

# **EXHIBIT B**

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS**

CONTINENTAL AUTOMOTIVE SYSTEMS,  
INC.,

Plaintiff,

v.

AVANCI, LLC, et. al.,

Defendants.

Case No. 3:19-cv-02933-M

**DEFENDANTS' NOTICE OF MOTION  
AND MOTION TO DISMISS FIRST  
AMENDED COMPLAINT**

The Honorable Barbara M. Lynn

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** Defendants Avanci, LLC; Avanci Platform International  
3 Limited; Nokia Corporation; Nokia of America Corporation; Nokia Solutions and Networks US LLC;  
4 Nokia Solutions and Networks Oy; Nokia Technologies Oy; Conversant Wireless Licensing SARL;  
5 Optis UP Holdings, LLC; Optis Cellular Technology, LLC; Optis Wireless Technology, LLC; and  
6 Sharp Corporation (collectively, “Defendants”) will and hereby do move to dismiss Plaintiff  
7 Continental Automotive Systems, Inc.’s (“Continental”) First Amended Complaint (“Complaint”)  
8 filed in this matter.

9 Defendants bring this motion pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2),  
10 and 12(b)(6) on the following grounds:

11 1. Continental lacks Article III standing because it never sought a license, its allegations  
12 of injury are too speculative to satisfy Article III’s standing requirements, and it has not sufficiently  
13 alleged that any conduct engaged in by Defendants actually caused any actual or threatened injury to  
14 Continental ripe for adjudication or sufficient to satisfy the causation and prudential components of  
15 Article III standing.

16 2. Continental’s antitrust claims fail to state a claim under Rule 12(b)(6) because  
17 Continental fails to establish the following essential components of an antitrust claim: antitrust injury;  
18 an anticompetitive agreement or conspiracy; that Defendants have unlawfully acquired monopoly  
19 power; and a relevant market.

20 3. Continental’s promissory estoppel claim fails to state a claim under Rule 12(b)(6)  
21 because it is not available under French law and does not satisfy the requirements of U.S. law.

22 4. Continental’s declaratory judgment claim should be dismissed because it is duplicative.

23 5. Continental’s breach of contract claim should be dismissed for seeking an improper  
24 remedy.

25 6. Continental’s claim for violation of California Business & Professions Code Section  
26 17200 should be dismissed because Continental has not alleged that it has lost money or property as a  
27 result of the alleged unfair competition and therefore lacks UCL standing; because the antitrust claims  
28 should be dismissed; and because there are insufficient connections with California.

1           7.       If the Court dismisses Continental’s antitrust claims, it should also dismiss Defendants  
2 Nokia of America Corporation, Nokia Solutions and Networks US LLC, Nokia Technologies Oy, and  
3 Sharp Corporation for lack of personal jurisdiction.

4           8.       Continental’s breach of contract claim against Avanci fails because Avanci is not an  
5 SEP owner and did not make any FRAND commitments to any of the SSOs, so Avanci did not owe  
6 any contractual obligations which Continental can claim have been breached.

7           9.       The claims against the Optis Defendants should additionally be dismissed for lack of  
8 personal jurisdiction (state law claims), and because of a lack of a case or controversy because  
9 Continental entities declined to pursue license negotiations.

10           This motion is based upon this notice of motion, the accompanying statement of issues to be  
11 decided, the accompanying memorandum of points and authorities, the accompanying declarations,  
12 all pleadings and documents on file in this case, and on such other written and oral arguments as may  
13 be presented to the Court.

14 Dated: February 10, 2020

*/s/ Michael J. Newton*

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21           *[additional counsel for Defendants listed on memorandum signature page]*

**STATEMENT OF ISSUES TO BE DECIDED**

1  
2 1. Whether the Complaint should be dismissed in its entirety because Continental lacks  
3 Article III standing to assert the claims alleged in the Complaint?

4 2. Whether Continental’s antitrust claims should be dismissed under Rule 12(b)(6)  
5 because Continental fails to establish antitrust injury; an anticompetitive agreement or conspiracy;  
6 that Defendants have unlawfully acquired monopoly power; and a relevant market?

7 3. Whether Continental’s claim for promissory estoppel should be dismissed because  
8 that claim is not available under French law and does not satisfy U.S. law?

9 4. Whether the declaratory judgment claim is duplicative and should be dismissed?

10 5. Whether Continental’s breach of contract claim should be dismissed because it seeks  
11 an improper remedy?

12 6. Whether Continental’s claim for violation of California Business & Professions Code  
13 Section 17200 should be dismissed because Continental lacks UCL standing; because the antitrust  
14 claims should be dismissed; and because there is no connection to California?

15 7. Whether, if the antitrust claims are dismissed, this Court then lacks personal  
16 jurisdiction over Nokia Corporation, and the Optis Defendants such that the claims against those  
17 Defendants should be dismissed under Rule 12(b)(2)?

18 8. Whether Continental’s breach of contract claim against Avanci fails because it cannot  
19 be alleged that Avanci made any FRAND commitments to the relevant SSOs, such that it did not  
20 owe any contractual obligations which Continental can claim have been breached?

21 9. Whether there is a lack of a case or controversy between the Optis Defendants and  
22 Continental because Continental entities declined to pursue license negotiations?

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Continental's Amended Complaint ("Complaint") fails at the threshold for lack of Article III  
3 standing. Continental seeks advisory opinions from this Court relating to its negotiations with  
4 Defendants without plausibly alleging any ripe, actual, or imminent injury. Instead, Continental  
5 speculates that *if* Continental's OEM customers agreed to pay Defendants supra-FRAND royalties, it  
6 *might* have to indemnify its customers, regardless of the cost, and its customers *might* invoke the  
7 undefined indemnity obligation to pass along supra-FRAND royalties to Continental. While  
8 Continental has suggested that certain of its foreign affiliates may face formal indemnification  
9 demands based on their non-U.S. supply agreements, Continental does not allege that any OEM  
10 customer has actually paid a supra-FRAND royalty, nor that any customer has demanded that  
11 Continental US indemnify or reimburse it for any unfair and unreasonable royalties. Likewise, the  
12 Complaint contains no allegations that Defendants have threatened Continental with infringement  
13 litigation, an injunction proceeding, or other denial of access to patented technology. The speculative  
14 future harm upon which Continental predicates its Complaint does not constitute a ripe, concrete, and  
15 imminent injury sufficient to confer Article III standing.

16 Continental's claims fare no better on substance. Continental asserts antitrust claims against  
17 the Avanci patent licensing platform, but the law recognizes that patent licensing pools, like the Avanci  
18 platform, offer procompetitive benefits in the form of efficient, one-stop-shopping for patent licensees  
19 and do not restrain trade at all when they permit individual licensing by the patent pool members. The  
20 Avanci master licensing agreement (incorporated by reference in the Complaint) expressly allows  
21 licensing by individual patent owners and prohibits double royalties. Indeed, the Complaint itself  
22 admits that Continental has negotiated independently with the patent owners.

23 Continental's antitrust claims against the Standard Essential Patent ("SEP") holder Defendants  
24 also fail because they are based on the wholly implausible and conclusory assertion that every SEP  
25 holder lied to every standard setting organization ("SSO") for several decades, without any specific  
26 factual allegations to back this up. Such wild allegations do not come close to satisfying the pleading  
27 standard for fraud required by Rule 9(b). Continental also fails to allege any of the facts required to  
28 support its claims of (1) antitrust injury; (2) an antitrust conspiracy not to engage in individual



1 licensing;  
2 (3) monopolization or conspiracy to monopolize; or (4) an appropriate relevant market and market  
3 power. Despite mentioning the *FTC v. Qualcomm* several times in the Complaint, there are no  
4 allegations that this case is in any way factually analogous. The Complaint does not allege that any  
5 Defendant actually makes TCUs or competes with Continental in any market. The antitrust claims  
6 must be dismissed.

7 Continental's non-antitrust claims should suffer the same fate. Continental's claim for  
8 promissory estoppel is barred as a matter of French law, and in any event fails to satisfy U.S. law; its  
9 declaratory judgment claim is duplicative of its other claims and should be dismissed; its contract  
10 claim seeks an improper remedy; and its UCL claim fails because the Complaint does not allege any  
11 actionable loss of money or property to Continental itself.

12 Separately, several parties are entitled to dismissal on the following bases: (1) Continental's  
13 breach of contract and promissory estoppel claims against Avanci should be dismissed because, as  
14 Continental acknowledges, Avanci owns no patents and therefore could not have made any contractual  
15 commitments or promises to any SSO; and (2) the Optis Entities (Optis UP Holdings, LLC, Optis  
16 Cellular Technology, LLC and Optis Wireless Technology, LLC) should be dismissed because of the  
17 absence of a case or controversy.

18 **I. FACTS**

19 Several Defendants (Nokia entities, Conversant, certain of the Optis Entities, and Sharp) are  
20 among the owners of SEPs relating to wireless communication standards. FAC ¶¶ 86-97. To facilitate  
21 licensing, Defendant Avanci has a non-exclusive right to grant licenses to the collection of SEPs held  
22 by the other Defendants (and many other non-defendant members of the Avanci platform) to certain  
23 groups of potential licensees (*e.g.*, automotive OEMs). *Id.* ¶ 4. Avanci participants retain the right to  
24 license their patents separately to Avanci's potential licensees as well as to anyone else. Papendick  
25 Decl., Ex. A (the Master License Management Agreement ["Avanci Agreement"]).<sup>1</sup> Continental is a

26

27 <sup>1</sup> The Court may consider this agreement on a Rule 12 Motion under the incorporation by reference  
28 doctrine because the Complaint refers to the document and it is central to Continental's claims. *Marder*  
*v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006); [Lohmann v. JPMorgan Chase Bank, No. MO:15-CV-110-DAE, 2016 U.S. Dist. LEXIS 17451, at \\*11 \(W.D. Tex. Feb. 12, 2016\)](#).

1 U.S. supplier of automotive components, including telematics control units (TCUs), to automobile  
2 manufacturers (OEMs). FAC ¶¶ 1, 3. Continental is an indirect subsidiary of Continental AG, a  
3 German company. *Id.* ¶ 17.

4 Continental alleges that it sought to license SEPs necessary for its TCUs from Avanci, but was  
5 unwilling to pay Avanci's stated royalty. *Id.* ¶¶ 8-9. Continental also claims that Avanci allegedly only  
6 licenses at the OEM level and that Avanci members agreed not to engage in individual license  
7 negotiations with component suppliers. *Id.* ¶¶ 141, 149-50. Dissatisfied with Avanci's offer to  
8 negotiate, Continental admits it sought licenses directly from certain Avanci members. *Id.* ¶¶ 142-145.  
9 Continental allegedly contacted Nokia about an individual license, but no agreement was reached  
10 because Continental believed Nokia's royalty rates were too high. *Id.* ¶ 142. Continental contacted  
11 Conversant but rejected Conversant's offer to license Continental at the same rate that Conversant  
12 offered others. *Id.* ¶ 143. Continental alleges it also contacted PanOptis and Sharp to negotiate  
13 individual licenses but reached no agreements. *Id.* ¶¶ 144, 145.

14 Continental brings claims for (1) breach of contract; (2) promissory estoppel;  
15 (3) declaratory judgment; (4) violation of Section 1 of the Sherman Act; (5) monopolization under  
16 Section 2 of the Sherman Act; (6) conspiracy to monopolize under Section 2 of the Sherman Act; and  
17 (7) violation of California's Unfair Competition Law. Continental does not seek any damages, but  
18 rather seeks declaratory and injunctive relief. *See id.* at Prayer.

19 **II. LEGAL STANDARDS**

20 Generally, a plaintiff bears the burden of demonstrating that it has alleged sufficient facts to  
21 establish subject matter jurisdiction, personal jurisdiction over all Defendants, and that it has stated a  
22 plausible claim for relief. [Johnson v. United States, 502 F. App'x 412, 414-15 \(5th Cir. 2012\)](#); [Shaikh](#)  
23 [v. Tex. A&M Univ. Coll. of Med., 739 F. App'x 215, 218 \(5th Cir. 2018\)](#) (subject matter jurisdiction);  
24 [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 \(2007\)](#) (a claim for relief must be plausible). Though  
25 courts generally look to the complaint's allegations to evaluate whether these requirements have been  
26 met, the court may look beyond the pleadings to assess a motion to dismiss for lack of subject matter  
27 or personal jurisdiction. [Johnson, 502 F. App'x at 414](#); [Shaikh, 739 F. App'x at 218](#).

28 **III. THE COMPLAINT SHOULD BE DISMISSED IN ITS ENTIRETY BECAUSE**  
**CONTINENTAL LACKS ARTICLE III STANDING.**

1 To demonstrate Article III standing, Continental must allege facts sufficient to show that it  
 2 suffered (1) a constitutionally cognizable and non-hypothetical injury-in-fact, (2) that Defendants  
 3 caused. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Article III’s standing requirements  
 4 apply equally to injunctive and declaratory relief claims. *Summers v. Earth Island Inst.*, 555 U.S. 488,  
 5 493 (2009). Here, Continental faces an insurmountable obstacle: Continental is not directly or  
 6 imminently threatened with any concrete injury from Defendants’ alleged behavior. Instead,  
 7 Continental improperly speculates that its non-party OEM customers potentially might suffer injuries,  
 8 which those customers might then attempt to pass on to Continental through hypothetical contractual  
 9 indemnity claims. Such remote and speculative allegations are not ripe and cannot establish standing  
 10 under Article III, and this Court must dismiss this action for lack of subject matter jurisdiction.

11 **A. Continental Has Not Alleged that It Has Suffered a Non-Speculative Injury-in-**  
 12 **Fact or that Any Threatened Injury Is Imminent and Ripe for Adjudication.**

13 Continental seeks a declaratory adjudication of FRAND terms and an injunction preventing  
 14 Defendants from seeking “royalties from Continental *and its customers* that are not consistent with  
 15 Defendants’ FRAND obligations.” FAC Prayer at H & I (emphasis added). Notably, however, the  
 16 Complaint does not allege that any Defendants are seeking royalties (much less “elevated” non-  
 17 FRAND royalties) from Continental itself. *Id.* ¶¶ 8, 154.<sup>2</sup> Instead, Continental alleges that Defendants  
 18 will seek royalties only from non-party OEM customers of Continental or its affiliates, and it  
 19 speculates those royalties might be inflated to unfair or unreasonable levels. Continental’s wholly  
 20 speculative future injury is then one step further removed: any such OEM that might ultimately agree  
 21 to pay unfair and unreasonable royalties, might then hypothetically seek indemnification from  
 22 Continental, including for the allegedly unfair or unreasonable portion of those royalties. *Id.* ¶¶ 11,  
 23 157. Such a claim, however, is not ripe because it “will depend on facts not yet in existence.” *New*  
 24 *Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 587-88 (5th Cir. 1987) (“A court  
 25 should dismiss a case for lack of ‘ripeness’ when the case is abstract or hypothetical.”). *Courts in the*

26 <sup>2</sup> Indeed, the Optis Entities have never sued or threatened to sue Continental’s known customers for  
 27 patent infringement. Warren Decl., Dkt. 102-6 ¶ 4. The Nokia entities have never dealt with  
 28 Continental (the U.S. entity here), and the European Continental entities with which Nokia has dealt  
 have never requested a license—they have only requested to pay for past use—and they have asserted  
 that they only practice the CDMA2000 standard, not any of the full 2G, 3G, or 4G standards asserted  
 in the Complaint. Holopainen Decl. ¶¶ 5, 15-16. The Continental U.S. entity simply has no standing.

1 [Fifth Circuit routinely hold that “indemnity disputes ordinarily are not ripe until the underlying](#)  
2 [obligation is determined.”](#) *W. Jefferson Props., LLC v. W. Jefferson Levee Dist.*, No. 10-2780, 2010  
3 [U.S. Dist. LEXIS 112924, at \\*7 \(E.D. La. Oct. 22, 2010\)](#) (“In the usual indemnity situation, the  
4 [indemnitor is liable to the indemnitee only after a judgment has been entered against it, and until that](#)  
5 [has occurred, no responsibility exists.”\) \(citations omitted\);](#) *Colony Ins. Co. v. Adsil, Inc.*, No. 4:16-  
6 [CV-408, 2016 U.S. Dist. LEXIS 119485, at \\*11 \(S.D. Tex. Sep. 2, 2016\)](#) (“Texas recognizes the  
7 [‘longstanding rule that a\[n\] . . . indemnification clause does not accrue . . . until . . . judgment is entered](#)  
8 [against the indemnitee in the underlying lawsuit.’”\) \(citing](#) *SMBC Rail Servs. v. W. Petroleum Co.*,  
9 [No. 3:14-CV-03982-P, 2015 U.S. Dist. LEXIS 161242, at \\*8 \(N.D. Tex. June 17, 2015\)](#))).

10 [Nor are](#) such speculative and remote allegations of injury the type of “concrete” and  
11 “imminent” allegations of injury-in-fact sufficient to confer Article III standing. *Chapman v. Pier 1*  
12 *Imports (U.S.) Inc.*, 631 F.3d 939, 951-52 (9th Cir. 2011). Injury-in-fact is simply not established  
13 where, as here, the harm alleged to the plaintiff “may or may not occur.” *See, e.g., Live Nation Merch.,*  
14 *Inc. v. Does*, No. 18-cv-2703-GPB, 2018 WL 6326321, at \*4 (S.D. Cal. Dec. 4, 2018); *see also*  
15 *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410 (2013) (rejecting “objectively reasonable likelihood”  
16 standard as “inconsistent with our requirement that ‘threatened injury must be certainly impending to  
17 constitute injury in fact’”). When a plaintiff’s alleged injury requires that “a litany of speculative  
18 events come about,” that harm “is too attenuated to constitute a qualifying injury in fact for standing.”  
19 *Stelmachers v. Verifone Sys.*, No. 5:14-cv-04912-EJD, 2016 WL 6835084, at \*3-4 (N.D. Cal. Dec. 17,  
20 2015); *see also Conservation Cong. v. United States Forest Serv.*, No. 2:16-cv-00864-MCE, 2018 WL  
21 2427640, at \*9 (E.D. Cal. May 30, 2018). “In *Clapper*, the Supreme Court held that respondents’  
22 reliance on a ‘highly attenuated chain of possibilities,’ involving a ‘highly speculative fear’ that a  
23 number of third-party actors would take certain actions, did not amount to the ‘certainly impending’  
24 injury required for Article III standing.” *Dugas v. Starwood Hotels & Resorts Worldwide, Inc.*, No.  
25 3:16-cv-00014 GPC, 2016 WL 6523428, at \*2 (S.D. Cal. Nov. 3, 2016) (citing *Clapper*, 133 S. Ct. at  
26 1148); [see \*In re Gee\*, 941 F.3d 153, 163-65 \(5th Cir. 2019\)](#).

27 The only way Continental alleges it *might* be injured by the allegedly “excessive royalties”  
28 which its OEM customers *might* agree to pay ([including as a result of German patent litigation not](#)

1 [involving Continental US](#)) is through the possibility that such OEMs *might* invoke contractual  
2 indemnification rights that *might* exist to recoup even excessive royalties from their Tier 1 suppliers,  
3 like Continental. *See* FAC ¶¶ 11, 12, 126, 135, 157, Prayer at H. Specifically, Continental alleges that  
4 OEMs “typically”—but not always—“demand indemnity of such licensing costs as a condition of  
5 purchasing any TCUs from Tier 1 suppliers.” *Id.* ¶ 11. But, fatally, Continental does not allege that a  
6 single OEM customer has ever signed a license covering the SEPs at issue with one of the Defendants,  
7 paid supra-FRAND royalties, invoked an indemnity clause against Continental, or taken the position  
8 that the indemnity was not limited to reasonable royalties, but required indemnification of even unfair  
9 and unreasonable royalties.

10         Rather than pleading any actual and concrete injury, Continental merely speculates that it  
11 might suffer future injury “*should Defendants succeed* in procuring a non-FRAND license from those  
12 OEM customers.” *Id.* ¶ 157 (emphasis added). Continental concedes that this injury is wholly  
13 speculative and uncertain—*i.e.*, that the royalties accepted by Continental’s OEM customers might be  
14 excessive and “*risk* being passed through to Tier 1 suppliers like Continental.” *Id.* ¶ 11 (emphasis  
15 added). Continental’s injury is thus based on the conjectural assertion that there is a “risk” of an  
16 unidentified third-party customer invoking an unidentified indemnity provision that might potentially  
17 expose Continental to “liability” to that third party. *Id.* Such a conjectural and hypothetical injury  
18 claim [might never occur—or might not occur as anticipated—and is thus](#) insufficient to plead injury-  
19 in-fact, even for injunctive relief. [See, e.g., \*SMBC Rail Servs.\*, 2015 U.S. Dist. LEXIS 161242, at \\*8](#)  
20 [\(dismissing declaratory judgment claim\). Because these issues require factual development, they are](#)  
21 [not yet fit for judicial resolution and are not ripe under Article III. \*New Orleans Pub. Serv.\*, 833 F.2d](#)  
22 [at 587-88; see also \*United Transp. v. Foster\*, 205 F.3d 851, 858 \(5th Cir. 2000\) \(finding pre-](#)  
23 [enforcement challenge to law premature as “conjecture and speculation” requiring chain of uncertain](#)  
24 [events to first occur\).](#)

25         Nor can Continental cure its lack of Article III standing by asserting the requested injunctive  
26 relief on behalf of its “customers.” *See id.* Prayer at H & I. Indeed, Continental’s Motion for Antisuit  
27 Injunction [sought](#) to enjoin a patent infringement lawsuit brought against a non-party OEM *customer*  
28 of certain non-party *European affiliates* of Continental. *See* Dkt. 32. But Continental lacks standing to

1 assert claims on behalf of its non-party customers, much less its non-party affiliate’s non-party  
2 customers. *Pony v. Cty. of Los Angeles*, 433 F.3d 1138, 1146 (9th Cir. 2006) (“Generally, a plaintiff  
3 may only bring a claim on his own behalf, and may not raise claims based on the rights of another  
4 party.”).

5 Continental’s requests for declaratory relief (*see* FAC Prayer at A-G, J-L) must also be  
6 dismissed for lack of Article III standing. *See, e.g., Cepheid v. Roche Molecular Sys., Inc.*, No. C-12-  
7 4411 EMC, 2013 WL 184125, at \*13 (N.D. Cal. Jan. 17, 2013) (plaintiff lacked standing for  
8 declaratory relief because she could not demonstrate real or immediate threat of future injury).

9 **B. Continental Fails to Plead that Defendants’ Conduct Caused It Injury.**

10 Nor are there plausible allegations that Defendants’ conduct caused the remote and speculative  
11 injury Continental [anticipates in its pleadings](#). *See, e.g., MAI Sys. Corp. v. UIPS*, 856 F. Supp. 538,  
12 540 (N.D. Cal. 1994) (causation is one of Article III’s “three separate but interrelated components.”);  
13 [Ford v. Nylcare Health Plans of the Gulf Coast, Inc.](#), 301 F.3d 329, 333 (5th Cir. 2002). Instead,  
14 Continental’s potential injury, as alleged, is a result of independent decisions of Continental’s OEM  
15 customers—non-parties here—voluntarily to accept purportedly excessive royalties and then demand  
16 indemnification broad enough to cover unfair or unreasonable royalties, to which Continental alleges  
17 it might agree. *See, e.g.,* FAC ¶¶ 11, 105, 157. These independent actions of non-party  
18 intermediaries—and of Continental itself—break the causal chain from Defendants’ conduct and  
19 provide another reason why Article III standing does not exist.

20 **IV. THE ANTITRUST CLAIMS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM**

21 Continental’s antitrust claims (Counts IV-VI) should also be dismissed for four independent  
22 reasons: (1) Continental fails to allege facts to establish antitrust injury, a prerequisite to an antitrust  
23 claim; (2) Continental has not alleged an agreement or conspiracy that unreasonably restrains trade;  
24 (3) Continental has not alleged a monopoly or conspiracy to monopolize; and (4) Continental has not  
25 alleged any relevant market or monopoly power.

26 **A. Continental’s Antitrust Claims Should Be Dismissed Because Continental Lacks Antitrust Standing.**

27 Beyond Article III standing, the Complaint also fails to allege facts that meet “the more  
28 demanding standard for *antitrust* standing” under Section 16 of the Clayton Act. *Lucas Auto. Eng’g,*

1 *Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1232 (9th Cir. 1998). In the Fifth Circuit, antitrust  
 2 standing has three requirements: (1) injury in fact proximately caused by the defendants' conduct, (2)  
 3 antitrust injury, and (3) proper plaintiff status. *Waggoner v. Denbury Onshore, L.L.C.*, 612 F. App'x  
 4 734, 736 (5th Cir. 2015). Antitrust standing “is distinct from Article III standing,” for even though a  
 5 plaintiff may satisfy the constitutional requirement of injury in fact, it “is not necessarily a proper party  
 6 to bring a private antitrust action” because “[t]he antitrust laws do not provide a remedy to every party  
 7 injured by unlawful economic conduct.” *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051,  
 8 1054 n.3, 1055 (9th Cir. 1999); *see also Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th  
 9 Cir. 2001) (antitrust injury is “[t]he most important limitation” to standing for antitrust claims); *Hydril*  
 10 *Co., L.P. v. Grant Prideco, L.P.*, No. H-05-0337, 2007 U.S. Dist. LEXIS 44278, at \*19 (S.D. Tex.  
 11 June 19, 2007); see also Blue Shield of Va. v. McCready, 457 U.S. 465, 477 (1982).

12 Moreover, to establish antitrust standing, “[a] showing of antitrust injury is necessary, but not  
 13 always sufficient.” *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n. 5 (1986). Antitrust  
 14 injury requires a showing of (1) unlawful conduct; (2) causing an injury to the plaintiff; (3) that flows  
 15 from that which makes the conduct unlawful; and (4) that is of the type the antitrust laws were intended  
 16 to prevent. *Glen Holly Entm't, Inc. v. Tektronix, Inc.*, 352 F.3d 367, 372 (9th Cir. 2003). The Fifth  
 17 Circuit typically limits parties with antitrust injury to “competitors, purchasers, or consumers in the  
 18 relevant market.” *Waggoner*, Fed. App'x 612 at 737; *see also Jebaco, Inc. v. Harrah's Operating Co.*,  
 19 587 F.3d 314, 319 (5th Cir. 2009). “[A]ntitrust injury for standing purposes should be viewed from  
 20 the perspective of the plaintiff's position in the marketplace, not from the merits-related perspective  
 21 of the impact of defendant's conduct on overall competition.” *Ginzburg v. Mem'l Healthcare Sys.*, 993  
 22 F. Supp. 998, 1015 (S.D. Tex. 1997) (citation omitted). Continental cannot demonstrate antitrust  
 23 standing because its alleged injury is (1) too remote to be proximate, and (2) does not flow from  
 24 Defendants' alleged anticompetitive conduct.

25 First, as discussed above, if Defendants' conduct has any effect on Continental, it is merely an  
 26 indirect effect that is dependent on intervening events in which Defendants were not involved—*i.e.*,  
 27 Continental's independent decision to indemnify its OEM customers for any and all patent royalties  
 28 those customers independently choose to pay. This claimed injury “flow[s] merely from the [alleged]

1 misfortunes visited upon a third person” making it “too remote” to support standing for injunctive  
2 relief under the Clayton Act. *Meyer v. Qualcomm Inc.*, No. 08-cv-655 WQH, 2009 WL 539902, at \*6  
3 (S.D. Cal. Mar. 3, 2009); *Static Control Components, Inc. v. Lexmark Int’l, Inc.*, 697 F.3d 387, 406  
4 (6th Cir. 2012) (denying standing to supplier of components where OEM was more direct victim:  
5 “where there are more direct victims of the anticompetitive conduct, those victims have standing to  
6 sue, rather than those affected indirectly”); *Texas Carpenters Health Benefit Fund, IBEW-NECA v.*  
7 *Philip Morris, Inc.*, 21 F. Supp. 2d 664, 670 (E.D. Tex. 1998) (too indirect where plaintiffs voluntarily  
8 “undertook this [contractual] obligation”). If anything, Continental’s allegations show that the OEMs  
9 are first in line to suffer any injury, and that Continental’s own alleged injury is derivative of its  
10 customers’ injury rather than any direct relationship between Continental and Defendants. Thus, the  
11 proper party with antitrust standing to bring a private antitrust action would be the OEMs, not OEM  
12 suppliers like Continental. As a result, Continental cannot meet its burden to show that the requested  
13 “injunctive relief is necessary to prevent injury to *its* interests, rather than those of others” who more  
14 directly bear the alleged injury. *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459  
15 *U.S. 519, 540-45 & n.46 (1983) (holding those injured remotely or derivatively of others lack antitrust*  
16 *standing*); *Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1171  
17 (C.D. Cal. 2000) (emphasis added).

18 Second, Continental’s alleged injury is not “the type the antitrust laws were intended to  
19 prevent.” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Continental alleges  
20 that it must engage in “fierce bidding competitions” for contracts with OEM customers, and that such  
21 customers—not Defendants—could exercise “significant buyer power” to coerce Continental to  
22 capitulate to indemnification provisions. FAC ¶ 105. Thus, Continental’s purported harm—the pass  
23 through of the allegedly supra-FRAND royalties that might be agreed to by the OEMs in contractual  
24 indemnity provisions—does not flow from any alleged reduction in competition from Defendants’  
25 conduct, but rather from competition with Continental’s competitors for TCU sales, which cannot  
26 support a claim of antitrust injury. *See Orion Pictures Distrib. Corp. v. Syfy Enters.*, 829 F.2d 946,  
27 949 (9th Cir. 1987) (“[Plaintiff] has suffered a breach of contract, not an antitrust injury” where  
28 plaintiff complained prices established through intensive bidding were unreasonably high). Indeed,



1 any contractual indemnity obligations Continental agreed to are the product of Continental's  
2 independent business decision to accept such terms. No antitrust injury occurs in such a situation. *See*  
3 *Union Cosmetic Castle, Inc. v. Amorepacific Cosmetics USA, Inc.*, 454 F. Supp. 2d 62, 71 (E.D.N.Y.  
4 2006) (no antitrust injury where "the injury . . . appears to be largely the result of [plaintiffs'] own  
5 business decisions"); *CBC Cos. v. Equifax, Inc.*, 561 F.3d 569, 572-73 (6th Cir. 2009) (plaintiff's  
6 "fundamental frustration is with the price terms of [the agreement it entered], rather than specific  
7 anticompetitive behavior").

8 Nor is Continental a proper plaintiff here. The Fifth Circuit weighs: "(1) whether the plaintiff's  
9 injuries or their causal link to the defendant are speculative, (2) whether other parties have been more  
10 directly harmed, and (3) whether allowing this plaintiff to sue would risk multiple lawsuits, duplicative  
11 recoveries, or complex damage apportionment." *Norris v. Hearst Tr.*, 500 F.3d 454, 465 (5th Cir.  
12 2007). Because Continental's alleged injuries and links to Defendants are speculative, and if there is  
13 any injury at all, the OEMs would have been more directly harmed, thus allowing Continental to  
14 proceed would risk multiple lawsuits if OEMs did choose to sue. As such, Continental is not the proper  
15 plaintiff and lacks antitrust standing. See *Associated Gen. Contractors*, 459 U.S. 519, 540-45 & n.46.

16 Further, even if Continental could allege a non-speculative injury that it would pay supra-  
17 FRAND royalties itself as a result of Defendants' conduct, such a claim would still be based on  
18 Defendants' alleged breach of contract regarding FRAND obligations, not an antitrust violation. Thus,  
19 this theory would not be a source of an antitrust, as opposed to contractual, injury. *Vernon v. S. Cal.*  
20 *Edison Co.*, 955 F.2d 1361, 1368 (9th Cir. 1992); *Trendsettah United States v. Swisher Int'l, No.*  
21 SACV14-01664 JVS (DFMx), 2016 U.S. Dist. LEXIS 197906, at \*24-25 (C.D. Cal. Aug. 17, 2016).

22 **B. Continental's Section 1 Claim (Count IV) Must Also Be Dismissed Because**  
23 **Continental Fails to Allege Facts to Support an Actionable Agreement or an**  
24 **Unreasonable Restraint.**

25 Continental's Section 1 claim also fails to support a plausible inference of an agreement that  
26 unreasonably restrains trade. To establish a claim under Section 1 of the Sherman Act, a plaintiff must  
27 show: (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably  
28 restrained trade; and (3) did so in the relevant market. *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062  
(9th Cir. 2001); *Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 627 (5th Cir. 2002).

1 Continental’s Complaint has not met this test. Continental advances two unsupported theories  
2 regarding an agreement that unreasonably restrains trade: (1) that the Avanci Agreement itself is an  
3 unlawful agreement that restrains trade; and (2) that Defendants made some other, unspecified,  
4 agreement that restrains trade. Neither theory withstands scrutiny.

5 1. *The Avanci Agreement Cannot Create Antitrust Liability Because It Did Not*  
6 *Restrain Patent Owners from Independent Licensing.*

7 To the extent Continental contends that the Avanci Agreement itself forms the requisite  
8 “contract, combination, or conspiracy” for purposes of Section 1, this theory fails because “[c]ourts  
9 have repeatedly held that if the antitrust plaintiff had the opportunity to license independently from  
10 individual owners of . . . patent rights engaged in a pooled activity, then the pool of rights does not  
11 restrain trade in violation of the conspiracy provision of the Sherman Act.” *Sumitomo Mitsubishi*  
12 *Silicon Corp. v. MEMC Elec. Materials, Inc.*, No. 05-cv-2133 SBA, 2007 WL 2318903, at \*15 (N.D.  
13 Cal. Aug. 13, 2007) (collecting cases); *Matsushita Elec. Indus. Co., Ltd. v. Cinram Int’l, Inc.*, 299 F.  
14 Supp. 2d 370, 378-79 (D. Del. 2004) (no restraint of trade when plaintiff “realistically could avail  
15 itself of individual licenses to [the essential patents]”) (“*Cinram*”); *Nero AG v. MPEG LA, L.L.C.*, No.  
16 10-cv-3672-MRP, 2010 WL 4878835, at \*4 (C.D. Cal. Nov. 24, 2010) (no restraint of trade where  
17 patent pool does not restrict individual licensing); *see also* DOJ Guidelines on Licensing Intellectual  
18 Property §§ 3.1, 4.1, 5.1, 5.5 (2017) (setting forth pro-competitive benefits of patent pools). [This](#)  
19 [principle is derived from the Supreme Court’s decision in \*Broadcast Music, Inc. v. Columbia\*](#)  
20 [Broadcasting System, Inc.](#), which reversed the *per se* condemnation of a blanket license to pooled  
21 copyrighted compositions where the “individual composers and authors [had not] agreed not to sell  
22 individually.” 441 U.S. 1, 24 (1979) (“*BMI*”); *Cinram*, 299 F. Supp. 2d at 376 (quoting *BMI*, 441 U.S.  
23 at 14). Following the Court’s guidance, the Second Circuit held on remand that the blanket license  
24 could not restrain trade because “the opportunity to acquire a pool of rights does not restrain trade if  
25 an alternative opportunity to acquire individual rights is fully available.” *CBS v. Am. Soc’y of*  
26 *Composers*, 620 F.2d 930, 935-36 (2d Cir. 1980); *Cinram*, 299 F. Supp. 2d at 376 (quoting *BMI*, 441  
27 U.S. at 14).

28 Continental makes the conclusory assertion that it did not have the opportunity to license  
independently because Defendants “expressly memorialized in a multilateral agreement” (the Avanci

1 Agreement) an unlawful refusal to individually license. FAC ¶ 129. But the Avanci Agreement says  
 2 the opposite—that patent owners in the Avanci platform have the absolute right to independently enter  
 3 into individual licensing agreements directly with any interested parties. *See* Ex. A, § 4.3. (“Each  
 4 Licensor retains the right to independently enter into licenses for their Essential Patents or any other  
 5 Patents with prospective licensees for any products.”).

6 Backtracking from its allegations of an outright prohibition on individual licensing,  
 7 Continental further asserts that “it is practically impossible for [Avanci] members to offer individual  
 8 licenses” “[b]ecause fully exhaustive individual licenses would subject Avanci to double-dipping and  
 9 exhaustion claims with respect to an Avanci Member’s separately-licensed SEPs.” FAC ¶ 129. Again,  
 10 Continental’s conclusory assertion is contradicted by the express language of the Avanci Agreement  
 11 which *prohibits* double royalty collections on the same patents through individual licensing:

12 It shall be the responsibility of each Licensor, and not of L[icense]  
 13 A[dmistrator], to resolve the effect of any overlapping license with the  
 14 Licensee; provided, however, that *each Licensor agrees that it will not*  
 15 *collect royalties under both* a pre-existing Patent license agreement and  
 a Licensing Program PLA for Patents that are licensed under such  
 Licensing Program PLA.

16 Ex. A, § 4.4 (emphasis added). Thus, the express terms of the Avanci Agreement preclude the “double-  
 17 dipping” restraint on individual licensing that Continental alleges. *Cf.* FAC ¶ 129. And Continental  
 18 fails to allege that any “double-dipping” has occurred or been threatened.

19 When the plain language of an incorporated agreement, like the Avanci Agreement, contradicts  
 20 the Complaint, the language of the incorporated document controls for purposes of a motion to dismiss.  
 21 *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988-98 (9th Cir. 2001); [Oatalys, Inc. v.](#)  
 22 [Mountain Med. Techs., Inc.](#), No. 3:14-CV-1784-L, 2015 WL 1401220, at \*5 (N.D. Tex. Mar. 27, 2015)  
 23 (“When a plaintiff’s allegations in a complaint directly contradict language in a contract that formed  
 24 the basis of the lawsuit, a court need not give credence to those allegations.”). As the Avanci  
 25 Agreement expressly permits participants to individually license their portfolios to any potential  
 26 licensee, Continental “has not plausibly alleged that [Defendants’ agreement] prevents it and other  
 27 potential licensees from negotiating individual licenses with any of the patentees.” *Nero*, 2010 WL  
 28 4878835, at \*4.

2. *Continental Fails to Plausibly Allege Facts Showing Any Agreements to*

*Restrain Trade Outside the Avanci Agreement.*

1  
2 Beyond the written Avanci Agreement, Continental also alleges “on information and belief” a  
3 conspiracy to refuse to negotiate with Continental and to agree to offer supra-FRAND rates and myriad  
4 other restraints.<sup>3</sup> The Supreme Court has made clear that to satisfy the “contract, combination, or  
5 conspiracy” prong of Section 1, a plaintiff cannot simply make bald allegations of agreement or  
6 conspiracy; rather, it must submit “allegations plausibly suggesting (not merely consistent with)  
7 agreement”—things like the “specific time, place, or person involved in the alleged conspiracies.”  
8 *Twombly*, 550 U.S. at 557, 565 n.10; *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008);  
9 [see also \*Vendever LLC v. Intermatic Mfg. Ltd.\*, No. 3:11-CV-201-B, 2011 WL 4346324, at \\*8 \(N.D.](#)  
10 [Tex. Sept. 16, 2011\)](#). As with any other Section 1 claim, pleading a “group boycott,” as Continental  
11 appears to state, requires a complaint to contain “enough factual matter (taken as true) to suggest that  
12 an agreement was made.” *Cascades Computer Innovation LLC v. RPX Corp.*, No. 12-cv-01143 YGR,  
13 2013 WL 316023, at \*7 (N.D. Cal. Jan. 24, 2013) (quoting *Twombly* and dismissing group boycott  
14 claim); [EuroTec Vertical Flight Sols., LLC v. Safran Helicopter Engines S.A.A.](#), No. 3:15-CV-3454-  
15 [S](#), 2019 WL 3503240, at \*15 (N.D. Tex. Aug. 1, 2019).

16 First, Continental baldly asserts that “Defendants collectively have agreed to refuse to directly  
17 license Continental,” and that “this concerted refusal to license was a necessary mechanism for  
18 achieving Avanci’s collective supra-FRAND royalties.” FAC ¶¶ 106, 113; *see also id.* ¶¶ 114, 128-  
19 129. In essence, Continental alleges that the parties agreed to one thing in the Avanci Agreement  
20 (independent licensing), but then made some side agreement contradicting the Avanci Agreement (no  
21 independent licensing). Even if there were facts that could support a plausible inference of such a side  
22 agreement, other contradictory allegations in the Complaint destroy any such inference. For example,  
23 Continental expressly alleges that Defendant Conversant did, in fact, offer an individual license of its

24 <sup>3</sup> Allegations “on information and belief at best would constitute surplusage” since the Federal Rules  
25 require all allegations be based on an informed belief after reasonable pre-suit investigation. *Delphix*  
26 *Corp. v. Actifio, Inc.*, No. 13-cv-4613 RS, 2014 WL 4628490, at \*2 (N.D. Cal. Mar. 19, 2014). When,  
27 like here, attorneys use the phrase “information and belief” selectively, it “undermines [Plaintiff]’s  
28 argument that the facts it has pleaded are sufficient to support a plausible inference of pre-suit  
knowledge.” *Id.* A plaintiff must “be willing to make those averments without caveat and/or with  
additional detail explaining the basis of its beliefs.” *Id.* [To the extent allegations are pled on  
information and belief because of lack of knowledge in the Defendants’ possession, the Complaint  
must state so specifically. U.S. ex. rel Doe v. Dow Chemical Co.](#), 343 F.3d 325, 330 (5th Cir. 2003).

1 SEPs to Continental. FAC ¶ 143 (“Conversant responded [to Continental] . . . that it was ‘offering a  
 2 FRAND license to its SEP portfolio to manufacturers of vehicles with cellular functionality,’ and *only*  
 3 *expressed a willingness to ‘make the same offer’* to Continental”) (emphasis added); *see also* FAC ¶  
 4 142 (alleging that Nokia offered to license its SEPs to Continental, but Continental was unwilling to  
 5 accept the royalty rates and other terms offered).

6 Second, Continental alleges in conclusory fashion that Defendants used Avanci’s licensing  
 7 platform to collusively engage in a wide variety of anticompetitive behavior but alleges no facts to  
 8 support these claims. FAC ¶¶ 175, 177, 178.<sup>4</sup> These bald conspiracy allegations fail to plead the  
 9 requisite “specific time, place, or person involved in the alleged conspiracies.” *See Frost v. LG*  
 10 *Electronics Inc.*, No. 16-cv-05206-BLF, 2018 WL 6256790, at \*5 (N.D. Cal. July 9, 2018); [Vendever](#),  
 11 [2011 WL 4346324, at \\*8](#); *see, e.g.*, FAC ¶ 113 (“At the heart of Defendants’ scheme was the collective  
 12 agreement among Avanci Members to not directly license upstream suppliers . . .”); *id.* ¶ 132  
 13 (“Continental is informed and believes, and thereupon alleges, that . . . there exists agreements or  
 14 understandings—tacit or express—among Defendants and their unnamed co-conspirators that they  
 15 would collectively offer royalty discounts, rebates, marketing support and/or other incentives”).  
 16 Without more, Continental’s mere “labels and conclusions” of an anticompetitive conspiracy cannot  
 17 satisfy the pleading standards for a Section 1 violation. *Twombly*, 550 U.S. at 555; *Kendall*, 518 F.3d  
 18 at 1047; *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1189 (9th Cir. 2015)  
 19 (applying *Twombly* to affirm dismissal of conclusory antitrust conspiracy allegations); [In re Online](#)  
 20 [Travel Co. \(OTC\) Hotel Booking Antitrust Litig.](#), 997 F. Supp. 2d 526, 538 (N.D. Tex. 2014).

21 **C. Continental’s Section 2 Claims (Counts V and VI) Must Be Dismissed Because the**  
 22 **Allegations Raise a Simple Breach of Contract Dispute.**

23 Continental’s Section 2 claims alleging monopolization and a conspiracy to monopolize must

24 <sup>4</sup> Continental’s allegations of tying and bundling SEPs with “unwanted technologies” and/or non-SEPs  
 25 is another diversionary tactic. These allegations are implausible because they are internally  
 26 inconsistent with Continental’s other allegations that (1) it does not know the scope or content of the  
 27 Avanci portfolio (FAC ¶ 115); and (2) the Avanci portfolio is available for a flat fee. *Id.* ¶ 112. As  
 28 such, even the alleged inclusion of unwanted or non-essential patents does not foreclose competition  
 for non-essential technologies nor increase the cost of a license to the pool. *U.S. Philips Corp. v. I.T.C.*,  
 424 F.3d 1179, 1189 (Fed. Cir. 2005) (unlike a product tying arrangement, a patent license “does not  
 obligate the licensee to do anything; it simply provides the licensee with a guarantee that it will not be  
 sued for engaging in conduct that would infringe the patent in question”).

1 also be dismissed. Continental’s monopolization claim founders on its inability to allege specific facts  
2 constituting exclusionary conduct, an essential element of any Section 2 claim. *Verizon Communic’s*  
3 *Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“The possession of monopoly  
4 power will not be found unlawful unless it is accompanied by an element of anticompetitive  
5 conduct.”). Here, Continental fails adequately to allege exclusionary conduct because (1) a pricing  
6 disagreement over a contractual royalty rate commitment is not exclusionary conduct; and (2)  
7 Continental offers no facts to support a claim that Defendants engaged in deceptive conduct before the  
8 SSOs. Moreover, Continental’s claim of a conspiracy to monopolize must be dismissed for the further  
9 reason that the Complaint does not allege facts plausibly supporting the existence of such a conspiracy  
10 to convey monopoly power upon any entity.

11 1. *Dissatisfaction with Offered Royalty Rates that Are Allegedly in Breach of*  
12 *Contract Does Not Constitute a Section 2 Claim.*

13 Patents provide legally protected and enforceable rights to an invention. *Illinois Tool Works*  
14 *Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006). Generally, antitrust law does not impose a duty on a patent  
15 owner to license its patent to others, nor does it constrain what the patent owner may charge for its  
16 patents. Continental claims that when patent owners declare their patents potentially essential to a  
17 SSO, they no longer have the unlimited right to exclude others from practicing their patent if they also  
18 undertake a commitment to offer a license on fair, reasonable, and non-discriminatory (FRAND)  
19 terms. FAC ¶ 5. Continental asserts that such a commitment is a contractual right enforceable by third-  
20 party beneficiaries in a court of law. *Id.* ¶¶ 151-158. As such, Continental’s own allegations complain  
21 of an alleged breach of contract, but it is axiomatic that “a claimed breach of contract by unreasonable  
22 conduct, standing alone, should not give rise to antitrust liability.” *Vernon*, 955 F.2d at 1368. If all that  
23 was required to expose a patent owner to treble damages under the antitrust laws was an allegation  
24 that a patent owner failed to comply with their contractual FRAND commitment, then any patent  
25 owner participating in a SSO could be subject to an antitrust suit by any dissatisfied implementer, even  
26 in the absence of exclusionary conduct. This is not the law, and Continental’s Section 2 claim should  
27 be dismissed. *See Rambus Inc. v. FTC*, 522 F.3d 456, 466 (D.C. Cir. 2008) (“[A]n otherwise lawful  
28 monopolist’s end-run around price constraints [in form of FRAND commitment], even when deceptive  
or fraudulent, does not alone present a harm to competition in the monopolized market.”). [Indeed, the](#)

1 Fifth Circuit has never found that an alleged breach of a FRAND commitment can give rise to antitrust  
2 liability. This Court should find that it is inappropriate to open the doors to sweeping antitrust liability  
3 for a claim that should be addressed through the third-party beneficiary breach of contract theory.<sup>5</sup>

4 2. *The Complaint Fails to Allege Any Deceptive Conduct with the Required*  
5 *Particularity to Support a Section 2 Claim.*

6 Even those courts outside the Circuit that have found potential Section 2 liability involving  
7 SSO conduct and a FRAND dispute have only held that such conduct may present a potential Section  
8 2 claim where a patent owner is found to have engaged in deceptive conduct by intentionally  
9 misrepresenting to the SSO its commitment to offer FRAND rates. *Broadcom Corp. v. Qualcomm*  
10 *Inc.*, 501 F.3d 297, 314 (3d Cir. 2007); *u-blox AG v. InterDigital, Inc.*, No. 3:19-cv-001 CAB, 2019  
11 WL 1574322, at \*3 (S.D. Cal. Apr. 11, 2019) (actionable anticompetitive conduct requires “a patent  
12 holder’s intentionally false promise to license essential proprietary technology on FRAND terms”).  
13 Under this theory, which the Fifth Circuit has not addressed, the Complaint must plausibly allege that  
14 a patent owner made an intentionally false promise to license essential proprietary technology on  
15 FRAND terms, and that the SSO relied on that promise in adopting the patented technology over  
16 available alternatives. *Apple Inc. v. Samsung Elecs. Co.*, No. 11-cv-01846-LHK, 2011 WL 4948567,  
17 at \*4 (N.D. Cal. Oct. 18, 2011). Moreover, because this claim is premised on fraud, Continental must  
18 plead facts “specific enough to give defendants notice of the particular misconduct which is alleged to  
19 constitute the fraud . . . so they can defend against the charge.” *Id.* This requires Continental to plead,  
20 at a minimum, the “who, what, when, where, and how of the misconduct charged.” *Vess v. Ciba-Geigy*  
21 *Corp.*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal citation omitted); *Berry v. Indianapolis Life Ins.*  
22 *Co.*, 600 F. Supp. 2d 805, 816 (N.D. Tex. 2009).

23 But Continental makes no allegations in its pleading, much less allegations sufficient to meet  
24 the more stringent Rule 9(b) standard, to support its assertion that the patent owner Defendants, or any

25 <sup>5</sup> See Makan Delrahim, “Don’t Stop Thinking About Tomorrow”: Promoting Innovation by Ensuring  
26 Market-Based Application of Antitrust to Intellectual Property, D.O.J. (June 6, 2019), at  
27 [https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-](https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-organisation-economic-com)  
28 [organisation-economic-com](https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-organisation-economic-com). Continental may cite the 12-year-old opinion in *Research in Motion Ltd.*  
*v. Motorola, Inc.*, 644 F. Supp. 2d 788 (N.D. Tex. 2008), but there Judge Fish gave the monopoly-  
power issue cursory treatment since it was only raised “obliquely in a footnote.” And, since 2008, it  
has become settled that a FRAND commitment is enforceable by third-party beneficiaries.

1 [of them](#), engaged in fraudulent conduct before the SSOs when making their respective FRAND  
2 declarations. Continental makes only the conclusory allegation, with no factual details, that  
3 “Defendant Licensors intentionally and falsely represented to the relevant SSOs, such as ETSI, ATIS  
4 and/or TIA that if elements of their proprietary technology were included in the cellular standards  
5 adopted into the standards, they would license such patents to any applicant.” FAC ¶ 182. These  
6 perfunctory allegations are insufficient under Rule 9(b). *See Apple*, 2011 WL 4948567, at \*4 (plaintiff  
7 had “not set forth facts establishing when these declarations were made and by whom, and for *which*  
8 *patents* these FRAND declarations were made”) (emphasis in original). The cellular standards and  
9 patent declarations are typically publicly available, and Continental offers no explanation why this  
10 information is lacking from its Complaint. *Avago Techs. Fiber Ip Sing. Pte v. IPtronics, Inc.*, No. C  
11 10-02863 EJD (PSG), 2012 U.S. Dist. LEXIS 151037, at \*7 (N.D. Cal. Oct. 19, 2012) (“[b]oth the  
12 industry standards and the patents-in-suit are publicly available yet IPtronics has not identified any  
13 standards from which the patents-in-suit were improperly withheld”).

14 In addition, Continental’s conclusory allegations of deceptive conduct do not differentiate  
15 between Defendants, which also necessitates dismissal. *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65  
16 (9th Cir. 2007) (“Rule 9(b) does not allow a complaint to merely lump multiple defendants together  
17 but requires plaintiffs to differentiate their allegations when suing more than one defendant and inform  
18 each defendant separately of the allegations surrounding his alleged participation in the fraud.”)  
19 (internal quotations omitted); [In re Urcarco Sec. Litig.](#), 148 F.R.D. 561, 569 (N.D. Tex. 1993), *aff’d*  
20 [sub nom. Melder v. Morris](#), 27 F.3d 1097 (5th Cir. 1994) (allegations “which lump all defendants  
21 together failing to segregate the alleged wrongdoing of one from those of another do not meet the  
22 requirements of Rule 9(b)”). Continental’s pleading failures are not mere formalities. By way of  
23 example, Defendants Conversant and the Optis Entities are not alleged even to have been in existence,  
24 much less actively participated in the SSO process, at the time the 2G, 3G, and 4G technology  
25 selections were made and standards adopted decades earlier. FAC ¶¶ 75-76, 102 (alleging only that  
26 they “either knew or should have known of the original transferees’ FRAND promises”). As another  
27 example, the Avanci Defendants do not hold patents and thus did not make any contractual  
28 commitments or promises to any SSOs. *Id.* ¶ 4. Absent specific factual allegations that each Defendant



1 made specific intentionally false statements to an SSO and that the SSO relied upon such statements  
2 in its standards development, there can be no actionable Section 2 claim under any Circuit's case law.  
3 *See Huawei Techs., Co v. Samsung Elecs. Co*, 340 F. Supp. 3d 934, 955 (N.D. Cal. 2018) (dismissing  
4 section 2 claim when defendant did not offer any evidence of fraudulent intent). Indeed, the blanket  
5 allegation that each Defendant intentionally misrepresented its FRAND intentions for every patent  
6 that Continental might hope to license underscores the implausibility of Continental's claims.

7 Finally, even if Continental could allege facts sufficient to satisfy Rule 9(b) as to each  
8 individual Defendant, it would still not have a Section 2 claim because Continental must also  
9 demonstrate that but for such deceptive conduct, other technologies would have been adopted into the  
10 standard. *Rambus*, 522 F.3d at 466. Continental does not even attempt to allege what alternatives to  
11 Defendants' patents existed prior to standardization that would have been selected for inclusion into  
12 the standards but for Defendants' alleged deception. Indeed, and as explained above, although  
13 Continental alleges that absent the FRAND promises, "the SSOs otherwise would not have agreed to  
14 adopt a cellular standard that would have given Defendant Licensors the power to effectively block  
15 companies from practicing the standards," FAC ¶ 183, Continental merely assumes, without factual  
16 allegations in support, that there were alternative technologies that the SSO could have adopted.

17 3. *The Complaint Fails to Allege Facts Establishing a Conspiracy to Monopolize.*

18 Continental's conspiracy to monopolize claim must also be dismissed for multiple reasons. A  
19 conspiracy to monopolize claim has four elements: (1) the existence of specific intent to monopolize;  
20 (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of  
21 the combination or conspiracy; and (4) an effect upon a substantial amount of interstate commerce. *N.*  
22 *Mississippi Commc'ns, Inc. v. Jones*, 792 F.2d 1330, 1335 (5th Cir. 1986). Continental has not pled  
23 any facts to support these elements, and instead alleges that each "Defendant Licensor" has a separate  
24 monopoly in each of the various technologies co-extensive with their SEPs (FAC ¶ 121), which each  
25 defendant independently achieved during the course of 2G, 3G and 4G standardization (i.e., years prior  
26 to Avanci's formation). *Id.* Post-standardization, according to the Complaint, there would be no  
27 competition among these different technology market monopolies to eliminate. Nevertheless,  
28 Continental implausibly claims that the Defendant Licensors conspired to eliminate "competition"

1 between and amongst themselves in so-called “licensing market(s)” for their SEP portfolios (which,  
2 again, by Continental’s own allegations do not compete with one another). *Id.* ¶ 127. As such, Plaintiff  
3 claims that Avanci was a mechanism that each Defendant Licensor used “to exploit the monopoly  
4 power that each co-conspirator SEP holder initially obtained from standardization of its proprietary  
5 technologies” to obtain higher rates from licensing their separate SEP portfolios. *Id.* ¶ 192. This makes  
6 no legal or economic sense.

7       Moreover, for the reasons stated above with respect to Continental’s Section 1 claim, this claim  
8 must be dismissed for failure to allege a plausible conspiracy not to individually license under  
9 *Twombly*. And even if a plausible conspiracy was alleged, it would not constitute a conspiracy to  
10 monopolize because there is no allegation that a single entity would gain monopoly power. Instead,  
11 the conspiracy alleged amounts to a mere “shared monopoly” theory that is not actionable under  
12 Section 2. Even if “two or more competitors conspire to create a market environment in which  
13 competition . . . is improperly restricted,” there can be no conspiracy to monopolize claim under  
14 Section 2 if the market power “continues to be shared among these otherwise unrelated entities.” *Sun*  
15 *Dun, Inc. v. Coca-Cola Co.*, 740 F. Supp. 381, 391-92 (D. Md. 1990); *see also H.L. Hayden Co. v.*  
16 *Siemens Med. Sys., Inc.*, 672 F. Supp. 724, 741-42 (S.D.N.Y. 1987) (“The notion that two *competitors*  
17 could conspire to monopolize is, seemingly, antithetical.”) (emphasis in original). Rather, a Section 2  
18 conspiracy to monopolize theory requires that the competitors must conspire to create a “single entity  
19 to possess the illegal market power.” *Sun Dun, Inc.*, 740 F. Supp. 391-92; *see also Harkins Amusement*  
20 *Enterps., Inc. v. Gen. Cinema Corp.*, 850 F.2d 477, 491-92 (9th Cir. 1988) (rejecting shared monopoly  
21 claim); *Standfacts Credit Servs, Inc. v. Experian Info. Sol., Inc.*, 405 F. Supp. 2d 1141, 1152 (C.D.  
22 Cal. 2005) (“Since section 2 prohibits only monopolization by a single entity, as opposed to shared  
23 monopolization, . . . an allegation of conspiracy to create a shared monopoly does not plead a claim  
24 of conspiracy under section 2.”). To the extent that Continental means to allege that Avanci holds a  
25 monopoly on the “licensing markets,” that allegation is implausible because Defendants have the  
26 absolute right to independently license their patents pursuant to the Avanci Agreement. Finally,  
27 Plaintiff fails to allege any overt acts in furtherance of the alleged conspiracy to monopolize. Plaintiff  
28 affirmatively alleges that each Defendant already enjoyed their “SEP monopoly” well before Avanci

1 was formed. For all of these reasons, the Complaint fails to state a claim for conspiracy to monopolize.

2 **D. Continental Fails to Allege a Relevant Antitrust Market in which Any Defendant**  
3 **Has Market Power.**

4 All of Continental’s Sherman Act claims also fail because Continental does not adequately  
5 allege any relevant market and the requisite degree of market power within any such relevant market.  
6 *Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 628 (5th Cir. 2002). Among other  
7 requirements for establishing a relevant market, the Fifth Circuit has held that “courts consider the  
8 extent to which the seller’s product is ‘interchangeable in use’ and the degree of ‘cross-elasticity of  
9 demand between the product itself and substitutes for it.” *Id.* at 626. As such, where a plaintiff  
10 “alleges a proposed relevant market that clearly does not encompass all interchangeable substitute  
11 products even when all factual inferences are granted in plaintiff’s favor, the relevant market is legally  
12 insufficient, and a motion to dismiss may be granted.” *Id.* at 628.<sup>6</sup>

13 1. *Technology Markets*

14 Continental purports to define the relevant “technology markets” as “all of the potential  
15 alternative technologies capable of performing each particular function within a 2G, 3G, or 4G  
16 standard.” FAC ¶ 120. But Continental does not identify with any specificity what these functions are,  
17 which patents (or products) are included, whether there are any economic substitutes, or any other  
18 factual underpinning as to the contours of these markets.

19 Continental’s failure to identify any economic substitutes is fatal. *See Newcal Indus.*, 513 F.3d  
20 at 1045. “Economic substitutes have a ‘reasonable interchangeability of use’ or sufficient ‘cross-  
21 elasticity of demand’ with the relevant product.” *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120 (9th  
22 Cir. 2018) (internal citation omitted); *see also NSS Labs, Inc. v. Symantec Corp.*, No. 18-cv-5711 BLF,  
23 2019 WL 3804679, at \*9 (N.D. Cal. Aug. 13, 2019) (dismissing the complaint because Plaintiff “fails  
24 to identify the economic substitutes for the product markets” and fails to “plead any facts regarding  
25 the cross-elasticity of demand between the Relevant Product Markets and their substitutes.”); *Apani*,  
26 300 F.3d at 628. Because Continental never identifies the specific functions or SEPs that it claims

27 \_\_\_\_\_  
28 <sup>6</sup> *See also Jacobs v. Tempur-Pedic Intern., Inc.*, 626 F. 3d 1327, 1338 (11th Cir. 2010) (dismissing  
claims for failure to adequately define market; accepting “skimpy allegations” would “absolve  
[Plaintiff] of the responsibility under *Twombly* to plead facts ‘plausibly suggesting’ that market).

1 comprise the relevant technology markets, it does not even purport to define the “potential alternative  
2 technologies capable of performing each particular function within a 2G, 3G, or 4G standard.” FAC ¶  
3 120.

4 Continental also fails to allege that Defendants have “any power to exclude that exceeds the  
5 exclusionary power to which a patent holder is otherwise legally entitled.” *Townshend v. Rockwell*  
6 *Int’l Corp.*, No. C99-0400SBA, 2000 WL 433505, at \*12 (N.D. Cal. Mar. 28, 2000). Continental  
7 alleges that absent the FRAND promises, “the SSOs otherwise would not have agreed to adopt a  
8 cellular standard that would have given Defendant Licensors the power to effectively block companies  
9 from practicing the standards.” FAC ¶ 183. But that allegation assumes, without factual allegations in  
10 support, that there were alternative technologies that the SSOs could have adopted. Standardization  
11 can only confer market power when it forecloses other technologies that could have been adopted. *See*  
12 *Apple*, 2012 WL 1672493, at \*6 (distinguishing *Townshend* on grounds that “Apple has identified the  
13 alternative technologies in each of the relevant markets that could have been adopted had Samsung  
14 not made the allegedly false FRAND commitments”).

15 Continental *never* identifies what “the alternative technologies in each of the relevant markets”  
16 would have been but for Defendants’ allegedly false FRAND commitments. *Id.* Again, this failure is  
17 fatal. *Rambus*, 522 F.3d at 466-67 (rejecting FRAND antitrust claim because FTC did not allege that  
18 alternative technology would have been adopted but-for defendant’s deception, so the deception did  
19 not harm competition). In the SEP context, [there must be](#) allegations identifying a *specified* patent that  
20 purportedly creates market power and *specified* reasonable substitutes that were excluded. *Apple*, 2012  
21 WL 1672493, at \*6; *cf.* Dkt. 381 at ¶ 99 (counterclaim allegations). Such factual allegations are  
22 necessary given Supreme Court precedent that patents do not create a presumption of market power.  
23 *Ill. Tool*, 547 U.S. at 46.<sup>7</sup> Here, Continental’s conclusory allegations that *all* SEPs for *all* standards

24 \_\_\_\_\_  
25 <sup>7</sup> The Court should also reject the bare allegation that holding an SEP creates market power: “the  
26 power to effectively block companies from practicing the standards.” FAC ¶ 183. Continental has not  
27 identified any patents whatsoever, much less patents it claims are valid and essential. As this Court  
28 has recognized, unless a patent is valid and essential there are likely no “antitrust implications” to the  
licensing dispute because “the ‘lock-in’ effect of the standard setting does not exist.” *Apple Inc. v.*  
*Samsung Elecs. Co.*, No. 11-cv-01846-LHK, 2011 WL 4948567, at \*4 n.6 (N.D. Cal. Oct. 18, 2011).  
Indeed, per Continental’s allegations, because the FRAND commitments to SSOs are contractually  
enforceable, an SEP owner necessarily has no market power. *See Fed. Trade Comm’n v. Qualcomm*

1 and *all* SSOs at issue had substitutes before adoption of the standards fail to comply with these  
2 minimum pleading requirements.<sup>8</sup>

### 3 2. *Licensing Markets*

4 Continental also alleges a novel “market for the licensing of 2G, 3G, and 4G cellular SEPs.”  
5 FAC ¶¶ 127, 134. According to Continental, “[i]n a competitive SEP licensing market . . . the terms,  
6 including the price, on which one large SEP holder would offer to license its cellular SEPs would  
7 competitively discipline the terms that could be offered by other SEP holders.” *Id.* ¶ 127. But, a market  
8 is defined by products, not consumers; here, SEP licenses, not potential licensees. *See Newcal*, 513  
9 F.3d at 1044. Nokia licenses Nokia’s SEPs; Conversant licenses Conversant’s SEPs; Optis licenses  
10 Optis’s SEPs; Sharp licenses Sharp’s SEPs. Continental’s theory that the SEP holders are in  
11 competition with each other makes no economic sense (and conflicts with the other allegations in the  
12 Complaint that each SEP holder has a separate monopoly)—SEPs are by definition complements, not  
13 substitutes. Prospective licensees cannot pick and choose between licenses to different SEP portfolios;  
14 they need to secure rights to each SEP portfolio. There is no allegation, nor could there be, that an  
15 extra license to Nokia’s SEPs would eliminate the need to also have a license to Conversant’s (or  
16 anyone else’s) SEPs. Continental’s novel “licensing market” allegations fail because they do not  
17 identify any patents that actually compete with each other in that claimed market.

### 18 3. *Baseband Processor Market*

19 Finally, Continental alleges antitrust “markets for baseband processors that implement the 2G,  
20 3G, 4G, and/or eCall functionalities and standards,” FAC ¶ 131, but it does not allege that any  
21

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22 *Inc.*, No. 17-cv-00220-LHK, 2019 WL 2206013, at \*26 (N.D. Cal. May 21, 2019) (discussing how  
23 FRAND litigation or arbitration prevents unreasonably high royalty rates).

24 <sup>8</sup> And to the extent any of these technology markets relate to foreign patents, the antitrust laws do not  
25 apply under the Foreign Trade Antitrust Improvement Act (FTAIA). 15 U.S.C. § 6a. The FTAIA  
26 “initially lays down a general rule placing all (nonimport) activity involving foreign commerce outside  
27 the Sherman Act’s reach. It then brings such conduct back within the Sherman Act’s reach provided  
28 that the conduct both (1) sufficiently affects American commerce, *i.e.*, it has a ‘direct, substantial, and  
reasonably foreseeable effect’ on American domestic, import, or (certain) export commerce; and (2)  
has an effect of a kind that antitrust law considers harmful, *i.e.*, the ‘effect’ must ‘giv[e] rise to a  
[Sherman Act] claim.’” *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 162 (2004); *see*  
*Lotes Co., Ltd. v. Hon Hai Precision Indus. Co., Ltd.*, 753 F.3d 395, 415 (2d Cir. 2014) (applying  
FTAIA to dismiss FRAND antitrust claims relating to foreign standard setting).

1 Defendants participate in that market. Continental cannot establish that Defendants possess market  
2 power in a market in which they do not participate. *Trinko*, 540 U.S. at 407; *see also Newcal*, 513 F.3d  
3 at 1044 n.3. In *Newcal*, the court affirmed the rejection of two antitrust markets for which the plaintiff  
4 had not alleged market power. *Id.* at 1046; [see also \*Apani\*, 300 F.3d at 628](#). Here, *a fortiori*, the Court  
5 should reject the baseband processor market as the basis for Continental’s antitrust claims because  
6 there is no allegation that Defendants even *participate* in that market. Because Continental defines no  
7 relevant product market with the specificity necessary to assert an antitrust claim, and in any event  
8 fails to allege the requisite market power in any such market by Defendants, both its Section 1 and  
9 Section 2 antitrust claims must be dismissed.

10 **V. CONTINENTAL’S ADDITIONAL CLAIMS SHOULD BE DISMISSED.**

11 **A. Continental Has Not Pled a Promissory Estoppel Claim.**

12 [For state-law claims, transferor choice-of-law analysis applies, and under California choice-](#)  
13 [of-law rules](#), French law governs ETSI commitments. *See Apple*, 2012 WL 1672493, at \*10. However,  
14 “[p]romissory estoppel is not traditionally recognized under French law.” *Id.*; *see also u-blox*, 2019  
15 WL 1574322, at \*2 (same). As a result, Continental’s promissory estoppel claim regarding any  
16 commitments made to ETSI under French law fails as a matter of law.

17 To the extent that Continental advances a promissory estoppel claim based on commitments  
18 made to U.S. organizations (ATIS and TIA), that claim also fails. Promissory estoppel requires a clear  
19 and unambiguous promise. *Boon Rawd Trading Int’l Co., Ltd. v. Paleewong Trading Co., Inc.*, 688 F.  
20 Supp. 2d 940, 953 (N.D. Cal. 2010). Continental does not allege that any Defendant made a clear and  
21 unambiguous promise because any promises to “provide licenses on FRAND terms were at best  
22 promises to negotiate the terms of such patent licenses” with Continental, and such a general promise  
23 without any specific terms “does not create an enforceable promise on which a promissory estoppel  
24 claim could lie.” *Haier Am. Trading, LLC v. Samsung Elecs., Co.*, No. 1:17-cv-921 TJM, 2018 WL  
25 4288617, at \*17 (N.D.N.Y. Sept. 7, 2018); *Cortez v. Mortg. Elec. Registration Sys., Inc.*, No. 3:11-cv-  
26 00872-RCJ, 2012 WL 1744449, at \*3 (D. Nev. May 11, 2012) (finding that “Plaintiffs have not  
27 sufficiently stated a promissory estoppel claim” because “they allege only a promise to negotiate”).  
28 Further, Continental does not, and cannot, allege that Avanci made any commitments to SSOs because

1 it was not a patent owner, so there can be no promissory estoppel claim against Avanci. [FAC ¶ 4.](#)

2 **B. The Declaratory Judgment Claims Are Duplicative and Not Ripe.**

3 Continental’s declaratory judgment claim is nearly identical to its breach of contract claim.  
4 FAC ¶¶ 167-169. In fact, the basis of Continental’s request that this Court declare a FRAND rate is  
5 that “Defendants are contractually obligated to license” their SEPs on FRAND terms. *Id.* ¶ 168.  
6 “Declaratory relief should be denied when it will neither serve a useful purpose in clarifying and  
7 settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty  
8 and controversy faced by the parties.” *United States v. Washington*, 759 F.2d 1353, 1356-57 (9th Cir.  
9 1985). As has [been](#) held, when a breach of contract claim provides a plaintiff with an adequate legal  
10 remedy, “dismissal of the claim for declaratory relief related to breach of contract is proper.” *Reyes v.*  
11 *Nationstar Mortg. LLC*, No. 15-cv-01109-LHK, 2015 WL 4554377, at \*8 (N.D. Cal. July 28, 2015);  
12 *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823 JLR, 2011 WL 11480223, at \*6 (W.D. Wash. June  
13 1, 2011) (dismissing duplicative declaratory judgment claim in a RAND case); [Xtria LLC v. Tracking](#)  
14 [Sys., Inc.](#), No. 3:07-CV-0160-D, 2007 WL 1791252, at \*3 (N.D. Tex. June 21, 2007) (“This court has  
15 [dismissed declaratory judgment actions where the core issues of the controversy concerned whether](#)  
16 [the parties entered into enforceable contracts and, if so, whether defendants breached the contracts.”\)](#)  
17 [\(internal quotations omitted\).](#)

18 Also, “[w]hen there are proposed or ongoing license negotiations, a litigation controversy  
19 normally does not arise until the negotiations have broken down.” *Phillips Plastics Corp. v. Kato*  
20 *Hatsujou Kabushiki Kaisha*, 57 F.3d 1051, 1053 (Fed. Cir. 1995) *abrogated on other grounds by*  
21 *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (finding no actual controversy where  
22 licensing negotiations ongoing). For both reasons, the declaratory judgment claim must be dismissed.

23 **C. The Breach of Contract Claim Fails to Establish a Claim to Specific Performance**  
24 **[as a Remedy.](#)<sup>9</sup>**

25 Continental’s breach of contract claim raises only the conclusory allegation that it has “been

26 \_\_\_\_\_  
27 <sup>9</sup> The Optis Defendants [do not join this section and respectfully submit that because this Court does](#)  
28 [not sit in diversity jurisdiction, it is a court of limited jurisdiction and therefore should not reach issues](#)  
[of FRAND licensing of worldwide patent rights. This would be in contrast to a situation where the](#)  
[Court has both federal question original jurisdiction \(e.g., due to a claim of patent infringement\) and](#)  
[diversity jurisdiction \(such that it may act as a court of general jurisdiction on state law claims\).](#)

1 injured in its business or property,” including through “the imposition of non-FRAND terms and  
2 conditions” by indemnity. FAC ¶ 157. As a result, the Complaint requests “(1) that this Court order  
3 Defendants to offer a license on FRAND terms and conditions to Continental, and (2) an adjudication  
4 of the FRAND terms and conditions for such a license.” *Id.* ¶ 158. Continental has not alleged any  
5 facts in support of this claim for specific performance under whatever unidentified contract it is  
6 seeking to enforce (and under whatever law it seeks to apply). *E.g.*, *Osborn ex rel. Osborn v. Kemp*,  
7 991 A.2d 1153, 1161 (Del. 2010) (“We will order specific performance only if a party is ready, willing,  
8 and able to perform under the terms of the agreement.”). Nor has Continental established that the Court  
9 has the ability to dictate specific “FRAND terms and conditions” where a wide variety of terms and  
10 conditions can be fair, reasonable, and non-discriminatory. *Microsoft Corp. v. Motorola, Inc.*, 795  
11 F.3d 1024, 1033 (9th Cir. 2015) (describing Judge Robart’s determination of “RAND rate and range”  
12 for jury to compare against licensing offers to adjudicate breach of RAND claim).

13 Further, Continental cannot overcome the fact that this Court does not have jurisdiction to  
14 dictate terms and conditions of a license where many of the patents at issue are granted by foreign  
15 jurisdictions. *E.g.*, *Lotes Co. v. Hon Hai Precision Indus. Co.*, No. C 11-01036 JSW, 2011 WL  
16 13152817, at \*4 (N.D. Cal. July 14, 2011) (declining jurisdiction over foreign patent claims); *Voda v.*  
17 *Cordis Corp.*, 476 F.3d 887, 902 (Fed. Cir. 2007) (holding that adjudication of “foreign patent  
18 infringement claims should be left to the sovereigns that create the property rights in the first  
19 instance”); [Optis Wireless Tech., LLC v. Huawei Techs. Co., No. 217CV00123JRGRSP, 2018 WL](#)  
20 [3375192, at \\*8 \(E.D. Tex. July 11, 2018\) \(finding that under the Declaratory Judgment Act, foreign](#)  
21 [patent claims “should be dismissed for the reasons explained in \*Voda\*, even if jurisdiction could be](#)  
22 [exercised”\).](#)<sup>10</sup> Finally, Continental alleges that it has practiced the standard and sold products  
23 incorporating the standardized technology to its customers unimpeded—free from threats of exclusion  
24 or infringement litigation—so its failure to secure a license has not caused it any harm. *See* Section  
25 III, *supra*. If Continental is ever harmed, it can claim damages. *See* Witkin, Cal. Proc. (5th ed.2008)  
26 Pleading, § 785, p. 203-204 (no specific performance where plaintiff has adequate remedy at law).

27 \_\_\_\_\_  
28 <sup>10</sup> [Conversant, speaking only for itself, takes the position that where a court otherwise has jurisdiction over the parties and subject matter \(e.g. in the context of an infringement action\), it could declare the terms of a global FRAND license as a remedy.](#)



1           **D.     The UCL Claim Should Be Dismissed for Multiple Reasons.**

2           First, Continental’s claim for a violation of California’s Unfair Competition Law should be  
 3 dismissed because it has not alleged that it has “has lost money or property as a result of the unfair  
 4 competition,” which it must allege in order to have UCL standing. Cal. Bus. Prof. Code § 17204. A  
 5 claim for violation of the UCL cannot be maintained absent such alleged injury. *See Walker v. Geico*  
 6 *Gen. Ins. Co.*, 558 F.3d 1025, 1027 (9th Cir. 2009) (affirming dismissal of UCL claim because a  
 7 plaintiff must allege lost money or property). Second, Continental is a non-California plaintiff alleging  
 8 non-California conduct, and thus cannot assert any claims under the UCL. *Norwest Mortg., Inc. v.*  
 9 *Superior Court*, 85 Cal. Rptr. 2d 18, 23-24 (Cal. App. 1999) (non-California resident cannot state a  
 10 claim under the UCL where none of the alleged misconduct or injuries occurred in California). Third,  
 11 because a UCL claim must be based on a predicate claim, it should be dismissed if the Court dismisses  
 12 Continental’s antitrust claims. *Apple*, 2011 WL 4948567, at \*8-9.

13 **VI.   CERTAIN DEFENDANTS AND CLAIMS SHOULD BE DISMISSED FOR**  
 14 **ADDITIONAL REASONS.**

15           In addition to the reasons stated above for dismissing all the claims in the case, there are  
 16 numerous other deficiencies with the Complaint that apply to specific Defendants. First, if the Court  
 17 dismisses the antitrust claims, then personal jurisdiction and venue are not proper over a number of  
 18 the Defendants. Second, [because Avanci was not a patent owner, there is no basis to assert a breach of](#)  
 19 [contract claim against it as it is not alleged to have made any FRAND promises to any SSO.](#) Third,  
 20 additional reasons exist to dismiss the Optis Defendants.

21           **A.     Personal Jurisdiction Will Be Lacking Over Some Defendants If the Antitrust**  
 22 **Claims Are Dismissed**

23           If the Court dismisses the antitrust claims, the Court should also dismiss the following  
 24 Defendants [for lack of personal jurisdiction](#) because they have no alleged connection to Texas: Nokia  
 25 of America Corporation, Nokia Solutions and Networks US LLC, Nokia Technologies Oy, and Sharp  
 Corporation (the “non-Texas Defendants”).

26           First, none of these Defendants are subject to general jurisdiction in [Texas](#) because none are  
 27 incorporated in [Texas](#), nor do they have a principal place of business in [Texas](#). *Williams v. Yamaha*  
 28 *Motor Co.*, 851 F.3d 1015, 1020-22 (9th Cir. 2017); FAC ¶¶ 20-56; *See Holopainen & Schmidt Decs.*  
 (Nokia); Burt Decl. ¶ 4 (Conversant SARL).

1 Second, specific jurisdiction is similarly lacking because Continental does not allege that the  
 2 non-[Texas](#) Defendants purposefully availed themselves of [Texas's](#) jurisdiction as it relates to this case.  
 3 *Doe v. Unocal Corp.*, 248 F.3d 915, 924 (9th Cir. 2001); *see generally*, Holopainen Decl. The  
 4 Complaint improperly groups Defendant entities together, making assertions about licensing and  
 5 negotiations as to multiple entities at once. At best, the Complaint alleges that each Defendant engaged  
 6 in licensing activities, demands, and negotiations in California – not Texas. FAC ¶ 59. This boilerplate  
 7 pleading is both insufficient and false. *See Swartz*, 476 F.3d at 766 (stating that, for personal  
 8 jurisdiction, “mere ‘bare bones’ assertions of minimum contacts with the forum or legal conclusions  
 9 unsupported by specific factual allegations will not satisfy a plaintiff’s pleading burden”). It has been  
 10 recognized that non-exclusive license agreements with non-resident defendants are insufficient to create  
 11 personal jurisdiction. *Nanoexa Corp. v. Univ. of Chicago*, No. 10-cv-2631-LHK, 2010 WL 4236855, at  
 12 \*4-6 (N.D. Cal. Oct. 21, 2010). None of Continental’s allegations involve discussions or meetings that  
 13 occurred in [Texas](#). *See* FAC ¶¶ 119-150.

14 **A.B. Continental Has Not and Cannot Plead Facts to Establish that Avanci Is**  
 15 **Contractually Obligated to Offer FRAND Rates to Third-Party Beneficiaries.**

16 Continental’s breach of contract claims against all Defendants, including Avanci, are based on  
 17 alleged FRAND commitments that the SEP owners—not Avanci—made to various SSOs. FAC ¶¶  
 18 151-166 (“Defendants entered into, or are bound by, contractual commitments they made to the  
 19 relevant SSOs”). It is undisputed that Avanci is not a SEP owner, and the Complaint does not allege  
 20 that Avanci entered into any contractual FRAND commitments or made any promises to any SSOs.  
 21 *See id.* ¶ 4 (“Avanci purportedly does not own any patents directly, but rather acts on behalf of  
 22 Defendant Licensors and other owners of SEPs . . . as their licensing agent”); *id.* ¶¶ 5, 99, 183. The  
 23 breach of contract claims against Avanci must thus be dismissed for this additional reason.<sup>11</sup>

24 Continental tries to evade this result by making the wholly conclusory assertion that Avanci is

25 <sup>11</sup> Avanci cannot breach a contractual FRAND commitment to an SSO if it never entered into such a  
 26 contract in the first place. *See, e.g., United Comp. Sys., Inc. v. AT&T Corp.*, 298 F.3d 756, 761 (9th  
 27 Cir. 2002) (only a party to a contract may be liable for breach); *Monaco v. Liberty Life Assurance Co.*,  
 28 No. C06-07021 MJJ, 2007 WL 420139, at \*4 (N.D. Cal. Feb. 6, 2007) (citing Cal. Civ. Code § 1550)  
 (“In order to be liable for breach of contract a defendant must be a consenting party to the contract.”).  
 Although Avanci did not make any promises or contractual commitments to any SSOs because it was  
 not a patent owner, it does, in fact, offer its joint platform license on FRAND terms.

1 “bound by” the Defendant Licensors’ contractual FRAND commitments to relevant SSOs. *Id.* ¶ 152.  
2 But the Complaint makes clear that Avanci is merely licensing portfolios of others, and that Avanci  
3 has not itself entered into any FRAND contract with any SSO. *Id.* ¶ 99 (“all of the alleged SEPs for  
4 which Avanci acts as *licensing agent* [for the SEP owners] are encumbered by FRAND obligations . .  
5 . to make the latest technology available in a way that is fair, reasonable, and non-discriminatory  
6 (FRAND)”) (emphasis added). An action for breach of contract lies only against the principal, not  
7 against the agent. *See, e.g., Cruz v. United States*, 219 F. Supp. 2d 1027, 1038 (N.D. Cal. 2002) (“it is  
8 a matter of basic California contract law that where his principal is disclosed an agent cannot be held  
9 liable for breach of a contract to which he is not a party”); [Bernsen v. Live Oak Agency, Inc.](#), 52 S.W.3d  
10 306, 309 (Tex. App. 2001) (“As a general rule, an agent is not liable for the contracts of the  
11 principal.”); [Lake City Stevedores, Inc. v. E. W. Shipping Agencies, Inc.](#), 474 F.2d 1060, 1063 (5th Cir.  
12 1973) (“One who acts in the capacity of an agent for a disclosed principal is not liable for claims  
13 arising out of a contract on behalf of his principal.”). While Defendants may require Avanci to comply  
14 with their separate FRAND obligations, that is a right enforceable by the patent holders against their  
15 agent; it does not create a contract right against Avanci as to any implementer of the standard.

16 **B.C. The Optis Entities Request Dismissal for the Following Additional Reasons.**

17 The Complaint should be dismissed against the Optis Entities for additional reasons.

18 ***Personal Jurisdiction.*** First, Continental cannot allege personal jurisdiction over the Optis  
19 Entities as to state-law claims. The Complaint does not contain allegations that any relevant  
20 agreements were negotiated, executed, or performed in California. *See* FAC ¶¶ 44-51, 66, 92-95, 102,  
21 144. Nor does the Complaint contend that any of the Optis Entities’ activities related to Continental  
22 were or are directed to California. [As a result, California state law does not apply to it. See AllState](#)  
23 [Ins. Co. v. Hague](#), 449 U.S. 302 (1981). Further, undisputed facts establish that there was and still is  
24 [no case or controversy between Continental and the Optis Entities](#). Dkt. 102-6 (Warren Decl.), ¶¶ 4-  
25 19. Docket 136 at pages 7-9 discusses the unique interactions between the Optis Entities and  
26 Continental.

27 ***No Case or Controversy:*** Each of Plaintiff’s counts is premised on allegations of a conspiracy  
28 among Avanci “members” “to only offer licenses to the automotive industry at the OEM level in an

1 attempt to obtain elevated royalties that far exceed any measure of FRAND.” FAC ¶ 8; *see also id.*  
2 ¶¶ 119-35. As to the Optis Entities, that premise is supported by nothing more than conclusory,  
3 boilerplate assertions. *Id.* ¶¶ 131, 136; *Iqbal*, 556 U.S. at 678. Conclusory assertions of law  
4 masquerading as facts cannot form the basis of a proper complaint.

5       There is a reason why allegations against the Optis Entities are so threadbare. As noted in the  
6 Warren Declaration submitted in opposition to the Motion for Antisuit Injunction, Continental never  
7 pursued negotiations with the Optis Entities.<sup>12</sup> Dkt. 102-6, ¶¶ 5-7. [In contrast to other Defendants](#), the  
8 Optis Entities have never sued or threatened to sue Continental or its known customers for patent  
9 infringement. *Id.* ¶ 4; [1/21/2020 Tr. at 18:22-19:1](#). The Optis Entities have recently been acquired and  
10 inherited the Avanci Agreement. Optis Entities ceased all communications with automobile  
11 manufacturers before this lawsuit. *Id.* ¶ 8. There has been no refusal to negotiate. There has been no  
12 impasse in negotiation.<sup>13</sup> There has been no proposal of terms by Continental. There has been no  
13 identification of the scope of the license Continental desires. There has been no identification of the  
14 products it desires to license other than CDMA2000 products for which the Optis Entities do not have  
15 a licensing program. Dkt. 102-6 ¶¶ 5-7; [Dkt. 193-2 at 4](#). There has been no rejection by Continental  
16 or Optis of terms. The Optis Entities are being hauled into a massive, complex, and costly litigation  
17 involving a dispute between other parties on nothing more than empty boilerplate allegations. Article  
18 III case or controversy requires more.

19       The Optis Entities will license all their declared standard essential patents for cellular  
20 communication to Continental on fair, reasonable, and non-discriminatory terms (“FRAND”).

21       ***First Cause of Action (Breach of Contract):*** The boiler-plate allegations that “Defendants are  
22 refusing to license Continental” and “Defendants have also failed and refused to license their alleged  
23 SEPs on FRAND terms” are the exact type of empty allegation that cannot sustain a claim. FAC ¶¶  
24 154, 156.

25 \_\_\_\_\_  
26 <sup>12</sup> Optis UP Holdings, LLC has no authority to license patents held by Unwired Planet, LLC or  
Unwired Planet International Limited (Ireland), or any other Defendant identified in the case. Blasius  
Decl. ¶ 2. This is an independent basis for dismissal.

27 <sup>13</sup> [The Optis Entities have proactively reached out to Continental since the filing. Continental’s in-](#)  
28 [house people with authority to negotiate, however, simply refused to deal with the Optis Entities,](#)  
[insisting instead on communications between Optis’ lead litigation counsel and a solo practitioner](#)  
[located in the Northern District of California. Dkt. 193-2; Dkt. 182-33; 2/10/2020 Dec. of M. J. Binder.](#)

1 **Second Cause of Action (Promissory Estoppel):** This count relies on the same boilerplate  
2 predicates as the First Cause of Action.

3 **Third Cause of Action (Declaratory Judgment):** This count seeks an advisory opinion on the  
4 terms of a FRAND license and seeks “a determination that Defendants have not offered Continental  
5 a direct license to their . . . 2G, 3G, and 4G SEPs on FRAND terms and conditions.” FAC ¶ 169. This  
6 count is defective for three reasons. First, there is no live controversy. Plaintiff has not pleaded that  
7 there has been any discussion of terms with the Optis Entities that it maintains are not FRAND, and  
8 the Optis Entities agree to license on FRAND terms. Second, this Court sits under limited federal  
9 question jurisdiction and, in that context, the requests go well beyond its authority. Third, there is no  
10 patent infringement action pending against Continental in this District (or any other district) based on  
11 the Optis Entities’ SEPs. Each of the three factors above independently establish that the Court’s  
12 declaration will serve no more than “a data point from which the parties could continue negotiations.”  
13 *InterDigital Commc’ns, Inc. v. ZTE Corp.*, No. 1:13-cv-00009-RGA, 2014 WL 2206218, at \*3 (D.  
14 Del. May 28, 2014); *see also Estate of Farrar v. Cain*, 941 F.2d 1311, 1314 (5th Cir. 1991), *aff’d sub*  
15 *nom. Farrar v. Hobby*, 506 U.S. 103 (1992) (stating that the “value of the judicial pronouncement—  
16 what makes it a proper judicial resolution of a ‘case or controversy’ rather than an advisory opinion—  
17 is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*”).

18 **Fourth to Seventh Causes of Actions (Federal and California competition law):** Once again,  
19 these counts are dependent on the boilerplate allegation that the Optis Entities have “refus[ed] to  
20 directly license [Continental], let alone on FRAND terms and conditions[.]” FAC ¶ 171. This is empty  
21 rhetoric, unsupported by any competent allegation.

22 **VII. CONCLUSION**

23 For the foregoing reasons, Defendants request that the Complaint be dismissed in its entirety.

24 DATED: February 10, 2020

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**FILER'S ATTESTATION**

1  
2 I, Michael J. Newton, am the ECF User whose identification and password are being used to  
3 file this document. I hereby attest that the concurrence to the filing of this document, and  
4 accompanying declarations and exhibits, has been obtained from each signatory hereto.  
5

6 DATED: February 10, 2020

ALSTON & BIRD LLP

7 By: /s/ Michael J. Newton  
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**CERTIFICATE OF SERVICE**

1  
2 I certify that on February 10, 2020, I caused a copy of this Motion to be served on all counsel  
3 of record via the Court’s Electronic Filing system.

4  
5 Dated: February 10, 2020

*/s/ Michael J. Newton*

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