Robert A. Mittelstaedt (State Bar No. 60359)
ramittelstaedt@JonesDay.com
Craig A. Waldman (State Bar No. 229943)
cwaldman@JonesDay.com
David C. Kiernan (State Bar No. 215335)
dkiernan@JonesDay.com
Craig A. Huckelbridge (State Bar No. 217737)
chuckelbridge@jonesday.com
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939
Facsimile: (415) 875-5700

Attorneys for Defendant
ADOBE SYSTEMS INCORPORATED

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Free FreeHand Corp., Jabez Palmer, Eric Rosenberg, Mark Oliver, Inc., and Jamie Pritchett, on Behalf of Themselves and All Others Similarly Situated,

Plaintiff,

v.

Adobe Systems Inc.,

Defendant.

Case No. CV 11-02174 PSG

DEFENDANT ADOBE SYSTEMS INC.'S NOTICE OF MOTION, MOTION TO DISMISS, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION TO DISMISS

Date: August 23, 2011
Time: 10:00 a.m.
Courtroom: 5
Judge: Hon. Paul S. Grewal

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

I. PRELIMINARY STATEMENT 1

II. SUMMARY OF PLAINTIFFS' CLAIMS 2

III. LEGAL STANDARDS 3

IV. ARGUMENT 4

A. Plaintiffs' Monopolization Claims Are Time-Barred 4

B. Plaintiffs Cannot State Any Independent Monopoly "Maintenance" Claims 8

1. Unilateral Price Increases Do Not Violate the Antitrust Laws 9

2. Discontinuing a Product Line Does Not Violate the Antitrust Laws 9

3. Declining to "Open Source" Does Not Violate the Antitrust Laws 9

4. Plaintiffs Cannot Sustain a "Monopoly Broth" Claim 10

C. Plaintiffs Cannot State a Claim Under California or Washington Law 11

V. CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Abbyy USA Software House, Inc. v. Nuance Commc'ns Inc.,
No. C 08-01035, 2008 WL 4830740 (N.D. Cal. Nov. 6, 2008) 5, 7

Alaska Gasline Port Auth. v. ExxonMobil Corp.,
No. 4:05-CV-0026-RRB, 2006 WL 1718195 (D. Alaska June 19, 2006) 5

Am. Floral Servs., Inc. v. Florists' Transworld Delivery Ass'n,
633 F. Supp. 201 (N.D. Ill. 1986) 10

Apple Inc. v. Psystar Corp.,
586 F. Supp. 2d 1190 (N.D. Cal. 2008) 11

Apple iPod iTunes Antitrust Litig.,
No. 5:05-cv-00037-JW, Order Granting in Part and Denying in Part Mot. For Summ. J. at 9-10 [Dkt. 627] (N.D. Cal. May 19, 2011) 10, 11

Ashcroft v. Iqbal,
129 S. Ct. 1937 (2009) 3, 4

Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,
472 U.S. 585 (1985) 10

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 3

Cal. Computer Prods., Inc. v. IBM Corp.,
613 F.2d 727 (9th Cir. 1979) 10

Clegg v. Cult Awareness Network,
18 F.3d 752 (9th Cir. 1994) 3

Cnty. of Tuolumne v. Sonora Cmty. Hosp.,
236 F.3d 1148 (9th Cir. 2001) 11

Concord Boat Corp. v. Brunswick Corp.,
207 F.3d 1039 (8th Cir. 2000) 5

Eason v. Waste Mgmt. of Alameda Cnty.,
No C-06-06289-JCS, 2007 WL 2255231 (N.D. Cal. Aug. 3, 2007) 4

Fortaleza v. PNC Fin. Serv. Group, Inc.,
642 F. Supp. 2d 1012 (N.D. Cal. 2009) 11

Glen Holly Entm't Inc. v. Tektronix Inc.,
352 F. 3d 367 (9th Cir. 2003) 9

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

TABLE OF AUTHORITIES
(Continued)

Page

Harrell v. 20th Century Ins. Co.,
934 F.2d 203 (9th Cir. 1991) ... 12

In re Indep. Serv. Orgs. Antitrust Litig.,
203 F.3d 1322 (Fed. Cir. 2000) ... 10

Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elecs. Corp.,
518 F.2d 913 (9th Cir. 1975) ... 5, 8

Midwestern Mach. Co. v. Northwest Airlines, Inc.,
392 F.3d 265 (8th Cir. 2004) ... 5, 7, 8

Morgan v. Microsoft Corp.,
No. 41586-7-I, 2001 WL 783758 (Wash. Ct. App. July 9, 2001) ... 11

Northeastern Tel. Co. v. AT&T Co.,
651 F.2d 76 (2d Cir. 1981) ... 10

Pauly v. Stanford Hosp.,
No. 10-CV-5582-JF (PSG), 2011 WL 1793387 (N.D. Cal. May 11, 2011) ... 3

Peck v. Gen. Motors Corp.,
894 F.2d 844 (6th Cir. 1990) ... 7

S. Pac. Commc'ns Co. v. AT&T Co.,
556 F. Supp. 825 (D.D.C. 1982) ... 10

Sprewell v. Golden State Warriors,
266 F.3d 979 (9th Cir. 2001) ... 4

State v. Black,
676 P.2d 963 (Wash. 1984) ... 11

United States v. Westinghouse Elec. Corp.,
648 F.2d 642 (9th Cir. 1981) ... 10

Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP,
540 U.S. 398 (2004) ... 9, 10

Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.,
810 F.2d 243 (D.C. Cir. 1987) ... 9

Zenith Radio Corp. v. Hazeltine Research, Inc.,
401 U.S. 321 (1971) ... 4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(Continued)

Page

STATUTES

15 U.S.C. § 15b 4

ANTITRUST LAW § 320c4 (3d ed. 2007) 5, 7

ANTITRUST LAW § 320c5 5

Cal. Bus. & Prof. Code § 16700 11

Cal. Bus. & Prof. Code § 16750.1 4

Cal. Bus. & Prof. Code § 17200 11

Cal. Bus. & Prof. Code § 17208 4

Fed. R. Civ. P. 12(b)(6) 3, 4

1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE, that on August 23, 2011 at 10:00 a.m. or as soon thereafter as
3 this matter may be heard, Defendant Adobe Systems Incorporated ("Adobe") will bring on for
4 hearing this motion to dismiss with prejudice the class action complaint of Plaintiffs Free
5 FreeHand Corp., Jabez Palmer, Eric Rosenberg, Mark Oliver, Inc. and Jamie Pritchett, on behalf
6 of themselves and all others similarly situated (collectively, the "Plaintiffs"), under Federal Rule
7 of Civil Procedure 12(b)(6). This motion is based on the Memorandum of Points and Authorities
8 presented below, the pleadings and papers on file in this action, and such further evidence and
9 argument as may be presented at the time of the hearing.

10 **RELIEF REQUESTED**

11 Dismissal of all causes of action alleged against Adobe with prejudice, pursuant to Rule
12 12(b)(6), for failure to state a claim upon which relief can be granted.

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I. PRELIMINARY STATEMENT**

15 As the allegations in their complaint definitively establish, Plaintiffs have not stated – and
16 cannot state – any federal or state competition law claims against Adobe. Plaintiffs allege that
17 Adobe illegally acquired and maintained monopoly power in markets for professional vector
18 graphic illustration software. Plaintiffs concede, however, that their claims are based wholly on
19 the alleged anticompetitive effects flowing from an acquisition that took place **in 2005** following
20 investigation and clearance by the U.S. Department of Justice and other competition authorities
21 around the world. Because Plaintiffs' causes of action have a four-year statute of limitations,
22 these claims are now time-barred.

23 If, contrary to the admissions in their complaint, Plaintiffs now intend to argue that they
24 are challenging alleged anticompetitive effects (consisting of price increases and product changes)
25 that do **not** flow from the merger, their claims still would be defective. Ignoring the merger
26 leaves Plaintiffs with no claim of any illegal acquisition of monopoly power because even an
27 alleged monopolist is entitled to raise its prices and make its own product decisions.

28 In short, even accepting Plaintiffs' allegations as true for this motion, they have failed to

state a claim upon which relief can be granted. The complaint should be dismissed without leave to amend.

II. SUMMARY OF PLAINTIFFS' CLAIMS

Plaintiff Free FreeHand is a Washington non-profit corporation comprised of graphic design professionals who assert that Adobe's FreeHand software is superior to Adobe's Illustrator product, and therefore advocate that Adobe should continue to update and offer FreeHand. Compl. ¶¶ 7-9. Plaintiffs Jabez Palmer, Eric Rosenberg, Mark Oliver, Inc. and Jamie Pritchett are consumers who have purchased licenses to FreeHand and Illustrator. *Id.* ¶¶ 12-15. These Plaintiffs seek to represent four classes of consumers of FreeHand, Illustrator and other "professional vector graphic illustration software." *Id.* ¶ 99.

Defendant Adobe is a Delaware Corporation, headquartered in San Jose, California, that offers FreeHand, Illustrator and other business, creative and mobile software solutions. *Id.* ¶ 17.

Six years ago, in 2005, Adobe acquired Macromedia, Inc. ("Macromedia"), the maker of FreeHand vector graphic illustration software. *Id.* ¶ 1. According to Plaintiffs, FreeHand was "the primary competitor to Adobe's professional graphic illustration software product, Illustrator." *Id.* Plaintiffs allege that Adobe acquired monopoly power as a result of this acquisition. *Id.*

Plaintiffs allege Adobe then proceeded almost immediately to "crippl[e]" the newly-acquired FreeHand. *Id.* ¶ 77. Specifically, Plaintiffs contend that "**[p]ost-acquisition**, Adobe has simply been incorporating existing FreeHand features into Illustrator" rather than continuing to innovate on both platforms. *Id.* ¶ 75.[1] They allege that since acquiring Freehand **in 2005**, "Adobe has continually and significantly increased the price of Illustrator." *Id.* ¶ 71. And, "**[i]n 2005**, simultaneous with its Illustrator price increase, upon purchasing FreeHand, Adobe stopped its development" (*id.* ¶ 72), "crippl[ing] FreeHand's functionality." *Id.* at ¶ 73. Plaintiffs allege further that, since 2005, Adobe has declined to give away its intellectual property in FreeHand to "be used and developed as an open source code." *Id.* at ¶ 1.

According to Plaintiffs, the Federal Trade Commission predicted these alleged

---

[1] Emphasis is added unless otherwise noted.

1 consequences back in 1994 when it challenged an earlier proposed combination of Illustrator and
2 FreeHand on the grounds that it could "eliminate competition between the two closest substitutes,
3 Illustrator and FreeHand, among differentiated products in the relevant markets[,] allow[ing] the
4 merged firm to raise prices" and/or "reduce innovation by delaying or reducing product
5 development." *Id.* ¶ 64.

6 Plaintiffs contend that this purported course of action constitutes "predatory, exclusionary,
7 and anticompetitive conduct" and has allowed Adobe to unlawfully acquire and maintain a
8 monopoly in violation of Section 2 of the Sherman Act and California and Washington State
9 competition laws. *Id.* ¶¶ 76, 110-129.

10 **III. LEGAL STANDARDS**

11 Familiar standards mandate dismissal of Plaintiffs' complaint. The Federal Rules of Civil
12 Procedure require dismissal of any cause of action that fails to state facts sufficient to base a
13 claim that would entitle a plaintiff to relief. Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion is
14 proper when there is either a lack of a cognizable legal theory or the absence of sufficient facts
15 alleged under a cognizable legal theory. *Pauly v. Stanford Hosp.*, No. 10-CV-5582-JF (PSG),
16 2011 WL 1793387, at *2 (N.D. Cal. May 11, 2011). A complaint may survive a motion to
17 dismiss only if, taking all well-pleaded factual allegations as true, it contains enough facts to
18 "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949
19 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

20 In ruling on a motion to dismiss, the Court "need not accept as true conclusory allegations,
21 unreasonable inferences, legal characterizations, or unwarranted deductions of fact contained in
22 the complaint." *Pauly*, 2011 WL 1793387, at *2 (citing *Clegg v. Cult Awareness Network*, 18
23 F.3d 752, 754-55 (9th Cir. 1994)). Moreover, the complaint's "[f]actual allegations must be
24 enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.[2] While a

25 [2] In *Twombly*, the Supreme Court recognized the heavy costs and burdens that can be
26 imposed by an inadequately pleaded antitrust case, as well as the possibility that such burden and expense may "push cost-conscious defendants to settle even anemic cases." *Twombly*, 550 U.S.
27 at 559. It also considered the burden on courts in managing the discovery process and explained "[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless,
28 be weeded out early in the discovery process through 'careful case management.'" *Id.*

complaint may not require detailed factual allegations, a plaintiff can "plead himself out of a claim by including unnecessary details contrary to his claims." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

"If the expiration of the applicable statute of limitations is apparent from the face of the complaint, the defendant may raise a statute of limitations defense in a Rule 12(b)(6) motion to dismiss." *Eason v. Waste Mgmt. of Alameda Cnty.*, No C-06-06289-JCS, 2007 WL 2255231, at *4 (N.D. Cal. Aug. 3, 2007).

IV. ARGUMENT

A. Plaintiffs' Monopolization Claims Are Time-Barred

Plaintiffs' claims reduce to an untimely attempt to challenge a merger cleared by the U.S. Department of Justice and consummated almost six years ago. According to Plaintiffs, Adobe acquired monopoly power in 2005 by acquiring Macromedia and, as anticipated at that time and foreseen over 10 years earlier, the alleged anticompetitive harms flowed directly from that acquisition. Simply put, Plaintiffs have pleaded themselves out of court by affirmatively establishing that their claims are time-barred.

By statute, any private cause of action brought under the federal antitrust laws is "forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. This "cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971).[3] As explained by the Ninth Circuit:

> The four-year limitation of Clayton Act [§] 4B for private antitrust actions for damages is long enough to enable potential plaintiffs to observe the actual effects of a possible antitrust violation and to calculate its potential effects. The abuses which would occur if plaintiffs were permitted to search the history of other firms and challenge at their pleasure any possible violations, no matter how old, seem apparent.

Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elecs. Corp., 518 F.2d 913, 929 (9th Cir. 1975), *overruled*

---

[3] Plaintiffs' state law claims also have four-year statutes of limitations. *See* Cal. Bus. & Prof. Code § 16750.1; Cal. Bus. & Prof. Code §17208; RCW 19.86.120.

on other grounds, Cal. v. Am. Stores Co., 495 U.S. 271 (1990); *see also Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1052 (8th Cir. 2000); *Alaska Gasline Port Auth. v. ExxonMobil Corp.*, No. 4:05-CV-0026-RRB, 2006 WL 1718195, at *3 n.23 (D. Alaska June 19, 2006). Accordingly, "courts consistently hold that if the monopoly is created by a single identifiable act and is not perpetuated by an ongoing policy, the statute of limitations runs from the [time of] commission of the act, notwithstanding that high prices may last indefinitely into the future." Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW § 320c4 (3d ed. 2007).

In the context of a merger, the relevant "act" is the acquisition itself, and thus a cause of action generally accrues when the transaction is consummated. *See Abbyy USA Software House, Inc. v. Nuance Commc'ns Inc.*, No. C 08-01035, 2008 WL 4830740, at *6 (N.D. Cal. Nov. 6, 2008); *see also Concord Boat*, 207 F.3d at 1051; *Midwestern Mach. Co. v. Northwest Airlines, Inc.*, 392 F.3d 265, 271 (8th Cir. 2004); Areeda & Hovenkamp, ANTITRUST LAW § 320c5 (noting that under this approach, "a merger whose competitive threat is reasonably predictable at the time of the acquisition is subject to a strict four-year limitation period from the date of the acquisition"). Here, that event occurred almost six years ago.

On its face, the complaint demonstrates beyond dispute that Plaintiffs' claims flow from the merger. Plaintiffs assert that:

- Adobe acquired monopoly power **in 2005** when it acquired FreeHand, "the primary competitor to Adobe's professional graphic illustration software product, Illustrator." Compl. ¶ 1.
- **Since acquiring FreeHand**, Adobe has raised the price of its Illustrator product while "effectively removing Freehand from the market by failing to update the program." *Id.*
- As a result of its alleged high shares of vector graphics software – **acquired through the merger** – Adobe "has the power to extract supracompetitive prices in the Relevant Markets." *Id.* ¶ 59.
- "**In 2005**, Adobe acquired and then discontinued FreeHand in order to end competition in the Relevant Markets." *Id.* ¶ 70.
- "**Since its acquisition of FreeHand**, Adobe has continually and significantly

increased the price of Illustrator." *Id.* ¶ 71.

- "**In 2005**, simultaneous with its Illustrator price increase, upon purchasing FreeHand, Adobe stopped its development" (¶ 72), "crippl[ing] FreeHand's functionality." *Id.* ¶ 73.
- "There is no legitimate business justification for Adobe's actions, **including its acquisition of FreeHand through its purchase of Macromedia, and its subsequent failure to support FreeHand**." *Id.* at ¶ 80.
- "Adobe's monopolistic conduct has produced significant anticompetitive effects. Instead of competing in the Relevant Market on the merits of its products through price and feature innovation, **Adobe attacked FreeHand, Illustrator's primary rival**." *Id.* ¶ 91.
- Class damages began on the date of "**Adobe's purchase of Macromedia in 2005 (the "Class Period**")." *Id.* ¶ 99.

In fact, Plaintiffs claim that all of the alleged competitive threats flowing from the 2005 merger that form the basis of its complaint were recognized **in 1994**, when Adobe acquired the former owner of FreeHand.[4] Compl. ¶¶ 60-68. As Plaintiffs point out, the Federal Trade Commission challenged Adobe's 1994 acquisition of Aldus, which at the time marketed and sold FreeHand, arguing that the transaction could (1) "eliminate Aldus as a substantial independent competitive force in the relevant markets"; (2) "eliminate actual, direct and substantial competition between Adobe and Aldus"; (3) "eliminate competition between the two closest substitutes, Illustrator and FreeHand, among differentiated products in the relevant markets"; (4) "allow the merged firm to raise prices … on either Illustrator or FreeHand or on both products"; and/or (5) "allow the merged firm to reduce innovation by delaying or reducing product development." *Id.* ¶ 64. These are precisely the harms now alleged by Plaintiffs (and considered in virtually every merger of horizontal competitors.) Plaintiffs cannot allege that these alleged harms were unpredictable or flowed from anything but the consummated merger.

[4] Adobe subsequently sold FreeHand to Macromedia.

There is only one exception to the four-year bar for challenging mergers, and it does not apply here – *i.e.*, when "assets are used in a different manner from the way that they were used when the initial acquisition occurred, and that new use injures the plaintiff." *Abbyy USA Software House*, 2008 WL 4830740, at *6 (internal quotation marks and citation omitted) (dismissing untimely merger challenge on 12(b)(6) because "Abbyy does not allege any specific and separate conduct, following the acquisition of Caere Corporation, that identifies any new use of the assets that would reset the time for the tolling of the statute of limitations"); *see also Midwestern Mach.*, 392 F.3d at 270-72.

Plaintiffs do not and cannot fit into this limited exception. Plaintiffs repeatedly and unequivocally link Adobe's alleged misconduct back to the acquisition, and stress that Adobe's actions and their purported anticompetitive consequences were the consistent and predictable results of that merger. In short, based on Plaintiffs' own concessions, the alleged consequences of the merger are not independent from the acquisition itself and do not otherwise represent "new use[s]" of Adobe assets. *See Abbyy USA Software House*, 2008 WL 4830740, at *6. To the contrary, under Plaintiffs' allegations, the challenged conduct simply reflects the "unabated inertial consequences" of the merger and does not re-start the statute of limitations. *Midwestern Mach.*, 392 F.3d at 271[5]; *see also Peck v. Gen. Motors Corp.*, 894 F.2d 844, 849 (6th Cir. 1990) (per curium) (conduct causing injuries that have a rippling effect into the future does not constitute a continuing violation); Areeda & Hovenkamp, ANTITRUST LAW § 320c4 ("The monopolist's simple charging of its profit-maximizing price is a naturally expected consequence of monopoly and can hardly be said to be independent."); *see also id.* at § 320c5 (the statute might not run if the merger "caused the plaintiff no injury at the time it occurred, but subsequently the acquired assets were used in an anticompetitive way not contemplated at the time of the acquisition and caused the plaintiff injury").

[5] As the Eighth Circuit noted in *Midwestern Machinery*, "[i]f the initial violation was the merger itself, none of the 'continuing violations' [plaintiff] alleges can justify restarting the statute of limitations because these acts were not undertaken to further an illegal policy of merger or to maintain the merger. Otherwise, every business decision could qualify as a continuing violation to restart the statute of limitations as long as the firm continued to desire to be merged." *Midwestern Mach.*, 392 F.3d at 271.

1 Plaintiffs' allegation that Adobe announced that it would no longer develop FreeHand in
2 2007 does not alter this conclusion. Compl. ¶ 73. According to the complaint, Adobe allegedly
3 stopped FreeHand development upon its purchase in 2005, "crippling its functionality," and
4 causing the anticompetitive effects alleged. Plaintiffs acknowledge that this "threat" was well
5 understood at the time of the acquisition – and indeed years earlier – and have expressly
6 attributed their injuries to the date the transaction closed. Indeed, as noted, they expressly seek
7 damages from 2005 on. *See Midwestern Mach.*, 392 F.3d at 276 ("The limitations period begins
8 when 'present or future damages became definite enough to support a recovery'…[t]he total
9 extent of the alleged damages, including future damages, was unknown at that time, but damages
10 that could be claimed existed.") (citation omitted).

11 Nor may Plaintiffs rely on their equitable claims to redeem their complaint. Claims for
12 equitable relief face an identical four-year limitation period. *See Int'l Tel. & Tel.*, 518 F.2d 913
13 (imposing four-year laches period under Section 16; Congress did not intend "to permit potential
14 plaintiffs to sleep through their competitors' antitrust violations and then sue many years later," *id.*
15 at 927, and further holding that a four-year laches guideline was designed to prevent plaintiffs
16 from "seriously interfer[ing] with a rival's business operations, at a time of the plaintiff's own
17 choosing . . ." *Id.* at 926-27.) The Ninth Circuit imposed this laches guideline to "circumscribe[]
18 the requirement that injunction-seeking plaintiffs act with reasonable promptness unless excused
19 by equitable considerations." *Id.* at 927.

20 In sum, because of Plaintiffs' unambiguous statements attributing their injuries to the
21 acquisition and its natural consequences, their antitrust action is time-barred and should be
22 dismissed.

23 **B. Plaintiffs Cannot State Any Independent Monopoly "Maintenance" Claims**

24 If Plaintiffs try to evade this dispositive time-bar by styling the alleged after-effects of the
25 merger as an independent monopoly maintenance claim, any such claim would also fail as a
26 matter of law.

27 Plaintiffs challenge three types of post-merger conduct, namely that Adobe (1) raised the
28 price of its Illustrator product; (2) declined to separately develop its FreeHand product line; and

(3) declined to give away its FreeHand code to be cloned by the "open source" community. None of this challenged conduct, either alone or together, comes close to violating the antitrust laws. An alleged monopolist is entitled to raise prices; it is entitled to make product line decisions, including discontinuing products; and it has no duty to **give away** its technology for others to clone.

1. Unilateral Price Increases Do Not Violate the Antitrust Laws.

The Supreme Court has flatly rejected the claim that unilateral price increases like the ones Plaintiffs challenge here can violate the antitrust laws absent some *other* independent anticompetitive conduct. *See Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 407 (2004) (the "charging of monopoly prices[] is not only not unlawful; it is an important element of the free-market system"); *see also Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 252 (D.C. Cir. 1987) ("[A]n excessive price alone does not establish a violation of the antitrust laws, because imposition of a high price is not, in and of itself, an anticompetitive act.").

2. Discontinuing a Product Line Does Not Violate the Antitrust Laws.

As the Ninth Circuit has recognized, all companies have the right to unilaterally discontinue product lines. *See Glen Holly Entm't Inc. v. Tektronix Inc.*, 352 F. 3d 367, 372 (9th Cir. 2003) ("[T]he antitrust laws 'do not preclude any manufacturer from independently discontinuing a product line any more than they preclude a manufacturer from independently raising prices.'") (citation omitted). Plaintiffs may prefer FreeHand to Illustrator, but they have no right to raise Adobe's costs and divide its brand equity by forcing it to develop and support multiple product lines within its own portfolio.

3. Declining to "Open Source" Does Not Violate the Antitrust Laws.

Nor is Adobe's decision to use the FreeHand technology to improve its Illustrator product rather than give it away to "open source" competitors an unlawful exclusionary act. No court has ever condemned a company for choosing to use complementary assets for internal development instead of voluntarily handing them over to competitors.

1 In *Trinko*, in affirming the dismissal of a monopolization complaint at the pleading stage,
2 the Supreme Court held that, subject to very narrow exceptions not applicable here, companies
3 have no antitrust duty to deal with competitors even if consumers would allegedly benefit from
4 the cooperation. *Trinko*, 540 U.S. at 408.[6] Courts have also repeatedly held that the antitrust
5 laws do not require even an alleged dominant company to compete against itself with its own
6 technology by licensing its intellectual property to rivals. *See e.g., Apple iPod iTunes Antitrust*
7 *Litig.*, No. 5:05-cv-00037-JW, Order Granting in Part and Denying in Part Mot. For Summ. J. at
8 9-10 [Dkt. 627] (N.D. Cal. May 19, 2011); *United States v. Westinghouse Elec. Corp.*, 648 F.2d
9 642, 647 (9th Cir. 1981) (patentees have "the untrammeled right" to refuse to license); *In re Indep.*
10 *Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1326 (Fed. Cir. 2000).

11 **4. Plaintiffs Cannot Sustain a "Monopoly Broth" Claim.**

12 In tacit recognition of their defective case, Plaintiffs claim that "Adobe's course of
13 conduct warrants antitrust liability even if Adobe's acts would be considered lawful if viewed
14 individually." Compl. ¶ 79. This is incorrect as a matter of law. Plaintiffs cannot salvage their
15 claims by alleging a "monopoly broth" of lawful conduct. *See Cal. Computer Prods., Inc. v. IBM*
16 *Corp.*, 613 F.2d 727, 745 (9th Cir. 1979) ("there can be no synergistic result" from "a number of
17 acts none of which shows casual antitrust injury"); *Northeastern Tel. Co. v. AT&T Co.*, 651 F.2d
18 76, 94-95 & n.28 (2d Cir. 1981) (six challenged practices "cannot have any synergistic effect"
19 where plaintiff "failed to prove that five of those six activities were exclusionary"); *Am. Floral*
20 *Servs., Inc. v. Florists' Transworld Delivery Ass'n*, 633 F. Supp. 201, 215 n.23 (N.D. Ill. 1986)
21 ("zero plus zero plus zero still equals zero," so "[i]f no incident has probative value, all incidents
22 taken together have no probative value"); *S. Pac. Commc'ns Co. v. AT&T Co.*, 556 F. Supp. 825,
23 888 n.69 (D.D.C. 1982) (claim "found to be without merit" "cannot be used as a basis for finding
24

25 [6] The exception permitted in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S.
26 585 (1985), was "at or near the outer boundary of § 2 liability." *Trinko*, 540 U.S. at 409. The *Trinko* Court found that, under *Aspen Skiing*, unilateral termination of a pre-existing course of
27 dealing is a requirement for a valid refusal-to-deal claim. *Id.* Here, as in *Trinko* (and unlike *Aspen Skiing*), there is no allegation that Adobe cut off a voluntary course of dealing with the
28 open source community with respect to FreeHand.

other claims to constitute a violation of the antitrust laws" because "such claims collectively 'cannot have any synergistic effect' and thus cannot support a charge of Section 2 monopolization") (citation omitted).

C. Plaintiffs Cannot State a Claim Under California or Washington Law

As noted above, all of Plaintiffs' state law claims are bound by four-year statutes of limitations and are therefore time-barred for the reasons already discussed.

Plaintiffs' state law claims also fail on substantive grounds. California's relevant statute defines unfair competition as "any unlawful, unfair or fraudulent business act or practice" and "unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. The Washington Consumer Protection Act similarly condemns "[u]nfair methods of competition and unfair or deceptive acts or practices." RCW 19.86.020. Because Plaintiffs have not pleaded deception or false advertising, their claims necessarily require well-pleaded allegations of "unlawful" or "unfair" competition. To make that claim under either statute, Plaintiffs would have to show a violation of an underlying state or federal statute or common law, or a present or incipient violation of the letter or spirit of the antitrust laws. *Fortaleza v. PNC Fin. Serv. Group, Inc.*, 642 F. Supp. 2d 1012, 1019-20 (N.D. Cal. 2009); *Apple Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1204 (N.D. Cal. 2008); *Apple iPod iTunes Antitrust Litig.*, No. 5:05-cv-00037-JW, Order Granting in Part and Denying in Part Mot. For Summ. J. at 13; *State v. Black*, 676 P.2d 963, 967-68 (Wash. 1984). For the reasons discussed above, Plaintiffs cannot state any such claim.

This failure applies equally to Plaintiffs' state law monopolization claims. *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001) (analysis under California's Cartwright Act mirrors analysis under the Sherman Act); *Black*, 676 P.2d at 967; *Morgan v. Microsoft Corp.*, No. 41586-7-I, 2001 WL 783758, at *2 n.2 (Wash. Ct. App. July 9, 2001) (monopolization claims under RCW 19.86.040 are coextensive with the Sherman Act and Washington courts look to federal law for guidance). Moreover, the Cartwright Act, Cal. Bus. & Prof. Code § 16700, does not even address unilateral conduct; it is an analog to Section 1 of the Sherman Act, which Plaintiffs have not and cannot apply to the conduct they challenge here. *See e.g., Apple Inc.*, 586 F. Supp. 2d at 1203-04 (Cartwright Act was patterned after Section 1 of the

Sherman Act and does not reach unilateral conduct).

Given these fatal defects, the interests of economy and comity dictate that Plaintiffs' state law claims be dismissed on the merits as well, rather than remanding those claims to state court. *See e.g., Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 205 (9th Cir. 1991).

V. CONCLUSION

For these reasons, the complaint should be dismissed without leave to amend.

Dated: July 7, 2011

Respectfully submitted,

JONES DAY

By: /s/ Robert A. Mittelstaedt
Robert A. Mittelstaedt

Attorneys for Defendant
ADOBE SYSTEMS INCORPORATED