IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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SANDISK CORPORATION,

OPINION and ORDER

Plaintiff,

v.

10-cv-243-bbc

KINGSTON TECHNOLOGY CO., INC.,
KINGSTON TECHNOLOGY CORP.,
IMATION CORP., IMATION
ENTERPRISES, CORP., MEMOREX
PRODUCTS, INC.,

Defendants.

- -

This case is primarily a patent lawsuit, with plaintiff SanDisk Corporation asserting patent infringement claims against defendants and defendants asserting standard noninfringement and invalidity defenses and counterclaims. However, defendants Kingston Technology Co., Inc. and Kingston Technology Corp. are also asserting defenses and counterclaims related to antitrust law, contending that plaintiff is using its patents to coerce industry participants into agreements that raise costs, obstruct entry and chill innovation. According to these defendants, plaintiff's licensing program serves to maintain plaintiff's monopoly in the market for the patented technology and threatens to give plaintiff monopoly power in downstream product markets as well. Now before the court is plaintiff's motion to dismiss defendants' state and federal antitrust claims and affirmative defenses on the ground that defendants have not alleged sufficient facts and could not state an antitrust claim under their theory at any rate.

As an initial matter, defendants have filed a motion to strike certain portions of plaintiff's reply brief or allow defendants leave to file a surreply on the ground that plaintiff included new arguments in its reply brief. In its opening brief, plaintiff argued that the facts alleged failed to support an antitrust claim for "tying"or a claim related to plaintiff's charging "double royalties" on its patents. With respect to these two arguments, defendants responded that they are not pursuing separate claims for "tying" or "double royalites"; instead, these alleged acts are but part of a "series of actions" that as a whole violates antitrust laws. Plaintiff shifted gears in its reply, arguing that the acts alleged do not support an antitrust claim because they relate to terms in patent licencing and plaintiff has a right to refuse to license altogether.

Defendants contend that plaintiff's new argument should be disregarded because plaintiff could have brought the argument in the original brief in support of dismissal but failed to do so. Although that is true, the first brief does mention plaintiff's right to charge "monopoly prices" and, more important, defendants have submitted a proposed surreply and thus will not be prejudiced if plaintiff's new arguments are considered. I will deny defendants' motion to strike the reply brief but grant their motion for leave to file a surreply and accept dkt. #78-2 for that purpose.

1 Turning to plaintiff's motion to dismiss, I will deny the motion. The allegations suffice to support an inference that plaintiff exercises monopoly power in the flash memory technology market and threatens to obtain monopoly power in the downstream markets using broad terms in its licensing program that are anticompetitive and extend beyond the scope of the patent.

From defendants' counterclaims I find that defendants have alleged the following facts.

ALLEGATIONS OF FACT

A. Background

Flash memory is a type of removable solid-state storage non-volatile computer memory that can be electrically erased and reprogrammed. Flash memory comes in the form of memory "devices" fabricated on silicon wafers. These devices have economic value only when they are incorporated into flash memory systems. A flash memory system includes the flash memory device and a "controller," which acts as an interface between the device and a host such as a computer. Flash memory technology is used in a wide variety of flash memory systems, including Universal Serial Bus flash drives, Secure Digital cards, CompactFlash memory cards and media players. The flash memory device is by far the largest part of the costs of a flash memory system.

Some manufacturers of flash memory system, including plaintiff SanDisk Corporation, are "vertically integrated," manufacturing both the flash memory devices and the flash memory systems that incorporate those devices. Other companies manufacture only flash memory devices and a third group of companies, called "aggregators," purchases those devices and incorporates them with other component parts into a flash memory system.

Defendants Kingston Technology Co., Inc. and Kingston Technology Corp. are "aggregators" that sell flash memory systems throughout the world. Defendants' business model of buying the component parts and manufacturing their own devices from those parts allows them to take advantage of low flash memory device prices to price their products competitively. Vertically-integrated manufacturers produce devices both for their own internal use and for sale to third parties. When prices for flash memory devices fall, aggregators can take advantage of the price drop to produce lower-cost flash memory systems.

B. Plaintiff's Presence in Relevant Markets

Plaintiff has a dominant presence in the flash memory technology market, as well as in three downstream markets: flash memory devices, flash memory systems and USB flash drives (the end-user market). The flash memory technology market includes the technology needed to manufacture, import or sell flash memory systems in the United States. Plaintiff owns more than 1,400 United States patents related to flash memory technology, which plaintiff contends cover all feasible flash memory technologies in the United States. Currently there are no closely suitable technologies to which a manufacturer of flash memory systems could switch in the event of a price increase for plaintiff's patents related to flash memory systems.

The flash memory device market is the market for the manufacture and sale of the flash memory devices that spring from flash memory technology. Plaintiff accounted for approximately 40% of retail sales of USB flash drives and flash card systems in the United States in 2009. Aside from those devices sold within these systems, plaintiff sold additional flash memory devices as component parts to be integrated into systems by the customer. High barriers to entry into the flash memory device market would prevent new competition from entering for at least two years at a level sufficient to deter or counteract plaintiff's exercise of market power. No close substitutes for flash memory devices exist; a firm would have to invest in significant research and development to develop a product that is a viable alternative product to flash memory devices incorporating the technology purportedly covered by plaintiffs' patents. Such new technology development could cost billions of dollars.

Next downstream is the intermediate products market for the manufacture and sale of flash memory systems in the United States. These systems are the principal component of various end-user consumer products such as USB flash drives. No close substitutes for flash memory systems exist. The systems must be highly mobile, small in size, reliable and non-volatile.

The final downstream market is the USB flash drive market, which includes the sale of USB flash drives to United States consumers. As with flash memory systems, no close economic substitutes for USB flash drives exist. Plaintiff accounts for approximately 40% of this market. Its next closest competitor has less than one-half of plaintiff's share of the market. All four markets are "highly concentrated" and have high entry barriers.

C. Plaintiff's Licensing Program

Plaintiff purports to control rights to patents necessary to manufacture and sell flash memory systems in the United States. Although alternative designs exist that do not infringe some of plaintiff's patents, plaintiff has taken the position that any firm manufacturing or selling products in the United States containing flash memory technology must be practicing plaintiff's patents and thus should pay royalties or face litigation. Plaintiff's patent portfolio includes patents relating to flash memory technology in the United States patents and in a handful of foreign jurisdictions. Plaintiff does not have such patents in a majority of jurisdictions around the world.

Under the terms of plaintiff's licensing program, licensees must pay a royalty on all flash memory system units sold worldwide, including units sold in those jurisdictions in which plaintiff does not possess patent rights. The practical effect of this licensing scheme is that any aggregator seeking to sell in the United States market must pay royalties on worldwide sales. This requirement drastically raises the marginal cost of each United States sale. Plaintiff has repeatedly refused to offer or even discuss a narrower license that would cover only patent rights in the United States or in those jurisdictions in which plaintiff has patent rights.

Plaintiff's standard licensing terms also include "cross-licensing" a large portfolio of patents, and requires potential licensees to pay royalties for sales that would not otherwise be prohibited by its patents. Licensees must pay royalties on the sales price of a flash memory device or system regardless whether that device or system practices very little of plaintiff's patents or none at all. In addition, because the license is a cross-license, plaintiff obtains the rights to new technology developed by a licensee if the technology is covered by the scope of the portfolio license. Even if a licensee develops or obtains access to an alternative technology it could use to practice less or none of plaintiff's patents, it would still be required to pay a royalty to plaintiff on any sales from the new product and plaintiff would have the right to use the new technology.

In addition, plaintiff's licensing scheme requires that royalties be paid both on sales of the flash memory device and sales of the flash memory system in every instance. If an aggregator purchases a device from an licensed device manufacturer, that manufacturer will have paid a 4% royalty on sales of the device but the aggregator is still required to pay a 4% royalty on its own worldwide sales of the flash memory system. If an aggregator purchases an unlicensed device, then it must pay both a royalty of 4% of its costs on the device (reflecting the sales price of the device) plus an additional 4% on its worldwide sales of the flash memory system. Currently, plaintiff receives such double royalties from at least one aggregator licensee. Requiring double royalties raises the costs of manufacturing and selling flash memory devices.

Plaintiff has entered into several settlement agreements with competitors in separate lawsuits, SanDisk v. Phison Electronics Corp., 07-cv-605-bbc and 07-cv-607-bbc. The agreements require these defendants to purchase their flash memory devices from plaintiff. In addition, plaintiff obtained a settlement agreement with Buffalo, a large manufacturer of electronic devices, that requires Buffalo to exit one or more relevant markets in the United States. Other competitors have also exited or significantly reduced United States markets or reducedtheir presence in the United States.

Plaintiff's licensing scheme increases costs to its rivals by requiring them to pay royalties on all worldwide sales. The higher costs are passed on to consumers of flash memory systems in the form of increased retail prices. The cost of a product containing a flash memory device is highly dependent on the flash memory capacity in the particular product and is therefore largely governed by the price of the flash memory device within the product.

DISCUSSION

Defendants Kingston Technology Co., Inc. and Kingston Technology Corp. are asserting several counterclaims related to state and federal antitrust laws. These include claims brought pursuant to §§ 1 and 2 of the Sherman Act and similar provisions under California and Wisconsin law, Cal. Bus. & Prof. Code § 17200 and Wis. Stat. § 133.03(2). They are also asserting affirmative defenses for "patent misuse" based on plaintiff's alleged "tying" and "double royalties."

A. Section 2 of the Sherman Act

Defendants' principal claim arises under § 2 of the Sherman Act, 15 U.S.C. § 2, which makes it a crime to "monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several States." A defendant violates this provision if it possesses monopoly power in the relevant markets and willfully acquired or maintained that power by predatory or anticompetitive conduct rather than superior product, business acumen or historic accident. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004). If a defendant does not possess monopoly power, a § 2 claim for attempted monopolization may be brought if there is "a dangerous probability" that the defendant may be able to achieve monopoly power and the defendant is engaged in predatory or anticompetitive conduct with "a specific intent to monopolize." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993). According to defendants, plaintiff is engaging in monopolization and attempted monopolization by using its patent monopoly to impose restrictions on licensees that raise costs to competitors in the flash memory markets. These restrictions include licensing only a patent portfolio (instead of individual patents); requiring royalties be paid worldwide as opposed to only on products manufactured and sold in areas plaintiff's patents cover; and requiring licensees to share their innovations with plaintiff.

1. Market power

As a starting point, any claim involving § 2 of the Sherman Act requires the alleged monopolist to either possess monopoly power or "a dangerous probability of achieving" it. Trinko, 540 U.S. at407; Spectrum Sports, 506 U.S. at 456. Plaintiff contends that defendants have failed to allege sufficient facts to support either of these requirements for any of the four flash memory markets. According to plaintiff, defendants fail to describe plaintiff's market share at all in the flash memory technology market and for the downstream markets defendants allege only that plaintiff accounts for 40% of the retail sales of flash drives and flash card systems.

Plaintiff is mistaken on both counts. First, although defendants do not describe the specific percentage of the flash memory technology market that is plaintiff's, they do allege that plaintiff treats all flash memory technology in the United States as being covered by their patents and that there are no close substitutable technologies. In other words, the allegations support an inference that plaintiff enjoys 100% of this market, or something approximating it.

Second, although defendants' only mention of market share is to the 40% of the retail sales for USB and flash devices, this is not all defendants allege. A mere 40% market share does not give grounds for inferring monopoly power or even a dangerous probability of monopolization. Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1411 (7th Cir. 1995) ("Fifty percent is below any accepted benchmark for inferring monopoly power from market share."); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 271 (7th Cir. 1981)(citing cases that find a "market share of 30% or higher to be insufficient, by itself, to prove a dangerous probability of monopolization"). However, facts other than market share alone can support a claim for attempted monopolization. As the court explained in Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 452 F.2d 579, 598 (7th Cir. 1971), assessing whether a "dangerous probability" of monopolization exists "requires an appraisal of the alleged offender's ability to achieve the forbidden result, his intent, and the nature of the overt actions."

As plaintiff points out, defendants fail to allege facts that support an inference that plaintiff possesses much more than 40% of any of the downstream markets. Defendants allege that plaintiff sells "additional" devices, beyond those sold already inside flash drives and flash cards, but they do not allege any facts suggesting that the amount of additional devices make up a substantial part of the market, except to say in conclusory fashion that its market share in that market would be "much higher." This means they cannot pursue a claim for monopolization of any of the downstream markets (only the flash memory technology market).

On the other hand, the allegations support a claim for attempted monopolization of the downstream markets, which is what defendants are pursuing. Not only does plaintiff appear to enjoy at least a 40% share of each of these markets, it also exercises a dominant presence in the technology market upstream of these markets. Moreover, as explained below, the broad terms of plaintiff's licensing program could serve to eliminate competition from theses downstream markets, giving plaintiff a chance to expand its market share substantially. At this early stage, these allegations suffice to support a claim for monopolization in the flash memory technology market and for "dangerous probability" of monopolization in the markets downstream the flash memory technology market.

2. Plaintiff's right to license

Defendants contend that plaintiff's licensing program amounts to monopolization or attempted monopolization in four markets tied to flash memory technology. As mentioned above, the landscape of plaintiff's motion to dismiss changed shape as the briefs progressed, moving from a challenge to "tying" or "double royalties" claims to a challenge to the licensing program as an overall scheme to raise costs and exclude competitors from the flash memory technology market and downstream markets. In its last brief, plaintiff's principal argument for dismissal is that it was entitled to structure its licensing program as it wished without running up against antitrust laws because, as a patent owner, it has the right to exclude others from using or selling that technology and has no duty to share those rights with competitors. Thus, if it decides to license its technology at all, it can do so on its own terms.

Plaintiff cites two recent Supreme Court cases in support of its position, Pacific Bell Telephone Co. v. LinkLine Communications, Inc., 129 S. Ct. 1109 (2009), and Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004). In Trinko, 540 U.S. at 407-11, the Court concluded that a dominant local exchange carrier's failure to provide adequate services to customers of its rivals did not violate antitrust laws. As the Court explained, "as a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" Id. at 408 (quoting

United States v. Colgate & Co, 250 U.S. 300, 307 (1919)).

More recently, in Linkline, 129 S. Ct. 1115, 1119, the Supreme Court applied Trinko to a case in which a dominant company participating in both the wholesale and retail markets for digital subscriber lines (DSL) charged high wholesale prices to its competitors and sold at low prices in the retail market, creating a "price squeeze" and allowing the defendant to maintain monopoly control of DSL access to the internet. As the Supreme Court saw it, "the nub of the complaint" in both cases was identical: "upstream monopolists" allegedly "abus[ing] their power in the wholesale market to prevent rival firms from competing effectively in the retail market." Id. Unlike in Trinko, in which the alleged violation involved failing to provide services helpful to competitors, in Linkline the alleged violation involved offering services on terms unfavorable to competitors by charging excessive wholesale prices. Id. The Court found no importance in this distinction, explaining that "the reasoning of Trinko applies with equal force to price-squeeze claims" because in either case the upstream monopolist could have simply stopped providing any service to its rivals without running afoul of antitrust violations. Id. Because it has no duty to deal, it also has the power to set the terms when it does deal: "a firm with no duty to deal in the wholesale market has no obligation to deal under terms and conditions favorable to its competitors." Id.

Plaintiff suggests that, after Trinko and Linkline, patent owners that choose to license may include any sort of anticompetitive terms in their license without violating antitrust laws. This reads the case law too broadly. Linkline and Trinko allow a monopolist to set unfavorable terms even if those terms have an anticompetitive effect on the monopolist's market or on downstream markets, but only in limited circumstances. The reason the Court gave in Linkline for finding no antitrust violation to the monopolist's excessive wholesale pricing was that it operated exactly the same as a refusal to deal. Id. (noting that defendant "could have squeezed its competitors profits just as effectively by providing poor-quality service" as in Trinko). The Court went no further than to hold that a monopolist may impose anticompetitive terms on competitors when those terms would have the same effect as if the monopolist exercised its right to refuse to deal with the competitors. There is no reason to think the holdings in Trinko and Linkline give monopolists free rein over the terms they set whenever they choose to deal with competitors.

Moreover, a long line of cases suggests that Trinko and Linkline should not be read so broadly. The Supreme Court has considered the intersection of patent law and antitrust law on multiple occasions. In Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 135-36, 139-41 (1969), the Court explained that although a patentee enjoys a "legal monopoly" in the form of its exclusive right to manufacture, use and sell its invention, "there are established limits which the patentee must not exceed in employing the leverage of his patent to control or limit the operations of the licensee." Thus, a patentee may not condition its license on the use, sale or purchase of products not within the scope of the patent monopoly or require royalties for products not patented. Id. This sentiment is reflected in earlier cases from the Court as well. United States v. United Shoe Machine Co. of N.J., 247 U.S. 32, 57 (1918) (stating that "we must not overestimate" the right of patentee "or give it a sinister effect" by allowing it to become a means to form an illegal monopoly); E. Bement & Sons v. National Harrow Co., 186 U.S. 70, 91 (1902) (recognizing limitations to patentees' right to set terms in licenses); see also United States v. Griffith, 334 U.S. 100 (1948) (stating that it is unlawful to use monopoly power, even if lawfully acquired, to foreclose competition from any market).

Lower courts have also held that patentees have limitations to the conditions they may impose in their patent licenses. For example, in Atari Games Corp. v. Nintendo of America, Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990), the Court of Appeals for the Federal Circuit explained that

> a patent owner may not take the property right granted by a patent and use it to extend his power in the marketplace improperly, i.e. beyond the limits of what Congress intended to give in the patent laws. The fact that a patent is obtained does not wholly insulate the patent owner from the antitrust laws.

The Court of Appeals for the District of Columbia considered an argument that a company may have "an absolute and unfettered right to use its intellectual property as it wishes" as "border[ing] upon the frivolous," saying that this was like arguing that a person could freely use his own baseball bat in any way he wished without fear of tort liability. United States v. Microsoft Corp., 253 F.3d 34, 62 (D.C. Cir. 2001).

As the same court explained in United States v. Studiengesellschaft Kohle, m.b.H., 670 F.2d 1122, 1128 (D.C. Cir. 1981), it is legal for a patentee to threaten competition in areas protected by the patent but not in areas beyond it; "[t]he patentee is entitled to exact the full value of his invention but is not entitled to endanger competition in other areas by manipulating his patent monopoly." See also Dairy Foods Inc. v. Dairy Maid Products Co-op, 297 F.2d 805, 807-08 (7th Cir. 1961) (finding antitrust claim for alleged "pooling of patents and patent applications" and "using the patents in the pool in a manner and with objectives which violate the Sherman Act); Bela Seating Co. v. Poloron Products, Inc., 438 F.2d 733, 738 (7th Cir. 1971) (addressing antitrust claims against patentee on merits without suggesting that finding antitrust violation could interfere with patent rights).

Plaintiff does not argue that Trinko and Linkline overruled this lengthy history of imposing limitations on a patentee's rights, but such an argument would fail at any rate. Plaintiff cites no cases following Trinko or Linkline that read these cases so broadly. My own search discovered only cases treating the law before Trinko and Linkline as undisturbed. Schor v. Abbott Laboratories, 457 F.3d 608, 610 (7th Cir. 2006) (acknowledging holding in Trinko that monopolists have no duty to cooperate but deciding that antitrust claims against patentee failed on other grounds); In re Neurontin Antitrust Litigation, 2009 WL

2751029, at *8 (D.N.J. Aug. 28 2009) (describing boundary of permissible acts for patentees as those "that are permissible under the patent laws, such as the mere maintenance of the statutory patent monopoly"); Applera Corp. v. MJ Research, Inc., 349 F. Supp. 2d 338, 347 (D. Conn. 2004) (stating that patentee's anticompetitive effect cannot be "'illegally extended beyond the statutory patent grant'") (quoting In re Independent Service Organizations Antitrust Litigation, 203 F.3d 1322, 1327-28 (Fed. Cir. 2000)).

Trinko and Linkline cannot be read to upset long-standing law on the limitations on patentees. As before, a patentee is free to assert its patent to threaten competition within the areas protected by the patent, but no further. Studiengesellschaft Kohle, 670 F.2d at 1128; Independent Service Organizations, 203 F.3d at 1327-28. Thus, the principal question in this case is whether efendants have alleged facts sufficient to show that plaintiff's acts threatened competition in areas not protected by its patents.

3. Plaintiff's anticompetitive conduct

As mentioned above, defendants' theory is that plaintiff's licensing program as a whole violates § 2 through various provisions that allegedly serve to exclude aggregators such as defendants from the flash memory technology market and the markets downstream. The allegedly exclusionary provisions include worldwide licensing, double royalties and "cross-licensing" by which a licensee's advances in technology must be shared. Plaintiff contends that the court cannot consider the anticompetitive effects of the licensing program as a whole, but rather must assess whether any of the individual pieces of that program violate antitrust laws. According to plaintiff, there is no such thing as a claim for an "anticompetitive scheme"; an amalgamation of legal conduct does not amount to illegal monopolization.

Plaintiff misreads the case law. It cites Trinko, 540 U.S. at 404, for the Court's rejection of a § 2 claim for an "anticompetitive scheme" and cites three cases from courts of appeals rejecting "general course of conduct" theories. Microsoft, 253 F.3d at 78; Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1366-67 (Fed. Cir. 1999); City of Groton v. Connecticut Light & Power Co., 662 F.2d 921, 928-29 (2d Cir. 1981). However, in Microsoft, 253 F.2d at 78, the Court of Appeals for the District of Columbia expressly declined to decide whether a course of conduct theory can succeed. In that case the plaintiff had not identified individual acts that could be lumped together into such a claim. In both Intergraph, 195 F.3d at 1366-67, and City of Groton, 662 F.2d at 928-29, the courts rejected combining weak *theories* or *claims*, not the "factual components" of a case. As the court explained in Intergraph, 195 F.3d at 1366-67, "[e]ach legal theory must be examined for its sufficiency and applicability, on the entirety of the relevant facts." In City of Groton the court rejected the notion that an antitrust claim can arise "if there is a fraction of validity to each of the basic claims and the sum of the fractions is one or more" but nonetheless recognized that various anticompetitive acts can have a "synergistic effect" such that their combined total amounts to an antitrust violation.

As the Supreme Court explained in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962), when considering whether an antitrust violation has occurred, a court should not "tightly compartmentaliz[e] the various factual components" of the case and "wip[e] the slate clean after scrutiny of each"; instead, the facts must be viewed as a whole. Although, as plaintiff points out, the Court set out this rule in the context of a case involving conspiracy, there is no reason the same rule should not apply in any case involving anticompetitive conduct.

Thus, it is appropriate to consider whether, as a whole, the assorted requirements plaintiff imposes on those who would participate in the flash memory markets are anticompetitive and threaten to harm competition. At this early stage of the proceedings, defendants' allegations suffice. Defendants allege that plaintiff requires potential licensees to accept a broad portfolio license that covers worldwide sales. Moreover, plaintiff allegedly imposes double royalties on "aggregators," requiring them to pay both the 4% royalty for their own sales and the 4% royalty that the underlying manufacturer should have paid. Although there may be nothing wrong with requiring a total of 8% royalties, and even dividing those royalties, the alleged anticompetitive aspect of the deal is requiring the aggregator to cover the manufacturer's costs, imposing additional costs on those companies.

Finally, the licensing terms include cross-license provisions under which plaintiff may use the fruits of a licensee's new inventions. Such cross-license provisions would reduce incentives to create innovative, non-infringing methods that could compete in the flash memory markets because plaintiff would be able to use the innovation.

These allegations allow an inference that plaintiff is seeking to maintain its monopoly in the flash memory technology market and expand monopoly powers in downstream markets by dampening innovation and creating a barrier to entry into the downstream markets by raising the cost of doing business in those markets. These provisions extend beyond the field covered by plaintiffs' patents in several ways: they require licensees to agree to terms covering products worldwide, require full royalties even for licensees using very little of the patented inventions and require licensees to share new technology.

4. Harm

Plaintiff contends that defendants' allegations of harm fail to satisfy Rule 8 because they are nothing more than conclusory statements that plaintiff's licensing program has a harmful effect on competition and innovation. Plt.'s Br., dkt. # 68, at 17. Defendants respond that they have more than conclusory statements to back up their theory and are "not required to plead that a license into which [they have] not entered has already harmed [them]." Defs.' Br., dkt. #76, at 23. Defendants are correct on both points.

Defendants are not pursuing a claim for compensation for injuries they have already suffered from plaintiff's alleged monopolization. If they were, they would be required to allege facts supporting an inference that they have been "injured in [their] business or property." 15 U.S.C. § 15. Instead, defendants seek injunctive relief pursuant to 15 U.S.C. § 26, which requires only that there is a "threatened loss or damage." It is not necessary for defendants to show that plaintiff's allegedly anticompetitive conduct has already had an anticompetitive effect on the relevant markets, only that it threatens to have such an effect.

At any rate, defendants do include facts of actual anticompetitive effect, alleging that at least one competitor has exited the United States markets because of plaintiff's licensing program. The allegations also allow an inference that the licensing provisions threaten to raise costs and dampen innovation. Cf. Ball Memorial Hospital v. Mutual Hospital, Inc., 784 F.2d 1325, 1339 (7th Cir. 1986) (recognizing claim for raising costs). Although plaintiff argues that defendants have nothing but conclusory statements to support this inference, the terms of the provision themselves allow the inference to be drawn. It is reasonable to infer that provisions requiring multiple layers of royalties could increase the cost of the product (and thus entry into the market) and provisions requiring the licensee to share its technology and pay broad royalties that cost the same for more- and less-infringing products could reduce the licensee's incentive to create new non-infringing products.

In conclusion, the facts alleged state a claim that plaintiff is violating § 2 of the Sherman Act by monopolization of the flash memory technology market and attempted monopolization of the markets downstream. Therefore, plaintiff's motion to dismiss defendants' § 2 claim will be denied.

B. Remaining Claims

Plaintiff seeks dismissal of the remaining counterclaims and seeks to strike defendants' affirmative defenses for patent misuse, which are based on the alleged "illegal tying" and "double royalties" at the root of the § 2 claim. However, plaintiff's principal argument in each case is tied to its argument that the § 2 claim must be dismissed. Because the § 2 claim remains in the case, that argument fails.

1. Claim under § 1 of the Sherman Act

Section 1 of the Sherman Act prohibits acts of "conspiracy in restraint of trade or commerce." 15 U.S.C. § 1. Such claims often "closely overlap" § 2 claims and "the same kind of predatory practices may show violations" of both. Maryland and Virginia Milk Producers Association v. United States, 362 U.S. 458, 463 (1960). A § 2 monopoly is a "species of restraint of trade under § 1," United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n. 59 (1940), but § 1 adds the requirement that the anticompetitive conduct be pursuant to a "conspiracy." 15 U.S.C. § 1.

Plaintiff does not challenge the complaint as failing to allege conspiracy; indeed, it barely mentions § 1 at all in its opening brief, except to lump it together with § 2. Plt.'s Br., dkt. #68, at 6 n.1 (noting that the § 1 claims are "equally unavailing"); id. at 16 (arguing that §§ 1 and 2 claims must be dismissed for failure to allege harm). Its reply brief is no better; it argues only that the allegations fail to support an inference that the agreements "unreasonably restrain trade." Plt.'s Rep. Br., dkt. #77, at 15. For the same reason that the allegations suffice to support a claim for monopolization, they suffice to support a claim for conspiracy in restraint of trade.

2. State law claims

Defendants are asserting state antitrust claims arising under Wisconsin and California law. Plaintiff's sole argument for dismissal of these claims is that, because they mirror the federal antitrust claims, they fall with the § 2 claim.

3. Affirmative defenses

Plaintiff contends that defendants' fifth and sixth affirmative defenses must be stricken. These are "patent misuse" defenses, one related to the allegedly improper "tying" of products covered by the patents to products not covered, and one related to the double royalty provisions in plaintiff's licensing agreement.

Plaintiff contends that these defenses must be stricken because the alleged "tying" and alleged "double royalties" do not violate federal antitrust law. However, the affirmative defense of patent misuse does not necessarily track a particular federal antitrust law; it requires the alleged infringer to show that the patentee has "impermissibly broadened the physical or temporal scope of the patent grant . . . in a manner that has anticompetitive effects." Princo Corp. v. International Trade Commission, 616 F.3d 1318, 1328 (Fed. Cir. 2010) ("What patent misuse is about, in short, is 'patent leverage,' i.e., the use of patent power to impose overbroad conditions on the use of the patent in suit that are not within the reach of the monopoly granted by the Government."). As explained above, the allegations support an inference that the conditions plaintiff seeks to impose on licensees extend beyond the reach of the patent monopoly. Therefore, there is no basis to strike these defenses.

ORDER

IT IS ORDERED that

1. The motion to strike certain portions of the reply brief or in the alternative for leave to file a surreply filed by defendants Kingston Technology Co., Inc. and Kingston Technology Corp., dkt. #78, is DENIED in part and GRANTED in part. The motion to

strike is DENIED and the motion for leave to file a surreply is GRANTED.

2. The motion to dismiss filed by plaintiff SanDisk Corporation, dkt. #67, is DENIED.

Entered this 15th day of November, 2010.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge