John M. Desmarais (*admitted pro hac vice*)
jdesmarais@desmaraisllp.com
Paul A. Bondor (*admitted pro hac vice*)
pbondor@desmaraisllp.com
Alan S. Kellman (*admitted pro hac vice*)
akellman@desmaraisllp.com
Tamir Packin (*admitted pro hac vice*)
tpackin@desmaraisllp.com
Brian Leary (*admitted pro hac vice*)
bleary@desmaraisllp.com
Tom BenGera (*admitted pro hac vice*)
tbengera@desmaraisllp.com
Michael R. Rhodes (*admitted pro hac vice*)
mrhodes@desmaraisllp.com
DESMARAIS LLP
230 Park Avenue
New York, NY 10169
Telephone: (212) 351-3400
Facsimile: (212) 351-3401

Amy H. Candido (SBN 237829)
amycandido@quinnemanuel.com
QUINN EMANUEL URQUHART & SULLIVAN
50 California Street, 22nd Floor
San Francisco, CA 94111
Telephone: (415) 875-6600
Facsimile: (415) 875-6700

Attorneys for Defendant Cisco Systems, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ARISTA NETWORKS, INC.,

Plaintiff,

v.

CISCO SYSTEMS, INC.,

Defendant.

Case No. 5:16-cv-00923-BLF

DEFENDANT CISCO SYSTEMS, INC.'S MOTION TO DISMISS THE COMPLAINT

Date: September 7, 2017
Time: 9:00 A.M.
Judge: Hon. Beth Labson Freeman
Dept.: Courtroom 3

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 7, 2017, at 9:00 a.m., or as soon as counsel may be heard by the above-titled Court, located at 280 South 1st Street, San Jose, California, in Courtroom 3, before the Honorable Beth Labson Freeman, Defendant Cisco Systems, Inc. ("Cisco") will and hereby does move the Court for an Order dismissing the case. This motion is based on this Notice of Motion, the following arguments and cited authorities, the pleadings and papers on file herein, and any evidence or argument presented to the Court at the hearing.

STATEMENT OF RELIEF SOUGHT

Cisco seeks an Order from the Court dismissing with prejudice all claims in this case.

STATEMENT OF THE ISSUES

Whether this litigation should be dismissed under Federal Rule of Civil Procedure 12(b)(6).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

** Unless otherwise indicated, all emphasis is added **

INTRODUCTION

Arista claims that Cisco violated the Sherman Act by interfering with Arista's sales of Ethernet switches. But the U.S. International Trade Commission has determined that those very same switches infringe Cisco's patents and must be excluded from the United States. Arista is now prohibited—*by the U.S. government, not Cisco*—from selling its Ethernet switches in this country. Because Arista cannot lawfully sell its products in the United States, Arista cannot claim antitrust injury that stems from alleged lost sales of those products—*regardless of any alleged anticompetitive conduct by Cisco*. Accordingly, Arista lacks standing to assert its antitrust claims, and on this ground alone, Arista's Complaint must be dismissed.

Arista's antitrust claims also fail on the merits. Arista alleges two categories of anticompetitive conduct: (1) Cisco deceived Arista and other switching competitors with respect to the intellectual property covering its CLI for Ethernet switching products; and (2) Cisco unlawfully "bundled" its SMARTnet service with Cisco products. But the factual predicates for Arista's CLI-based claims were squarely rejected by the jury in the CLI trial just a few months ago. Indeed, in finding that Cisco did not abandon or misuse its copyrights, the jury rejected Arista's arguments that Cisco led the industry into believing it would not enforce those copyrights and that Cisco harmed competition—two essential components of Arista's CLI-based antitrust claims. The Court should not give Arista a second chance to persuade a jury that Cisco's use of its copyrights was anticompetitive: the first jury already rejected Arista's assertions under the more lenient standard of copyright misuse, whereas now Arista must prove an antitrust violation.

Arista's bundling claim fares no better. To circumvent the Supreme Court's repeated skepticism regarding predatory pricing claims, Arista attempts to wrap its claim in a narrow Ninth Circuit exception. Yet Arista does not plead any specific facts to support its claim beyond a recitation of the Ninth Circuit's test. Even more fatal, the Ninth Circuit recently narrowed the sole legal theory upon which Arista bases its claim, holding that it does not apply when both parties sell the same bundle of goods and services—as Arista and Cisco do. Arista does not plead any specific facts that distinguish its allegations from those recently rejected by the Ninth Circuit.

Finally, Arista's Complaint fails the basic requirement of every antitrust complaint: alleging

antitrust injury in a relevant market. Arista alleges two markets for its Ethernet switches—one for "high-speed" Ethernet switches and another for all Ethernet switches. But Arista's own Complaint and admissions in this case demonstrate that neither is a plausible relevant market for its antitrust claims.

In sum, Arista's Complaint fails because it is not a lawful competitor in the marketplace and thus has no recognizable antitrust injury, and its claims have no legal or factual merit, having been rejected on the facts by a jury in this very Court and on the law by the Court of Appeals. Accordingly, Arista's Complaint should be dismissed in its entirety.

FACTUAL BACKGROUND

I. The Parties

Founded in 1984, Cisco is the worldwide leader in networking technologies that enable the internet and local data networks. Cisco invests billions of dollars annually in research and development focused on creating the future of networking technologies. Those investments led to the development of innovative products—including networking devices and the Internetwork Operating System ("IOS") that runs them—and an industry-leading intellectual property portfolio.

Former Cisco engineers and executives founded Arista in 2004 to compete with Cisco in Ethernet switching. Most of Arista's leadership helped develop proprietary technologies used in Cisco products: six of eight members of Arista's Senior Management, four of seven members of Arista's Board of Directors, and eight of ten of Arista's functional Vice Presidents previously worked at Cisco. *See, e.g.*, 5:14-cv-05344-BLF, Dkt. 64 ¶ 40, Dkt. 65 ¶ 40; Ex. 1.[1] Rather than innovate to compete fairly with Cisco, Arista engaged in blatant and wholesale copying of Cisco's intellectual property, leading Cisco to file several lawsuits to stop Arista's infringement.

II. This Litigation

In its Complaint, Arista claims that Cisco violated Section 2 of the Sherman Act and Section 17200 of the California Business and Professional Code, the California Unfair Competition Law

[1] Citations to "Ex. __" refer to exhibits to the Declaration of Brian Leary In Support Of Cisco Systems, Inc.'s Motion To Dismiss The Complaint, filed herewith.

("UCL"). The Complaint relies on conclusory assertions that: (1) Cisco deceived Arista and other switching competitors with respect to the intellectual property covering its CLI for Ethernet switching products by encouraging adoption of Cisco's CLI and then suing Arista in December 2014 for infringing Cisco's rights in its CLI; (2) Cisco engaged in unidentified "intimidation tactics" related to that purported deception; and (3) Cisco "bundled" its SMARTnet service with Cisco switches in an anticompetitive way.[2] Dkt. 1 ¶¶ 135, 142, 149–50. Arista also claims—without any supporting facts—that this conduct suppressed Arista's ability to sell its Ethernet switches and diminished its future sales opportunities. *Id.* ¶¶ 138, 145, 152.

Cisco moved to stay or dismiss this case on April 13, 2016. Dkt. 48. The Court granted Cisco's motion to stay the case on August 23, 2016, finding that "resolution of the CLI case is likely to 'bear upon' this case [because] [t]he CLI case's finding regarding infringement and Arista's affirmative defenses will impact the scope and viability of certain antitrust allegations." Dkt. 95 at 4.[3] As explained below, that is exactly what has happened. Developments in the CLI case and the two ITC investigations establish that Arista's claims in this case must be dismissed.

III. The Intellectual Property Infringement Litigations

Arista's indiscriminate infringement of Cisco's intellectual property caused Cisco to file two lawsuits in this District on December 5, 2014. The CLI case, pending in this Court, relates to Arista's infringement of Cisco's copyrights in its CLI, as well as a CLI-related patent. 5:14-cv-05344-BLF. The district court patent case, pending before the Honorable Jeffrey S. White, relates to Arista's infringement of twelve Cisco patents covering a variety of technologies. 4:14-cv-05343-JSW. In addition, on December 19, 2014, Cisco asserted infringement of those same twelve patents in two actions instituted in the U.S. International Trade Commission ("ITC") as *In the Matter of Certain Network Devices, Related Software and Components Thereof (I)*, ITC Inv. No. 337-TA-944 ("the '944 Investigation") and *In the Matter of Certain Network Devices, Related Software and*

[2] The patents Cisco is enforcing in the ITC Investigations involve technology not specific to CLI but covering the same Arista Ethernet switches that copy Cisco CLI. Arista does not allege that Cisco's enforcement of patents on non-CLI technology is anticompetitive or violates antitrust law.

[3] The Court also denied without prejudice Cisco's motion to dismiss the Complaint "[i]n light of the stay." Dkt. 95 at 4.

Components Thereof (II), ITC Inv. No. 337-TA-945 ("the '945 Investigation") (collectively, "the ITC Investigations"). *See* Exs. 2–3. On February 10, 2015, Judge White stayed the district court patent case pending resolution of the ITC Investigations. *See* Ex. 4.

A. The ITC Investigations

1. The '944 Investigation

The parties tried the '944 Investigation in September 2015 before the Honorable David P. Shaw, ITC Administrative Law Judge. On February 2, 2016, Judge Shaw issued his Initial Determination, finding that Arista Ethernet switches infringe three valid Cisco patents covering Cisco's inventive SysDB and Private VLAN technologies. Ex. 5 at 292. Judge Shaw also rejected Arista's equitable defenses and included sections in his Initial Determination explaining that "There Was No Misleading Conduct by Cisco" and that "There Was No Reasonable Reliance By Arista." *Id.* at 263–67; *see also id.* at 267 ("There was no express or implied communication or relationship between Cisco and Arista that could have led Arista into a false sense of security, and any reliance under the circumstances [that Cisco would not enforce its intellectual property rights] would be unreasonable."); *id.* at 265 ("[T]he evidence fails to establish that encouraging adoption of a product in the industry creates any licensing obligation for patents related to that product.").

On June 23, 2016, the ITC affirmed Judge Shaw's finding that Arista Ethernet switches infringe three Cisco patents, *see* Ex. 6 at 3, and ***entered an order excluding all Arista Ethernet switches (and components thereof) from being imported into this country***. Ex. 7 at 2. The ITC also entered a cease-and-desist order, *inter alia*, ***prohibiting Arista from selling those switches in the United States***. Ex. 8 at 1. The President did not disapprove of the Commissions' orders under 19 U.S.C. § 1337(j). Accordingly, Arista is now prohibited from importing and selling its entire infringing Ethernet switch product line.

2. The '945 Investigation

The parties tried the '945 Investigation in November 2015 before the Honorable MaryJoan McNamara, ITC Administrative Law Judge. On December 9, 2016, Judge McNamara issued her Initial Determination, finding that Arista Ethernet switches infringe two Cisco patents covering Cisco's inventive technology on access control list processing in associative memory and on

protecting the control plane, including against denial of service attacks, *see* Ex. 10 at 302, adding two more infringed patents to the three that Arista was previously found to be infringing in the '944 Investigation. Like Judge Shaw, Judge McNamara rejected Arista's defenses based on allegations (echoing those in its Complaint here) that Cisco's prior actions promoting its technology within the industry reasonably led Arista to believe that Cisco would not enforce its intellectual property rights. *Id.* at 265–67 (concluding "the record evidence does not demonstrate that Cisco's public statements with regard to its patents rights could lead Arista to 'reasonably infer' that Cisco would not enforce its patents against Arista"); 270–73 ("Arista has failed to provide any evidence that Cisco engaged in language or conduct that could be interpreted as 'an affirmative grant of consent or permission' for Arista to use the Cisco patents . . . ."); 275–77 (similar).

Judge McNamara also issued her Recommended Determination on Remedy and Bonding on December 9, 2016, recommending exclusion and cease-and-desist orders covering all of Arista's products. *Id.* at 297, 302. Cisco expects the Commission to affirm Judge McNamara's finding by May 1, 2017. Ex. 11 (notice of ITC deadline). The statutory 60-day presidential review period would end no later than June 30, 2017, *see* 19 U.S.C. § 1337(j), after which Arista will be prohibited (for the second time) from importing or selling its infringing switches into the United States.

B. The CLI Case

The parties tried the CLI case to a jury in late 2016. The jury returned a verdict on December 14, 2016, finding that Arista infringed Cisco's copyrights in its CLI-related user interfaces but that Arista was not liable for its infringement under the scènes à faire doctrine. 5:14-cv-05344-BLF, Dkt. 749 at 1. Importantly, the jury also rejected Arista's affirmative defenses of copyright misuse, abandonment, and fair use. *Id.* at 1–2. The Court entered judgment for Arista on December 19, 2016. 5:14-cv-05344-BLF, Dkt. 750. The parties' post-trial motions are fully briefed, and the hearing on those motions is scheduled for April 27, 2017.

Arista's copyright misuse, abandonment, and fair use defenses were based on the same factual assertions that Arista makes here: (1) Cisco promoted its CLI within the industry for many years, (2) that doing so somehow constituted a surrender of its intellectual property interests in the

CLI, and (3) that the public interest should prevent Cisco from asserting those rights against Arista.[4] Indeed, Arista repeated this refrain in its closing argument. *See, e.g.*, Ex. 12 at 2793:11–24 (arguing that it is against the public interest to allow Cisco to "turn around years later and say, no, we are going to change the rules now" and enforce its copyrights against Arista after "for years, and years, and years" saying its CLI was "common"); *id.* at 2743:10–19 ("Long before Arista came along, Cisco was promoting its own CLI as industry standard . . . in their own data sheets . . ., at their user conferences . . ., in white papers . . ., to everyone."); *id.* at 2746:11–14 (similar); *id.* at 2757:3–5 (similar); *id.* at 2764:24–2765:2 (similar); *id.* at 2747:3–5 ("[T]he networking industry has been using these commands for years and years with no complaint from Cisco whatsoever."); *id.* at 2765:20–23 ("[Cisco] abandoned the claim for copyright on these CLI's when they decided not to stop it to go forward, promote it as an industry standard, and tolerate its use by others."). The jury was not persuaded, and it rejected those defenses. *See* 5:14-cv-05344-BLF, Dkt. 749 at 1–2. Moreover, in rejecting Arista's copyright misuse defense, the jury concluded that Cisco has not used its copyrights in the CLI to prevent Arista from "undertaking activity safeguarded by public policy . . . ." 5:14-cv-05344-BLF, Dkt. 737 at 33 (Instr. No. 62), Dkt. 749 at 2.

The same factual allegations the CLI jury rejected are necessary predicates to Arista's CLI-based antitrust claim. *See, e.g.*, Dkt. 1 ¶ 119 ("Global and U.S. consumers of all [Internet and e-commerce] technology will ultimately pay the price of Cisco's exclusionary conduct."); *id.* ¶ 38 ("Cisco's conduct has impeded competition in markets that are the very backbone of our modern economy. . . . [U]ltimately global e-commerce consumers and Internet users[] will pay the price."). Arista's CLI-based antitrust claims cannot succeed if it is unable to establish the same facts that were already rejected in the CLI case.

ARGUMENT

The Court should dismiss Arista's Complaint for failing to state a claim pursuant to Rule

[4] Although the jury credited Arista's scènes à faire defense—a finding that Cisco contests in its pending motion for judgment as a matter of law, *see* 5:14-cv-05344-BLF, Dkt. 761—that defense has nothing to do with Cisco's actions after creating the copyrighted works. Instead, that finding relates to ***the time that Cisco created*** the user interfaces, which has nothing to do with Arista's antitrust allegations. 5:14-cv-05344-BLF, Dkt. 737 at 32 (Instr. No. 61) (emphasis added).

12(b)(6). Arista lacks standing to assert its antitrust claims against Cisco in light of the ITC's infringement findings and associated exclusion and cease-and-desist orders. And Arista's Complaint fails to plausibly plead factual and legal theories to support its allegations. *See Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (to survive a Rule 12(b)(6) motion "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation"); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); Fed. R. Civ. P. 8(a). Accordingly, Arista's claims should be dismissed.

I. Arista Has No Standing To Sue, Because Arista Is Precluded From Importing And Selling Its Ethernet Switch Products In The United States.

To have standing to bring an antitrust claim, a plaintiff must demonstrate (among other things) that the allegedly anticompetitive conduct impaired competition in at least one relevant antitrust market. *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1054–55 (9th Cir. 1999); *Feitelson v. Google, Inc.*, 80 F. Supp. 3d 1019, 1027 (N.D. Cal. 2015). Antitrust injury is both a substantive element of the antitrust claims and a prerequisite to establish antitrust standing. *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp.*, 592 F.3d 991, 998 (9th Cir. 2010) (citation omitted); *Cost Mgmt. Servs., Inc. v. Wash. Nat. Gas Co.*, 99 F.3d 937, 949 (9th Cir. 1996) (citation omitted). Arista has not—and cannot—satisfactorily plead antitrust injury. Accordingly, the Court must dismiss the entirety of Arista's Complaint.

A. Arista Cannot Establish Antitrust Injury Because The Products It Alleges Cisco Prevented It From Selling Have Been Barred By The ITC's Exclusion And Cease-And-Desist Orders.

Arista asserts that Cisco enforced its CLI copyrights in an anticompetitive way and that Cisco engaged in anticompetitive bundling of its Ethernet switches and support/maintenance services. Both allegations rely on Arista's claim that Cisco's conduct interfered with Arista's ability to sell Ethernet switches. But Arista's alleged difficulty in selling its Ethernet switches is not an injury Arista suffered "by reason of anything forbidden in the antitrust laws," 15 U.S.C. § 15(a), but

because Arista is ***barred*** from selling those same Ethernet switches in the United States by the ITC's orders. In other words, there is no antitrust injury—regardless of Cisco's conduct—because Arista cannot lawfully sell the infringing products that form the basis of its claims within the United States.[5]

In the '944 Investigation, the ITC found that Arista Ethernet switches that include Arista's Extensible Operating System ("EOS") infringe three Cisco patents. *See, e.g.*, Ex. 6 at 8, 41 (identifying the infringing components of Arista's EOS). Having reached that conclusion, the ITC issued two orders: (1) an exclusion order that prohibits Arista from importing the infringing Ethernet switches and components thereof into the United States; and (2) a cease-and-desist order that, *inter alia*, prohibits Arista from selling the infringing Ethernet switches in the United States. Ex. 7 at 2; Ex. 8 at 1. All of Arista's Ethernet switches use Arista's EOS. *See* Ex. 13 (Arista website describing EOS as operating system of Arista switches). Accordingly, the ITC's orders apply to all of Arista's Ethernet switches, and none of those switches may be imported into, or sold in, the United States. Put simply, the ITC's orders prevent Arista from lawfully participating in any alleged Ethernet switch market in the United States.[6]

Arista's inability to sell Ethernet switches precludes any antitrust claim relating to those products. There can be no anticompetitive injury to products that a federal agency or court bars from the marketplace, ***regardless*** of any allegedly anticompetitive conduct within that market. *See Ethypharm S.A. Fr. v. Abbott Labs.*, 707 F.3d 223, 236–37 (3d Cir. 2013) (finding no antitrust injury when the plaintiff could not lawfully participate in the market because it had not obtained FDA approval); *RealNetworks, Inc. v. DVD Copy Control Ass'n*, No. 08-cv-04548, 2010 WL 145098, at

[5] Arista pleads both a domestic market for Ethernet switches as well as a global market for Ethernet switches. Without an injury in the domestic market (due to its inability to sell its Ethernet switches in the United States), Arista's antitrust claims relating to the global market also cannot stand. *See* 15 U.S.C. § 6(a)(1) (Sherman Act only applies if there is a direct, substantial, and reasonably foreseeable effect on United States commerce); *F. Hoffmann–La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 159–61 (2004); *United States v. Hsiung*, 778 F.3d 738, 756 (9th Cir. 2015).

[6] Cisco anticipates that second exclusion and cease-and-desist orders will issue this summer after the ITC affirms Judge McNamara's recommendation to issue such orders in the '945 Investigation. These orders will be another independent factor precluding any alleged antitrust injury.

*5–6 (N.D. Cal. Jan. 8, 2010) (plaintiff's inability to participate lawfully in the market due to preliminary injunction meant that plaintiff could not establish antitrust injury). Without antitrust injury, Arista has no standing to pursue its claims. Accordingly, those claims must be dismissed. *Feitelson*, 80 F. Supp. 3d at 1026.

B. Any Sales That Arista Makes In Violation Of, Or Made Before, The ITC's Orders Are Unlawful And Cannot Form The Basis Of An Antitrust Injury.

Arista cannot create antitrust injury by selling products in violation of the ITC's orders, because any such sales are unlawful. Nor can Arista rely on sales made before entry of the ITC's orders. Indeed, courts routinely hold that a party cannot suffer antitrust injury if the products that it sells in the market are themselves unlawful.

For example, in *Monarch Marking System, Inc. v. Duncan Parking Meter Maintenance Co.*, the court dismissed the plaintiff's antitrust claims because the plaintiff sold labels that infringed the defendant's patents. No. 82-cv-02599, 1988 WL 5038, at *3 (N.D. Ill. Jan. 19, 1988), *vacated on other grounds*, 1988 WL 23830 (N.D. Ill. Mar. 8, 1988). The court held that "[a]n antitrust plaintiff does not have standing to recover damages for the loss of sales which would have infringed valid patents." *Id.* The reason for this is straightforward: "Because [the antitrust plaintiff] never had the right to infringe [defendant's] patents in the first place, it necessarily cannot have suffered injury by reason of the alleged" anticompetitive acts. *Id.* at *4; *cf. id.* at *5 ("The case would be different if [the plaintiff] were seeking to compete with non-infringing [products].").

The same is true here. Arista cannot lawfully sell its Ethernet switch products in the United States because those infringing products are subject to exclusion and cease-and-desist orders, and thus any activity related to those products—whether before or after the ITC issued its exclusion and cease-and-desist orders—cannot be a basis for any antitrust claims. Arista cannot sustain antitrust injury related to unlawful products that it has no right to sell. *See Modesto Irrigation Dist. v. Pac. Gas & Elec. Co.*, 309 F. Supp. 2d 1156, 1169–70 (N.D. Cal. 2004) ("Courts have long recognized that 'an action under the antitrust laws will not lie where the business conducted by the plaintiff, and alleged to have been restrained by the defendant, was itself unlawful.'" (quoting *Jenkins v. Greyhound Lines, Inc.*, 1971 WL 529, at *1 (N.D. Cal. 1971))); *Pearl Music Co. v. Recording*

Industry Ass'n of Am., Inc., 460 F. Supp. 1060, 1068 (C.D. Cal. 1978) (plaintiffs lacked standing to bring an antitrust claim based on sales of pirated copies of music that, under U.S. copyright law, were unlawful distributions).

C. Arista Cannot Establish Antitrust Injury By Arguing That It Has Redesigned (Or Will Redesign) Its Ethernet Switches.

Arista suggested in prior briefing and at the March 2, 2017 Case Management Conference that it will simply redesign—and allegedly has redesigned—its products to avoid the ITC's orders. *See, e.g.*, Dkt. 60 at 24; Ex. 9 at 13:10–13. But Arista cannot and does not deny that any alleged redesign occurred ***after*** Arista filed this antitrust case. Accordingly, any such alleged redesign cannot establish antitrust injury in ***this case*** because the alleged redesigned products did not exist at the time of the Complaint and are nowhere mentioned in the Complaint. Indeed, all of the switches that are the subject of the antitrust injury alleged in Arista's Complaint are subject to the ITC's orders and may not be imported into, or sold in, the United States. Arista never alleges that Cisco impeded its ability to sell any redesigned product, nor does it plead any facts suggesting a time period in which Arista was, is, or will be a lawful market participant. In fact, Arista never alleges in its Complaint that it made any efforts to create allegedly non-infringing Ethernet switches.

Not only has Arista failed to plead that any redesigned switches exist, but Arista has taken the position that its efforts to redesign its switches and move its manufacturing to the United States are not relevant to this action. Arista successfully prevented discovery by Cisco into any alleged redesigns and domestic manufacturing. *See* Dkt. 85 (granting Arista's motion to quash Cisco's discovery requests on these subjects). The Court should not allow Arista to maintain its Complaint based on facts that are not only unpled but adjudicated to be beyond the scope of this case.

Even if Arista had made redesign allegations in its Complaint, and the Court allowed discovery into those future plans, any such allegation would have been insufficient to support an antitrust claim because future injury based on the sale of future products is too speculative to support an antitrust claim. *See, e.g.*, *AstraZeneca AB v. Glenmark Generics Ltd.*, No. 14-cv-665, 2014 WL 5366050, at *1 n.1 (D. Del. Oct. 9, 2014) (dismissing antitrust claims because plaintiff's future participation in the market was speculative prior to the expiration of a patent); *Bristol-Myers Squibb*

Co. v. Copley Pharma., Inc., 144 F. Supp. 2d 21, 24–25 (D. Mass. 2000) (dismissing case because company's future participation in the relevant market was speculative). Indeed, to plead future antitrust injury associated with products that are not on the market, Arista must show that it has taken "substantial demonstrable steps to enter" the market with the new products. *See, e.g.*, *Cyntegra, Inc. v. IDEXX Labs., Inc.*, 322 F. App'x 569, 573 (9th Cir. 2009) (scant evidence "regarding the actual production of the [products]"). Arista pleads no such facts with respect to purportedly redesigned products. Arista's suggestion that it can simply manufacture Ethernet switches in the United States to avoid the ITC's orders also cannot create standing. *See* Ex. 9 at 13:6–9. Arista does not plead in its Complaint that it manufactures any Ethernet switches in the United States, that it can avoid using excluded foreign components in that manufacture, or that it has taken "substantial demonstrable steps" to do so. *Cyntegra, Inc.*, 322 F. App'x at 573.

Nor is Arista's failure to plead these facts a mere technical deficiency. There simply is no factual predicate in Arista's Complaint to support any of its antitrust allegations *during any time period in which Arista allegedly sold redesigned, non-infringing products*. *See, e.g., G.U.E. Tech, LLC v. Panasonic Avionics Corp.*, No. 15-cv-00789, 2016 WL 6138422, at *4 (C.D. Cal. Feb. 4, 2016) (plaintiff's allegations of an anticompetitive refusal to deal were insufficient because, among other reasons, "none of the allegations underpinning its claims for relief date to the time period" when the defendant was allegedly competing in the market); *see also Am. Ad Mgmt., Inc.*, 190 F.3d at 1057 (a purported antitrust plaintiff must be a market participant to establish antitrust standing).

In sum, the Court should reject any effort by Arista to establish standing based on unpled (and speculative) facts. Instead, the Court should consider the products at issue at the time of the Complaint and dismiss Arista's Complaint for lack of standing.

D. Arista Does Not And Cannot Plausibly Plead That Any Alleged Harm To Its Products Was The Result Of Anticompetitive Acts By Cisco, Rather Than Arista's Own Infringement Of Cisco's Patents.

Even putting aside Arista's inability to legally sell its Ethernet switches, the Court should dismiss all of Arista's claims for the additional reason that Arista's Complaint does not plausibly plead antitrust injury ***caused*** by Cisco's allegedly unlawful conduct. *See Am. Ad Mgmt., Inc.*, 190 F.3d at 1056 ("An antitrust injury must 'flow[] from that which makes defendants' acts unlawful.'")

(quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). Although Arista's Complaint asserts that Arista had difficulty selling its Ethernet switches, Arista's Complaint falls short of plausibly pleading that any such difficulty was ***caused by*** Cisco's allegedly anticompetitive conduct, because the Complaint does not contain any allegations that would tend to exclude the possibility that Arista's alleged difficulty was caused by other factors. *Cf. In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) (holding pleading was insufficient under *Iqbal* and *Twombly* for failing to plead "facts tending to exclude the possibility that the alternative explanation is true"); *RSA Media, Inc. v. AK Media Grp.*, 260 F.3d 10, 14–15 (1st Cir. 2001) (affirming judgment that plaintiff lacked antitrust standing because it did not show that the injury was caused by the anticompetitive conduct, not other factors); *Cascades Comput. Innovation LLC v. RPX Corp.*, No. 12-cv-01143, 2013 WL 316023, at *11 (N.D. Cal. Jan. 24, 2013) (dismissing antitrust claims because "Cascades has provided insufficient facts from which to plausibly infer that the reason it suffered this harm is due to a conspiracy in a particular market, rather than due to individual business disputes between independent actors"); *In re Wellbutrin XL Antitrust Litig.*, 133 F. Supp. 3d 734, 738 (E.D. Pa. 2015) ("[P]laintiffs cannot prove that they suffered antitrust injury or that the Wellbutrin Settlement was the proximate cause of any injury suffered because they have not presented evidence that the Wellbutrin Settlement, as opposed to an independent patent, prevented market entry of generic Wellbutrin XL.").

Arista's silence is particularly problematic here when it is at least equally plausible that potential customers declined to purchase Arista switches, not because of any CLI-related issues, but rather out of concern among sophisticated business customers that those switches infringed Cisco's patents at issue in public ITC investigations that might—and did—result in the exclusion of Arista products from U.S. commerce. Any such concerns would have been well-founded given the ITC's multiple findings of patent infringement. Pleadings that are "merely consistent with" a defendant's liability but do not foreclose an "obvious alternative explanation" fail to cross the line from mere possibility to a plausible entitlement to relief. *Iqbal*, 556 U.S. at 678. Arista has not adequately pled that its alleged injury was caused by unlawful conduct of Cisco, rather than a natural consequence of its own infringement. Accordingly, the Court should dismiss Arista's claims.

II. Arista's CLI-based Antitrust Claims Must Be Dismissed, Because The Factual Predicates For Those Claims Are Not Plausible And Have Already Been Rejected In The CLI Case.

Arista's CLI-based antitrust claims rely on Arista's assertion that Cisco induced Arista and others to use Cisco's CLI by representing that Cisco would not enforce its copyrights only to conduct a "policy change" once the industry was "locked into" Cisco's proprietary CLI. *See* Dkt. 1 ¶¶ 30–32. Arista claims that this behavior harmed competition in the Ethernet switch market and harmed Arista in particular. *Id.* ¶¶ 91–93. But Arista's allegations were already rejected by the jury in the CLI case and, in any event, are not plausibly pled by Arista.

A. The Jury In The CLI Case Rejected Arista's CLI-based Antitrust Allegations.

The jury in the CLI case rejected these very same allegations when presented as part of Arista's copyright misuse defense. To allege copyright misuse, a defendant "must allege that the plaintiff is misusing its copyrights in an attempt to stifle competition or otherwise abuse its monopoly." *Oracle Am. v. Hewlett Packard Enter. Corp.*, No. 16-cv-01393, 2017 WL 635291, at *4 (N.D. Cal. Feb. 16, 2017) (striking copyright misuse because allegations amounted to no more than "suggest[ing] that Oracle decided to enforce its limited monopoly after it had allegedly been failing to do so"); *Omega S.A. v. Costco Wholesale Corp.*, 776 F.3d 692, 700 (9th Cir. 2015) (Wardlaw, J., concurring). Indeed, the copyright misuse defense has its origins in antitrust law. *See Practice Mgmt. Info. Corp. v. Am. Medical Ass'n*, 121 F.3d 516, 520–21 (9th Cir. 1997) (citing *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 977–79 (4th Cir. 1990)); *United Tel. Co. of Mo. v. Johnson Pub. Co.*, 855 F.2d 604, 611 (8th Cir. 1988) ("Johnson has cited no case in which the misuse of a copyright has been held to constitute a successful defense to copyright infringement. The court, however, has found several cases in which courts have noted that the misuse of a copyright, in violation of the antitrust laws, may bar a plaintiff from recovering damages for copyright infringement.").

In the CLI trial, Arista relied on Cisco's alleged anticompetitive conduct as the basis for its copyright misuse defense, arguing to the Court during trial that it should grant Arista judgment as a matter of law on copyright misuse because "[t]he only reasonable conclusion on this record is that Cisco is attempting to leverage its limited copyright claims, if any, and any CLI elements, ***to stifle***

fair competition." Ex. 12 at 2647:6–8. Arista doubled down on this assertion in its post-trial motion for judgment as a matter of law on the issue of copyright misuse, arguing, "[t]he only reasonable conclusion . . . is that Cisco [is] doing exactly that: attempting to leverage limited copyright claims ***to stifle fair competition in broader markets***." 14-cv-5344-BLF, Dkt. 760 at 24.

On the special verdict form, the jury rejected Arista's copyright misuse defense. In doing so, it necessarily found that Arista did not prove that Cisco's promotion of its CLI as the gold standard of the industry or its enforcement of its copyright claims was unlawful or stifled competition. That finding eliminates necessary factual predicates for Arista's CLI-based antitrust claims.

If Arista cannot prove its copyright misuse claim, then it follows that Arista cannot prove the associated antitrust claim, because "the standard for copyright misuse is more lenient than that applicable to antitrust claims." *Oracle Am., Inc. v. Terix Comput. Co.*, No. 13-cv-03385, 2015 WL 1886968, at *5 (N.D. Cal. Apr. 24, 2015) (citing *Practice Mgmt. Info. Corp.*, 121 F.3d at 521); *Omega v. Costco*, 776 F.3d at 700 ("[A] defendant in a copyright infringement suit need not prove an antitrust violation to prevail on a copyright misuse defense.") (citation omitted) (Wardlaw, J., concurring); *see also Lasercomb*, 911 F.2d at 979 (finding misuse based on "Lasercomb's attempt to . . . control competition in an area outside the copyright, . . . regardless of whether such conduct amounts to an antitrust violation"). Although it is easier to prove copyright misuse than an antitrust violation, courts even have granted judgment of no copyright misuse when a party's antitrust claims have failed, demonstrating the common elements underlying the two claims. *See Pixels.com, LLC v. Instagram, LLC*, No. 15-cv-03610, 2015 WL 10943591, at *2 (N.D. Cal. Dec. 21, 2015) (dismissing misuse claims, which were based on allegations of anticompetitive conduct, because antitrust claim had been dismissed); *Bell Atl. Bus. Sys. Servs., Inc. v. Hitachi Data Sys. Corp.*, No. 93-cv-20079, 1995 WL 836331, at *11 (N.D. Cal. Dec. 14, 1995) (granting summary denial of copyright misuse defense because it "relie[d] upon [the] antitrust claims" that the court had dismissed on summary judgment).

Accordingly, once the judgment in the CLI case becomes final—following post-trial motions—Arista will be collaterally estopped from pursuing a claim contrary to the jury's findings. *See Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000).

B. Arista Cannot Plausibly Plead That Cisco Led The Industry To Believe It Would Not Enforce Its Intellectual Property In Its CLI.

Rather than identify any communications in which Cisco stated that it would not enforce its CLI, Arista repeatedly makes vague allegations that "Cisco made representations that led customers and the industry to believe that Cisco either did not have or would not assert any intellectual property rights claims in the CLI commands it used." Dkt. 1 ¶ 30; *see also id.* ¶ 77 ("Cisco intentionally made representations about industry-standard commands without qualifying those statements with any assertion of copyright or other intellectual property rights in the CLI commands."); *id.* ¶ 85 (alleging that Cisco's public statements regarding its CLI "leave . . . the impression that IOS CLI commands were in the public domain – or, at a minimum, that Cisco did not claim any proprietary rights in them"); *id.* ¶¶ 25–27, 74–76, 78 (similar).

Arista's vague allegations may be understood in one of two ways: either Cisco's representations reflected an intent to forgo its rights in its CLI copyrights; or Cisco never intended to forgo its rights but intentionally misled the industry to believe it did. In response to Cisco's original motion to dismiss, Arista asserted that its lock-in claim does not sound in fraud and merely reflects an anticompetitive policy change from copyright abandonment to copyright enforcement. Dkt. 60 at 3:26–28, 4:6–14. But Arista's argument that Cisco intended to abandon its copyrights only to change course later is foreclosed by the jury's rejection of Arista's copyright abandonment defense. 5:14-cv-05344-BLF, Dkt. 749 at 2, Dkt. 737 at 52 (Instr. No. 93). The Court should prohibit Arista from retrying the same theory that the CLI trial jury already rejected based on the doctrine of collateral estoppel.

Nor can Arista now revive its previously disclaimed theory that Cisco misled the industry and intended to enforce its CLI copyrights all along; those claims sound in fraud and fail to meet the heightened pleading standard of Fed. R. Civ. P. 9(b). Unlike other "policy change" cases, such claims depend on allegations that Cisco intentionally ***misled*** the industry to believe it either did not have or would not enforce its intellectual property in its CLI. This differs significantly from cases like *Eastman Kodak Co. v. Image Technical Services, Inc.*, where Kodak engaged in anticompetitive conduct by suddenly ceasing to sell replacement parts to photographic copiers to its competitors in the repair market after years of doing so. 504 U.S. 451, 473–77 (1992). A jury could find that

Kodak made an anticompetitive "policy change" without finding that Kodak had misrepresented its intentions to its customers. That is not true here. For Arista to succeed here in spite of the CLI jury's determination that Cisco did not intend to abandon its copyrights, the antitrust jury must find that Cisco knowingly misled its competitors regarding its intentions to enforce its copyrights in its CLI. Arista's claim resembles claims that the owner of a patent essential to implement a standard makes false or misleading statements to an industry standard-setting organization or remains silent despite an obligation to disclose its intellectual property. *See, e.g.*, *Apple Inc. v. Samsung Elecs. Co.*, No. 11-cv-1846, 2011 WL 4948567, at *4–6 (N.D. Cal. Oct. 18, 2011).

Courts look to state law to ascertain if a cause of action sounds in fraud and must meet the Rule 9(b) pleading standard. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009). The elements of a cause of action for fraud in California are (a) misrepresentation; (b) knowledge of falsity; (c) intent to induce reliance; (d) justifiable reliance; and (e) resulting damage. *Engalla v. Permanente Med. Grp.*, 15 Cal. 4th 951, 974 (1997). The Complaint recites conclusory allegations reflecting each of the five elements of fraud:

- [Misrepresentations]: Cisco made ***representations that led customers and the industry to believe*** that Cisco either did not have or would not assert any intellectual property rights claims in the CLI commands it used. Dkt. 1 ¶ 30.
- [Knowledge of falsity]: Cisco ***intentionally*** made representations about industry-standard commands without qualifying those statements with any assertion of copyright or other intellectual property rights in the CLI commands. On information and belief, Cisco ***did so knowing that its statements would induce industry players*** to use those commands rather than standardizing an alternative, and to do so without challenging any Cisco copyright claim. *Id.* ¶ 77; *see also, e.g., id.* ¶ 27.
- [Intent to induce reliance]: ***Cisco knew that its representations also had the effect of inducing other Ethernet switch competitors***. *Id.* ¶ 27. Cisco encouraged the very reliance on industry-standard CLI. *Id.* ¶ 96.
- [Justifiable reliance]: Observers of Cisco's long-standing policy and its corresponding marketplace statements about industry-standard CLI would ***reasonably infer*** that Cisco would not assert any intellectual property rights in CLI commands. *Id.* ¶ 78; *see also, e.g., id.* ¶¶ 28, 79, 83, 89.
- [Resulting damage]: Cisco's reversal of policy and its execution of this reversal of policy in the marketplace harm competition and consumers. *Id.* ¶ 93; *see also, e.g., id.* ¶¶ 31, 90.

Accordingly, the heightened pleading standard of Fed. R. Civ. P. 9(b) applies. *See, e.g., Lotes Co. v. Hon Hai Precision Indus. Co.*, No. 12-cv-7465, 2013 WL 2099227, at *5 n.71 (S.D.N.Y. May 14, 2013); *Apple v. Samsung*, 2011 WL 4948567, at *4–5; *Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178, 2011 WL 7324582, at *12 (W.D. Wis. June 7, 2011).

Arista's conclusory claims regarding "industry standard" CLI commands—which do not even satisfy the *Iqbal* and *Twombly* pleading standards—surely fall far short of satisfying Rule 9(b), which requires Arista to plead the "who, what, when, where, and how" of the alleged misrepresentations. *Kearns*, 567 F.3d at 1124; *Apple v. Samsung*, 2011 WL 4948567, at *3 (Rule 9(b) requires a pleading of the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations").

Similarly, Arista does not plead that Cisco had a duty to disclose its CLI copyrights and patents, nor does Arista identify specific circumstances that allegedly created such a duty. *See, e.g.*, *Hynix Semiconductor Inc. v. Rambus, Inc.*, 609 F. Supp. 2d 988, 1024 (N.D. Cal. 2009) (concluding that jury's finding that Rambus had no duty to disclose its patent application foreclosed plaintiff's argument that failure to so disclose was anticompetitive), *aff'd*, 645 F.3d 1336 (Fed. Cir. 2011); *cf. Rambus Inc. v. Infineon Techs.*, 318 F.3d 1081, 1101 (Fed. Cir. 2003) (discussing circumstances where such a duty to disclose would arise). Nor does Arista describe any such specific circumstances through its broad assertion that "[d]espite the IETF's Intellectual Property Rights ('IPR') policy requiring Cisco to disclose any purported intellectual property, including copyrights and patents, Cisco has disclosed nothing of the sort for its submissions containing industry-standard commands." Dkt. 1 ¶ 124. For example, Arista does not identify the "submissions" it generically refers to, who made those submissions, what IETF disclosure obligations apply to Cisco's CLI intellectual property (*e.g.*, that the use of the copyrighted CLI commands is essential to implement an IETF standard), or even what particular intellectual property was required to be disclosed. *Cf. Netscape Commc'ns Corp. v. ValueClick, Inc.*, 684 F. Supp. 2d 699, 723 (E.D. Va. 2010) ("[I]f, on the other hand, plaintiff was not an IETF member or the IETF disclosure obligation did not reach the

. . . patent, then plaintiff is entitled to summary judgment on this issue.").[7]

Moreover, Arista equivocally asserts that "industry participants ***would likely have*** developed and invested in alternative 'industry standard' CLI commands, free from intellectual property claims." Dkt. 1 ¶ 29. But Arista does not identify which specific "industry participants" likely would have invested in the development of alternative "industry standard" CLI commands or when that development and investment would have taken place. And even if Arista had identified the would-be participants, a conclusory assertion that those industry participants ***would likely have*** selected a viable alternative technology, without supporting facts, is not sufficient to satisfy the pleading standards. *See Apple v. Samsung*, 2011 WL 4948567, at *4 (dismissing antitrust counterclaim alleging fraudulent statements to a standard-setting organization because Apple failed to provide supporting factual assertions, conclusorily alleging instead, for example, that "[h]ad Samsung properly disclosed the existence of its IPR, the relevant SSO would have selected a viable alternative technology or would have decided not to incorporate that proposal into the standard").

Arista's CLI-based claims should be dismissed for this additional reason.

III. Arista's SMARTnet Bundling Scheme Allegations Should Be Dismissed, Because They Rely On A Legal Theory That Was Rejected By The Ninth Circuit Court Of Appeals.

Arista alleges that Cisco "[p]enaliz[es] SMARTnet customers renewing their contracts who choose to implement new competitive Ethernet switches into their networks." Dkt. 1 ¶¶ 135, 142. In other words, Arista alleges that Cisco offers an anticompetitive discount to customers who bundle their product purchase with a service contract from Cisco. *Id.* ¶ 105. But Arista's allegations are inadequately pled, contrary to law, and must be dismissed.

As a general matter, bundled discounts are legitimate price competition. "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S.

[7] Beyond this factual deficiency, Arista does not state a plausible claim because Cisco's asserted interaction with the IETF occurred in January 2015, Dkt. 1 ¶ 124, after Arista claims that Cisco conducted its "about face" in 2014 and started notifying the industry that its CLI was proprietary. *See, e.g., id.* ¶ 91. It is not plausible for Arista to assert that anyone was misled by Cisco's interaction with the IETF *after* Cisco had begun to enforce its intellectual property against Arista.

209, 223 (1993) (citation omitted). "Consistent with that principle, [courts] should not be too quick to condemn price-reducing bundled discounts as anticompetitive, lest we end up with a rule that discourages legitimate price competition." *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 896 (9th Cir. 2008) (citation omitted). Bundled discount claims, like other predatory pricing claims, must be "evaluated with care" so that businesses legitimately trying to compete are not subjected to burdensome antitrust litigation initiated by fact-free pleadings like Arista's Complaint here. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 121 n.17 (1986); *see also Twombly*, 550 U.S. at 558 (warning against "forget[ting] that proceeding to antitrust discovery can be expensive."). Low prices "stimulate[] competition," and predatory pricing schemes are quite rare because "the obstacles to the successful execution of a strategy of predation are manifold, and . . . the disincentives to engage in such a strategy are accordingly numerous." *Cargill, Inc.*, 479 U.S. at 121 n.17. Arista pleads no *facts* that plausibly suggest such a rare scheme here; litigating Arista's bundling scheme will more likely "chill the very conduct the antitrust laws are designed to protect." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1186 (9th Cir. 2016) (quoting *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007)).

A. Arista's Bundling Claim Offers Nothing But Conclusory Allegations Devoid Of Any Factual Support.

The Court should dismiss Arista's bundling claim because "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). In *Cascade Health Solutions v. PeaceHealth*, the Ninth Circuit carved out a narrow exception to the general rule that bundled discounts are procompetitive. The "discount attribution" test legitimizes bundled discounts "unless the discounts have the potential to exclude a *hypothetical* equally efficient producer of the competitive product." 515 F.3d at 906. To determine whether that exception applies, the test allocates the "full amount of the discounts given by the defendant" to the competitive product and compares the total discounted price of the competitive product to "the defendant's incremental cost to produce them." *Id.* Arista's allegations are a rote recital of the *PeaceHealth* test:

Upon information and belief, the difference in SMARTnet price between the price

> charged to a customer buying a competitor's Ethernet switch and one buying only Cisco's Ethernet switches is substantial and operates as a serious penalty. ***If the price difference were attributed to Cisco's Ethernet switch sales as a discount***, Cisco would be selling Ethernet switches in the Relevant Product Markets below its incremental costs. Dkt. 1 ¶ 106.

Yet this claim is devoid of a single supporting fact. For example, Arista does not explain when Cisco began the purported SMARTnet bundling scheme. Nor does Arista provide even a single example of a customer Cisco penalized—or threatened—with higher service prices if it bought switches from Arista. Nor does Arista plead its own costs or that Cisco's pricing forced it to sell at or below its costs. Arista's Complaint also is devoid of factual assertions regarding Cisco's pricing or whether that pricing was below Cisco's costs.

Faced with similar fact-free pleadings in bundled pricing cases, Courts have not hesitated to grant motions to dismiss. *See, e.g.*, *Vesta Corp. v. Amdocs Mgmt. Ltd.*, 129 F. Supp. 3d 1012, 1032–34 (D. Or. 2015) (dismissing claims of predatory pricing and bundling for lack of factual support because, *inter alia*, "Plaintiff does not identify any figures or estimates of Defendants' costs, nor does Plaintiff demonstrate that Defendants would have suffered any losses on their pricing schemes"); *Synopsys, Inc. v. ATopTech, Inc.*, No. 13-cv-02965, 2015 WL 4719048, at *7 (N.D. Cal. Aug. 7, 2015) (dismissing claims with prejudice for lack of factual support because "[t]he [Complaint] does not include facts that would show how the alleged discounting practice was coercive, e.g., the amount of the difference between the price of PrimeTime when purchased separately and its price when purchased together with IC Compiler, or how Synopsys' prices compare to the prices charged by competitors"); *Montano Cigarette, Candy & Tobacco, Inc. v. Core-Mark Mid-Continent, Inc.*, No. 08-cv-00426, 2008 WL 4793696, at *2 (D. Conn. Oct. 31, 2008) (dismissing predatory pricing claim where the complaint "simply states in conclusory fashion that Core-Mark sells cigarettes below cost to injure competition" but fails "to buttress its conclusory allegations with some factual detail consistent with the requirements of Rule 11").

The glaring absence of factual allegations to support Arista's bundled pricing claim is especially notable because Arista had access to voluminous internal documents that Cisco produced in related litigation and the ITC Investigations, yet its Complaint provides no details at all about Cisco's costs or prices. *See* 5:14-cv-05344-BLF, Dkt. 163 at 5 n.2 (Arista explaining that its

antitrust claims are based on its review of documents "totaling over 2 million pages"). Given the discrepancy between the facts available to Arista and the facts Arista included in its Complaint, the Court should "insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Feitelson*, 80 F. Supp. 3d at 1025, 1032. That Arista failed to include such information in its Complaint can only mean that it lacks such information, demonstrating the claim is not plausible and must be dismissed with prejudice. *See, e.g.*, *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 07-cv-05944, 2013 WL 5425183, at *2–3 (N.D. Cal. Sept. 26, 2013) (granting motion to dismiss antitrust claims and noting that, given Plaintiffs' own claims of evidence of anticompetitive conduct accessed in discovery in related cases, "Plaintiffs should be able to provide something more than boilerplate allegations"); *Montano Cigarette*, 2008 WL 4793696, at *2 (concluding that Montano's choice "not to include such information [i.e., factual detail to support its allegations] in its Second Amended Complaint can only mean that it lacks such information. But without it, Core-Mark lacks needed notice of Montano's predatory pricing claim and the claim itself is not plausible.").

B. As A Matter Of Law, The Narrow *PeaceHealth* Exception Does Not Apply Where Cisco And Arista Both Offer Competing Bundled Goods And Services.

The Ninth Circuit recently held that the *PeaceHealth* "discount attribution" test does not apply when both the antitrust plaintiff and defendant sell the same bundle of goods. *Aerotec Int'l, Inc.*, 836 F.3d at 1186. In *Aerotec*, both parties competed in the repair market for Honeywell-manufactured aircraft auxiliary power units. *Id.* at 1175–76. Aerotec argued that Honeywell sold bundles of parts and services below cost in violation of Sherman Act § 2 under the discount attribution test. *Id.* at 1186. The Ninth Circuit flatly disagreed: "[T]he math doesn't add up here because the discount attribution test does not apply in circumstances like this where the parties offer the same bundle of goods and services." *Id.*

Arista and Cisco, too, offer the same bundle of goods and services: Ethernet switches and accompanying maintenance contracts. The Complaint alleges the relevant market is the "service market" comprised of the "maintenance and service provided by Ethernet switch suppliers or third-party vendors to ensure the proper functioning of their hardware and software." Dkt. 1 ¶ 55; *see also*

id. ¶¶ 56–57 (describing alleged service market). Arista admits that it competes in that alleged service market by offering "comparable maintenance services for [its] own products." *Id.* ¶ 98. And as discussed extensively in the Complaint, both parties sell Ethernet switches. As such, Arista's allegations fall outside the narrow set of bundled pricing claims permitted by *PeaceHealth.* Instead, Arista is challenging the kind of pro-competitive bundling that "generally benefit[s] buyers because the discounts allow the buyer to get more for less." *Aerotec Int'l, Inc.*, 836 F.3d at 1185 (citation omitted). The *Aerotec* decision dooms Arista's bundling claims because the bundle Arista alleges is a bundle Arista also sells. Accordingly, Arista's bundling claims should be dismissed.

IV. The Court Should Dismiss Arista's Complaint Because Arista Does Not Plausibly Plead A Relevant Antitrust Market.

A necessary element of Sherman Act monopolization or attempted monopolization claims is defining the relevant antitrust market that the antitrust defendant has allegedly monopolized or seeks to monopolize. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455–56 (1993). Thus, to sufficiently plead an antitrust claim, a complaint must propose a relevant antitrust market. *Tanaka v. Univ. of Southern Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) ("Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim."). A relevant product market under antitrust law is one that includes the products that "customers view . . . as reasonable substitutes for each other and would switch among . . . in response to changes in relative prices." *Apple, Inc. v. Pystar Corp.*, 586 F. Supp. 2d 1190, 1196 (N.D. Cal. 2008); *see also Brown Shoe v. United States*, 370 U.S. 294, 325 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."). Although market definition is typically factual, "[a]n antitrust complaint can be dismissed if its market definition is facially unsustainable" as it is here. *Colonial Med. Grp. v. Catholic Health Care W.*, 444 F. App'x 937, 938 (9th Cir. 2011). Indeed, courts regularly dismiss antitrust claims that do not plausibly plead a relevant antitrust market. *See, e.g., Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1105 (9th Cir. 1999) (affirming dismissal of antitrust complaint for failing to adequately allege a relevant market); *Manwin Licensing Int'l S.A.R.L. v. ICM Registry, LLC*, No. 11-cv-9514, 2012 WL 3962566, at *8–9 (C.D. Cal. Aug. 14, 2012) (dismissing antitrust

claims based on insufficiently pled market); *Apple v. Pystar*, 586 F. Supp. 2d at 1198–99 (dismissing antitrust counterclaim as insufficient under *Twombly* because Pystar failed to allege facts tending to support the alleged market that, absent such facts, was facially counterintuitive); *Sidibe v. Sutter Health*, 4 F. Supp. 3d 1160, 1176–77 (N.D. Cal. 2013) (dismissing antitrust claims for failing to plead facts that would make the pled market plausible); *Hicks v. PGA Tour, Inc.*, 165 F. Supp. 3d 898, 909–10 (N.D. Cal. 2016) (dismissing Sherman Act claims with prejudice based on failure to allege plausible market).

In its Complaint, Arista pleads the existence of two alleged Relevant Product Markets: one for "high-speed" Ethernet switches and another for all Ethernet switches. *See* Dkt. 1 ¶¶ 40–54. But Arista's claim for a single relevant market for all Ethernet switches is not facially plausible in light of Arista's other assertions. More specifically, in its Complaint, Arista asserts that all Ethernet switches are ***not*** reasonably interchangeable, pleading that "customers of high-speed Ethernet switches would ***not*** be able to turn to alternative technologies—including, but not limited to, lower-speed switches—in response to a high-speed switch monopolist's price increase above competitive level." *Id.* ¶ 49. Thus, Arista's first purported market—an Ethernet switch market that includes what Arista concedes are non-interchangeable high-speed and low-speed switches—must be dismissed as a matter of law. *See Westlake Servs., LLC v. Credit Acceptance Corp.*, No. 15-cv-07490, 2015 WL 9948723, at *5 (C.D. Cal. Dec. 7, 2015) (dismissing complaint for failure to plead relevant market because markets as alleged "include products that cannot plausibly be considered substitutes"); *Apple v. Pystar*, 586 F. Supp. 2d at 1200 (noting internal contradictions in market allegations as additional reason to dismiss antitrust counterclaim).

Arista's narrower proposed market—that of "high-speed" Ethernet switches—suffers from a different problem. Arista has not sufficiently alleged any injury in that purported market. Instead, Arista includes a conclusory allegation regarding its injury as it relates to its proposed markets:

> ***Cisco's unlawful monopolization has injured competition in each of the Relevant Product Markets***, suppressed sales of Arista's products and the products of other competitors, diminished Arista's future sales opportunities and the sales opportunities of other competitors, and increased Arista's operating costs and the operating costs of other competitors.

Dkt. 1 ¶ 138; *see also id.* ¶ 145. Arista's conclusory assertion of harm to competition caused in "each of the Relevant Product Markets" is devoid of facts alleging harm specific to the alleged high-speed market. Nor is Arista's obfuscation of injury specific to the high-speed market a mere oversight. In fact, Arista recently told this Court in the parties' Case Management Statement that Cisco's purportedly anticompetitive conduct has ***not*** harmed Arista in the high-speed market: "Cisco's scheme has been largely unsuccessful with respect to cutting-edge data center and ***high-speed*** finance customers." Dkt. 102 at 3. The Court should not allow Arista's threadbare assertion of injury in "each of the Relevant Product Markets" to proceed, particularly in light of contradictory statements that Arista made to this Court regarding the alleged high-speed Ethernet market.

Even if the Court were to overlook Arista's contradictory statement, Arista's relevant market allegations suffer from the same fatal flaw as its allegations concerning the harm it says Cisco has caused: despite its business selling switches in competition with Cisco and despite access to millions of documents that Cisco produced in related litigation, Arista never identifies any specific Cisco, Arista, or third-party products that would fall into any alleged market that Cisco purportedly monopolized. Nor does Arista identify which of its products suffered from alleged suppressed sales. The Court should dismiss Arista's allegations with respect to a high-speed market for failure to plausibly plead injury in that alleged market.

V. Arista's UCL Claim Falls With Its Sherman Act Claims.

Arista's "UCL claim based on 'unfair' competition rises and falls with [its] Sherman Act claims." *See Feitelson*, 80 F. Supp. 3d at 1034 (citing *City of San Jose v. Office of the Comm'r of Baseball*, 776 F.3d 686, 691–92 (9th Cir. 2015)). Accordingly, for all the reasons set forth above, Arista's UCL claim also must be dismissed. *See Hicks v. PGA Tour, Inc.*, 165 F. Supp. 3d at 911 (dismissing with prejudice a UCL claim that overlaps with allegations of antitrust violations) (citing *Chavez v. Whirlpool Corp.*, 113 Cal. Rptr. 2d 175, 184 (Ct. App. 2001)).

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint with prejudice.

Dated: March 23, 2017

Respectfully submitted,

By: */s/ John M. Desmarais*

John M. Desmarais (*admitted pro hac vice*)
jdesmarais@desmaraisllp.com
Paul A. Bondor (*admitted pro hac vice*)
pbondor@desmaraisllp.com
Alan S. Kellman (*admitted pro hac vice*)
akellman@desmaraisllp.com
Tamir Packin (*admitted pro hac vice*)
tpackin@desmaraisllp.com
Brian Leary (*admitted pro hac vice*)
bleary@desmaraisllp.com
Tom BenGera (*admitted pro hac vice*)
tbengera@desmaraisllp.com
Michael R. Rhodes (*admitted pro hac vice*)
mrhodes@desmaraisllp.com
DESMARAIS LLP
230 Park Avenue
New York, NY 10169
Telephone: (212) 351-3400
Facsimile: (212) 351-3401

Amy H. Candido (SBN 237829)
amycandido@quinnemanuel.com
QUINN EMANUEL URQUHART & SULLIVAN
50 California Street, 22nd Floor
San Francisco, CA 94111
Telephone: (415) 875-6600
Facsimile: (415) 875-6700

Attorneys for Defendant Cisco Systems, Inc.