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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NSS LABS, INC.,

Plaintiff,

vs.

CROWDSTRIKE, INC., SYMANTEC CORP., ESET, LLC, ANTI-MALWARE TESTING STANDARDS ORGANIZATION, INC., AND DOES 1-50, INCLUSIVE,

Defendants.

Case No. 3:18-cv-05711-BLF

CROWDSTRIKE, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Date: February 7, 2019
Time: 9:00 a.m.
Courtroom: San Jose Courthouse Courtroom 3
Judge: The Honorable Beth Labson Freeman

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 7, 2019 at 9:00 a.m. or as soon thereafter as this matter may be heard, in the United States District Court for the Northern District of California, located at 280 South 1st Street, San Jose, CA 95113, in the courtroom of the Honorable Beth Labson Freeman, Defendant CrowdStrike, Inc. will and hereby does move the Court for an order dismissing Plaintiff NSS Labs, Inc.'s Complaint against CrowdStrike for Violation of the Sherman Act, 15 U.S.C. § 1, and the Cartwright Act, California Business & Professions Code § 16720 (Dkt. 1) under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Request for Judicial Notice, the Declaration of Ryan Tyz, the pleadings and papers on file in this action, any other such matters upon which the Court may take judicial notice, the arguments of counsel, and any other matter the court may properly consider.

RELIEF SOUGHT

NSS's Complaint against CrowdStrike should be dismissed under Federal Rule of Civil Procedure 12(b)(6) because NSS has not pleaded facts constituting essential elements of a conspiracy to restrain trade and has not pleaded facts showing that it has suffered antitrust injury.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

NSS Labs, Inc. ("NSS") complains of a conspiracy among Defendants to "boycott" NSS through the May 22, 2018 adoption of the AMTSO's Testing Protocol Standard for the Testing of Anti-Malware Solutions (the "Standard"). Its Complaint, however, only insinuates a conspiracy and offers no facts to support one, particularly with respect to CrowdStrike.

NSS objects to the Standard in two respects. First, the Standard does not compel "Vendors," i.e., cybersecurity product suppliers like CrowdStrike, to work with NSS. (Compl. ¶ 17 ("it does little to ensure that vendors cannot block or prevent testers from procuring the product to conduct a test")). But a standard that does not compel Vendors and Testers to work together is not an antitrust harm; indeed, what NSS wants is antithetical to the antitrust laws. *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) ("[T]he [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."). Second, the Standard encourages transparency over secrecy, requiring that a "Tester" (such as NSS) "reveal the 'types of Products … in the Test, … the purpose of the Test, … the methodology of the Test, … the scoring, [and] how the Test's results can be disputed." (Compl. ¶ 78). NSS would prefer to hide this basic information from Vendors. But these features of the Standard are not exclusionary and therefore do not harm competition.

The Complaint, accordingly, must be dismissed for at least the following reasons:

First, NSS's Complaint fails under *Twombly* as it does not allege any facts plausibly explaining a purported group boycott involving CrowdStrike, namely (1) who conspired, (2) what they conspired to do, (3) when or where the conspiracy took place, (4) why the alleged conspirators conspired, *i.e.*, the purpose of the alleged conspiracy, or (5) how they were to enforce the conspiracy. And NSS's group boycott claims are particularly implausible given that over a year ago CrowdStrike independently refused to deal with NSS when it sued NSS for fraudulently accessing CrowdStrike's proprietary and confidential software platform, theft of

trade secrets, and other violations of CrowdStrike's intellectual property rights – a dispute that arose after CrowdStrike and NSS's relationship broke down due to multiple testing failures NSS has admitted to in another federal court.

Second, the Complaint can satisfy neither the *per se* rule nor the rule of reason standard with respect to the setting or enforcement of the Standard. Because the Vendors who allegedly "conspired" by adopting the AMTSO Standard are not alleged to be NSS's competitors and thus cannot be alleged to have adopted the Standard for the purpose of foreclosing a competitor, and because NSS does not claim to have been fully excluded from any market but only "disadvantaged," this case does not fit within the limited universe of cases for which *per se* treatment is appropriate under *Northwest Wholesale Stationers v. Pacific. Stationery & Printing Co*., 472 U.S. 284, 294 (1985) in the standard setting context. Nor does NSS state a claim under the rule of reason, as the Complaint fails (a) to allege any facts suggesting that the Standard discriminates against NSS or might otherwise suggest harm to competition and (b) to allege that any Defendant has market power (individually or collectively) in any relevant market.

Finally, NSS fails to tie any of its alleged harm to the alleged anticompetitive conduct, and thus cannot demonstrate antitrust injury or standing to state an antitrust claim. NSS cannot complain that AMTSO rejected NSS's attempts to impose a standard that would force Vendors like CrowdStrike to deal with NSS against their will, as that cannot be an antitrust injury when, as noted above, the antitrust laws do not require forced dealing. And NSS's claim of harm from the Standard fails for the further reason that NSS has alleged an intervening independent harm resulting from events that are currently the subject of ongoing litigation between NSS and CrowdStrike. Finally, NSS's Complaint never explains why it cannot engage transparently with Vendors and thus meet the Standard and thereby avoid any alleged injury.

Dismissal of all of NSS's claims is therefore appropriate.

II. STATEMENT OF ISSUE TO BE DECIDED

Whether NSS has stated a plausible claim for a conspiracy to restrain trade against CrowdStrike as required by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

III. RELEVANT FACTUAL BACKGROUND

a. AMTSO's Standard Setting Process and the Standard Here

AMTSO is an international nonprofit organization founded in large part to develop and implement standards for fair, open, and trustworthy testing of security products, including by establishing protocols and best practices for testing. (*See* Declaration of Ryan Tyz in support of CrowdStrike's Motion to Dismiss Plaintiff's Complaint ("Tyz Decl."), ¶ 2, Ex. A. (https://www.amtso.org/about-amtso/); Compl. ¶ 75; *id.* at Ex A, p. 3). AMTSO membership is open to any individual or entity that supports its mission, and AMTSO currently has over fifty industry members consisting of both Vendors and Testers, including NSS. (*See* Tyz Decl., ¶ 2, Ex. A (https://www.amtso.org/members/)).

Representatives of sixteen AMTSO members, including NSS, the named Defendants, and twelve other companies, participated in AMTSO's Standards Working Group that drafted the AMTSO Standard adopted on May 22, 2018. (Compl. Ex A, pp. 3-4). The purpose of the Standard is "to help improve the transparency and fairness of Anti-Malware Tests that are made publicly available." (*Id.* at p. 6). The "Standard is based on a premise that although testers and vendors must retain their independence, anti-malware testing is more likely to be transparent and [f]air if there is communication between the parties regarding the solution being tested, and the testing methodology." (*Id.* at p. 3). Thus, the Standard seeks to further Vendor-Tester communication and avoid "opaque or unfair testing [that] can create misleading results and leave corporations and consumers with inadequate protection." (*Id.*).

To comply with the Standard, a Tester provides Vendors whose products are being tested with basic information such as the "types of Products … in the Test, … the purpose of the Test, … the methodology of the Test, … the scoring, [and] how the Test's results can be disputed." (Compl. ¶ 78). The Standard also prohibits Testers from discriminatorily disfavoring Vendors based on whether the Vendor has paid the Tester and requires disclosing conflicts of interest. (*Id.* at Ex. A ¶¶ 8.2.1, 9.2.4). Finally, Testers must present results "in a way that is clear and understandable to prevent the results from being deceptive, unfair, or misleading." (*Id.* at Ex. A

¶ 9.2.1). A Tester can ignore the Standard, or may claim AMTSO compliance if it follows these requirements and provides confirmatory information to the AMTSO. (*Id.* at Ex. A ¶ 9.2.5).

Another purpose of the Standard is to "[p]rovid[e] Testers with Fair access to Products as they run Tests" and "[e]ncourag[e] more voluntary participation by Vendors." (*Id.* at Ex. A ¶ 1.2). Thus, "Vendors are encouraged to provide their Products as requested by any Tester." (*Id.* at Ex. A ¶ 5.4). The Standard also provides a "carrot" for Vendors to participate, allowing them additional rights to audit and comment on the test results in exchange for cooperating with a test. (*Id.* at Ex. A ¶ 6.1.10.2.1). NSS speculates that this open exchange of information between Testers and Vendors will allow Vendors to "cheat" by "tailor[ing] their products" to the test (*Id.* at ¶ 79); but, the Standard, as alleged in the Complaint, prohibits Vendors from "cheating," such as by adding a feature "for testing purposes only" or by "tuning" features to "known testing environments" to alter the results. (*Id.* at Ex. A ¶ 8.1.1.1).

b. CrowdStrike's Complaint Against NSS Pending in Delaware

The Court may take judicial notice of the fact that on February 10, 2017 – over a year before the adoption of the AMTSO Standard – CrowdStrike sued NSS in the District of Delaware in response to NSS unlawfully accessing CrowdStrike confidential and proprietary software. (*See* Tyz Decl., ¶ 3, Ex. B (Redacted Complaint, *CrowdStrike, Inc. v. NSS Labs, Inc.*, C.A. No. 17-146 (D. Del. Feb. 10, 2017), ECF 22 ("DE Compl."))). The Court need not take any view with respect to the merits of the Delaware Complaint, but the fact of that dispute provides important context explaining the lack of a business relationship between CrowdStrike and NSS.

Previously, in January 2016, CrowdStrike agreed to work with NSS for conducting only a so-called "private testing" of CrowdStrike's products. (DE Compl. ¶¶ 14-29; *see also* Compl. ¶¶ 37-41 (describing private and public testing)). However, CrowdStrike believes (and has thus alleged in the Delaware action) that NSS failed to adhere to NSS's own stated testing methodologies and that its testing exhibited severe quality control failures, to which NSS later admitted in the Delaware action, and for that reason CrowdStrike chose not to participate in NSS's later public testing. (DE Compl. ¶¶ 34-35, 43). CrowdStrike alleges that NSS then fraudulently accessed the CrowdStrike software without authorization, in violation of

CrowdStrike's license agreements and federal law, in order to conduct such public testing. (*Id.* ¶¶ 31, 69-73). CrowdStrike asserts claims for breach of contract, tortious interference with contract, misappropriation of trade secrets, fraud, copyright infringement, violations of the Computer Fraud and Abuse Act, and false and misleading advertising against NSS. (*Id.* at Counts I-III; Tyz Decl., ¶ 4, Ex. C (Redacted Sec. Am. Compl. at Counts I-VII, *CrowdStrike, Inc. v. NSS Labs, Inc.*, C.A. No. 17-146 (D. Del. Jan. 18, 2018), ECF 35 ("DE SAC"))). CrowdStrike has not worked with NSS privately since and has never worked with NSS as part of any public test, and adoption of the Standard would not affect that decision because "the [] Standard does not enforce vendor participation in tests." (Compl. ¶ 17; *id.* at Ex. B).

CrowdStrike initially sought a temporary restraining order to prevent NSS from publicly releasing a testing report with stolen CrowdStrike data. NSS responded by claiming it would be irreparably harmed by a TRO as "[a]ny interference with NSS' ability to test all competitive cybersecurity products would put the value of its public tests at risk (it would be like omitting any important product from competitive testing) and undermine its public test business." (Tyz Decl., ¶ 5, Ex. D (Declaration of Lisa Owen, ¶ 17 (Redacted Public Version), *CrowdStrike, Inc. v. NSS Labs, Inc.*, C.A. No. 17-146, (D. Del. Nov. 19, 2018), ECF 79 ("Owen Decl."))). The Court denied the TRO. (Mem. at 11, *CrowdStrike, Inc. v. NSS Labs, Inc.*, C.A. No. 17-146 (D. Del. Feb. 13, 2017), ECF 12). The parties are well into discovery and trial is set for October 21, 2019 in the Delaware litigation.

IV. NSS'S ANTITRUST CLAIMS SHOULD BE DISMISSED

a. Legal Standard under Fed. R. Civ. P. 12(b)(6)

Before "unlock[ing] the doors of discovery," the complaint must include enough facts to suggest that the right to relief is plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Twombly*, 550 U.S. at 570. Conclusory allegations cannot meet this standard; to survive a motion to dismiss, a plaintiff must provide more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Orchard Supply Hardware LLC v. Home Depot USA, Inc.*, 939 F. Supp. 2d 1002, 1007 (N.D. Cal. 2013) (quoting *Twombly*, 550 U.S. at 555);

Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788, 794 (9th Cir. 2007). On a motion to dismiss, "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *see also United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

b. NSS's Antitrust Conspiracy Claims as to CrowdStrike Are Not Plausible Because They Lack Sufficient Factual Support, and Because NSS and CrowdStrike Stopped Doing Business for Unrelated Reasons

i. NSS's Allegations Are Implausible in Light of the Ongoing Litigation Between NSS and CrowdStrike

A court cannot infer anticompetitive agreement "when factual allegations 'just as easily suggest rational, legal business behavior.'" *name.space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1130 (9th Cir. 2015) (quoting *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008)). Here, NSS alleges no plausible conspiracy involving CrowdStrike, as distinct from unilateral conduct flowing from preexisting litigation between them. CrowdStrike has been in litigation for nearly two years regarding NSS's improper and unlawful conduct targeting CrowdStrike, including NSS's fraudulently accessing CrowdStrike's systems without permission in violation of federal and state laws. *See* DE SAC Counts I-VII. The Court need not take any view of the merits of this prior dispute; it need only take judicial notice of the fact that CrowdStrike and NSS are disputants in long-running litigation, the subject matter of which would rationally lead any vendor in CrowdStrike's position unilaterally to cease all dealings with NSS. It is thus implausible to suggest that CrowdStrike's decision to stop dealing with NSS was pursuant to a "group boycott" rather than the natural result of issues being addressed in the Delaware litigation between these parties.

ii. NSS Fails to Offer Any Coherent Claim of Conspiracy Involving CrowdStrike

To state a claim under *Twombly* a complaint must also do more than just state that a conspiracy to boycott was agreed upon at some point in the past by some or all defendants. *See,*

e.g., *Kendall*, 518 F.3d at 1048 (affirming dismissal of Section 1 claim where "the complaint does not answer the basic questions, who, did what, to whom (or with whom), where, and when"); *Int'l Norcent Tech. v. Koninklijke Philips Elecs. N.V.*, 2007 U.S. Dist. LEXIS 89946, at *39 (C.D. Cal. Oct. 29, 2007) (same). NSS's Complaint lacks even the most basic "who, what, when, where, why, and how" required for such allegations, and must therefore be dismissed.

What Was the Conspiracy? NSS claims it is harmed by a "boycott," but offers no facts suggesting CrowdStrike agreed not to deal with NSS. Instead, NSS offers a number of disjointed theories about the AMTSO, its standard-setting activities, and other unrelated conduct by industry members, none of which offer factual support to tie CrowdStrike to a group "boycott."

First, the Complaint suggests that the majority vote for the AMTSO Standard is the "boycott" because NSS has declared that it will refuse to follow the adopted Standard and thus will not be able to truthfully represent itself as AMTSO compliant. (Compl. ¶¶ 21, 24). While NSS accurately alleges that CrowdStrike is a voting AMTSO member, and is correct in implying that CrowdStrike voted in favor of the Standard, the act of voting for a standard does not rise to a conspiracy to boycott. Indeed, standard setting is not an antitrust violation absent other conduct that might harm competition. *See, e.g.*, *Int'l Norcent*, 2007 U.S. Dist. LEXIS 89946, at *26 n. 51 (setting standard "by itself" does not constitute antitrust violation); *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 436 (4th Cir. 2015) ("neither the standard-setting organization nor its participants will run afoul of antitrust law when they use ordinary processes to adopt unexceptional standards"); *Golden Bridge Tech. v. Motorola, Inc.*, 547 F.3d 266, 273 (5th Cir. 2008) ("We have maintained that 'it has long been recognized that the establishment and monitoring of trade standards is a legitimate and beneficial function.'") (quoting *Consol. Metal Products, Inc. v. American Petroleum Inst.*, 846 F.2d 284, 294 (5th Cir. 1988)). As shown *infra* at § IV(c), the mere setting of the Standard here will not suffice to make out an antitrust claim.

Second, NSS suggests a "group boycott" where Vendors allegedly agreed to <u>follow</u> the Standard. (Compl. ¶¶ 22-23). For example, in one of only two allegations that specifically calls out any effort at coordination by CrowdStrike, NSS claims that CrowdStrike organized a meeting in February 2017 with the "purpose and effect" of boycotting NSS when participants "agreed

that defendant AMTSO would adopt 'standards'" and then the "EPP Vendor Conspirators would refuse to deal with any cybersecurity testing service that did not adhere to the testing 'standards' to be adopted by AMTSO." (Compl. ¶¶ 65-66) (emphasis added). As a starting point, there cannot be a conspiracy to boycott where NSS admits the Standard would not be agreed upon until it was voted on by AMTSO's 50-plus membership in the indeterminate future – including by NSS, who participated in the drafting Working Group. (Compl. ¶ 75 (ultimately drafted and voted on 15 months later); Ex. A, pp. 3-4; Tyz Decl., ¶ 2, Ex. A (https://www.amtso.org/members)). Moreover, this does not rise to an allegation of an actual agreement reached between CrowdStrike and anyone else to boycott NSS. Setting aside the failure to allege just what this purported February 2017 CrowdStrike agreement was – least of all any allegation that a standard was agreed to that would effectuate a boycott in February 2017 – the effort to secure an "agreement" to follow a standard is no more a violation than the adoption of the standard itself. *See Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 507 (1988) (recognizing that "any agreement to exclude polyvinyl chloride conduit from the Code is in part an implicit agreement not to trade in that type of electrical conduit"); *SD3*, 801 F.3d at 436 ("It is 'axiomatic that a standard setting organization must exclude some products, and such exclusions are not themselves antitrust violations.'") (quoting *Golden Bridge*, 547 F.3d at 273). Absent a plausible claim that the eventual Standard would be anticompetitive (which, as below, is not alleged, *see infra* § IV(c)(ii)(A)), this alternative theory does not state a conspiracy to boycott claim.

Third, deviating from the rest of its Complaint, NSS states that Vendors "conspired" on licensing terms of use. (*See* Compl. ¶ 64). But, even if the Court ignores the absence of any factual allegations to support any allegation that this was a "boycott" by a group of competitors of a rival, the statement is simply not plausible because these licensing terms predate the subject matter of this Complaint. These terms of use formed the basis of CrowdStrike's February 10, 2017 lawsuit – before any purported conspiracy here – and NSS responded to that Delaware lawsuit with a public statement in March 2017 that these CrowdStrike terms "far predate any interaction between NSS and CrowdStrike." (*See* DE SAC ¶ 44-45) (alleging that NSS violated CrowdStrike's standard license terms containing the now complained-of provision); Tyz Decl., ¶

6, Ex. E (Scharon Harding, *NSS Labs CEO denies calling on reseller to obtain CrowdStrike product: Exec tells Channelnomics CrowdStrike ULA provisions are "un-American,"* Channelnomics.com (Mar. 8, 2017), https://www.channelnomics.com/channelnomics-us/news/3005995/nss-labs-ceo-denies-calling-on-reseller-to-obtain-crowdstrike-product); *see also id.* at ¶ 7, Ex. F (NSS Labs, Media Resources, https://www.nsslabs.com/company/news/media-resources/nss-labs-ceo-denies-calling-on-reseller-to-obtain-crowdstrike-product/) (partially reprinting and citing Channelnomics.com article containing NSS quotation)). In any event, NSS never mentions – much less offers any facts supporting – any alleged conspiracy based on license terms. *See Miller v. Cont'l Airlines, Inc.*, 260 F. Supp. 2d 931, 935 (N.D. Cal. 2003) ("The court is not required to accept legal conclusions cast in the form of factual allegations.") (quoting *Clegg v Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir 1994)).

Finally, the Complaint claims another "conspiracy" untethered to anything else in the Complaint when it refers to "an email discussion among [AMTSO's] members" in August 2016 about access to the website VirusTotal.com. (Compl. ¶ 63). This is the second and only other specific mention of any CrowdStrike role in the purported conspiracy. It amounts to nothing more than artful pleading about a matter outside CrowdStrike's control; NSS never alleges just what CrowdStrike or the other "conspirators" could have agreed to when they do not even control the VirusTotal.com website. The Complaint instead relies on innuendo with its conclusion that Defendants "agreed . . . that access [to VirusTotal.com] should only be available to EPP vendors who are AMTSO members and whose products are only tested by EPP testing services who are also AMTSO members." (*Id*. (emphasis added)). But this makes no sense where NSS never alleges that (a) it requires access to VirusTotal or (b) that any Defendant has any control over it where Google – neither a Defendant nor a member of the AMTSO – owns VirusTotal. (*See, e.g.*, Tyz Decl., ¶ 8, Ex. G. Frederic Lardinois, *Google Acquires Online Virus, Malware and URL Scanner VirusTotal*, TechCrunch (July 9, 2012), https://techcrunch.com/2012/09/07/google-acquires-online-virus-malware-and-url-scanner-virustotal/). NSS cannot rely on clearly unreasonable inferences by innuendo. *See, e.g.*, *Hartman v. Gilead Scis., Inc. (In*

re Gilead Scis. Sec. Litig.), 536 F.3d 1049, 1055 (9th Cir. 2008) (court need not draw unreasonable inferences from facts in complaint). NSS's claim on this front is just misleading.

In short, to the extent NSS alleges standard-setting conduct, that ordinary, procompetitive conduct cannot suffice to state either a rule of reason or per se antitrust violation as discussed *infra* at § IV(c). To the extent NSS seeks to allege anything more than merely voting for a Standard that Vendors and Testers may choose to follow, such as an agreement not to deal with NSS, its Complaint is utterly devoid of any such allegations and fails under *Twombly*.

***Who* Conspired?** The Complaint also fails to identify the Defendants who entered into this "conspiracy," much less the specific individuals at those Defendants who did so. Notably, no rival to NSS is ever alleged to have participated in any boycott. *See Northwest Wholesale Stationers*, 472 U.S. at 294 (limiting boycott claims to "joint efforts by a firm or firms to disadvantage competitors" by denying access to suppliers or customers) (citing cases).

First, while NSS insinuates that all three Vendor Defendants voted together, the Complaint never actually alleges that all of CrowdStrike, Symantec, and ESET voted for the Standard, because NSS knows it cannot do so. Nor can NSS imply a broad conspiracy and name as "Doe" defendants fifty other Vendors without offering any explanation for who those defendants are or what they are alleged to have done. *See, e.g.*, *Zepeda v. Sullivan*, 2009 U.S. Dist. LEXIS 42067, at *7-8 (E.D. Cal. May 7, 2009). Thus, the Complaint fails to identify the entities that allegedly "conspired" with CrowdStrike.

Second, NSS fails to identify the individuals at the Defendants who supposedly agreed, relying instead on vague general statements about unknown persons. (*See, e.g.*, Compl. ¶ 74 ("some or all of the EPP Vendor Conspirators announced"; yet, no allegations of who made such announcements)). This cannot state an alleged agreement. *Bona Fide Conglomerate, Inc. v. SourceAmerica*, 2015 U.S. Dist. LEXIS 20359, at *30 (S.D. Cal. 2015) (dismissing conspiracy claims where plaintiff "fails to allege how or what [a particular identified person] did to allegedly facilitate a conspiracy"). And when NSS's Complaint does attempt a superficial semblance of specificity, it is only to mask the lack of any real factual allegation tending to show who agreed with whom. For example, NSS states that a Symantec representative announced on

May 19, 2018 that it would vote for an AMTSO Standard, would honor the Standard, and encouraged others "to do the same." (Compl. ¶ 73.) However, NSS stops there, alleging no fact to suggest that someone from CrowdStrike – or any other person – responded. Further, NSS alleges no fact suggesting that anyone from CrowdStrike or any other person understood the Symantec communication to mean that the Standard meant or implied not dealing with NSS. *See Plant Oil Powered Diesel Fuel Sys. v. ExxonMobil Corp*., 801 F. Supp. 2d 1163, 1195 (D.N.M. 2011) (that ExxonMobil "made its position known and trusted that other members" of the standards working group "would not go against it" did not suggest an agreement). Because NSS's remaining allegations are equally lacking, NSS fails to allege the "who" of a conspiracy.

***When* and *Where* Was the Conspiracy Entered?** It is doubly challenging to determine when or where the purported conspiracy was allegedly agreed to. The Complaint's alternative conspiracies meander over a three-year period (2016-2018). The inability to allege just when the conspiracy occurred alone renders it implausible. For example, allegations of an agreement "at least as early as February 2016" (Compl. ¶ 23) cannot state a plausible claim for relief. *See, e.g.*, *Twombly*, 550 U.S. at 551 n.2 (rejecting claim that "[b]eginning at least as early as February 6, 1996, and continuing to the present, the exact dates being unknown to Plaintiffs, Defendants and their co-conspirators engaged in a contract, combination or conspiracy. . ."). NSS does not allege (nor can it allege) that CrowdStrike was even an AMTSO member in February 2016. And NSS's string of other conclusory claims, often made on information and belief, are likewise deficient. *See Citizens United v. Schneiderman*, 882 F.3d 374, 384 (2d Cir. 2018) (plaintiff cannot "merely plop 'upon information and belief' in front of a conclusory statement and thereby render it non-conclusory"); *Menzel v. Scholastic, Inc.*, 2018 U.S. Dist. LEXIS 44833, at *5 (N.D. Cal. Mar. 19, 2018) ("An allegation made on information and belief must still be 'based on factual information that makes the inference of culpability plausible.'"). NSS thus fails to allege when or where CrowdStrike and the other Defendants reached any wrongful agreement.

***Why* Was the Conspiracy Entered?** NSS complains it is excluded from competing, but never explains why Vendors or the AMTSO might want less competition among Testers. *Northwest Wholesale Stationers* makes clear that the purpose of a group boycott is to exclude a

competitor and, yet, NSS never alleges that any competing Tester sought the boycott of NSS. 472 U.S. at 294; *see also, e.g.*, *RxUSA Wholesale, Inc. v. Alcon Labs, Inc.*, 661 F. Supp. 2d 218, 232 (E.D.N.Y. 2009), *aff'd*, 391 F. App'x 59 (2010) (analogously, manufacturers would have no purpose to conspire to reduce the number of distributors). All NSS suggests is that the Defendants do not want to work with Testers that do not deal transparently with them. But each Vendor always had the right not to deal with Testers that were not transparent with them; the complained of Standard merely helped define transparency so that Vendors and Testers who want to deal transparently have a baseline to do so. Indeed, this highlights the fundamental absurdity of NSS's claim, as NSS's Complaint depends on the idea that but for the Standard Vendors would prefer Testers who do not deal transparently and honestly. (*See* Compl. ¶¶ 98-100). NSS thus cannot plausibly allege a "why" for the conspiracy.

***How* Was the Conspiracy Enforced?** Finally, NSS's theory of "how" the conspiracy is supposed to work makes no sense. If a Vendor does want to work with non-transparent Testers, it remains free to do so. Indeed, NSS admitted in Exhibit B to its Complaint that it did not believe enforcement of the supposed "conspiracy" was possible, noting that "We do not believe AMTSO has the capability to enforce compliance with its Standards." (Compl. at Ex. B). NSS, thus, does not allege that any person's discretion to deal is in any way restricted.

In short, NSS's Complaint fails to provide fair notice to CrowdStrike as to what it allegedly did, with whom, or to whom, when, where, why, or how. *See Paramount Contractors & Developers, Inc. v. City of L.A.*, 2011 U.S. Dist. LEXIS 156023, at *60 (C.D. Cal. Feb. 7, 2011) ("A complaint is not an opportunity to throw everything onto a judicial wall to see what sticks and what falls."). The Complaint thus fails under *Twombly*, and dismissal is warranted.

c. NSS Cannot State a Claim under a *Per Se* Theory, and Fails to Allege Harm to Competition in a Relevant Market as Required by the Rule of Reason

Because NSS cannot allege a true "group boycott," it must instead argue that the standard-setting conduct that led to the adoption of the AMTSO Standard is itself an antitrust violation. But NSS's Complaint falls far short of alleging the type of anticompetitive conduct required to state a claim under the rarely-available *per se* standard as alleged in Counts I, III, V,

VII, and IX, and fails to allege even the most basic elements of a rule of reason claim as alleged in Counts II, IV, VI, VIII, and X. NSS's Complaint must therefore be dismissed.

i. The Complaint Does Not Come Close to Stating a *Per Se* Theory

The Sherman Act rarely prohibits companies from working together on standard-setting, and instead both Congress and courts have expressed a clear desire to encourage the procompetitive setting of standards. *See, e.g.*, Standards Development Organization Advancement Act of 2004 ("SDOAA"), Pub. L. No. 108-237 § 104, 118 Stat. 661, 663 (an act to "encourage the development and promulgation of voluntary consensus standards by providing relief under the antitrust laws to standards development organizations"); *Allied Tube*, 486 U.S. at 501 ("When . . . private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant procompetitive advantages." (internal citation omitted)); *see also Analogix Semiconductor, Inc. v. Silicon Image, Inc.*, 2008 U.S. Dist. LEXIS 118508, at *11 (N.D. Cal. Oct. 28, 2008) ("SSO's are not illegal *per se* and often create a net pro-competitive effect. . . . Accordingly, any alleged agreement among the members of a SSO is analyzed under the rule of reason."). Indeed, the SDOAA makes clear that standard-setting "activity" cannot normally be subject to *per se* condemnation. 15 U.S.C. § 4302.

Thus, *per se* antitrust liability is available in the standard-setting context only in the rare case when standard setting is used by competitors to fix prices or allocate markets (i.e., conduct not related to standards promulgation) or where competitors are abusing the standard-setting process to exclude a competitor without a procompetitive justification, none of which is alleged here. *See Universal Grading Servs. v. Ebay, Inc.*, 2011 U.S. Dist. LEXIS 25193, at *14-16 (N.D. Cal. Mar. 8, 2011), *aff'd* 563 Fed. App'x 571 (9th Cir. 2014) (rejecting *per se* claim based on standard-setting where "plaintiffs are not completely excluded" and where the alleged "boycott" was not allegedly "designed to injure competitors"); *Eastway Constr. Corp. v. New York*, 762 F.2d 243, 251 n.5 (2d Cir. 1985) (distinguishing cases applying *per se* treatment to alleged group boycotts because such cases involved a plaintiff "in competition with some or all of the

defendants"); *Larry v. Muko, Inc. v. SW Pa. Building and Constr. Trades Council*, 670 F.2d 421, 430 (3d Cir. 1982) ("a survey of the Court's group boycott decisions in which the per se rule was invoked confirms that it is attempts by competitors to exclude horizontal competitors which trigger the *per se* rule") (citation and quotation marks omitted); *cf. Paladin Assocs. v. Montana Power Co.*, 328 F.3d 1145, 1154-55 (9th Cir. 2003) (*per se* treatment limited to conduct where "the practices generally were not justified by plausible arguments that the practices enhanced overall efficiency and made markets more competitive"). NSS does not allege any such agreement here – nor could it, as NSS is not alleged to be a competitor of the Vendors alleged to have conspired, and the conduct at issue is merely establishing a transparency standard.

Moreover, *per se* treatment is particularly inappropriate where, like here, there is no allegation the plaintiff was driven from the market, but rather only that it was "disadvantaged" by choosing to not comply with a standard. *Compare* Compl. ¶¶ 96-103 (alleging mere disadvantage) *with Paladin Assocs.*, 328 F.3d at 1154-55 (disadvantage rising to the level of exclusion by persuading customer to deny a competitor relationships necessary to compete); *Universal Grading*, 2011 U.S. Dist. LEXIS 25193, at *14-16 (rejecting *per se* treatment when a company is not excluded from the market); *GSI Tech., Inc. v. Cypress Semiconductor Corp.*, 2012 U.S. Dist. LEXIS 93888, at *12-13 (N.D. Cal. July 6, 2012) (allegations did not "fall under the narrow category of illegal boycotts" and "establish a *per se*" claim "because they [did] not illustrate that Defendant [SSO] 'cut off' Plaintiff's access to the market"); *see also Consol. Metal*, 846 F.2d at 296 (no *per se* treatment where no exclusion from market). Here, NSS is not excluded from the market but simply asked to comply with basic transparency standards if it chooses to run a Standard-compliant test. NSS remains free to convince Vendors to ignore their self-interest in transparent and honest dealing. NSS therefore cannot come close to claiming a *per se* violation and Counts I, III, V, VII, and IX must be dismissed.

ii. The Complaint Fails to State a Rule of Reason Claim for Two Independent Reasons: Failure to Allege Harm to Competition and Failure to Allege Market Power in a Relevant Market

To state a claim under the rule of reason, NSS must allege facts plausibly suggesting that an agreement harmed competition and that the defendants had market power in a properly-defined relevant market. *See, e.g.*, *Tanaka v. University of Southern California*, 252 F.3d 1059, 1063-64 (9th Cir. 2001). The Complaint fails on both.

A. NSS Fails to Allege Harm to Competition, and the AMTSO Standard is Facially Procompetitive

The Complaint alleges what is inherently a procompetitive industry standard, i.e., one requiring that Testers and Vendors deal with one another in a transparent manner. (*See* Compl. Ex. A). *See, e.g.*, *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 763-64 (1999) (concluding that transparency in dealing with consumers could be a sufficient procompetitive benefit to justify advertising restrictions). Because NSS cannot claim the standard is designed to restrict competition, its conclusory statements about the absence of a procompetitive justification are insufficient to make out a rule of reason claim, and dismissal is appropriate.

"To state a claim against a standard-making organization . . . [a claimant] must show either that it was barred from obtaining approval of its products on a discriminatory basis from its competitors, or that the conduct as a whole was manifestly anticompetitive and unreasonable." *In re Circuit Breaker Litig.*, 984 F. Supp. 1267, 1278 (C.D. Cal. 1997) (quoting *ECOS Elecs. Corp. v. Underwriters Labs*., 743 F.2d 498, 501 (7th Cir. 1984)); *see also Eliason Corp. v. National Sanitation Foundation*, 614 F.2d 126, 129 (6th Cir. 1980) (same); *Consol. Metal Prods.,* 846 F.2d at 297. In applying this rule, the Ninth Circuit has cautioned that standard setting does not violate the antitrust laws just because it harms a particular party's business model. *name.space, Inc.*, 795 F.3d at 1130 (not enough to claim that a standard is "contrary to [the plaintiff's] business model"). Instead, antitrust scrutiny is reserved only to those standards that are "illogical or suspicious" and, thus, appear to be directed toward harming competition. *Id.*; *see also* Tyz Decl., ¶ 9, Ex. H (Order Granting Defendants' Motion to Dismiss at 21-22, *Int'l Norcent Tech. v. Koninklijke Philips Elecs. N.V.*, 2:07-cv-00043, ECF 30 (C.D.

Cal. Apr. 25, 2007) ("Successful promotion of a standard does not amount to an actionable restraint of trade.")); *see also DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 57-58 (1st Cir. 1999) (antitrust laws play a role only where "the use of standards setting as a predatory device by some competitors to injure others" such as where "the standard was deliberately distorted by competitors of the injured party, sometimes through lies, bribes, or other improper forms of influence, in addition to a further showing of market foreclosure").

NSS's argument against the requirement that Testers disclose such basic information as the product type and version, the methodologies for testing, and a means for challenging test results only highlights that the Standard is intrinsically procompetitive, as these requirements are appropriate to mitigate Tester error – or worse, manipulation. But more fundamentally, while NSS appears to quibble over the *correctness* of the Standard (Compl., ¶¶ 76-82), the mere incorrectness of a standard-setting decision does not make it "illogical" or anticompetitive, or suggest that antitrust liability should apply. *See Consol. Metal*, 846 F.2d at 297. As the Fifth Circuit has noted, "[w]ere this not so, the federal courts would become boards of automatic review for trade association standards committees, product testing services, and countless other business transactions," a result the antitrust laws never intended. *Id.* Rather, NSS must show that the Standard harms competition between NSS and the Defendants. That is not – and cannot be – alleged here, as the Standard's adoption of transparency over secrecy in dealings between a Vendor on the one hand and a Tester on the other hand is, as with the actions in *name.space*, "perfectly logical." 795 F.3d at 1130.; *see also Rambus v. FTC*, 522 F.3d 456, 467 (D.C. Cir. 2008) ("[I]f JEDEC, in the world that would have existed but for [the alleged antitrust violation], would have standardized the very same technologies, [the conduct] cannot be said to have had an effect on competition in violation of the antitrust laws"). The crux of NSS's Complaint is that it would prefer a standard that better benefits NSS's business model, such as by not requiring Testers to work with Vendors in a transparent way. This conflict with Vendors that want transparency does not render the Standard anticompetitive, however. *See name.space*, 795 F.3d at 1130. Thus even if NSS's quibbles were correct, it would need to do more to state a claim.

Nor is NSS correct in its quibbles. While NSS says that secrecy is better than transparency as a way to prevent a Vendor from "cheating" at the testing (Compl. ¶ 79), NSS ignores that the Standard forbids steps that would result in "cheating." (*Id.* at Ex. A ¶ 8.1.1). And NSS never alleges either that any Vendor has ever interpreted the Standard to allow the sort of manipulation of which it warns, or that any Vendor has ever engaged in it. (*Id.* at ¶ 79). Courts routinely reject such allegations of speculative competitive "harm" that might happen if the defendants were to behave in a certain way in the future. *See, e.g.*, *Bourns, Inc. v. Raychem Corp.*, 331 F.3d 704, 712 (9th Cir. 2003) (mere speculation about the possibility of future antitrust injury insufficient to support jury verdict); *Hilton v. Children's Hosp.-San Diego*, 2007 U.S. Dist. LEXIS 16517, at *17 (S.D. Cal. Mar. 7, 2007) (plaintiff failed to demonstrate injury to competition when he merely asked the Court "to speculate about a potential antitrust injury"), *aff'd*, 315 F. App'x 607 (9th Cir. 2008)).

Finally, NSS never alleges any facts to suggest any sort of procedural discrimination in adopting the Standard. *See, e.g.*, *Plant Oil*, 801 F. Supp. 2d at 1193 (rejecting claims based on similarly-deficient claims of supposed procedural improprieties). Nor is the Standard lacking in due process and thus designed as a sham to allow competitors to exclude NSS. *See, e.g.*, *name.space*, 795 F.3d at 1130 (rejecting claims where standard-setting organization was not controlled by competitors, even in the face of alleged conflicts of interest). Though NSS complains that it thinks a secret ballot would have been better than a public ballot (Compl. ¶¶ 67-68), this is hardly the sort of fundamental procedural "flaw" that might transform otherwise-appropriate standard-setting conduct. *See* SDOAA, 108 P.L. 237, 118 Stat. 661, 662 (Enacted June 22, 2004) (noting that principles of good standard setting include "transparency"). Finally, NSS's conclusory statement, "on information and belief," that unnamed Vendors "threatened not to use [the] testing services" of testers who "voted against adoption" of the Standard (Compl. at ¶ 18) has no factual support and accordingly deserves no weight.

NSS has thus failed to allege any anticompetitive harm from the Standard, and its claim can and should be dismissed on this basis along with all the foregoing.

B. NSS Fails to Allege that the Defendants Have Market Power in a Properly-Defined Relevant Market

The Complaint's market power allegations are deficient – six short sentences, five of which begin "NSS Labs is informed and believes and thereon alleges." (Compl. ¶¶ 90-95.) NSS has thus failed to allege that the Defendants have market power in a properly-defined relevant market, and dismissal is appropriate for this reason as well. *See, e.g.*, *Tanaka*, 252 F.3d at 1063-64; *Colonial Med. Grp., Inc. v. Catholic Healthcare West*, 2010 U.S. Dist. LEXIS 51350, at *9-10 (C.D. Cal. May 25, 2010).

First, NSS has not properly pleaded a relevant market. NSS's allegations resemble – but are even more deficient than – the allegations the Ninth Circuit held facially deficient even pre-*Twombly* in *Tanaka*. There, the plaintiff alleged that the UCLA women's soccer program was a relevant market because it was "unique" and therefore "not interchangeable with any other program in Los Angeles." *Tanaka*, 252 F.3d 1063-64. The Ninth Circuit found such an allegation insufficient to explain why that particular program was a relevant market, and on that basis (and others) dismissed the claim. NSS does not allege even that much – it alleges only that "NSS is informed and believes and thereon alleges that the [first, second, third, fourth] relevant market affected by the acts herein alleged is the national market for [EPP products, AEP products, EPP product testing services, AEP product testing services]." (Compl. ¶¶ 91-94). Such conclusions do not come close to meeting the required standard, and dismissal is thus appropriate on this basis alone. *See Colonial Med.*, 2010 U.S. Dist. LEXIS 51350, at *9-10 (dismissing claims when the plaintiff "fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand").

But even if NSS had alleged a relevant market, it simply has not alleged that Defendants have any market power, or even compete with NSS, in any of the relevant markets it alleges. Nor could it, as NSS does not participate in the first and second market, none of the defendants participate in the third and fourth markets, and the AMTSO does not participate in any of the markets. Without such an allegation, dismissal is required. *See, e.g.*, *Tanaka*, 252 F.3d 1063-64.

d. NSS Suffered No Antitrust Injury Resulting from the Alleged Anticompetitive Conduct

Even if NSS could claim that competition has been harmed here in some way, NSS lacks antitrust standing to bring a claim for that alleged harm. The Ninth Circuit has identified "four requirements for antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is the type the antitrust laws were intended to prevent." *Am. Ad. Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th Cir. 1999). Additionally, plaintiff must show it "suffered its injury in the market where competition is being restrained." *Id*. at 1057. NSS fails to satisfy this standard.

First, NSS's complaint about the adoption of the Standard ignores the fact that the Standard does not alter how Vendors deal with a Tester. A Vendor that prefers transparent dealings did not have to work with a Tester that prefers secrecy before the Standard's adoption. Indeed, that was the case with CrowdStrike, which declined to work with NSS for this reason before adoption of the Standard. As NSS's Complaint confirms, its problem with the Standard is that it "does little to ensure vendors cannot block or prevent testers from procuring the product to conduct a test." (Compl. ¶ 17.) NSS's complaint is therefore really that the Standard does not go far enough – although the Standard encourages Vendors to participate in testing upon request, it does not force a Vendor to participate in a test against its will. (Compl. Ex. A ¶ 5.4 ("All potential Test Subject Vendors are encouraged to provide their Product as requested by any Tester.")). The antitrust laws do not require forced dealing, *Trinko*, 540 U.S. at 409; *Colgate*, 250 U.S. at 307, and a standard-setting organization's refusal to force such dealing is not an antitrust injury. Nor does a plaintiff suffer antitrust injury on the theory that adoption of a different standard would have been helpful to that particular plaintiff's business model. *See name.space*, 795 F.3d at 1130.

Second, NSS has admitted that any harm to it flows from its inability to convince the full slate of all or virtually all major Vendors to participate in its testing. NSS is on record in the Delaware action as claiming that it would be irreparably harmed by a lack of access to CrowdStrike's software alone. Tyz Decl., ¶ 5, Ex D (Owen Decl. ¶17). So, even without the Standard or any boycott – i.e., without the alleged antitrust violation – CrowdStrike's unilateral

decision not to work with NSS would have caused the same harm NSS complains of here. *See Rambus*, 522 F.3d at 467. If lack of access to one Vendor's product caused NSS irreparable injury, and that lack of access was caused by a separate legal dispute, that intervening harm means the same purported harm from the "boycott" complained of here is not an antitrust injury.

Finally, NSS offers no reason it cannot comply with the AMTSO Standard, which merely mandates communication between the tester and vendor so that there is transparency and reduced opportunity for testing bias. This is yet another reason why NSS has not suffered antitrust injury.

e. NSS's Remaining Claims Also Should Be Dismissed

NSS's Cartwright Act claims are based on the same facts as its antitrust claims, and thus fail for the same reasons. *See Analogix*, 2008 WL 8096149, at *10 (dismissing Cartwright claim where complaint did not state a Sherman Act claim).

V. CONCLUSION

NSS's Complaint should be dismissed in its entirety under Rule 12(b)(6).

REQUEST FOR JUDICIAL NOTICE

Defendant CrowdStrike, Inc. requests that the Court take judicial notice of the following documents pursuant to Federal Rule of Evidence 201:

1. The Complaint, Redacted Second Amended Complaint, and the Declaration of Lisa Owen in *CrowdStrike, Inc. v. NSS Labs, Inc.*, Tyz Decl., ¶¶ 3-5, Exs. B-D. The Court may take judicial notice of matters of public record, including pleadings and documents filed under seal in another court, as such filings are "not subject to reasonable dispute" and are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" under Rule 201. *See* Fed. R. Evid. 201; *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006); *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995).

2. The AMTSO website (cited at Complaint ¶ 75),[1] Frederic Lardinois, *Google Acquires Online Virus, Malware and URL Scanner VirusTotal*, TechCrunch (July 9, 2012),[2] and Scharon Harding, NSS Labs CEO denies calling on reseller to obtain CrowdStrike product, Channelnomics (March 8, 2017) (linked to on NSS Labs' website[3]), Tyz Decl., ¶¶ 2, 6-8, Exs. A, E-G. The Court may take judicial notice of websites maintained publicly on the World Wide Web, the contents of which are readily ascertainable, widely disseminated, and not reasonably in dispute. *See, e.g.*, *FTC v. Qualcomm Inc.*, 2018 U.S. Dist. 190051, at *20-21 (N.D. Cal. Nov. 6, 2018); *Belizaire v. Rav Investigative & Sec. Sevs.*, 61 F. Supp. 3d 336, 347 (N. D. Cal. 2013) (Freeman, J.).

[1] https://www.amtso.org/

[2] https://www.channelnomics.com/channelnomics-us/news/3005995/nss-labs-ceo-denies-calling-on-reseller-to-obtain-crowdstrike-product

[3] https://www.nsslabs.com/company/news/media-resources/nss-labs-ceo-denies-calling-on-reseller-to-obtain-crowdstrike-product/

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Respectfully submitted,

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