

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

XOCKETS, INC.,

Plaintiff,

v.

**NVIDIA CORPORATION,
MICROSOFT CORPORATION, and
RPX CORPORATION**

Defendants.

Civil Action No. 6:24-cv-00453-LS

JURY TRIAL DEMANDED

**PLAINTIFF XOCKETS' OMNIBUS OPPOSITION
TO DEFENDANTS' MOTIONS TO DISMISS (DKT. NOS. 128 & 129)**

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The Court should deny Microsoft Corporation, NVIDIA Corporation, and RPX Corporation's ("Defendants") motions for partial dismissal of Xockets, Inc.'s ("Xockets") antitrust claims.¹

I. INTRODUCTION

There is a standard game plan deployed when there is industry-wide infringement of a patent portfolio held by a small company. The plan involves what is euphemistically referred to as "efficient infringement."² Per this practice, the infringer simply adopts the technology, leaving the small company to enforce its legal rights, with the infringer knowing very few such companies will have the wherewithal to do so. The individual infringers then boycott good faith sale or licensing discussions in order to force negotiations with what RPX euphemistically refers to as "syndicates." The entire purpose of these syndicates is to exercise monopsony power and drive down the price by giving the patent holder no other practical alternative. The members of the syndicate assist in this process by making patent infringement cases as slow and as expensive as possible. This distorts the free market, and it is an antitrust violation under settled law. The fact that patent holders in Xockets' situation have no practical option other than to deal with RPX, and this has been the case for a while, does not make it any less illegal. For example, the United States Supreme Court found that the NCAA exercised monopsony power in violation of the anti-trust laws in 2021, even though the challenged limitations had been in place since at least 1985. *NCAA v. Alston*, 594 U.S. 69 (2021). At the preliminary injunction hearing, RPX went out of its way to

¹ Xockets has moved for a preliminary injunction demonstrating a likelihood of success that was heard by the Court on October 25, for which Xockets seeks to preclude NVIDIA and Microsoft from negotiating as a monopsony using RPX. Further, the parties have fully briefed (Dkt. 4) the Rule 16 Scheduling Order and Rule 26(f) procedures governing discovery for the Court.

² See Kristen Osenga, "The Loss of Injunctions under eBay: Evidence of the Negative Impact on the Innovation Economy," Hudson Institute (2024), available at [https:// www. hudson. org/regulation/loss-injunctions-under-ebay-evidence-negative-impact-innovation-economy](https://www.hudson.org/regulation/loss-injunctions-under-ebay-evidence-negative-impact-innovation-economy) (discussing "efficient"/"predatory" infringement).

repeatedly emphasize it wanted to license Xockets’ technology for its members.³ Of course it does. And its members know that and want to force Xockets into that negotiation as its only option.

This case involves a classic buyer’s side price fixing conspiracy. The FAC alleges that Xockets developed groundbreaking DPU technology that has enabled the growth of the generative AI industry. NVIDIA and Microsoft are using this technology to generate tens of billions of dollars of annual revenues from AI servers and services, but they have refused to engage with Xockets in any sale or licensing discussions directly. Instead, RPX—a collective licensing cooperative whose members include the biggest companies in the tech industry—has sought to negotiate a license on behalf of its relevant member buyers, including NVIDIA and Microsoft, on a collective basis. Because Microsoft and NVIDIA (along with several other RPX members who also boycotted Xockets’ sales process) form virtually the entire market for Xockets’ patents, Xockets faces the following choice: either accept whatever lowball price RPX offers for a group license, or get nothing in the market. Moreover, Xockets has been irreparably harmed by these actions because it sought a formal sales process with defendants. This type of cartel behavior is prohibited under the antitrust laws. None of Defendants’ arguments have merit.

First, Defendants attack the FAC’s allegations in isolation. But “[i]n cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effects of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.” *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S.

³ Dkt. 122 at 66:22-67:3 (“RPX talked to members because at that rarefied air of three-quarters of a billion dollars, it would have to assemble the funding for it. And when it went to its members . . . [they] said, well, this may be an interesting deal, but \$750 million in less than a month just isn’t going to happen.”); *id.* at 67:23-25 (“[S]o RPX said, and this is all in the record, it’s not contested, give us more time and we can try to talk this through.”).

690, 699 (1962). Here, the FAC alleges more than enough facts that, when taken together, give rise to a plausible inference that Defendants formed a buyer's cartel to depress the price for a license to Xockets' patents. RPX's own public statements promising its members "syndicated" deals at "wholesale" discount pricing, which RPX could only achieve by eliminating competitive bidding from individual members, alone is direct evidence of a conspiracy. The FAC also pleads ample circumstantial evidence under the "plus factors," including, most significantly, that NVIDIA and Microsoft, against their clear economic self-interest have refused to negotiate individually to purchase or license Xockets' patents. Given the FAC's well pleaded allegations that NVIDIA and Microsoft are infringing Xockets' "groundbreaking" and "revolutionary" patents (the sufficiency of which Defendants do not contest), it makes no economic sense for them to not even attempt to negotiate for a license absent an agreement not to do so. The FAC pleads numerous other plus factors as well, including Defendants' clear motive and opportunity to conspire, and their pretextual explanations for their conduct. This is more than sufficient at the pleading stage.

Second, Defendants' argument that the FAC has not alleged a restraint of trade also fails. Under Supreme Court precedent, a group boycott designed to depress prices is per se unlawful (or at the very least is anticompetitive under a "quick look" analysis). Defendants argue that collective IP licensing agreements are somehow outside of this rule. They are not. While seller-side collective licenses may be permissible in some instances, that does not mean Defendants can agree to form a buyer-side version of this as the only option as a means of depressing the license price. Moreover, even if the rule of reason analysis applied, the FAC's allegations are sufficient. The FAC adequately pleads anticompetitive effects in the form of decreased output and prices for Xockets' patents (both of which are decreased effectively to zero despite the patents' substantial value). The FAC also alleges Defendants have power over the market for Xockets' patents due to Microsoft

and NVIDIA's market share dominance of the downstream markets for AI servers and platforms for AI services thus making them the most likely and motivated buyers for Xockets' patents. And to the extent there are other buyers, they are also members of RPX.

Third, Defendants argue that Xockets has failed to plead Article III standing or antitrust injury because Xockets failed to license its patents before the alleged conspiracy. But prior to conspiring, NVIDIA and Microsoft simply stole Xockets' technology. Once Xockets discovered this and tried to negotiate a sale through a formal investment banking process, NVIDIA and Microsoft instead agreed to boycott Xockets (as demonstrated by their refusal to deal with Xockets individually, their RPX member agreements, and RPX's member service to syndicate group license deals for its relevant member buyers at wholesale prices) and negotiate collectively through RPX. This has allowed NVIDIA and Microsoft to continue infringing without having to pay a fair market price in a competitive bidding process. This scheme threatens Xockets' existence and constitutes an injury under both Article III and antitrust law.

II. BACKGROUND

Generative AI requires the near-instantaneous movement and computation of mountains of data without overburdening server central processing units (CPUs) and graphics processing units (GPUs). FAC ¶¶ 170-183. Xockets and its co-founder, Dr. Dalal, invented a DPU-based technology that provides the versatility needed to offload, accelerate, and isolate from cloud server CPUs and GPUs these data-intensive computing tasks required to make distributed computing in data centers possible, including for training large models for generative AI. *Id.* ¶¶ 84-122. In addition, Xockets invented a DPU switching architecture for connecting together its DPUs in a novel way to form a "New Cloud Fabric" in data centers—one that can bypass the existing cloud network to enable accelerated computing and AI in data centers. *Id.* ¶¶ 123-169.

After patenting its groundbreaking DPU technology in 2012, Xockets designed and built

the world's first DPU to enable accelerated computing and AI in cloud data centers. *Id.* ¶ 177. Then, in September of 2015, Xockets demonstrated its DPU computing and switching architecture at Strata, the industry's premier big data and network technology conference. *Id.* ¶ 178. Several months later, after a large company expressed an interest in acquiring Xockets, Microsoft began discussing with Xockets the potential benefits of Xockets' new DPU technology for accelerated computing and AI in cloud data centers. This included conversations with Microsoft's Corporate Vice President, Cloud and AI (Ulrich Homann) and its General Manager, Cloud Developer Relations (Jim Brisimitzis) along with a call for bids that provided an overview of Xockets' technology and patents. *Id.* ¶¶ 255-58. Mr. Homann responded that the "concept resonates and the team would like to understand in more depth," and directed Xockets to interface with Saurabh Kulkarni, (Microsoft's Director of Engineering, Cloud and AI System Technologies) and Kushagra Vaid (Microsoft's VP and Distinguished Engineer, Azure Infrastructure). *Id.* ¶ 258. Dr. Dalal then had a discussion with senior Microsoft engineers on March 22, 2017, so Microsoft could "get a technical overview of key Xockets technologies in the hardware acceleration space." *Id.* Thereafter, Mr. Kulkarni informed Dr. Dalal that he was reaching out to people from Microsoft's "big data and machine learning teams" in order to make an introduction. *Id.*

Instead, and unbeknownst to Xockets, Microsoft and NVIDIA, who have "partnered" together to enable new markets in AI servers and platform services by integrating Xockets' patented DPU technology in their product lines – a key input (*see, e.g.*, FAC ¶¶ 254, 255, 259) – both decided to willfully infringe Xockets' groundbreaking technology. FAC ¶¶ 184-208 (NVIDIA's infringement of the New Cloud Processor Patents); ¶¶ 209-238 (NVIDIA's infringement of the new Cloud Fabric Patents); ¶¶ 239-243 (NVIDIA's knowledge of Xockets' patents); ¶¶ 244-254 (Microsoft's infringement of Xockets' patents); ¶¶ 255-58 (Microsoft's

knowledge of Xockets’ patents). Microsoft and NVIDIA use Xockets’ technology in their AI servers and services. For example, NVIDIA has described its DPU-based technology (which it took from Xockets) as “vitally important to performance” of its AI servers, as part of “the holy trinity of computing,” as a “revolution” in AI for datacenters, and as an “essential element of modern and secure data centers in which CPUs, GPUs and DPUs are able to combine a single computing unit that’s fully programmable.” FAC ¶¶ 33-38; *see also id.* ¶¶ 28-32, 39-45, 192-233. Similarly, Microsoft has described its “collaboration with NVIDIA”—which includes use of Xockets’ technology—as “unlock[ing] the world’s most scalable supercomputer platform, which delivers state-of-the-art AI capabilities for every enterprise on Microsoft Azure.” FAC ¶ 253.

In addition to partnering with each other on technology they took from Xockets, NVIDIA and Microsoft are also members of RPX. RPX has admitted—in since-removed website posts—that its purpose is to serve as a single negotiating unit for its members. In doing so, it drives the price of patents/licenses below what the price would be if its members negotiated on their own:

- ***“RPX can buy ‘wholesale’ on behalf of our client network, while clients otherwise would pay ‘retail’ if transacting on their own.”***
- ***“RPX is often able to achieve ‘wholesale’ pricing terms, where *we can acquire rights for our members at significantly reduced cost relative to what the NPE might charge an individual company on its own.*”***
- RPX’s ***“mission”*** is to “transform the patent market by establishing RPX as the ***essential intermediary*** between patent owners and operating companies.”
- “Our clients see distinct advantages of ***syndicated purchasing through RPX***, as we are uniquely situated to structure transactions that are ***ultimately less costly*** and deliver more value to participating clients ***than if any attempted individual licensing or unilateral purchasing of the portfolios.***”

FAC ¶¶ 3, 274-75; *see also id.* ¶¶ 276-280.

After Xockets learned that Microsoft and NVIDIA were using its patents in their AI servers and services, Xockets approached them. In January and February 2022, Xockets’ co-founder, Dr.

Dalal, communicated with NVIDIA's Brad Genereaux (Global Lead, Healthcare Alliances) and asked for an introduction to NVIDIA Legal IP Counsel in order to discuss "some very strategic IP" that "Nvidia would be interested in acquiring." Mr. Genereaux ultimately connected Dr. Dalal with Gady Rosenfeld on February 4, 2022. FAC ¶¶ 240-41. Mr. Rosenfeld was "leading the DPU segment in the NVIDIA field organization" at that time, and his LinkedIn profile reflects that he has been NVIDIA's Vice President, DPU Business since July 2021 and remains so today. *Id.* ¶ 242. On February 10, 2024, Mr. Rosenfeld and Dr. Dalal had a Microsoft Teams meeting wherein Dr. Dalal walked Mr. Rosenfeld through exemplary claim charts evidencing the infringement of Xockets' patents and explained the nature of Xockets' patented technology. Dr. Dalal then emailed Mr. Rosenfeld sample claim charts for its patents and a list of Xockets' then-current patent list covering breakthrough DPU technologies essential to AI, which included the New Cloud Processor Patents and the New Cloud Fabric Patents, the very same patents that, as demonstrated above and in the FAC, NVIDIA and Microsoft both willfully infringe. *Id.* Mr. Rosenfeld told Dr. Dalal that he would discuss Xockets' patent portfolio with NVIDIA's legal department and follow up, but he never did. *Id.* ¶ 243. At no point in time did NVIDIA dispute its use of Dr. Dalal's inventions or their validity.

In early 2024, Xockets engaged in a process to sell its technology through its investment bankers, and as part of that effort reached out again to NVIDIA, as well as to Microsoft. The FAC identifies in detail the precise email communications reflecting this engagement, including the dates of the emails and the names of the senders and recipients. FAC ¶¶ 281-282. Because of their agreement to negotiate for the patents only through RPX, neither Microsoft nor NVIDIA would engage at all, despite the fact that they are willfully infringing this technology that is critical to some of their most important products and services. *Id.* ¶¶ 281-289, 290-306. Microsoft and

NVIDIA refused to negotiate despite the fact that by negotiating individually each of them would have had the opportunity to obtain a first mover advantage against the other—including an exclusive license. *Id.* ¶ 288.

Defendants’ buyer’s cartel has damaged Xockets’ business and threatens its very existence. Despite the tremendous value that Xockets’ patented technology affords, Xockets has thus far been unable to sell or license its patents at a competitive price because RPX is the only buyer. FAC ¶ 286. Indeed, Xockets’ licensing output has been effectively reduced to zero, *id.*, and if the conspiracy is allowed to continue, Xockets will eventually be driven out of business, *id.* ¶ 296.

III. THE FAC ADEQUATELY ALLEGES A PRICE FIXING CONSPIRACY

Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade.” 15 U.S.C. § 1. Section 2 similarly prohibits any person from “conspir[ing] with any other person or persons, to monopolize any part of the trade or commerce.” 15 U.S.C. § 2. Alleging a conspiracy is not subject to “any ‘heightened’ pleading standard,” nor must such claims be alleged with “particularity.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 588 (2007). Moreover, in pleading a conspiracy, “plaintiffs . . . may and often must rely on circumstantial evidence.” *Way v. Mueller Brass Co.*, 840 F.2d 303, 308 (5th Cir. 1988).

Thus, “antitrust plaintiffs are ‘*not* required to mention a specific time, place, or person involved in each conspiracy allegation.” *In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, 988 F. Supp. 2d 696, 715 (E.D. La. 2013) (quoting *Starr v. Sony BMG Music Entm’t*, 592 F.3d 314, 325 (2d Cir. 2010)). Instead, “a complaint need only ‘allege the general contours of when an agreement was made, supporting those allegations with a context that tends to make said agreement plausible.” *Id.* (quoting *Evergreen Partnering v. Pactiv Corp.*, 720 F.3d 33, 46 (1st Cir. 2013)). The FAC’s allegations more than satisfy this standard.

A. The FAC Pleads Evidence Of A Conspiracy

As the FAC explains (summarized in Section II, *supra*), Microsoft and NVIDIA are willfully infringing and “partnering” together to exploit Xockets’ technology, a patented technology critical to their AI servers and services. To avoid the justifiably high cost of using such extremely important patented technology, NVIDIA and Microsoft have agreed to only negotiate with Xockets through RPX, a platform that has itself admitted is purposefully intended to drive the price of patents below the price that would be obtainable if its members negotiated separately. This evidence when considered as a whole is more than enough to allege an antitrust conspiracy. *See Cont’l Ore Co.*, 370 U.S. at 699 (“The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.”).

As one district court has held in declining to dismiss antitrust claims against RPX, “[i]f the purpose of negotiating through RPX is to achieve ‘wholesale’ pricing, then the advantage of collective bargaining through RPX is realized only if the other Manufacturing Defendants also decide to negotiate a license through RPX.” *Cascades Comp. Innovation LLC v. RPX Corp.*, 2013 WL 6247594, at *11 (N.D. Cal. Dec. 3, 2013); *see also Sony Elecs. v. Soundview Techs., Inc.*, 157 F. Supp. 2d 180, 187 (D. Conn. 2001) (finding antitrust conspiracy adequately pled where plaintiff alleged that defendants “engaged in a joint boycott and concerted refusal to deal” in order to dictate the price for a license to plaintiff’s patents). RPX’s public admissions alone thus give rise to a plausible inference of a conspiracy.

Defendants contend that Xockets “admitted” during the preliminary injunction briefing that there is nothing inherently unlawful about RPX’s business model of negotiating on behalf of its members. Dkt. 128 at 6; Dkt. 129 at 2. Xockets has admitted no such thing. Instead, it merely noted that “[c]ollective licensing arrangements such as patent pools are legally permissible *only* ‘if an alternative opportunity to acquire individual rights is realistically available.’” Dkt. 99-2 at 17-18

(quoting *Buffalo Broad. Co. v. Am. Soc. of Composers*, 744 F.2d 917, 925 (2d Cir. 1984)). But here there is no such opportunity as evidenced by NVIDIA and Microsoft's refusal to individually negotiate to buy or license Xockets' highly valuable patents which they are both infringing.

Defendants also argue that the FAC contains “no allegations identifying any specific communications between NVIDIA and Microsoft relating to Plaintiff or Plaintiff’s patents,” Dkt. 128 at 6, or of a “‘side agreement’ between NVIDIA and Microsoft to negotiate only through RPX,” Dkt. 129 at 9. But such allegations are not required, especially at the pleading stage. Under Fifth Circuit precedent, “it is enough that [Defendants] individually authorized [RPX] to take certain actions on their behalf, knowing others were doing the same thing.” *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 357 (5th Cir. 2008). Defendants use their opposition to introduce extrinsic evidence (such as incomplete portions of their agreements with RPX), [REDACTED]

[REDACTED] The FAC pleads
that RPX acknowledged these members included NVIDIA and Microsoft. FAC ¶ 284.

B. The FAC Alleges the Existence of “Plus Factors”

The FAC also alleges the existence of numerous “plus factors” which constitute evidence of a conspiracy between NVIDIA, Microsoft, and RPX. While there is “no exhaustive list” of plus factors, they include “(1) actions that would be against defendants’ self-interest if defendants were

acting independently, but consistent with their self-interest if they were acting in concert; (2) a motive to conspire; (3) opportunities to conspire; (4) market concentration and structure conducive to collusion; (5) pretextual explanations for anticompetitive conduct; (6) sharing of pricing information; [and] (7) signaling among competitors . . .” *Acad. of Allergy & Asthma v. Superior Healthplan, Inc.*, 2022 WL 18076843, at *13 (W.D. Tex. July 14, 2022), *report and recommendation adopted*, 2022 WL 18034365 (W.D. Tex. Oct. 18, 2022). The FAC alleges facts showing that each of these plus factors supports a finding of conspiracy in this case.⁴

1. Actions Against Interest

As alleged in the FAC, absent a collusive agreement, it would be in Microsoft’s and NVIDIA’s self-interest to engage in individual sale or licensing negotiations with Xockets for its patents. FAC ¶ 288. Yet Microsoft and NVIDIA have refused to do so, despite the fact that they are clearly infringing Xockets’ patents, and despite the fact that their infringement is in connection with their AI servers and services. FAC ¶¶ 184-243 (NVIDIA’s knowing infringement); ¶¶ 244-258 (Microsoft’s knowing infringement); ¶¶ 18-45, 192-233; 259-272 (incorporation into important products and services). For example, by negotiating individually, NVIDIA or Microsoft could obtain ownership or an exclusive license which would “ensur[e] that no other entity has the ability to create competing products that practice” Xockets’ technology. *Inspired Dev. Grp., LLC v. Inspired Prods. Grp.*, 938 F.3d 1355, 1363 (Fed. Cir. 2019).

The fact that NVIDIA and Microsoft chose to forego a potentially valuable first-mover

⁴ Microsoft and RPX argue that there is no parallel conduct, but this ignores the FAC’s allegations. The parallel conduct includes, but is not limited to, both Microsoft and NVIDIA refusing to even engage in individual negotiations with Xockets (even to this day), despite the fact that they both know they are infringing in connection with their AI servers and services. FAC ¶¶ 184-243 (NVIDIA’s infringement and knowledge of Xockets’ patents); ¶¶ 244-258 (Microsoft’s infringement and knowledge of Xockets’ patents); ¶¶ 18-45, 192-233; 259-272 (incorporation into important products and services); ¶ 288 (refusal to negotiate other than through RPX).

advantage corroborates that they agreed not to negotiate individually so that they could depress the price of a royalty for a license. *See, e.g., Cascades*, 2013 WL 6247594, at *8 (fact that competitors declined potential “first taker” advantage of a patent license was evidence of a conspiracy) (denying motion to dismiss); *Golf City, Inc. v. Wilson Sporting Goods, Co.*, 555 F.2d 426, 435 (5th Cir. 1977) (“Actions against the apparent individual economic self-interest of the alleged conspirators may raise an inference of interdependent action. . . .”); *In re Credit Default Swaps Antitrust Litig.*, 2014 WL 4379112, at *10 (S.D.N.Y. Sept. 4, 2014) (plaintiff had alleged acts against self-interest where defendants had each turned down “sizeable first-mover advantages”) (denying motion to dismiss Section 1 claims).

Defendants argue that another purported reason for their refusal to individually negotiate with Xockets is that they “had no need or interest in whatever it was that Plaintiff had to offer.” Dkt. 128 at 9. But that argument flatly contradicts the allegations of the FAC which must be accepted as true at the pleading stage. For example, when Xockets initially approached Microsoft about its technology, Microsoft responded that this “concept resonates and the team would like to understand in more depth.” FAC ¶ 258. Since then, both NVIDIA and Microsoft have publicly touted the tremendous benefits of Xockets’ technology. NVIDIA described it as “vitally important to performance,” part of “the holy trinity of computing,” a “revolution” in AI for datacenters, FAC ¶¶ 33-38, and Microsoft described it as the “next wave of computing,” FAC ¶ 254; *see also id.* ¶¶ 28-32, 39-45, 192-233, 250-254, 259-272. The senior executive at Nvidia responsible for DPUs received detailed claim charts showing the applicability of Xockets patents, indicated that the technology was “extremely interesting,” and never disputed use of the technology. FAC ¶ 242. Instead, he announced that Nvidia lawyers would need to become involved. FAC ¶ 243. Moreover, Defendants do not contest the sufficiency of Xockets’ allegations that NVIDIA and Microsoft are

currently infringing Xockets’ patents. Their failure to seek a first mover advantage makes no economic sense absent an agreement.⁵

Finally, the mere fact that Defendants offer an alternative explanation for why NVIDIA and Microsoft have refused to negotiate cannot defeat Xockets’ antitrust claims at the motion to dismiss stage. A complaint “need not tell a *more* plausible story than alternative explanations; at most, such allegations need only tell a story that is as plausible as the alternatives.” *Escuadra v. Geovera Specialty Ins. Co.*, 739 F. Supp. 2d 967, 980 (E.D. Tex. 2010); *see also Watson Carpet v. Mohawk Indus.*, 648 F.3d 452, 454 (6th Cir. 2011) (“[T]o survive a motion to dismiss, Watson Carpet needs to allege only that the defendants’ agreement *plausibly* explains the refusals to sell, not that the agreement is the *probable* or exclusive explanation.”).

2. Motive And Opportunity To Conspire

Defendants also have a clear “motive to conspire,” given that, by negotiating collectively, they can effectively drive down the price of a royalty for a license. By paying a cheaper price for a license, NVIDIA and Microsoft can retain a greater share of the value of Xockets’ patented technology for themselves in terms of profit. Such profit motive is circumstantial evidence of a conspiracy. *See, e.g., Alarm Detection Sys., Inc. v. Vill. of Schaumburg*, 930 F.3d 812, 828 (7th Cir. 2019) (“Profits through coordination can be relevant to whether a conspiracy is inferable; when an agreement to resist competition would increase profits, there is a potential motive to conspire.”); *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 781–82 (2d Cir. 2016) (potential “increased profits” from the conspiracy “evinced a common motive to conspire”).

⁵ Even if Microsoft and NVIDIA had contested the infringement allegations, this would not have meant they had no motivation to negotiate for a license. A licensee “benefits from the grant of a license regardless of whether or not an infringing product is actually created” by, for example, “avoid[ing] uncertainty and litigation,” and, with an “exclusive license” ensuring “that no other entity has the ability to create competing products.” *Inspired Dev. Grp.*, 938 F.3d at 1363.

Defendants not only have the motive to conspire, but they also have the opportunity to do so. While “opportunity” alone is not sufficient to demonstrate a conspiracy, “the existence of an opportunity to effectuate the alleged conspiracy takes on additional weight” where, as here, it is coupled with evidence “that the parallel conduct was against the . . . Defendants’ individual self-interest.” *In re Pool Prods.*, 988 F. Supp. 2d at 714.

For, example, courts have held that common membership in organizations, such as trade associations, can give rise to an inference that each member was engaged in a conspiracy because such associations can be used to coordinate anticompetitive conduct. *See, e.g., In re Cal. Bail Bond Antitrust Litig.*, 2022 WL 19975276, at *11 (N.D. Cal. Nov. 7, 2022) (SCAC raised a suggestion of a preceding agreement based on . . . participation in trade associations that provide “opportunities to exchange information or make agreements.”). RPX is far more than a mere trade association. When forming what it refers to as “syndicates,” it is designed for the specific purpose of coordinating the acquisition of patents and licenses among its members. *See In re Turkey Antitrust Litig.*, 642 F. Supp. 3d 711, 727 (N.D. Ill. 2022) (finding that allegations of trade membership evinced a conspiracy where “the trade association memberships were not in fact typical, but rather a method for facilitating cooperation”).

Indeed, RPX has openly admitted that its purpose is to negotiate patent licenses on behalf of its members so that it can drive prices below what they would have been if they had been individually negotiated by RPX’s members. *See, e.g., FAC* ¶¶ 3, 274-280. In RPX’s own words, it buys at “wholesale” prices whereas its members “pay ‘retail’ if transacting on their own.” *FAC* ¶¶ 274-75. Defendants try to spin these admissions, even arguing at times that RPX exists to help patent owners, but the admissions are plain on their face, and, in any event, all reasonable inferences are drawn in Xockets’ favor at this stage of the case.

Moreover, the suggestion that these statements in paragraphs 274-275 are stale because they occurred some years ago is not credible on its face. The limited internal documents RPX has provided show an internal “Policy and Procedure” from 2022 in which it describes creating “[s]yndicated transactions,” which is “one of the most effective mechanisms for generating savings for our members.” Dkt. 99-14. This policy contains no provision forbidding the sharing of information on what each member of the syndicate will pay. It states members are free to negotiate on their own, but courts look to market reality, not boiler-plate: “[W]e look past the terms of the contract to ascertain the relationship between the parties and the effect of the agreement ‘in the real world.’” *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012). The monopsony RPX creates drives down the purchase price for each member, which deters individual action.

Here, NVIDIA and Microsoft did not exercise their purported option to negotiate individually, nor is it reasonable to infer that they joined RPX yet still chose to pay *more* money (i.e. “retail”) for a patent license rather than less money (i.e. “wholesale”) for that license. That is why antitrust law looks beyond contract language to the “practical effect” of the parties’ dealings and “marketplace realities,” because co-conspirators seldom spell out in a contractual writing all aspects of their conspiracy, but rather operate in the shadows to mask the conspiracy. *McWane, Inc. v. FTC*, 783 F.3d 814, 833-34 (11th Cir. 2015) (rejecting argument that contracts were not exclusive dealing because they were “voluntary” where they provided “a strong economic incentive” for exclusive dealing). Analyzing some of the exact same RPX admissions at issue here, the *Cascades* court denied a motion to dismiss and held that RPX’s admissions were evidence of a price fixing conspiracy:

Implicit in those statements is a proviso that ***wholesale pricing can be achieved through RPX but not independently***. . . . RPX, by publicly stating its intention to accumulate purchaser-side market power ... ***has, in essence, invited each of the [Defendants] to participate in a scheme to artificially drive the price or license***

fee of acquiring the [patent] below the competitive rate.

2013 WL 6247594, at *11; *see also Sony Elecs. v. Soundview Techs.*, 157 F. Supp. 2d 180, 187 (D. Conn. 2001) (upholding allegations of a conspiracy to fix prices through an “industry association, which markets itself as helping members ‘enhance their own competitive position in the marketplace’ and to provide ‘strength in numbers’ to ‘protect your company’s business interests’”). Defendants’ motions never even mention *Cascades*, much less try to distinguish it.

3. Market Concentration And Structure Conducive To Collusion

Another plus factor is “market concentration and structure conducive to collusion” *Acad. of Allergy & Asthma*, 2022 WL 18076843, at *13. Here the antitrust market is for Xockets’ patents (a monopsony market), but the point of NVIDIA and Microsoft in acquiring rights to those patents is to use them as inputs in markets that those two firms dominate, namely the market for GPU-enabled AI servers (where NVIDIA has an over 90% market share) and the market for GPU-enabled AI platforms or services (where Microsoft, through its partnership with Open AI, controls 70% of the market). FAC ¶ 297. *See, e.g., Le v. Zuffa, LLC*, 2023 U.S. Dist. LEXIS 138702, *43 (D. Nev., Aug. 9, 2023) (“The output market is relevant insofar as Zuffa’s market power on the seller side reinforces its ability to maintain a monopsony in the input market.”). Moreover, even in the monopsony market, RPX provides a structure conducive to collusion. For instance, in both motions, Defendants point to Google as a potential buyer, yet no Defendant argues that Google (or any other supposedly potential “buyer” they mention) is a non-member of RPX.⁶

4. Pretextual Explanations For Anticompetitive Conduct

Defendants have also “provided pretextual explanation for [their] anticompetitive conduct.” *Acad. of Allergy & Asthma in Primary Care v. Louisiana Health Serv. & Indem. Co.*,

⁶ *See RPX Corporation v. Publishing Technologies, LLC*, IPR2018-01131, Paper 44 (PTAB Jan. 7, 2020) (“Google is a long-term member of RPX . . .”).

2020 WL 4050243, at *8 (E.D. La. July 17, 2020). Specifically, RPX has tried to justify its business model as necessary to achieve “faster, better, and less expensive resolution” of patent litigation, FAC ¶ 273, and Defendants seize on these and other statements to explain away their collusive behavior. Dkt. 129 at 8. But RPX could achieve all of these same benefits by operating only on its own without forming syndicates in advance. That way, Xockets could decide whether negotiating with RPX was truly beneficial to the “patent owner.” Dkt. 128 at 12. Instead, the FAC alleges that Defendants have foreclosed this possibility by refusing to negotiate on an individual basis. The clear misfit between Defendants’ purported justification for their collusive conduct and the actual nature of that conduct further supports the existence of a conspiracy. *Acad. of Allergy & Asthma*, 2020 WL 4050243, at *7 (alleged pre-textual explanations supported inference of a conspiracy despite defendants’ “contention that their proffered explanation of events is more plausible.”).

5. Sharing of Pricing Information and Signaling Among Competitors

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As the FTC/DOJ have warned, “[c]ompetitor collaborations also may facilitate explicit or tacit collusion through facilitating practices such as the exchange or disclosure of competitively sensitive information.” Dkt. 111-12 at 6. Such opportunities to share information and reach agreements constitute circumstantial evidence of a conspiracy. *See, e.g., In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1119 (N.D. Cal. 2012) (Overlapping board membership “provided an opportunity for Defendants to share knowledge and to conspire”); *Bond Antitrust Litig.*, 2022 WL 19975276, at *11 (N.D. Cal. Nov. 7, 2022) (“SCAC raised a suggestion of a preceding agreement based on . . . participation in trade associations that provide ‘opportunities to exchange information or make agreements.’”); *Travelpass Grp. LLC v. Caesars Ent. Corp.*, 2019

WL 4727425, at *3 (E.D. Tex. Sept. 27, 2019) (rejecting the argument that the “opportunity to meet and conspire at trade shows, standing alone, isn’t suspicious.”).⁷

IV. XOCKETS HAS ADEQUATELY ALLEGED A RESTRAINT OF TRADE

Defendants’ contention that the FAC fails to allege a restraint of trade is baseless. The alleged price fixing conspiracy here clearly constitutes a restraint of trade under any of the three analytical frameworks applied by the Supreme Court: “per se,” “quick look,” and “rule of reason.” *See N. Texas Specialty Physicians v. FTC*, 528 F.3d 346, 360 (5th Cir. 2008).

A. The Alleged Price Fixing Conspiracy is Unlawful Per Se

As alleged, Defendants’ conduct falls squarely within the type of agreements that the Supreme Court has held “are so ‘plainly anticompetitive,’ and so often ‘lack . . . any redeeming virtue,’ that they are conclusively presumed illegal without further examination.” *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979) (“*BMF*”) (internal citations omitted). By agreeing to negotiate with Xockets only on a collective basis through RPX, Defendants have eliminated competition for such a license, thereby decreasing the price. FAC ¶¶ 254, 287. This is a classic buyer-side price fixing conspiracy which is *per se* unreasonable regardless of evidence of monopsony power. *See, e.g., id.* (noting that “price fixing” conspiracies are *per se* unlawful); *see also Vogel v. Am. Soc. of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) (“[B]uyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal *per se*.”).

Defendants’ assertions that RPX’s business model provides “value . . . to its members and

⁷ An additional plus factor is the existence of a government investigation. *Kjessler v. Zaappaaz, Inc.*, 2019 WL 3017132, at *10 (S.D. Tex. Apr. 24, 2019). The “buyers’ cartel in this case is part of a pattern of illegal cartel behavior engaged in by NVIDIA and Microsoft, as evidenced by the ongoing investigations of these entities by the United States Department of Justice, the United States Federal Trade Commission, and the European Union.” FAC ¶ 2.

patent owners,” Dkt. 128 at 12, *see also* Dkt. 129 at 8, n.1, 12, are accordingly irrelevant. As the Supreme Court held in *FTC v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411 (1990), which (just like the alleged conspiracy here) involved a group boycott designed to fix prices, “[w]hatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness.” *Id.* at 435.⁸

Defendants incorrectly argue that “joint IP licensing activities” must always be analyzed under the rule of reason analysis. Dkt. 128 at 10-11; *see also* Dkt. 129 at 11-12. But as is made clear by the very FTC and DOJ guidance Defendants cite, collusive conduct with respect to IP licensing is *per se* unlawful where, as here, it is a mechanism for fixing prices. *See, e.g.*, U.S. Dep’t of Justice and FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* (Jan. 12, 2017), Sec. 5.5 (“When cross-licensing or pooling arrangements are mechanisms to accomplish naked price fixing or market division, they are subject to challenge under the *per se* rule.”). Courts have likewise condemned collective arrangements such as patent pools as *per se* unlawful where they are used to facilitate price fixing. *See, e.g.*, 2 Holmes, *Intellectual Property and Antitrust Law* § 14:3 (“The Supreme Court has repeatedly held that where the true purpose of a pooling scheme is to impose horizontal price-fixing . . . or other *per se* illegal trade restraints on the participants, rather than simply to exploit the pooled property, the scheme will be stripped of its normal intellectual property protections and treated as part of the underlying conspiracy.”); *see also U.S. v. Line Material Co.*, 333 U.S. 287, 307 (1948) (patent pooling agreement that fixed the prices at

⁸ Contrary to Defendants’ assertion, the fact that Xockets stated that the Court could presume, for purposes of the preliminary injunction motion, that Xockets reached out to RPX first, Dkt. 128 at 12, n.8, does not somehow demonstrate that the *per se* rule is inapplicable. Xockets engaged RPX only after NVIDIA and Microsoft refused to engage. *See Dyer v. Conoco, Inc.*, 49 F.3d 727 (5th Cir. 1995) (“[I]n the monopsony or oligopsony price fixing case . . . the seller faces a Hobson's choice: he can sell into the rigged market and take the depressed price, or he can refuse to sell at all.”).

which licensees would sell the patented product was *per se* illegal); *Cont'l Auto. Sys., Inc. v. Avanci, LLC*, 485 F. Supp. 3d 712, 731, n.11 (N.D. Tex. 2020), *aff'd sub nom*, 2022 WL 2205469 (5th Cir. June 21, 2022) (“A patent pool may be a *per se* unlawful restraint of trade when its ‘only apparent purpose is naked price fixing.’”).

The cases on which Defendants rely are inapposite. Defendants cite *BMI*, but there, the Supreme Court held (1) that a blanket radio license for recorded music was unique because it would be “nearly impossible for each radio station to negotiate with each copyright holder separate licenses for the performance of his works on radio,” and (2) “[t]he individual composers and authors have neither agreed not to sell individually . . . [the plaintiff] in short, had a real choice.” *BMI*, 441 U.S. 1, 14, 23-24. Neither is true here. Unlike a radio station that would have to negotiate with thousands of copyright holders, nothing prevents Microsoft or NVIDIA from negotiating with Xockets (a single patent holder) on an individual basis. And unlike in *BMI*, the FAC alleges that Microsoft and NVIDIA have refused to negotiate individually. Section II, *supra*.

Defendants also rely on *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985), but that was not a price fixing case. There, the Court held that expulsion of a competitor from a collective purchasing group was not *per se* unlawful given the potential procompetitive benefits of the collective. *Id.* at 295. In contrast, this case involves concerted action designed to *fix prices* paid to a supplier, which the Supreme Court has held is *per se* anticompetitive regardless of whatever alleged benefits it might have. *See Superior Ct. Trial Laws. Ass’n*, 493 U.S. at 435; *see also Primetime 24 Joint Venture v. Nat’l Broad., Co.*, 219 F.3d 92, 102 (2d Cir. 2000) (“PrimeTime’s concerted refusal to deal claim alleged that it attempted to deal individually with each of the affiliated stations, but that ‘[t]he NAB and other [appellees] organized a campaign to ensure that no affiliate would break ranks and enter into discussions with PrimeTime.’” This is “a

classic *per se* violation of the Sherman Act.”)

Finally, to the extent there is any doubt as to whether the *per se* standard applies, that alone precludes dismissal. At the very least, the FAC has alleged enough facts to give rise to a plausible inference that Defendants collusively acted to depress the price of Xockets’ patents. Defendants’ arguments to the contrary are based “on factual evidence relating to the agreement’s formation and character” that cannot be resolved on a motion to dismiss. *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 2018 WL 3032552, at *15 (S.D. Cal. June 19, 2018) (denying dismissal because “the Court is unable to determine at this stage in the litigation ‘the level of analysis to apply.’”); *see also* Hovenkamp, *An Analysis of Antitrust Principles and Their Application* ¶ 305e (4th Ed. 2013) (“Often, however, the decision about which rule is to be employed will await facts that are developed only in discovery.”); *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d at 1122 (Whether conduct is *per se* unlawful “is more appropriate on a motion for summary judgment”).

B. The Alleged Conspiracy Restrains Trade Under a “Quick Look” Analysis

Even if *per se* analysis did not apply, the FAC adequately pleads a restraint of trade under a “quick look,” which applies where the “anticompetitive effect on customers and markets” is obvious. *N. Tex. Specialty Physicians*, 528 F.3d at 360 (quoting *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999)). This analysis is particularly appropriate where “the challenged practices [bear] a ‘close family resemblance’ to other practices ‘that already stand[] convicted in the court of consumer welfare,’” such as price fixing. *Realcomp II, Ltd. v. FTC.*, 635 F.3d 815, 826, n.4 (6th Cir. 2011) (*quoting Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005)).

Here, Defendants’ alleged conspiracy at the very least bears a “close family resemblance” to a price fixing scheme. It is also similar to other conduct that courts have held is anticompetitive under a quick look approach. For example, the Supreme Court has held that, under the quick look analysis, a “pure restriction on output is anticompetitive and in the absence of special

circumstances, would violate the antitrust laws.” *A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239, 247–48 (3d Cir. 2001) (citing *NCAA*, 468 U.S. at 85). This is precisely how the alleged conspiracy here works, i.e., Defendants have purposefully restrained licensing output to obtain a better price. The Fifth Circuit has similarly held that “concerted action to increase . . . bargaining power” in order to affect prices is a restraint of trade under the quick look approach. *N. Texas Specialty Physicians*, 528 F.3d at 367-68 (affirming finding of antitrust violation under the quick look approach). As explained above, this is how RPX’s business model works according to its own prior public statements. Section II *supra*.⁹

Because the FAC sufficiently alleges an anticompetitive restraint under the quick look framework, the burden shifts to Defendants “to show empirical evidence . . . that their conduct was somehow procompetitive.” *N. Texas Specialty Physicians*, 528 F.3d at 370. While Defendants insist (incorrectly) that such procompetitive effects exist here, Dkt. 128 at 12, Dkt. 129 at 8, n.1, 12, that raises a fact issue that cannot be resolved on a motion to dismiss. Moreover, even if there was a dispute about whether the quick look analysis applies based on the FAC’s allegations, this too raises a factual question that cannot be resolved at the motion to dismiss stage. It is enough that the FAC has alleged “the type of restraint that *may* fall under the ambit of the quick look rule.” *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1040 (N.D. Cal. 2013) (denying dismissal).

C. The Alleged Conspiracy Restrains Trade Under the Rule of Reason

Finally, even if this Court were to conclude that the rule of reason analysis applies, the FAC sufficiently alleges a restraint of trade under that standard. The rule of reason “is a highly fact-intensive inquiry, requiring the fact finder to ‘weigh all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on

⁹ NVIDIA’s motion ignores the quick look approach entirely; whereas, Microsoft and RPX simply cite *BMI* to argue it is inapplicable. But *BMI* is inapposite for the reasons explained above.

competition.” *Kinetic Concepts, Inc. v. Bluesky Med. Corp.*, 2005 WL 3068206, at *3 (W.D. Tex. Nov. 1, 2005). At the motion to dismiss stage, Xockets only needs to “plausibly allege” that Defendants’ conduct “imposed an unreasonable restraint on trade.” *Drs. Hosp. of Laredo v. Cigarroa*, 2022 WL 3567353, at *13 (W.D. Tex. Aug. 17, 2022).

The FAC clearly satisfies this standard. The FAC alleges that Defendants’ buyer’s cartel has prevented Xockets from “obtaining a fair market price for its patents” which “read on Microsoft’s and NVIDIA’s products . . . thereby reducing output in the market for Xockets’ patents to effectively zero.” FAC ¶ 286. The FAC also alleges that Defendants’ conduct harms competition in the downstream markets for “GPU-enabled AI servers, which is controlled by NVIDIA, and the market for GPU-enabled AI platforms, which is controlled by Microsoft.” FAC ¶ 297. “By driving down the costs of Xockets’ patents, Microsoft and NVIDIA can continue their dominance of these markets,” which will “harm inn[ov]ation and allow NVIDIA and Microsoft to unilaterally increase prices within these markets.” *Id.* This is plainly sufficient at the pleading stage. At least one court in this circuit has held that an alleged agreement among potential licensees “that none of them will . . . license the [plaintiff’s] patents,” which is how the alleged scheme here functions, constituted a restraint of trade under the rule of reason standard. *OLA, LLC v. Builder Homesite, Inc.*, 661 F. Supp. 2d 668, 674 (E.D. Tex. 2009). An alleged decrease in licensing output is also sufficient to show a restraint of trade under the rule of reason standard. *See Drs. Hosp.*, 2022 WL 3567353, at *13 (denying dismissal where complaint “plausibly alleges, in accordance with the rule of reason, that . . . [the] anticompetitive conspiracy imposed an unreasonable restraint on trade by limiting the supply of interventional cardiology services.”).

Defendants again rely on the supposed pro-competitive benefits of RPX’s business model, such as facilitating settlements and decreasing transaction costs. Dkt. 128 at 10; Dkt. 129 at 11.

But “such justifications are not appropriate for consideration on a motion to dismiss.” *Funevral Consumers v. Serv. Corp. Int’l*, 2006 WL 8445718, at *9 (S.D. Tex. Sept. 14, 2006), *report and recommendation adopted*, 2006 WL 8445720 (S.D. Tex. Oct. 18, 2006). Moreover, a restraint is “unreasonable when any procompetitive benefits it produces ‘could be reasonably achieved through less anticompetitive means.’” *Impax Lab’ys, Inc. v. FTC*, 994 F.3d 484, 497 (5th Cir. 2021) (quoting *Am. Express*, 138 S. Ct. at 2284). As discussed above, Defendants could achieve these same purported benefits simply by offering to serve when given permission by Xockets and other patent holders, or by operating only on its own without forming syndicates in advance. That way, Xockets could decide whether negotiating with RPX was truly beneficial to the “patent owner.” Dkt. 128 at 12. Instead, Defendants have foreclosed the possibility of individual licenses to achieve below market pricing.

V. THE FAC ADEQUATELY ALLEGES A MARKET AND MARKET POWER

A. No Market Analysis is Required Under the Per Se or Quick Look Standards

Defendants next argue that the FAC should be dismissed because it fails to adequately allege a cognizable market or that Defendants have market power. Dkt. 128 at 13-17, Dkt. 129 at 4-6. Neither contention is correct. As an initial matter, Xockets is not required to plead either a market or market power because, as explained above, Defendants’ conspiracy to fix prices is unlawful per se. *See In re Yarn Processing Pat. Validity Litig.*, 541 F.2d 1127, 1134 (5th Cir. 1976) (“[F]or the purposes of determining the existence of a per se antitrust violation, market analysis . . . [is] irrelevant.”); *see also PLS.Com, LLC v. Nat’l Ass’n of Realtors*, 32 F.4th 824, 838 (9th Cir. 2022) (“A plaintiff is not required to define a particular market for a per se claim . . .”) (citing *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 100); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 316 (3d Cir. 2010) (“Under the per se standard, plaintiffs are relieved of the obligation to define a market and prove market power.”).

As the Supreme Court explained in *Trial Lawyers*, “the fact that the group cannot control the market prices does not necessarily mean that the agreement as to prices has no utility to the members of the combination.” 493 U.S. at 435. Indeed, even when a “small participant in the market” engages in price fixing, this conduct violates the antitrust laws irrespective of whether the conspirators could otherwise control the market. *Id.* at 434. “For reasons including market inertia and information failures . . . a small conspirator may be able to impede competition over some period of time. Given an appropriate set of circumstances and some luck, the period can be long enough to inflict real injury upon particular consumers or competitors.” *Id.* at 434-435. Similarly, “less than a fullblown market analysis” is required for conspiracies that resemble per se unlawful conduct under the quick look doctrine. *N. Texas Specialty Physicians*, 528 F.3d at 362, 370; *see also Ohio v. Am. Express Co.*, 585 U.S. 529, 544, n.7 (2018) (under a quick look, the Court “did not need to precisely define the relevant market to conclude that these agreements were anticompetitive.”); *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 975 (9th Cir. 2023) (“Usually, the ‘quick look’ does not require a detailed analysis of the relevant market and market power.”).

Here, NVIDIA and Microsoft (two of the world’s largest companies) along with RPX (a collective licensing group started by big tech) can hardly be classified as “small participant[s] in the market,” *Trial Laws. Ass’n*, 493 U.S. at 434, but even if they could, their alleged scheme to depress the price of Xockets’ patents would harm competition. Their assertions that they lack market power because there are “many other potential buyers or licensees” of Xockets’ patents, Dkt. 129 at 4, or that Xockets could pursue “other methods to monetize their patents,” Dkt. 128 at 12, are irrelevant even if true (which they are not).

B. The FAC Sufficiently Alleges a Market and Market Power

Market power analysis is only relevant if the Court concludes that the rule of reason analysis applies. But even under that scenario, the FAC’s allegations are sufficient.

1. The Market For Xockets' Patents is a Cognizable Monopsony Market

“Because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market.’ . . . At the pleading stage, a plaintiff need not present intensive details regarding the existence of the relevant market.” *MVConnect, LLC v. Recovery Database Network, Inc.*, 2011 WL 13128799, at *7 (N.D. Tex. May 27, 2011) (quoting *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001) (Sotomayor, J.)). In the monopsony context, the “market is comprised of buyers who are seen by sellers as being reasonably good substitutes.” *Campfield v. State Farm*, 532 F.3d 1111, 1118 (10th Cir. 2008) (quoting *Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001)). Here the alleged market consists of the “the market for the purchase, acquisition, or licensing of technology covered by Xockets’ patents.” FAC ¶ 291. Courts have held that a patentee’s portfolio constitutes a cognizable antitrust market. *See, e.g., Intell. Ventures I LLC v. Cap. One Fin. Corp.*, 99 F. Supp. 3d 610, 621 (D. Md. 2015) (holding that a “patent financial-services portfolio” constituted a viable antitrust market). For example, in *Cascades*, another antitrust action brought against RPX, the court approved the market for “purchase, acquisition or licensing of technology covered by’ all the Elbrus Patents.” *Cascades*, 2013 WL 6247594, at *14. The FAC alleges this exact same type of market.

Defendants argue that the FAC fails to account for technologies that are substitutes for Xockets’ patents. Dkt. 128 at 13-14; Dkt. 129 at 4. But that would only be necessary with a **seller**-side conspiracy where the market was the technology at issue plus all reasonable substitutes. This analysis is “reversed in the context of a buyer-side conspiracy” where “the market is not the market of competing **sellers** but of competing **buyers**.” *Todd*, 275 F.3d at 202. With a monopsony, even if there are competing sellers of substitutes, they are all at the mercy of the monopsonist.

The authorities on which Defendants rely, such as *CCPI Inc. v. Am. Premier, Inc.*, 967 F. Supp. 813 (D. Del. 1997) are distinguishable because they involved “defining [a] relevant **product**

market,” *id.* at 818, not the market of competing purchasers for products (or technologies). Microsoft and RPX also cite numerous cases for the proposition that a patent does not confer market power, Dkt. 128 at 14-15, but that is only relevant where the patentee is the alleged monopolist. In a monopsony case, it is the market power of the potential purchaser (NVIDIA and Microsoft via RPX) that is relevant. *Campfield*, 532 F.3d at 1118.

Regardless, even if Xockets had to plead a lack of substitutes, it has. The FAC alleges that Xockets’ “groundbreaking” and “revolutionary” technology has “dramatically increase[d] the speed and lower[ed] the costs of distributed computing services and AI.” FAC ¶¶ 17, 21. This provides “unprecedented performance benefits” over the “performance limitations of existing cloud networks,” *id.* ¶ 21, that would not be possible “without Xockets’ patented inventions,” *id.* ¶ 261. These allegations “support the inference that there are no reasonably interchangeable substitutes for” Xockets’ patents. *See Constr. Cost Data v. Gordian Grp.*, 2017 WL 2266993, at *16 (S.D. Tex. Apr. 24, 2017), *adopted*, 2017 WL 2271491 (S.D. Tex. May 22, 2017).

2. The FAC Adequately Alleges Market Power

The FAC also adequately alleges that Defendants have power over the market for Xockets’ patents. To plead market power, the FAC does not need to “provide a specific market share” possessed by Defendants, but only facts that “indicate that [Defendants] do possess such power.” *MVConnect*, 2011 WL 13128799, at *8. Because this is a highly factual inquiry, generally the “[r]esolution of the market power question is inappropriate at the Rule 12(b)(6) stage.” *See Nat’l Athletic Trainers, Inc. v. Am. Physical Therapy*, 2008 WL 4146022, at *14 (N.D. Tex. Sept. 9, 2008) (citing *Newcal Industries v. Ikon Office Solution*, 513 F.3d 1038, 1051-52 (9th Cir. 2008)).

Here, the FAC pleads facts showing how Defendants have effectively limited any competition for the purchase of Xockets’ patents, thereby driving down both licensing output and price. This constitutes direct evidence of market power. *See, e.g., Eastman Kodak Co. v. Image*

Tech. Servs., 504 U.S. 451, 477-78 (1992) (“It is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition in the aftermarket, since respondents offer direct evidence that Kodak did so.”). Accepting the FAC’s allegations as true, there should be tremendous demand for Xockets’ revolutionary patents under normal market conditions. Yet “[s]ince the time that RPX has become involved, Xockets has been prevented from obtaining a fair market price for its patents . . . and neither Microsoft, nor NVIDIA, nor any of RPX’s other members will negotiate at all with Xockets, thereby reducing output in the market for Xockets’ patents to effectively zero.” FAC ¶ 286; *see also Theme Promotions, Inc. v. News Am.*, 546 F.3d 991, 1001 (9th Cir. 2008) (“Evidence of restricted output . . . is direct evidence of market power”); *Le v. Zuffa, LLC*, 2024 WL 195994, at *3 (D. Nev. Jan. 18, 2024) (monopsony market power shown by evidence of “restricted purchases and subcompetitive prices”). Thus, “it is clearly reasonable to infer” that Defendants have market power to restrict competition and depress the price of Xockets’ patents because they have done so. *Eastman Kodak*, 504 U.S. at 477.

The FAC also alleges additional evidence of market power. Indeed, RPX effectively controls the market for Xockets’ patents because, in addition to Microsoft and NVIDIA, its members include “other companies that further ***make up the vast majority of the demand for Xockets’ patented technology.***” FAC ¶ 285. Moreover, NVIDIA and Microsoft alone possess substantial market power. NVIDIA holds a dominant share above 90% of the GPU-enabled AI server market, and Microsoft (in combination with its partners) have over 70% of the GPU-enabled artificial intelligence platform market. FAC ¶ 289. This makes NVIDIA and Microsoft the dominant potential purchasers of Xockets’ technology.

Defendants argue that “a defendant’s market share in a market other than the alleged relevant market is irrelevant.” Dkt. 129 at 6. But this is not true in the monopsony context where

evidence of “Defendant’s dominance in the output market” may “bolster[] its exercise of monopsony power in the input market.” *Le*, 2023 WL 5085064, at *13, n 20; *see also*, 2023 U.S. Dist. LEXIS 138702, *43 (D. Nev., Aug. 9, 2023) (“The output market is relevant insofar as Zuffa’s market power on the seller side reinforces its ability to maintain a monopsony in the input market.”). For example, in *Cascades*, the court found adequate allegations of market power of the input market (i.e., the plaintiff’s patents) based on the defendants’ share of the output market (i.e., android mobile phones). *Cascades*, 2013 WL 6247594, at *2 (“Of the devices using Android sold in the United States, the three Manufacturing Defendants, taken together, sell more than 90 percent of mobile phones and 75 percent of tablets.”). Here, Xockets’ patent portfolio is particularly valuable because it enables GPU-enabled AI servers and platforms. It is at the very least plausible to infer at the pleading stage that NVIDIA’s and Microsoft’s respective control of these downstream markets gives them the power to depress licensing output and prices in the market for Xockets’ patents. *See Am. Express Co.*, 585 U.S. at 549 (“Market power is the ability to raise price profitably by restricting output.”) (quoting Areeda & Hovenkamp § 5.01). Simply put, if the 800-pound gorillas in the AI space are holding out and using RPX, everyone else will follow.

Defendants nonetheless argue that the FAC’s market power arguments are inadequate because they fail to account for other potential substitute buyers of Xockets’ patents. Dkt. 128 at 15-17; Dkt. 129 at 5-6. There are at least three problems with this argument.

First, Defendants misrepresent the FAC. They primarily rely on paragraph 235 to claim that Xockets admits there are at least 40 other potential buyers for Xockets’ patents. Dkt. 128 at 16; Dkt. 129 at 1, 5. But that paragraph is quoting a press release by NVIDIA regarding its “global network” of “partners.” FAC ¶ 235. Xockets quoted this paragraph as an example of NVIDIA touting the benefits of Xockets’ technology to its resellers. *Id.* The FAC nowhere alleges that each

of the entities identified in that paragraph are potential independent buyers of Xockets' patents.

Second, to the extent there are any such buyers, they are also members of RPX. FAC ¶ 285. For example, NVIDIA identifies Amazon Web Services (AWS), Oracle, Google, and Intel as other potential buyers and they also boycotted Xockets' sales process. Dkt. 129 at 5. But the limited record that has already been developed in this case reveals that each of these companies has been identified as an RPX member. Dkt. 4-43 at 4, n. 10; Dkt. 4-36 ¶ 5. These companies are beneficiaries of Defendants' price fixing conspiracy, and thus contrary to Defendants, have no incentive to bid for a higher price.

Third, even assuming there are other potential buyers either within the RPX umbrella or outside of it, this does not mean Defendants on their own lack market power. "[T]he existence of market power cannot be reduced to a determination of a firm's market share" because "even firms that lack market share may exert market power when they—either alone or in coordination with other firms—exhibit the 'ability to exclude other sources of supply.'" *Acad. of Allergy & Asthma*, 2017 WL 11824765, at *15. As explained above, NVIDIA's and Microsoft's control over the highly lucrative GPU-enabled AI servers and platform markets gives them unique price controlling power in the input market for Xockets' patents. Moreover, the fact that the licensing for output and price for Xockets' patents has been effectively reduced to zero despite its substantial value is direct evidence that Defendants wield market power.

Finally, "[a]n agreement to restrain trade may be unlawful even though it does not entirely exclude its victims from the market." *Drs. Hosp.*, 2022 WL 3567353, at *14 (quoting *Associated Gen. Contractors v. Cal. State Council*, 459 U.S. 519, 528 (1983)). At the very least, Defendants have prevented Xockets from earning revenue from the use of its technology in the GPU-enabled AI servers and platform markets. That alone constitutes an antitrust violation even if there are

buyers who operate in less lucrative downstream markets to whom Xockets could sell.

VI. THE FAC ADEQUATELY ALLEGES A SECTION II CLAIM

Defendants argue that Xockets has failed to allege a Sherman Act Section 2 claim for conspiracy to monopsonize on two grounds: (1) the FAC does not allege evidence of a conspiracy, and (2) the FAC does not allege the specific intent to monopolize. Dkt. 128 at 17-18; Dkt. 129 at 12-13. Neither is correct. The first argument fails for all the same reasons discussed in Section III above. As for the second, the FAC has alleged a specific intent to monopsonize. As explained above, RPX's very business model depends on RPX's ability to control, by agreement of its members, negotiations in this market and establish a single price for Microsoft and NVIDIA, as well as the rest of RPX's members. As explained above, "the advantage of collective bargaining through RPX is realized only if the [RPX's members] also decide to negotiate a license through RPX." *Cascades*, 2013 WL 6247594, at *11; *see also id.* at *15 (denying motion to dismiss claim for conspiracy to monopsonize). In sum, RPX's business model does not work unless RPX and its members achieve a monopsony. That is why no RPX member (including NVIDIA and Microsoft) has individually negotiated to obtain any rights to Xockets' undeniably valuable patent portfolio, demonstrating that Defendants not only sought to achieve a monopsony, but successfully did so.

VII. THE FAC ADEQUATELY ALLEGES STANDING AND ANTITRUST INJURY

Defendants' argument that the FAC fails to allege Article III standing or antitrust injury is baseless. Dkt. 128 at 19-20, Dkt. 129 at 13-14. Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690, 697 (1977). Allegations of "economic losses and competitive disadvantage 'fall easily within the conceptual bounds of antitrust injury . . .'" *Drs. Hosp.*, 2022 WL 3567353, at *8. Such allegations are also sufficient to demonstrate Article III standing. *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir.

2006) (“Economic injury” is “a quintessential injury upon which to base standing.”) Moreover, “the existence of an antitrust injury is typically resolved after discovery and not on a motion to dismiss.” *Morice v. Hosp. Serv. Dist. #3*, 430 F. Supp. 3d 182, 208 (E.D. La. 2019).

Here, the FAC easily satisfies the standard for both Article III and antitrust injury as it alleges that Defendants’ buyers’ cartel has directly caused Xockets to suffer a substantial economic loss. As explained above, the FAC alleges that Xockets developed a “revolutionary” and “groundbreaking new cloud computing architecture and a new cloud network fabric” that provides “unprecedented performance benefits” enabling the growth of AI, which is now a multitrillion dollar industry. FAC ¶¶ 17, 21, 261. The FAC also alleges in detail how both NVIDIA and Microsoft, the two dominant players in this industry, are infringing numerous patents that cover this very technology. In a competitive market, Xockets would be reaping the rewards of its enormously valuable technology. As it stands, Xockets has received nothing. This is more than sufficient to allege antitrust injury. *See, e.g., Sony Elecs., Inc. v. Soundview Techs., Inc.* 281 F. Supp. 2d 399, 402 (D. Conn. 2003) (“Soundview’s inability to procure licensing agreements is plainly an ‘injury in fact to its business or property,’ . . .”) (finding antitrust injury); *Doctor's Hospital. v. Southeast Medical Alliance*, 123 F.3d 301, 305 (5th Cir. 1997) (“DHJ’s alleged losses and competitive disadvantage . . . easily within the conceptual bounds of antitrust injury.”).

Contrary to Defendants’ assertions, the FAC’s allegations of injury are not “speculative” or “conclusory.” Dkt. 128; Dkt. 129. Indeed, Defendants do not even contest the sufficiency of the FAC’s infringement allegations. The FAC also alleges detailed facts, including numerous admissions from NVIDIA and Microsoft, demonstrating that Xockets’ patented technology, for which it is currently not getting paid as result of the alleged conspiracy, has substantial value. FAC ¶¶ 28-45. While Defendants may contest these allegations, this is irrelevant at the pleading stage.

See Drs. Hosp. of Laredo, 2022 WL 3567353, at *8 (“[E]conomic losses . . . ‘fall easily within the conceptual bounds of antitrust injury, whatever the ultimate merits of [plaintiff’s] case.’”).

NVIDIA argues that the existence of “other” potential buyers in the market means Xockets has suffered no injury. Dkt. 129 at 13. But this is wrong for all of the reasons explained above in section III.B.2. First, because NVIDIA and Microsoft dominate the downstream markets for GPU-enabled AI servers and GPU-enabled AI platforms, respectively, they likely possess unique market power in the upstream market for Xockets’ patents. Second, even if there are other buyers, Microsoft’s and NVIDIA’s ability to exclude Xockets from obtaining any licensing revenues from these downstream markets (unless Xockets accepts a lowball offer from RPX) standing alone constitutes an economic loss sufficient to show Article III standing and antitrust injury. Third, the other large companies that NVIDIA identifies as potential customers, e.g., Google, AWS, and Oracle (Dkt. 129 at 13), are also members of RPX, Section III.B.2 *supra*.

The fact that the FAC does not expressly allege that these companies are “part of the putative conspiracy” is of no moment. Dkt. 129 at 13. At the very least, these members have no incentive to negotiate with Xockets individually since they are likely beneficiaries of any deal RPX is able to reach. Regardless, at this stage of the litigation, Xockets is not required to identify all conspirators, *see Rochester Med. Corp. v. C.R. Bard, Inc.*, 2005 WL 8161204, at *6 (E.D. Tex. Feb. 28, 2005) (“[P]laintiffs may survive a motion to dismiss even if they fail to identify all of the conspirators in the alleged conspiracy”), and it is common in antitrust cases for there to be co-conspirators who are not named as defendants, *see, e.g., Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 740 (1976) (“The amended complaint alleges that respondents, along with several co-conspirators not named as defendants in this action, have acted in concert” to restrain trade); *Gas Light Co. of Columbus v. Georgia Power Co.*, 440 F.2d 1135, 1136 (5th Cir. 1971) (“Others

are charged as co-conspirators but are not named as parties defendant.”). The fact that Xockets has been unable to license its highly valuable patents to anyone is both evidence of a conspiracy and sufficient to show that Xockets has been injured as a result.

Finally, Defendants argue that the FAC does not allege antitrust injury because “Xockets failed to earn any revenue from” its patents before the alleged conspiracy. Dkt. 129 at 14; Dkt. 128 at 18. But this ignores the FAC’s allegations. Prior to the conspiracy, Microsoft and NVIDIA simply stole Xockets’ patented technology without Xockets’ knowledge. Specifically, Xockets’ technology was adopted by Mellanox without Xockets’ knowledge or permission. FAC ¶ 23. Mellanox provided services to Microsoft, *id.*, and was later acquired by NVIDIA, *id.* ¶ 33. After Xockets learned of NVIDIA’s and Microsoft’s infringement some years later, it put them on notice and sought to negotiate a sale or license. *Id.* ¶ 43. But instead of negotiating, NVIDIA and Microsoft formed a buyer’s cartel facilitated by RPX. *Id.* ¶ 8. The fact that NVIDIA and Microsoft had stolen Xockets’ technology (without Xockets’ knowledge) prior to conspiring does not demonstrate that Xockets has suffered no antitrust injury. It is this conspiracy that has allowed NVIDIA and Microsoft to continue to use Xockets’ technology without permission or compensation since they face no risk that they might outbid each other.

VIII. CONCLUSION

For the reasons explained above, Defendants’ motions should be denied. Even if the Court were to require that further facts be pled, Xockets should be granted leave to plead the additional facts (including facts that came to light as part of the preliminary injunction briefing). *See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir.2002) (“[D]istrict courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case”). RPX and Microsoft’s claim that the “FAC affirmatively negates Xockets’ antitrust causes of action,” Dkt. 129 at 14, is conclusory and unsupported.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 19, 2024, I electronically submitted the foregoing document with the clerk of the United States District Court for the Western District of Texas, using the electronic case management CM/ECF system of the Court which will send notification of such filing to all counsel of record who are deemed to have consented to electronic service.

/s/ Jamie H. McDole
Jamie H. McDole