IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CONTINENTAL AUTOMOTIVE SYSTEMS, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 3:19-cv-02933-M
	§	
AVANCI, LLC, et al.,	§	
	§	
Defendants.	§	

ORDER

Before the Court is Defendants' Amended Motion to Dismiss First Amended Complaint. [ECF No. 270]. Defendants move to dismiss Plaintiff's claims for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim under Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6). For the following reasons, the Motion is **GRANTED**.

I. Factual and Procedural Background

In its First Amended Complaint (the "FAC") [ECF No. 97], Plaintiff Continental Automotive Systems, Inc., a producer and supplier of telematics control units ("TCUs") for vehicles, alleges as follows. It sells TCUs to car manufacturers ("OEMs") that use the TCUs to provide their cars various functionalities, including cellular connectivity. To connect to cellular networks, the TCUs include a baseboard processor in a network access device built into the TCU. To access second generation ("2G"), third generation ("3G") and fourth generation ("4G") cellular networks, the baseboard processors, network access devices, and TCUs must comply with standards set by standard setting organizations ("SSOs").

Plaintiff alleges that SSOs are private organizations that establish uniform industry standards that provide guidance to product manufacturers. When an SSO sets a standard, it designates patented technologies that satisfy the standard, and a manufacturer that wishes to produce products that practice the standard must obtain licenses to the standard essential patents ("SEPs"). For a patent to be designated essential, Plaintiff contends that SEP holders must agree with the SSOs that they will license their SEPs on fair, reasonable, and non-discriminatory ("FRAND") terms and conditions. Plaintiff asserts that these terms should reflect the ex-ante value of the SEP, excluding its value obtained solely from its inclusion in the standard.

Plaintiff alleges that Defendants Nokia Corporation, Nokia of America Corporation, Nokia Solutions and Networks US LLC, Nokia Solutions and Networks Oy, Nokia Technologies Oy (the "Nokia Defendants"), Conversant Wireless Licensing SARL (the "Conversant Defendant"), Optis UP Holdings, LLC, Optis Cellular Technology, LLC, Optis Wireless Technology, LLC (the "Optis Defendants"), and Sharp Corporation (the "Sharp Defendant") (collectively, the "Licensor Defendants") own SEPs for 2G, 3G, and 4G connectivity standards established by various SSOs, including the European Telecommunications Standards Institute ("ETSI"), the Telecommunications Industry Association ("TIA"), and the Alliance for Telecommunications Industry Solutions ("ATIS"). Plaintiff claims that as a result, the Licensor Defendants are obligated to license those SEPs to Plaintiff on FRAND terms and conditions.

Plaintiff further claims that the Licensor Defendants pooled their SEPs, by agreeing that Defendants Avanci, LLC and Avanci Platform International Limited (the "Avanci Defendants") would serve as their joint licensing agent, offering their patents in a pooled arrangement. Plaintiff alleges that, while the Avanci licensing pool is purportedly intended to allow customers to obtain from a single supplier licenses for many necessary 2G, 3G, and 4G SEPs, it is actually an agreement between Defendants to require non-FRAND[1] terms for SEP licenses, offered only to OEMs, who are better positioned and thus more likely to accept those excessive, unreasonable terms than would component suppliers like Plaintiff.

Plaintiff originally brought this action in the Northern District of California, for violations of §§ 1 and 2 of the Sherman Act, declaratory judgment as to Defendants' FRAND obligations, breach of contract, promissory estoppel, and violations of California unfair competition law (the "UCL"). Several Defendants then moved to transfer venue to this Court under 28 U.S.C. § 1404(a). While the motion to transfer was pending, Defendants also filed a joint Motion to Dismiss. The Northern District of California granted the venue motion, and transferred the action to this Court. [ECF No. 204]. Following the transfer, the parties filed updated briefs on Defendants' Motions to Dismiss, to reflect Fifth Circuit law.[2]

II. Legal Standard

A court must dismiss a case if it lacks subject matter jurisdiction. *Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998). When considering a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, a court may dismiss the case based on "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996). "A 'facial attack' on the complaint requires the court merely to look and see if plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980). "A

[1] The parties also refer to "supra-FRAND" royalties and licenses. To avoid confusion as to what it literally means to be something other than fair, reasonable, and nondiscriminatory, the Court will instead use the term "non-FRAND."
[2] The parties did not modify their appendices on the Motion to Dismiss or Plaintiff's Request for Judicial Notice. [ECF Nos. 162-1, 182-1, 193-1].

'factual attack,' however, challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Id.*

A complaint must also contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). It does not need to include "detailed factual allegations." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). To survive a Rule 12(b)(6) motion to dismiss, the complaint must provide a factual basis "to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). When considering a motion to dismiss, the court will accept all well-pleaded factual allegations as true "with all reasonable inferences drawn in the light most favorable to the plaintiff." *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004). The court will not credit "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007).[3]

III. The Government's Statement of Interest

The Government seeks leave to file a Statement of Interest. [ECF No. 278]. Under 28 U.S.C. § 517, the Department of Justice may "attend to the interests of the United States in a suit pending in a court of the United States." "It is solely within the Court's discretion to permit or deny a statement of interest." *LSP Transmission Holdings, LLC v. Lange,* 329 F. Supp. 3d 695, 703 (D. Minn. 2018), *aff'd sub nom. LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020). This depends on "whether the information is timely, useful, or otherwise

[3] Defendants challenge Plaintiff's use of allegations that are based on "information and belief." [Motion at 13 n. 3]. However, "'information and belief' pleadings are generally deemed permissible under the Federal Rules." *Johnson v. Johnson*, 385 F.3d 503, 531 n. 19 (5th Cir. 2004). Therefore, the Court will consider such pleadings in light of the other facts alleged to determine whether the FAC is adequate. *See Funk v. Stryker Corp*., 673 F. Supp. 2d 522, 525 (S.D. Tex. 2009), *aff'd*, 631 F.3d 777 (5th Cir. 2011) ("Accordingly, this court reviews allegations based upon information and belief under *Twombly*'s 12(b)(6) formulation requiring sufficient fact pleading to make a claim plausible.").

necessary to the administration of justice." *Id.* However, the scope of 28 U.S.C. § 517 is broad, and generally favors allowing statements of interest. *See Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp. 3d 1315, 1317 (S.D. Fla. 2017) ("Courts have interpreted 28 U.S.C. § 517 broadly and have generally denied motions to strike statements of interest.").

While the Government's Statement of Interest was filed six months after Defendants moved to dismiss, it is nevertheless timely in light of the transfer of the case to this Court. Compared to the Ninth Circuit, there is limited case law in the Fifth Circuit interpreting FRAND obligations in the context of § 2 of the Sherman Act. The Government's decision to file a Statement of Interest only after learning of the transfer and considering its interest in a case in the Fifth Circuit does not warrant not accepting the Statement of Interest. The Statement of Interest assists the Court in evaluating Plaintiff's monopolization claims. Therefore, the Government's Motion for Leave to File a Statement of Interest is **GRANTED**.

IV. Judicial Notice and Facts Outside of the Pleadings

In support of their original Motion to Dismiss, Defendants provided a copy of the Avanci licensing agreement. [Papendick Decl., ECF No. 162-1, Ex. A]. The Court will consider the agreement as part of the pleadings, because it is referred to in the FAC and is central to its claims. *See Kaye v. Lone Star Fund V (U.S.), L.P.*, 453 B.R. 645, 662 (N.D. Tex. 2011). Similarly, because Defendants' FRAND declarations are also agreements that form the basis of Plaintiff's claims, Plaintiff's Request for Judicial Notice of the FRAND declarations provided in Holder Decl., Ex. 7, [ECF No. 182-9] is **GRANTED**. *See Rainwater v. Ragozzino Foods, Inc.*, No. 4:15-CV-00746, 2016 WL 8787143, at *3 n. 3 (E.D. Tex. Mar. 10, 2016) (considering a central document attached to the plaintiffs' response to a motion to dismiss). In all other respects, the Request to Take Judicial Notice is **DENIED**.

Plaintiff also includes new factual allegations in its Response regarding its indemnity obligations to the OEMs. [Response, ECF No. 289 at 4–5]. Briefing may clarify unclear allegations in a complaint. *Pegram v. Herdrich*, 530 U.S. 211, 230 n. 10 (2000). However, "it is axiomatic that a complaint cannot be amended by briefs in opposition to a motion to dismiss." *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 761 F. Supp. 2d 504, 566 (S.D. Tex. 2011). Plaintiff cannot amend the FAC, which only suggests the possibility that Plaintiff could be required to indemnify OEMs, with new factual allegations in its Response seemingly averring that it has already indemnified or will indemnify them. The Court will not consider factual allegations in Plaintiff's Response as part of the FAC.

V. Article III Standing and Ripeness

Under Article III of the Constitution, a federal court only has subject matter jurisdiction to adjudicate cases and controversies. To satisfy Article III, a plaintiff must have standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016). This requires "(1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Soniat v. Texas Real Estate Comm'n*, 721 F. App'x 398, 399 (5th Cir. 2018) (internal brackets omitted). An injury in fact is an "invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted).

Article III also requires that an action be ripe. *Lower Colo. River Auth. v. Papalote Creek II, L.L.C.*, 858 F.3d 916, 922 (5th Cir. 2017). It must be more than "abstract or hypothetical." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 833 F.2d 583, 586 (5th Cir. 1987). A "case is not ripe if further factual development is required." *Monk v. Huston*, 340 F.3d

279, 282 (5th Cir. 2003). It is also not ripe if "the purported injury is 'contingent [on] future events that may not occur as anticipated, or indeed may not occur at all.'" *Lopez v. City of Houston*, 617 F.3d 336, 342 (5th Cir. 2010) (internal citation omitted).

The parties dispute whether Plaintiff has suffered an injury in fact and whether this action is ripe. Ripeness and standing "often intersect because the question of whether a plaintiff has suffered an adequate harm is integral to both." *Prestage Farms, Inc. v. Bd. of Sup'rs of Noxubee Cty., Miss.*, 205 F.3d 265, 268 n. 7 (5th Cir. 2000). This is particularly true in the "examination of whether a plaintiff has suffered a concrete injury," and the "injury-in-fact analysis draws on precedent for both doctrines." *Texas v. United States*, 497 F.3d 491, 496 (5th Cir. 2007).

Plaintiff alleges that Defendants have refused to license their SEPs to it on FRAND terms, but rather will only provide non-FRAND licenses to OEMs, which may in turn seek indemnification from Plaintiff. [FAC ¶¶ 135, 139–45]. Plaintiff claims that indemnity agreements are common in its industry. [*Id.* ¶¶ 11, 105, 126, 177]. It also claims that it is subject to such agreements. [*Id.* ¶¶ 135, 157]. This alleges the potential of it being injured by Defendants' alleged conduct, but not an actual or imminent injury. Plaintiff does not allege in the FAC that any OEMs with which it has entered into indemnity agreements have been or will likely be forced to take a non-FRAND license from Defendants. Plaintiff also does not allege that those OEMs will, or even can, pass the costs of those licenses onto Plaintiff through indemnity obligations.

The only example Plaintiff alleges is a reference to the Sharp Defendant bringing a patent infringement action against one of Continental's German OEM customers, in which the Sharp Defendant sought to require the German OEM to obtain licenses from the Avanci platform on non-FRAND terms.[4] [*Id.* ¶ 145]. Plaintiff does not claim that it has an indemnity agreement with the German OEM, that any non-FRAND royalties have been paid by that OEM, or that the OEM has sought, will seek, or even can seek indemnification from Plaintiff of what it pays for a license from the Sharp Defendant. Therefore, Plaintiff does not sufficiently plead a non-speculative, concrete, or imminent injury as to the potential that it will be required to indemnify its OEMs.

However, Plaintiff pleads a sufficient injury, irrespective of any indemnity obligations, based on its alleged inability to obtain from Defendants, on FRAND terms, SEP licenses needed for its TCUs. The denial of property to which a plaintiff is entitled causes injury in fact. *See Castro Convertible Corp. v. Castro*, 596 F.2d 123, 124 n. 3 (5th Cir. 1979) ("The allegation that its right under this contract has been denied to it is sufficient allegation of injury in fact to confer Article III standing."); *HTC Corp. v. Telefonaktiebolaget LM Ericsson*, No. 6:18-CV-00243-JRG, 2018 WL 6617795, at *4–5 (E.D. Tex. Dec. 17, 2018) (finding the deprivation of a contractual right to FRAND licenses supported the existence of an injury in fact); *see also* S*ervicios Azucareros de Venezuela, C.A. v. John Deere Thibodeaux, Inc.*, 702 F.3d 794, 800 (5th Cir. 2012) ("Injuries to rights recognized at common law—property, contracts, and torts—have always been sufficient for standing purposes.").

Plaintiff's alleged inability to obtain licenses to the SEPs also means that Plaintiff has three options: 1) rely on the OEMs to which it sells TCUs to obtain licenses which cover the TCUs; 2) violate the law by infringing the SEPs; or 3) abandon production of products using the standards, and forego associated profits.

[4] Plaintiff also references a press release from the Conversant Defendant, describing its enforcement of an SEP in an English patent infringement proceeding, but that case does not involve vehicle manufacturers. [FAC ¶ 91].

Since Plaintiff alleges its unsuccessful attempts to obtain FRAND licenses from the Avanci Defendants, the Nokia Defendants, the Conversant Defendant, and the Optis Defendants[5] [FAC ¶¶ 8, 139–44], Plaintiff alleges an injury in fact with respect to its claims against those Defendants.[6] It does not allege a similar unsuccessful attempt as to the Sharp Defendant. Plaintiff only claims that it requested a FRAND license from the Sharp Defendant "shortly before the filing of [the FAC]." [*Id.* ¶ 145]. It does not identify the Sharp Defendant's response, whether negotiations resulted from the request, or the outcome. However, the Sharp Defendant is alleged to have agreed with the other Defendants to establish non-FRAND terms for all of their SEP licenses. The Sharp Defendant's alleged agreement with the other Defendants to establish prices and refuse to license to Plaintiff at more favorable terms adequately pleads that Plaintiff has been injured by the Sharp Defendant. Therefore, Plaintiff alleges imminent and actual harms creating an injury in fact for general standing purposes, so Defendants' Motion to Dismiss for lack of Article III standing and ripeness is **DENIED**.

[5] The Nokia and Optis Defendants cite declarations challenging Plaintiff's characterization of their negotiations with Plaintiff and whether they actually denied Plaintiff a FRAND license. [Motion at 4 n. 2, 28, 29 n. 12]. To the extent that these Defendants make a factual challenge to standing and ripeness, this determination of fact is intertwined with the merits of whether Defendants have violated their FRAND obligations to Plaintiff. Therefore, the Court will not now resolve these disputed facts. *See Clark v. Tarrant Cty., Texas*, 798 F.2d 736, 741–42 (5th Cir. 1986) ("Where the factual findings regarding subject matter jurisdiction are intertwined with the merits . . . the case should not be dismissed for lack of subject matter jurisdiction unless the alleged claim is immaterial or is wholly insubstantial and frivolous."). The Optis Defendants separately argue that, with respect to all of Plaintiff's claims except the declaratory judgment claims, the FAC has only made a conclusory allegation that it has denied Plaintiff FRAND licenses. [Motion at 29]. However, Plaintiff alleges that it contacted the Optis Defendants, attempting to obtain a FRAND license, but was denied. [FAC ¶ 144]. This adequately alleges that the Optis Defendants have withheld a FRAND license from Plaintiff.

[6] Contrary to Defendants' arguments that the dispute is not ripe, because licensing negotiations are "ongoing" [Motion at 24], Plaintiff alleges that those Defendants have either refused to license to Plaintiff or made offers that Plaintiff considers unlawful. [FAC ¶¶ 140–44]. This pleads a ripe licensing dispute following the breakdown of negotiations. *See HTC Corp.*, 2018 WL 6617795, at *3 (finding jurisdiction when "'HTC unilaterally put an end to the parties' negotiations when it filed a lawsuit against Ericsson . . . alleg[ing] that Ericsson breached FRAND and did not negotiate with HTC in good faith.'") (alterations in original); *PanOptis Patent Mgmt., LLC v. Blackberry Corp.*, No. 2:16-CV-00059-JRG-RSP, 2017 WL 780885, at *6 (E.D. Tex. Feb. 10, 2017), *report and recommendation adopted*, No. 2:16-CV-00059-JRG-RSP, 2017 WL 780880 (E.D. Tex. Feb. 28, 2017) ("Given PanOptis's alleged offer and BlackBerry's alleged refusal to take a FRAND license to the LTE patents, a sufficient controversy exists to confer subject matter jurisdiction.").

VI. Subject Matter Jurisdiction of Antitrust Claims over Foreign Patents

The Foreign Trade Antitrust Improvement Act (the "FTAIA") limits subject matter jurisdiction over antitrust claims involving trade or commerce with foreign nations, unless it pertains to imports or the conduct has a direct, substantial, and reasonably foreseeable effect on U.S. domestic, import, or export trade or commerce, where that effect gives rise to the antitrust claims. 15 U.S.C. § 6a; *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 426 (5th Cir. 2001). Defendants argue that the Court lacks subject matter jurisdiction under the FTAIA over Plaintiff's antitrust claims involving foreign patents. [Motion at 22 n. 8].

Plaintiff alleges antitrust violations through improper pricing and deprivation of SEP licenses. Given that Continental seeks to use these licenses to manufacture TCUs in the U.S. [FAC ¶¶ 19, 68], this action involves the import of SEP licenses for foreign patents, and the FTAIA's limitations on subject matter jurisdiction do not bar Plaintiff's claims. *See Hewlett-Packard Co. v. Quanta Storage, Inc.*, 961 F.3d 731, 737 (5th Cir. 2020) ("[I]mports fall within the ordinary scope of the Sherman Act.").

Even if Defendants' alleged conduct does not involve import trade or commerce, it still satisfies the jurisdictional requirements of the FTAIA. Defendants are allegedly obligated to U.S. SSOs,[7] and owe FRAND obligations to U.S. entities, including Plaintiff. These obligations involve Defendants' activities in global license and product markets, and their efforts to set prices within those markets. [*See* FAC ¶ 70 (alleging that standardization of cellular communications is intended to serve "products regardless of geographic boundary"); ¶ 134 (describing the claimed markets as worldwide)]. These global markets necessarily include U.S. markets, and Plaintiff alleges direct, substantial, and reasonably foreseeable effects in the U.S.

[7] The parties agree that ATIS and TIA are U.S. SSOs. [*See* Response at 23; Reply at 11].

that give rise to Plaintiff's antitrust claims. *See EuroTec Vertical Flight Sols., LLC. v. Safran Helicopter Engines S.A.A.*, No. 3:15-CV-3454-S, 2019 WL 3503240, at *11 (N.D. Tex. Aug. 1, 2019) (finding allegations of conduct that harmed U.S. commerce and corporations and involved participation in U.S. markets, anticompetitive agreements with U.S. companies, and a conspiracy to restrain U.S. commerce are sufficient to satisfy the FTAIA). Therefore, Defendants' Motion to Dismiss for lack of subject matter jurisdiction under the FTAIA is **DENIED**.

VII. Antitrust Standing

The Sherman Act does not allow claims for "all injuries that might conceivably be traced to an antitrust violation." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983). To state an antitrust claim, a plaintiff must plead antitrust standing. *Sanger Ins. Agency v. HUB Int'l, Ltd.*, 802 F.3d 732, 737 (5th Cir. 2015). This requires: "1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit." *Id.*

a. An Injury in Fact Proximately Caused by Defendants' Conduct

To satisfy antitrust standing, a plaintiff's injury must be proximately caused by the defendant's conduct. *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. All., Inc.*, 123 F.3d 301, 305 (5th Cir. 1997). This is stricter than the causation inquiry required for Article III standing. *Sanger Ins. Agency*, 802 F.3d at 737 n. 5. It depends on "the directness or indirectness of the asserted injury" and whether "the chain of causation . . . contains several somewhat vaguely defined links." *Associated Gen. Contractors of Cal., Inc.*, 459 U.S. at 540. Similar to their Article III arguments, Defendants contend that the potential for required indemnification of non-FRAND royalties paid by Plaintiff's OEM customers is not proximately caused by Defendants' conduct, as it is contingent on whether the OEMs are actually required to obtain SEP licenses on non-FRAND terms and then seek and obtain indemnification from Plaintiff. As explained above, however, Plaintiff's alleged injuries also include its own inability to obtain FRAND licenses due to Defendants' alleged agreement not to provide them. This injury is directly caused by Defendants' claimed misconduct, satisfying the proximate causation requirement.

b. Antitrust Injury

An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). It "should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Id.* The Fifth Circuit "has narrowly interpreted the meaning of antitrust injury, excluding from it the threat of decreased competition." *Anago, Inc. v. Tecnol Med. Prod., Inc.*, 976 F.2d 248, 249 (5th Cir. 1992).

"Antitrust laws were intended to prohibit firms from restraining trade by harming other competitors, which in turn harms consumers by restricting competition, increasing prices, and decreasing output." *Stewart Glass & Mirror, Inc. v. U.S.A. Glas, Inc.*, 940 F. Supp. 1026, 1035 (E.D. Tex. 1996); *see also Anago, Inc.*, 976 F.2d at 249 ("Typical anticompetitive effects include increased prices and decreased output."); *In re Pool Prods. Distribution Mkt. Antitrust Litig.*, 940 F. Supp. 2d 367, 400 (E.D. La. 2013) ("Higher prices to purchasers and lower output are exactly the types of harm that the antitrust laws are meant to prevent."). Usually "competitors, purchasers, or consumers in the relevant market" suffer such injuries. *Waggoner v. Denbury Onshore, L.L.C.*, 612 F. App'x 734, 737 (5th Cir. 2015); *see also Bell v. Dow Chem. Co.*, 847

F.2d 1179, 1183 (5th Cir. 1988) ("Restraint in the market affects consumers and competitors in the market; as such, they are the parties that have standing to sue.").

Plaintiff alleges that it has been injured because it is unable to obtain FRAND licenses from Defendants. [FAC ¶¶ 139–145]. However, this injury does not harm its competitive position or its position as a consumer of products used in its devices. Plaintiff's sole alleged use for the SEPs is to produce TCUs for the OEMs. Even in light of Defendants' allegedly anti-competitive conduct, Plaintiff can still produce TCUs for the OEMs, since, according to Plaintiff, Defendants are actively licensing the SEPs to the OEMs. In fact, Plaintiff may be able to produce TCUs at a lower cost, since it would not have to pay a license for an SEP, because the OEMs have one. Plaintiff does not allege that it has been unable to continue to produce and sell TCUs to the OEMs or that the OEMs cannot obtain SEP licenses from Defendants; in fact, it pleads otherwise.

To the extent that the OEMs pay non-FRAND royalties for those licenses, this increase in price may constitute an antitrust injury to the OEMs. As analyzed above, however, Plaintiff has not sufficiently alleged, even under the more lenient Article III causation standard, that those increased prices will be passed on to Plaintiff. Furthermore, an antitrust injury "should be viewed from the perspective of the plaintiff's position in the marketplace, not from the merits-related perspective of the impact of a defendant's conduct on overall competition." *Doctor's Hosp. of Jefferson, Inc.*, 123 F.3d at 305. Downstream anticompetitive conduct that adversely affects a relationship with an upstream entity rarely results in an antitrust injury for the upstream entity. *Jebaco, Inc. v. Harrah's Operating Co.*, 587 F.3d 314, 319–20 (5th Cir. 2009). Analogizing to the supplier-consumer and landlord-tenant context, the Fifth Circuit has held that the allegedly anticompetitive division of a riverboat gambling market did not create an antitrust injury for a plaintiff who incidentally suffered decreased revenue after the riverboats ceased using the plaintiff's boat berths. *Id.*; *see also Waggoner*, 612 F. App'x at 738–39 (finding that the decreased royalties a plaintiff received from the "downstream conduct by the payor, in a market in which [the plaintiff] is not a participant" was not an antitrust injury).

Plaintiff and the OEMs form distinct parts of the TCU supply chain. Plaintiff builds the TCUs that then go downstream to the OEMs, which install the TCUs in vehicles they manufacture. Given these separate operations, Defendants' charging of "licensing royalties, and alleged harm to OEMs" is a "distinct business practice" from any conduct toward TCU component suppliers. *See F.T.C. v. Qualcomm Inc.*, No. 19-16122, 2020 WL 4591476, at *13 (9th Cir. Aug. 11, 2020). The anticompetitive conduct allegedly directed at the downstream OEMs does not create an antitrust injury for the upstream TCU suppliers, like Plaintiff. Therefore, Plaintiff has not alleged that it has suffered the antitrust injury necessary for it to have antitrust standing.

c. Correct Plaintiff

Even if an OEM's antitrust injury could be imputed to Plaintiff, Plaintiff would not be the best plaintiff to bring this action. An antitrust plaintiff must demonstrate that "other parties are not better situated to bring suit." *Doctor's Hosp. of Jefferson, Inc.*, 123 F.3d at 305. This involves considering "(1) whether the plaintiff's injuries or their causal link to the defendant are speculative, (2) whether other parties have been more directly harmed, and (3) whether allowing this plaintiff to sue would risk multiple lawsuits, duplicative recoveries, or complex damage apportionment." *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1341 (5th Cir. 1988); *see also Ginzburg v. Mem'l Healthcare Sys., Inc.*, 993 F. Supp. 998, 1020 (S.D. Tex. 1997) ("In determining whether a particular plaintiff is a proper or appropriate plaintiff, courts generally consider the following factors: (1) the directness of the asserted injury, that is the chain of causation between the injury and the alleged unlawful restraint; (2) the nature of the harm; (3) the speculativeness of the alleged injury; (4) the difficulty of identifying damages and apportioning them among direct and indirect victims of the alleged conduct, in order to avoid duplicative recoveries and (5) the causal connection between the violation and the harm.”).

Any antitrust injury felt by Plaintiff would depend on whether, and if so, to what extent, the OEMs decide to pass on the extra costs of the SEP licenses to Plaintiff, if at all. The tenuous connection between Plaintiff's potential antitrust injury and the alleged misconduct “presents the sort of ‘speculative’ and ‘abstract’ causal chain” on which antitrust standing cannot be based. *See McCormack*, 845 F.2d at 1342.

The claimed antitrust violations are directly felt by the OEMs, which are allegedly forced to obtain SEP licenses on non-FRAND terms. Plaintiff is merely a “remote or indirect victim of the alleged scheme.” *Doctor's Hosp. of Jefferson, Inc.*, 123 F.3d at 306; *see also Associated Gen. Contractors of Cal., Inc.*, 459 U.S. at 541–42 (describing that “the immediate victims of coercion by defendants” are better suited to bring an antitrust action than more indirect victims); *McCormack*, 845 F.2d at 1342 (finding that indirect injuries are insufficient for employees to have antitrust standing for harms felt by their employers). The OEMs are “an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement,” which “diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general.” *See Associated Gen. Contractors of Cal., Inc.*, 459 U.S. at 542.

While the risk of multiple lawsuits or duplicative recoveries is less significant when, as here, the suit seeks injunctive relief,[8] the other considerations identified in *McCormack*, *supra*, clearly support a conclusion that Plaintiff is not the best entity to bring this antitrust action to vindicate the injury alleged.

Defendants' Motion to Dismiss Plaintiff's antitrust claims based on a lack of standing due to Plaintiff's failure to plead an antitrust injury and Plaintiff's failure to show that it is the best entity to assert the antitrust claims is therefore **GRANTED**.

VIII. Section 1 of the Sherman Act

Even if Plaintiff had adequately alleged antitrust standing, it does not allege an unlawful restraint of trade under § 1 of the Sherman Act.[9] Section 1 prohibits every "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. A plaintiff must establish that "the defendant (1) engaged in a conspiracy (2) that restrained trade (3) in a particular market." *Spectators' Commc'n Network Inc. v. Colonial Country Club*, 253 F.3d 215, 220 (5th Cir. 2001). Horizontal price fixing[10] is a restraint of trade that is typically *per se* unlawful. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). Nevertheless,

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[8] *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 n. 6 (1986).

[9] The Court assumes, without deciding, that Plaintiff has adequately alleged a market for antitrust purposes.

[10] The Court notes that the parties analyze Defendants' conduct as a boycott, rather than as price fixing. [Motion at 13; Response at 10]. Price fixing and boycotts can be related, given that increased prices and constricted supply are economically dependent on one another. *See F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990) (describing respondents' boycott as a "constriction of supply" and "the essence of 'price-fixing'" and stating that "[t]he horizontal arrangement among these competitors was unquestionably a 'naked restraint' on price and output"). Defendants' alleged agreement to boycott is not typical in that Plaintiff does not allege that Defendants boycotted to harm Defendants' competitors. What's more Defendants' alleged boycott is interdependent with their alleged agreement to exclude Plaintiff or to require licensing terms that Plaintiff cannot afford. Given that case law analyzes patent and licensing pools as a form of horizontal price fixing, and the parties cite to cases analyzing price fixing in their briefing, the Court interprets Plaintiff's allegations as price fixing. *See, e.g., Wuxi Multimedia, Ltd. v. Koninklijke Philips Elecs., N.V.*, 04CV1136 DMS BLM, 2006 WL 6667002, at *4 (S.D. Cal. Jan. 5, 2006) (analyzing defendants' alleged patent pooling arrangement under plaintiffs' horizontal price fixing claim). Plaintiff also alleges that the Avanci platform unlawfully ties essential and nonessential patents together, but includes only the conclusory assertion that such tying has occurred. [FAC ¶¶ 116, 171]. Therefore, the Court concludes that Plaintiff has not properly pled tying allegations.

a licensing pool that horizontally fixes prices by setting prices for each member's licenses is generally evaluated under the rule of reason.[11] *Nero AG v. MPEG LA, L.L.C.*, No. 10-CV-3672-MRP-RZ, 2010 WL 4366448, at *6 (C.D. Cal. Sept. 14, 2010); *see also Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8–9 (1979) (finding the blanket license issued by a licensing pool was not a *per se* unlawful restraint of trade, even though it "involves 'price fixing' in the literal sense").

"Under the rule, the anticompetitive evils of a restrictive practice must be balanced against any procompetitive benefits or justifications." *Hornsby Oil Co.*, 714 F.2d at 1392. A licensing pool's agreement to establish royalty rates does not unreasonably restrain trade if customers have a "realistic opportunity" to obtain individual licenses outside of the pool. *Sumitomo Mitsubishi Silicon Corp. v. MEMC Elec. Materials, Inc.*, No. C 01-4925, 2007 WL 2318903, at *15 (N.D. Cal. Aug. 13, 2007), *aff'd*, 301 F. App'x 959 (Fed. Cir. 2008); *see also Columbia Broad. Sys., Inc. v. Am. Soc. of Composers, Authors & Publishers*, 620 F.2d 930, 935 (2d Cir. 1980) (A blanket license "does not restrain trade when the complaining customer elects to use it in preference to realistically available marketing alternatives.").

Plaintiff alleges that Defendants pooled their SEPs through the Avanci platform to license, at agreed upon non-FRAND terms, only to OEMs. [FAC ¶¶ 8, 111, 113, 129, 191]. Plaintiff pleads that the Avanci platform reflects an agreement to establish prices to the OEMs. Defendants can license to non-OEMs at any price, irrespective of those required for the OEMs through the Avanci platform. *C.f. PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, No. CV 2:03CV107(TJW), 2009 WL 938561, at *4 (E.D. Tex. Apr. 6, 2009), *aff'd*, 615 F.3d 412 (5th

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[11] A patent pool may be a *per se* unlawful restraint of trade when its "only apparent purpose is naked price fixing." *Nero AG*, 2010 WL 4366448, at *6. Plaintiff does not make any such allegation or argument here.

Cir. 2010) (finding that an antitrust market could not be divided to include one group of retailers, but not another, when they both sold the same product).

The Avanci agreement allows the Licensor Defendants to independently license the SEPs outside of the platform. Plaintiff alleges that the Licensor Defendants are disincentivized from doing so, because they must resolve any conflicts between the terms of any licenses they grant and those granted through the Avanci platform. [FAC ¶ 129; Papendick Decl., ECF No. 162-1, Ex. A at 8]. However, this fact does not make the opportunity for separate licensing illusory or unrealistic. Plaintiff acknowledges that certain Licensor Defendants have responded to its requests for individual SEP licenses. [FAC ¶¶ 142–43]. To the extent the Licensor Defendants refused to negotiate with Plaintiff or only agreed to do so at the same prices at which they license to the OEMs, this alleges at best parallel conduct and the possibility of concerted action, which are insufficient to state a claim of an unlawful agreement to restrain trade. *See Twombly*, 550 U.S. at 557 ("An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility."); *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, 776 F.3d 321, 327 (5th Cir. 2015) ("Section 1 is only concerned with concerted conduct among separate economic actors rather than their independent or merely parallel action."). Therefore, Plaintiff has not alleged an agreement to unreasonably restrain trade, and Defendants' Motion to Dismiss Plaintiff's claims for violation of § 1 of the Sherman Act is **GRANTED**.

IX. Section 2 of the Sherman Act

Even if Plaintiff had adequately alleged antitrust standing, Plaintiff did not plead unlawful monopolization or a conspiracy to monopolize under § 2 of the Sherman Act. Section

2 makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize." 15 U.S.C. § 2. An unlawful monopoly requires that the defendant: "1) possesses monopoly power in the relevant market and 2) acquired or maintained that power willfully, as distinguished from the power having arisen and continued by growth produced by the development of a superior product, business acumen, or historic accident." *Abraham & Veneklasen Joint Venture*, 776 F.3d at 334. An unlawful conspiracy to monopolize requires "(1) the existence of specific intent to monopolize; (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of the combination or conspiracy; and (4) an effect upon a substantial amount of interstate commerce." *N. Mississippi Commc'ns, Inc. v. Jones*, 792 F.2d 1330, 1335 (5th Cir. 1986).

The "possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (emphasis omitted). Such conduct is "the creation or maintenance of monopoly by means other than . . . competition on the merits." *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 522 (5th Cir. 1999). It "tends to impair the opportunities of rivals" and "does not further competition on the merits or does so in an unnecessarily restrictive way." *Retractable Techs., Inc. v. Becton Dickinson & Co.*, 842 F.3d 883, 891–92 (5th Cir. 2016). An inference of exclusionary conduct results if there is "no rational business purpose other than its adverse effects on competitors." *Stearns Airport Equip. Co.*, 170 F.3d at 522.

Plaintiff asserts that Defendants have "attempted to abuse their monopoly power arising from the standardization process to exclude certain implementers from practicing the standards and extract supra-competitive royalty rates after companies are locked into the standardized technology." (First Am. Compl. ¶¶ 123, 181). The Court disagrees that this alleged exclusion of competitors and maximizing of rates in the standard setting context constitutes anticompetitive conduct actionable under § 2 of the Sherman Act.

A patent holder, of course, has a lawful monopoly to license its patent. "[P]atent and antitrust policies are both relevant in determining the 'scope of the patent monopoly'—and consequently antitrust law immunity—that is conferred by a patent." *F.T.C. v. Actavis, Inc.*, 570 U.S. 136, 148 (2013). "However, the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition." *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990).

An SEP holder may obtain additional monopoly power through inclusion in a standard. This additional market power is inevitable as a very frequent consequence of standard setting, and is necessary to achieve the benefits served by the standard, including procompetitive benefits.[12] *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988). Standard setting does not "harm the competitive process and thereby harm consumers." *See United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (emphasis omitted). Standard setting is not an action that "fail[s] to benefit consumers, [is] unnecessary to produce a given benefit to consumers, or [is] outright harmful to consumers." *See In re Educ. Testing Serv. Praxis Principles of Learning & Teaching: Grades 7-12 Litig.*, 429 F. Supp. 2d 752, 757 (E.D. La. 2005).

[12] As the Government maintains, standards literally exclude certain technologies that are not included in the standard, but generate "consumer benefits of interoperability or safety. . . . The reduction in consumer choice that occurs when a winning technology is selected for inclusion in a standard can be offset by the standard's many procompetitive benefits, including enhanced interoperability of products and services and follow-on innovation." [Statement of Interest at 12].

It is not enough to possess monopoly power. To be unlawful, monopoly power must be accompanied by unlawful anticompetitive conduct." *Trinko*, 540 U.S. at 407 (emphasis omitted). It is not anticompetitive for an SEP holder to violate its FRAND obligations. A lawful monopolist's "charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system." *Id*; *see also Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc*., 555 U.S. 438, 447-48 (2009) ("Simply possessing monopoly power and charging monopoly prices does not violate § 2."). A patent owner may use price discrimination to maximize the patent's value without violating antitrust law. *USM Corp. v. SPS Techs., Inc.*, 694 F.2d 505, 512 (7th Cir. 1982). An SEP holder may choose to contractually limit its right to license the SEP through a FRAND obligation, but a violation of this contractual obligation is not an antitrust violation.[13] *F.T.C. v. Qualcomm Inc.*, 2020 WL 4591476, at *13. For these reasons, the Court finds that Plaintiff's allegations regarding Defendants' "discriminat[ion] against suppliers," like Plaintiff, and Plaintiff's pursuit of claims of "inflated and non-FRAND royalty rates" do not state a violation of § 2.

Plaintiff alleges that Defendants obtained unlawful monopolies by making fraudulent FRAND declarations to the SSOs that induced the SSOs to include Defendants' SEPs in their standards.[14] Some courts have held that unlawful monopolization occurs when an SEP holder obtains a monopoly through anticompetitive misconduct and fraud toward the SSO. *See*

[13] Furthermore, the use of antitrust remedies to address an SEP holder's contractual FRAND obligations may deter patent holders from seeking inclusion in the standard, thereby inhibiting the achievement of the procompetitive goals of the standard setting process. [*See* Statement of Interest at 23]. The Court must be cautious "about using the antitrust laws to remedy what are essentially contractual disputes between private parties engaged in the pursuit of technological innovation." *F.T.C. v. Qualcomm Inc.*, 2020 WL 4591476, at *14.

[14] Plaintiff also contends that Defendants have violated § 2 by engaging in unlawful maintenance of their monopoly power. [Reply at 16]. Specifically, Plaintiff asserts that when SEP holders, such as Defendants, purposefully renege on FRAND commitments, they violate § 2's proscription of maintenance of monopoly power. [*Id.*]. Plaintiff does not cite any case law in support of its argument. The Court finds that these allegations do not support a § 2 claim based on unlawful maintenance of monopoly power.

Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 314 (3d Cir. 2007) ("Deception in a consensus-driven private standard-setting environment harms the competitive process by obscuring the costs of including proprietary technology in a standard and increasing the likelihood that patent rights will confer monopoly power on the patent holder."); *Wi-LAN Inc. v. LG Elecs., Inc.*, 382 F. Supp. 3d 1012, 1023 (S.D. Cal. 2019) ("Courts have recognized that fraudulent FRAND declarations that are used to induce SSOs to adopt standards essential patents can be monopoly conduct for the purposes of establishing a Section 2 claim."); *Research In Motion Ltd.*, 644 F. Supp. 2d at 796 (denying a motion to dismiss a section 2 claim because the plaintiff alleged that the defendant "obtained its position of power in the market not as a consequence of a superior product, business acumen or historic accident, but by misrepresenting its intentions"); *Apple Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2011 WL 4948567, at *4 (N.D. Cal. Oct. 18, 2011) ("Thus, intentionally false promises to SSOs regarding licenses with FRAND terms can give rise to actionable claims under Section 2 of the Sherman Act.").

The Court does not agree with those cases concluding that deception of an SSO constitutes the type of anticompetitive conduct required to support a § 2 claim. "Deceptive conduct—like any other kind—must have an anticompetitive effect in order to form the basis of a monopolization claim." *Rambus Inc. v. F.T.C.*, 522 F.3d 456, 464 (D.C. Cir. 2008). The use "of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition." *Id.* Even if such deception had also excluded Defendants' competitors from being included in the standard,[15] such harms to competitors, rather

[15] The Court is also skeptical that such exclusion has been properly alleged. Plaintiff only includes conclusory allegations that alternatives were presented and rejected by the SSOs for the 3G and 4G standards and that if there were no alternatives to a given technology, the SSOs would have been obligated to abandon those parts of the standard. [FAC ¶¶ 119–20, 183]. There is no indication of what these potential alternatives were, that they were alternatives to any of Defendants' SEPs, or that they were excluded because of Defendants' allegedly fraudulent

than to the competitive process itself, are not anticompetitive. *See Microsoft Corp.*, 253 F.3d at 58; *see also NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (holding that the plaintiff must "allege and prove harm, not just to a single competitor, but to the competitive process").

Therefore, Defendants' allegedly fraudulent FRAND declarations to the SSOs do not constitute anticompetitive conduct that can be the basis of a § 2 claim, and Defendants' Motion to Dismiss Plaintiff's claims of unlawful monopolization under § 2 of the Sherman Act is **GRANTED**. Given that Defendants' alleged conduct with respect to the SSOs and their FRAND obligations is not anticompetitive because such conduct does not harm the competitive process, any agreement to engage in that conduct cannot constitute a conspiracy to monopolize. Therefore, Defendants' Motion to Dismiss Plaintiff's claims alleging a conspiracy to monopolize in violation of § 2 of the Sherman Act is also **GRANTED**.

X. Subject-Matter Jurisdiction Over Non-Antitrust Claims

The Court is not sitting in diversity jurisdiction, as there is not complete diversity between Plaintiff and Defendants. [FAC ¶¶ 16, 20, 28–29, 44–46, 57–58]. Accordingly, the Court only has subject matter jurisdiction if there is federal question jurisdiction or supplemental jurisdiction.[16] Under 28 U.S.C. § 1367(a), a federal court has "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." The claims must "derive from a common nucleus of operative fact." *Mendoza v. Murphy*, 532 F.3d 342, 346 (5th Cir. 2008).

FRAND declarations. Even if the SSOs had known that the Licensor Defendants did not intend to comply with their FRAND obligations, the SSOs may nevertheless have adopted the Licensor Defendants' SEPs and chosen to insure compliance based on the Licensor Defendants' contractually binding FRAND commitments, which are enforceable regardless of any alleged deception by the Licensor Defendants.

[16] While Defendants do not argue that the Court does not have or should not exercise jurisdiction over the non-antitrust claims if the antitrust claims are dismissed, a "federal court may raise subject matter jurisdiction *sua sponte*." *McDonal v. Abbott Labs.*, 408 F.3d 177, 182 n. 5 (5th Cir. 2005).

However, supplemental jurisdiction "is a 'doctrine of discretion, not of plaintiff's right.'" *Meroney v. Pharia, LLC*, 688 F. Supp. 2d 550, 555 (N.D. Tex. 2009) (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966)). "Ordinarily, when the federal claims are dismissed before trial, the pendent state claims should be dismissed as well." *Wong v. Stripling*, 881 F.2d 200, 204 (5th Cir. 1989); *see also Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 585 (5th Cir. 1992) ("Our general rule is to dismiss state claims when the federal claims to which they are pendent are dismissed."). A "district court has wide discretion to refuse to hear a pendent state law claim . . . after dismissing all remaining federal claims." *Robertson v. Neuromedical Ctr.*, 161 F.3d 292, 296 (5th Cir. 1998).

a. Declaratory Judgment Claims

The Declaratory Judgment Act does not extend the scope of a court's jurisdiction, and instead, simply enlarges possible remedies. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671–72 (1950). Federal question jurisdiction exists if the underlying "coercive action to enforce its rights" that the declaratory judgment defendant could have brought "would necessarily present a federal question." *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 329 (5th Cir. 2008).

A declaratory judgment action seeking to resolve a dispute about FRAND licensing may raise a federal question regarding patent infringement. *See TCL Commc'ns Tech. Holdings Ltd v. Telefonaktenbologet LM Ericsson*, No. SACV 14–00341-JVS-ANX, 2014 WL 12588293, at *4 (C.D. Cal. Sept. 30, 2014) (stating that the defendant's hypothetical coercive action related to "a claim for declaratory judgment to resolve the FRAND licensing issue . . . would have been one for patent infringement”). However, Plaintiff does not allege any facts suggesting that Defendants consider Plaintiff to be infringing their SEPs.[17]

Instead, the dispute relates to Defendants’ contractual FRAND obligations, which does not raise a federal question. *See Optis Wireless Tech., LLC v. Huawei Techs. Co.*, No. 2:17-CV-00123-JRG-RSP, 2018 WL 3375192, at *8 (E.D. Tex. July 11, 2018), *report and recommendation adopted*, No. 2:17-CV-00123-JRG-RSP, ECF No. 246 (E.D. Tex. Aug. 9, 2018) (holding that a declaratory judgment dispute as to whether a defendant violated its third-party FRAND obligations was not a federal dispute); *Huawei Techs. Co. v. T-Mobile US, Inc.*, No. 2:16-CV-00715-JRG-RSP, 2017 WL 957720, at *1 (E.D. Tex. Feb. 22, 2017), *report and recommendation adopted*, No. 2:16-CV-00715-JRG-RSP, 2017 WL 951800 (E.D. Tex. Mar. 10, 2017) (characterizing a FRAND declaratory judgment claim as a contract dispute when analyzing its ripeness). Accordingly, the Court does not have federal question jurisdiction over Plaintiff’s declaratory judgment claims. Furthermore, given that all of Plaintiff’s federal claims are being dismissed, the Court declines to exercise supplemental jurisdiction over Plaintiff’s declaratory judgment claims, and they are also **DISMISSED** for lack of subject matter jurisdiction.

b. Contract, Promissory Estoppel, and Unfair Competition

The Court, of course, does not have federal question jurisdiction over Plaintiff’s contract, promissory estoppel, and UCL claims. As with Plaintiff’s declaratory judgment claims, the Court declines to exercise supplemental jurisdiction over these claims because all of Plaintiff’s

[17] Even if the underlying dispute related to a potential patent infringement action against Plaintiff, the declaratory judgment claims would not be ripe. The Declaratory Judgment Act requires an “actual controversy,” which is “rooted in Article III of the Constitution.” *SanDisk Corp. v. STMicroelectronics, Inc.*, 480 F.3d 1372, 1378 (Fed. Cir. 2007). An actual controversy regarding potential patent infringement only exists “where a patentee asserts rights under a patent based on certain identified ongoing or planned activity of another party, and where that party contends that it has the right to engage in the accused activity without license.” *Id.* at 1381. Plaintiff alleges no such conduct here.

federal question claims are being dismissed. Therefore, Plaintiff's contract, promissory estoppel, and unfair competition claims are **DISMISSED** for lack of subject matter jurisdiction.

XI. Conclusion

For the foregoing reasons, the Government's Motion for Leave to File a Statement of Interest is **GRANTED**. It is **ORDERED** that the Clerk shall file the Statement of Interest [ECF No. 278 at 6–37] as a separate docket entry. Furthermore, Plaintiff's Request for Judicial Notice is **GRANTED** with respect to Holder Decl., Ex. 7. Defendants' Motion to Dismiss Plaintiff's antitrust claims is **GRANTED** for failure to plead antitrust standing, an unlawful agreement to restrain trade under § 1 of the Sherman Act, and an unlawful monopoly or conspiracy to monopolize under § 2 of the Sherman Act. The Court finds that Plaintiff's theories of Defendants' unlawful agreement to price fix through the Avanci platform and unlawful monopolization through deception of the SSOs are legally untenable, and it is **ORDERED** that these claims are **DISMISSED WITH PREJUDICE**. Because the dismissal of Plaintiff's antitrust claims is based on legal principles as applied to the facts pled, the Court finds that allowing Plaintiff to amend its First Amended Complaint would be futile. *See Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 208 (5th Cir. 2009). Further, this case has been pending since May of 2019, and Plaintiff has already amended its complaint once. Given that all of Plaintiff's federal question claims have been dismissed, the Court declines to exercise supplemental jurisdiction over Plaintiff's remaining declaratory judgment, breach of contract, promissory estoppel, and unfair competition claims, and it is **FURTHER ORDERED** that these claims are **DISMISSED** for lack of subject matter jurisdiction.

SO ORDERED.

September 10, 2020.

BARBARA M. G. LYNN
CHIEF JUDGE