support such products—since the pool’s inception.”
25 Compl. ¶¶ 11(c), 57-58, 61-62. Nero contends also that MPEG LA should have
26 decreased its royalty rates to reflect the expiration of seminal or essential patents in the
27 pool. Compl. ¶ 63.

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1 Nero further alleges that MPEG LA collects royalties multiple times for the same
2 device, and also has failed to communicate its policies equally to all licensees in a way
3 that favors licensees that are also licensors, i.e., “insiders.” Compl. ¶¶ 59-60.

4 **b. Unreasonable Term Extension**

5 Nero also alleges that MPEG LA is coercing its licensees to extend their MPEG-2
6 Licenses until December 31, 2015, which Nero contends is an unreasonable term.
7 Compl. ¶ 64. Nero claims this five-year term requirement is dramatically different from
8 the original license, reviewed by DOJ in 1997, which allowed termination with 30 days’
9 written notice. Compl. ¶ 65. Nero complains that Nero and the other licensees have no
10 choice but to sign the agreement because the current MPEG-2 License expires at the end
11 of 2010 and it is economically infeasible to “conduct the necessary investigations to open
12 licensing negotiations with individual patent owners.” Compl. ¶ 65.

13 **c. Time-Limited Free Trials**

14 Nero alleges that MPEG LA changed its position with respect to time-limited free
15 trials, specifically whether or not a licensee is required to pay a royalty when it allows a
16 customer to use its product for a limited trial period but the customer does not ultimately
17 “upgrade” or purchase the product at the end of the trial. According to Nero, MPEG LA
18 in the past treated such a situation as a sale and a return, and did not require licensees to
19 pay royalties on that “sale.” In 2008, MPEG LA changed its position, conducted an
20 audit, and demanded \$15 million in royalties. Compl. ¶¶ 66-95.

21 Furthermore, Nero claims that MPEG LA manipulated the audit by coercing
22 KPMG to “interpret issues and make findings contrary to reason and in accordance with
23 MPEG LA’s untenable position.” Compl. ¶ 106. Nero claims this behavior constitutes
24 discriminatory enforcement of license terms, and is an example of how MPEG LA wields
25 its monopoly power to its own advantage, and manipulates competition and prices.
26 Compl. ¶¶ 96-98, 107.

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1 **D. SECTION 2 OF THE SHERMAN ACT**

2 Nero brings one claim for unlawful maintenance, extension and/or abuse of
3 monopoly power in violation of Section 2 of the Sherman Act. Compl. ¶¶ 108-22. Nero
4 defines the market as the “worldwide markets for the licensing of patents relating to the
5 MPEG-2, MPEG-4 Visual, and AVC standards” and alleges MPEG LA possesses
6 monopoly power. Compl. ¶ 109. Although Nero propounds numerous allegations—
7 some of which are, frankly, puzzling in the context of a Sherman Act claim—the crux of
8 Nero’s Complaint is that MPEG LA has added newer non-essential patents to its pools to
9 make it infeasible for a licensee to acquire the essential patents independently and thus, to
10 preclude any reasonably interchangeable substitutes and to preserve its market
11 dominance. Compl. ¶¶ 113-17. Moreover, Nero alleges MPEG LA has impermissibly
12 expanded the temporal scope of its monopoly by adding non-essential patents with later
13 term expiration dates to the patent pools. Compl. ¶ 118. “Nero seeks just compensation
14 for—and an injunction to terminate—MPEG LA’s unlawful maintenance, extension, and
15 abuses of its monopoly power in violation of Section 2 of the Sherman Act.” Compl. ¶
16 15.

17 **III. DISCUSSION**

18 To state a claim under Section 2, Nero must allege facts demonstrating that: (1)
19 MPEG LA possesses monopoly power in the relevant market and (2) “the willful
20 acquisition or maintenance of that power as distinguished from growth or development as
21 a consequence of a superior product, business acumen, or historic accident.” *U.S. v.*
22 *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). “As traditionally interpreted, the Sherman
23 Act punishes any individual or entity that uses ‘predatory’ means to attain a monopoly, or
24 to perpetuate a monopoly after the competitive superiority that originally gave rise to the
25 monopoly has faded.” *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 547
26 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602, 610-11
27 (9th Cir. 1991)). The holder of a patent enjoys a lawful monopoly to prevent others from
28 “making, using, offering for sale, or selling” the patented invention during the term of the

1 patent. 35 U.S.C. § 154(a)(1)-(2). The legitimacy of MPEG LA's initial monopoly
2 derived from the MPEG-2, MPEG-4 Visual and AVC patent pools is not at issue. Rather,
3 Nero contends that MPEG LA is using predatory means to extend its patent monopoly in
4 the relevant technology markets for years beyond the natural expiration of the essential
5 patents. There must be predatory conduct to perpetuate a monopoly for MPEG LA to be
6 liable under Section 2. *See Alaska Airlines, Inc.*, 948 F.2d at 549.

7 MPEG LA moves to dismiss the complaint on several bases. First, MPEG LA
8 argues that Nero has failed to establish that it lacked a realistic opportunity to obtain
9 individual licenses instead of licensing from MPEG LA. If Nero has such an opportunity,
10 then MPEG LA's patent pools are not anticompetitive and do not violate Section 2 of the
11 Sherman Act. Second, MPEG LA claims that Nero has failed to define a market in which
12 MPEG LA has monopoly power. Third, MPEG LA argues Nero has failed to allege
13 antitrust injury. Finally, MPEG LA argues Nero has failed to allege MPEG LA has
14 engaged in any predatory conduct. The Court focuses on the first argument and the last
15 argument, because they most accurately reflect the defects in the pleading. Nero has
16 failed to establish any *factual* basis for its lawsuit. Its allegations that it has no realistic
17 alternative to licensing from MPEG LA and that MPEG LA has engaged in predatory
18 conduct by adding non-essential patents are based entirely on speculation and implausible
19 inferences. Therefore, the Court **GRANTS** the motion to dismiss for failure to state a
20 claim upon which relief may be granted under the Supreme Court's precedent in *Bell*
21 *Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937
22 (2009).

23 **A. THE LEGAL STANDARD FOR A MOTION TO DISMISS**

24 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a
25 complaint if it fails to state a claim upon which relief can be granted. In deciding
26 whether the plaintiff has stated a claim upon which relief can be granted, the Court must
27 assume that the plaintiff's allegations are true and must draw all reasonable inferences in
28 the plaintiff's favor. *See Usher*, 828 F.2d at 561. However, the Court is not required to

1 accept as true “allegations that are merely conclusory, unwarranted deductions of fact, or
2 unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir.
3 2008). If the Court dismisses the complaint, it must then decide whether to grant leave to
4 amend. The Ninth Circuit has “repeatedly held that a district court should grant leave to
5 amend even if no request to amend the pleading was made, unless it determines that the
6 pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*,
7 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal quotation marks omitted).

8 **B. THE RULE 8 PLEADING STANDARD**

9 In *Bell Atlantic Corp. v. Twombly*, the Supreme Court established that dismissal
10 for failure to state a claim upon which relief may be granted does not require appearance
11 beyond a doubt that plaintiff can prove no set of facts in support of a claim that would
12 entitle him to relief.² 550 U.S. at 562-63. Instead, a complaint must be plausible on its
13 face and not rest upon legal conclusions. *Id.* at 564-65, 570. *Twombly* was an antitrust
14 case and the Supreme Court recognized that proceeding to antitrust discovery can be
15 expensive, thus the Court “must retain the power to insist upon some specificity in
16 pleading before allowing a potentially massive factual controversy to proceed.” *Id.* at
17 558. Indeed, a plaintiff must allege enough facts to make misconduct more plausible than
18 an “obvious alternative explanation.” *Id.* at 567. The Ninth Circuit, too, has explained
19 that “because discovery in antitrust cases frequently causes substantial expenditures and
20 gives the plaintiff the opportunity to extort large settlements even where he does not have
21 much of a case,” a complaint must have enough factual allegations to raise their claim
22 above speculation. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008).

23 Two years later, in *Ashcroft v. Iqbal*, the Court reemphasized that a pleading does
24 not suffice if it tenders naked assertions devoid of further factual enhancement; the

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26 ² The *Twombly* standard applies to Section 2 claims. See *Pac. Bell Tel. Co. v. Linkline*
27 *Commc’ns, Inc.*, 129 S. Ct. 1109, 1123 (2009) (remanding case to the district court to
28 consider whether the amended complaint, which alleged violation of Section 2 of the
Sherman Act, states a claim upon which relief may be granted in light of the new
pleading standard articulated in *Twombly*).

1 claims must be plausible. 129 S. Ct. at 1949. “The plausibility standard is not akin to a
2 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant
3 has acted unlawfully.” *Id.* Determining whether a complaint states a plausible claim for
4 relief is a context-specific task. *Id.* at 1950. “But where the well-pleaded facts do not
5 permit the court to infer more than the mere possibility of misconduct, the complaint has
6 alleged—but it has not shown—that the pleader is entitled to relief.” *Id.* (alterations,
7 citations and quotation marks omitted); *see* Fed. R. Civ. P. 8(a)(2). Here, Nero asks the
8 Court to infer misconduct where the Court finds no more than a mere possibility, and
9 further finds implausible.

10 **C. THE COMPLAINT LACKS THE NECESSARY FACTUAL ALLEGATIONS**

11 Nero’s allegations that MPEG LA has packed its patent pools with non-essential
12 patents to impermissibly expand the temporal scope of its monopoly and to make it
13 impracticable to identify only the essential patents are speculative. The Complaint does
14 not contain any statements of fact that support its claims. As counsel for Nero admitted
15 at oral argument, Nero relies on an “inference” that MPEG LA must have engaged in
16 unlawful, anticompetitive conduct because the number of patents in the MPEG-2 pool
17 increased from 27 to 800 over the last thirteen years. The Court finds that because the
18 conduct can be more likely explained by lawful behavior, Nero’s allegations are
19 implausible.

20 MPEG LA offers an “obvious alternative explanation” for the exponential increase
21 in the number of patents in the patent pool, that the patents are indeed essential. MPEG
22 LA argues that because the increase in patents has decreased the pro rata share of
23 royalties to each licensor member of MPEG LA, it makes no economic sense for them to
24 add non-essential patents. This argument fails to address the benefits of extending the
25 life of the pool. After all, a lower pro rata share of royalties paid after the expiration of
26 the terms of the essential patents is better than no share at all. However, MPEG LA also
27 offers the following very persuasive argument: “The fact that there are a large number of
28 patents in the MPEG-2 pool, or more than there were in 1993, says more about the length

1 of time it takes to prosecute patents (and the incentives to create blocking positions by
2 failing to prosecute them expeditiously) and precious little about whether those patents
3 are essential.” Reply at 6. It is not unusual for hundreds of patents to be essential to
4 implementing a complex technology. It is also not anticompetitive for a patent pool to
5 include numerous *potentially* blocking patents, patents which may or may not be
6 essential but which are more efficient to license as part of the pool than to risk the
7 expense of future litigation. *See Philips v. ITC*, 424 F.3d 1179, 1187-90 (Fed. Cir. 2005).
8 And, as MPEG LA points out, the length of time it takes to prosecute patents and the
9 incentives for withholding relevant technology until a standard is established are both far
10 more plausible explanations for hundreds of essential patents turning up in the decade
11 following the creation of the pools. *See generally Rambus Inc. v. FTC*, 522 F.3d 456
12 (D.C. Cir. 2008) (recognizing incentives to withhold relevant technology to set up a
13 blocking position and extract a windfall).

14 **1. ECONOMIC INFEASIBILITY OF DIRECT LICENSING**

15 The Supreme Court has recognized that patent pools should be addressed under
16 the rule of reason analysis, except for arrangements where the only apparent purpose is
17 naked price fixing. *United States v. Line Material*, 333 U.S. 287, 315 (1948). A rule of
18 reason analysis requires a determination of whether an agreement is on balance an
19 unreasonable restraint of trade, that is, whether its anti-competitive effects outweigh its
20 pro-competitive effects. *Nat’l Soc’y of Prof. Eng’rs v. U.S.*, 435 U.S. 679 (1978);
21 *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Chicago Bd. of Trade v.*
22 *U.S.*, 246 U.S. 231 (1918). The opportunity to acquire a pool of rights does not restrain
23 trade if an alternative opportunity to acquire individual rights is fully available. *Auto.*
24 *Radio Manuf. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950) (patents); *Standard*
25 *Oil Co. v. U.S.*, 283 U.S. 163 (1931) (same); *Sumitomo Mitsubishi Silicon Corp. v.*
26 *MEMC Elec. Materials, Inc.*, No. 05-2133 SBA, 2007 WL 2318903, at *15 (N.D. Cal.
27 Aug. 13, 2007). It likewise does not violate Section 2, the anti-monopoly provision of
28 the Sherman Act, because Section 2 requires proof of an anti-competitive act to acquire

1 or maintain a monopoly. *See Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S.
2 451, 481 (1992). Thus, the “true issue” in situations involving a patent pool is whether
3 the antitrust plaintiff lacked a “realistic opportunity” as a “practical matter” to obtain
4 individual licenses from individual owners as opposed to a single license from the pool.
5 *See Columbia Broadcasting Sys., Inc. v. Am. Soc’y of Composers, Authors & Publishers*,
6 620 F.2d 930, 936 (2d Cir. 1980); *Matsushita Elec. Indus. Co., Ltd. v. Cinram Int’l, Inc.*,
7 299 F. Supp. 2d 370, 377 (D. Del. 2004).

8 Nero’s monopolization argument relies heavily on the “economic infeasibility” of
9 individual licensing, which results in the unavailability of a substitute for MPEG LA’s
10 patent pools. However, Nero has not attempted to determine which patents it needs and
11 to license them individually. Nero’s conclusion that it lacks a realistic opportunity to
12 obtain the individual licenses necessary to practice Nero’s technology is a hypothesis. If
13 this case were to proceed, Nero would have the burden of proving the non-availability of
14 alternatives to MPEG LA’s patent pool. *Columbia Broadcasting Sys., Inc.*, 620 F.2d at
15 937. Furthermore, time and expense will not be considered insurmountable barriers to
16 direct licensing. *See id.*; *Buffalo Broadcasting Co., Inc. v. Am. Soc’y of Composers,*
17 *Authors & Publishers*, 744 F.2d 917, 926 (2d Cir. 1984) (rejecting the argument that
18 direct licensing is too costly and burdensome to be a realistic alternative to a blanket
19 license and concluding “the only valid test of whether the program license is ‘too costly’
20 to be a realistic alternative is whether the price for such a license, in an objective sense, is
21 higher than the value of the [intellectual property] rights obtained”); *Cinram Int’l, Inc.*,
22 299 F. Supp. 2d at 378-79. The burden of proving lack of a realistic opportunity to
23 license directly cannot be met where a plaintiff never makes an inquiry or attempts to
24 negotiate a single individual license. *Cinram Int’l, Inc.*, 299 F. Supp. 2d at 377-78.

25 Nero argues that these cases are not on point at the motion to dismiss stage,
26 because the procedural posture of the cases cited in the preceding paragraph is summary
27 judgment. Thus, Nero argues, the plaintiffs were given the opportunity to engage in
28 discovery to prove the non-availability of licensing alternatives. The Court finds this

1 argument unpersuasive because when the foregoing cases came before the respective
2 courts on a motion to dismiss, the Supreme Court had not yet issued its decision in *Bell*
3 *Atlantic v. Twombly*. Therefore, the courts applied the former pleading standard set forth
4 in *Conley v. Gibson*, that “a complaint should not be dismissed for failure to state a claim
5 unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his
6 claim which would entitle him to relief.” 355 U.S. 41, 45-46 (1957), *abrogated by*
7 *Twombly*, 550 U.S. 544 (2007). The Supreme Court has explained that under a literal
8 reading of *Conley*’s “no set of facts” language, “a wholly conclusory statement of claim
9 would survive a motion to dismiss whenever the pleadings left open the possibility that a
10 plaintiff might later establish some set of undisclosed facts to support recovery.”
11 *Twombly*, 550 U.S. at 561. This is no longer the law. Under *Twombly*, the new pleading
12 standard is plausibility, something more than speculation. Thus, the Court finds that
13 Nero has failed to plausibly allege it lacks a “realistic opportunity” as a “practical matter”
14 to obtain individual licenses from individual patent holders.

15 **2. PREDATORY CONDUCT: WILLFUL ADDITION OF NON-ESSENTIAL** 16 **PATENTS**

17 The essence of Nero’s allegations of predatory conduct rests on Nero’s
18 “inference” that because the patent pool has grown so large, MPEG LA must be adding
19 hundreds of non-essential patents to the pool for the purpose of improperly extending the
20 temporal scope of its monopoly and to make it economically infeasible for a licensee to
21 determine which patents are essential to its technology and must be licensed. The
22 success of Nero’s claims depend on a finding that the essential patents have expired and
23 that MPEG LA is willfully charging licensees royalties on a pool of non-essential patents,
24 which are not necessary to practice the relevant technologies. Yet, Nero offers not one
25 factual allegation from which the Court could conclude this is plausible.

26 Nero contends that it would be prohibitively expensive for it to identify the non-
27 essential patents and so justifies its failure to name even one example of one patent that is
28 non-essential and added for the purpose of unlawfully extending the temporal scope of

1 the patent pool. But Nero will have to undertake just such an inquiry to prove its
2 allegations in this case. It is not clear that Nero ever intends to undertake such inquiry.
3 Nero's counsel expressed desire to take discovery to find out how many patents the
4 MPEG-4 Visual and AVC patent pools contained initially so that it might, again, *infer*
5 that MPEG LA has added "hundreds upon hundreds of non-essential patents to make the
6 pool unchallengeable and to restrain individual licensing." Sept. 2, 2010 Hearing Tr. at
7 35:20-36:08.

8 The Court emphasizes that Nero *does not need* Court-ordered discovery to
9 determine whether any of the patents in the pools at issue contain non-essential or expired
10 patents. This information is in the public domain. For instance, the expiration date of
11 each patent is obvious from the first page of the patent. It does not require discovery,
12 claim construction or even a full reading of each patent to determine how many patents in
13 the patent pools are in fact expired. Yet, the Complaint contains no facts showing any of
14 the patents actually have expired. Nero did not conduct even that cursory amount of
15 preliminary investigation before bringing its claims approximately eight months ago. As
16 the Supreme Court made clear, before the Court should allow a case to proceed into
17 expensive, onerous discovery, a complaint must be plausible and must not rely solely on
18 speculation and unsupported theories. *Twombly*, 550 U.S. at 558, 564-65, 570; *Kendall*,
19 518 F.3d at 1047.

20 **D. THE FUTILITY OF AMENDMENT**

21 MPEG LA insists that Nero should not be given leave to amend because it has
22 been given a couple of opportunities to amend its allegations already. Nero first brought
23 its allegations in the form of counterclaims and then amended counterclaims in an earlier
24 suit, which eventually was remanded to state court for improper removal. In that prior
25 suit, Nero also had the benefit of reviewing a motion to dismiss that MPEG LA filed
26 before the case was remanded and before Nero re-filed its claims separately in federal
27 court. Thus, MPEG LA argues the Complaint represents Nero's third attempt at stating a
28 claim upon which relief can be granted.

1 The Court will grant leave to amend because this Court has not yet given Nero an
2 opportunity to cure the defects in its pleading and because, in fact, no court has
3 previously reviewed or opined on its sufficiency. Moreover, because the chief problem
4 with the Complaint is that it does not contain any actual factual allegations to support its
5 inferences, the Court will not conclude yet that the pleading could not possibly be cured
6 by the allegation of other facts. *See Lopez v. Smith*, 203 F.3d at 1130. Nero has twenty
7 (20) days from the date of this Order to file a First Amended Complaint.

8 **IV. REQUESTS FOR JUDICIAL NOTICE AND MOTION TO STRIKE**

9 **A. REQUESTS FOR JUDICIAL NOTICE**

10 In conjunction with its motion to dismiss, MPEG LA asks the Court to take
11 judicial notice of the following documents: (1) MPEG LA's Complaint filed in *MPEG*
12 *LA, L.L.C. v. Nero AG, et al.*, Case No. BC427817, on December 10, 2009 in Los
13 Angeles Superior Court; (2) Nero's First Amended Counterclaims, filed in *MPEG LA,*
14 *L.L.C. v. Nero AG, et al.*, No. 2:10-cv-00382 RGK (PJWx), on February 16, 2010 in the
15 U.S. District Court for the Central District of California; (3) MPEG LA's Motion to
16 Dismiss Nero's Section 2 Counterclaim, filed in *MPEG LA, L.L.C. v. Nero AG, et al.*, No.
17 2:10-cv-00382 RGK (PJWx) on March 17, 2010; (4) Order re: Plaintiff's Motion to
18 Remand, issued in *MPEG LA, L.L.C. v. Nero AG, et al.*, No. 2:10-cv-00382 RGK (PJWx)
19 on March 31, 2010. Under Federal Rule of Evidence 201, a court may take judicial
20 notice of court filings and others matters of public record. Fed. R. Evid. 201; *Reyn's*
21 *Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006). The request is
22 therefore **GRANTED**.

23 In conjunction with its opposition to MPEG LA's motion to dismiss, Nero asks the
24 Court to take judicial notice of the following documents: (1) Business Review Letter,
25 dated June 26, 1997, from Joel Klein on behalf of the U.S. Department of Justice
26 regarding MPEG LA; (2) The Antitrust Guidelines for the Licensing of Intellectual
27 Property Issued by the U.S. Department of Justice and the Federal Trade Commission;
28 (3) Business Review Letter, dated December 16, 1998, from Joel Klein on behalf of the

1 Department of Justice regarding a DVD patent pool. All three documents are publicly
2 available from the Department of Justice website and thus are capable of accurate and
3 ready determination by resort to sources whose accuracy cannot be reasonably be
4 questioned. Fed. R. Evid. 201(b).

5 The Complaint alleges and relies on the contents of the Business Review Letters
6 and the Court may therefore consider them. *See Branch v. Tunnell*, 14 F.3d 449, 453-54
7 (9th Cir. 1994), *overruled on separate grounds by Galbraith v. County of Santa Clara*,
8 307 F.3d 1119 (9th Cir. 2002); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir.
9 1998), *superseded by statute*. The request is therefore **GRANTED**.

10 **B. MOTION TO STRIKE**

11 In conjunction with its reply brief, MPEG LA submitted a copy of the hearing
12 transcript on a motion to compel in the separate lawsuit *MPEG LA, L.L.C. v. Alcatel*
13 *Lucent, et al.*, No. 3317-VCL, before Vice Chancellor Lamb in the Court of Chancery of
14 the State of Delaware on June 1, 2009. MPEG LA cited the transcript in its brief to
15 support its argument that Rubenstein's independence as an evaluator depends only on his
16 independence from potential licensors and not his independence from MPEG LA. MPEG
17 LA argued that Vice Chancellor Lamb recognized this point and found the argument that
18 Rubenstein was not independent from MPEG LA to be a red herring. *See Reply at 7:6-*
19 *11.*

20 Nero moves to strike any discussion of the transcript within the Reply Brief and
21 requests that the Court not consider the transcript as evidence or binding precedent when
22 ruling on the motion to dismiss. MPEG LA responds that the transcript of Vice
23 Chancellor Lamb's ruling is not offered as evidence of any fact, but is offered as legal
24 authority on a point of law. The Court has not considered whether Rubenstein is or is not
25 independent; the Court has not treated and would not have treated the transcript as
26 evidence on that point. Likewise, Vice Chancellor Lamb's ruling is not binding
27 precedent. Thus, to the extent that Nero requests that the Court not consider the
28 transcript as evidence or binding precedent when ruling on the motion to dismiss, the

1 motion is **GRANTED**. With respect to Nero's motion to strike any discussion of the
2 transcript within the Reply Brief, the Court does not find it improper for MPEG LA to
3 cite unpublished out-of-circuit decisions in its briefing. Therefore, the motion to strike
4 discussion of Vice Chancellor Lamb's decision within the brief is **DENIED**.

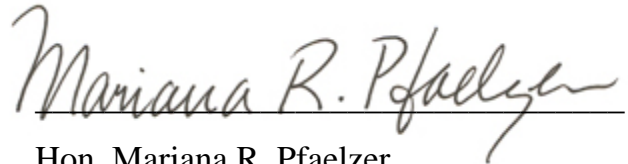
5 **V. CONCLUSION**

6 For the reasons set forth above, the Court **GRANTS** Defendant MPEG LA,
7 L.L.C.'s motion to dismiss without prejudice. The Court **GRANTS** the parties' Requests
8 for Judicial Notice. The Court **GRANTS in part** and **DENIES in part** Plaintiff Nero's
9 motion to strike.

10 Nero may file a First Amended Complaint on or before Monday October 4, 2010.

11
12 **IT IS SO ORDERED.**

13
14 DATED: September 14, 2010



15 Hon. Mariana R. Pfaelzer

16 United States District Judge
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