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8 **UNITED STATES DISTRICT COURT**
 9 **NORTHERN DISTRICT OF CALIFORNIA**
 10 **SAN JOSE DIVISION**

11
 12 FREE FREEHAND CORP., and JABEZ
 PALMER, on Behalf of Themselves and All
 13 Others Similarly Situated,

14 Plaintiffs,

15 v.

16 ADOBE SYSTEMS INC.,

17 Defendant.
 18
 19

Case No: CV 11-02174 LHK

Pleading Type: Class Action

**PLAINTIFFS' OPPOSITION TO
 ADOBE'S MOTION TO DISMISS
 FIRST AMENDED COMPLAINT**

Judge: The Hon. Lucy H. Koh

Hearing Date: November 8, 2011

Time: 1:30 p.m.

Location: Courtroom 8, 4th Floor

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1 **I. INTRODUCTION**

2 This antitrust class action stems from Adobe's monopolization of the market for
3 professional vector graphic illustration software. Such software enables graphic designers to
4 create typographic elements, graphic shapes, cartoons, logos as well as various types of graphic
5 illustrations by rendering vector images using mathematical formulas.

6 Before Adobe acquired Macromedia in 2005, there were two main options in the market:
7 Illustrator by Adobe and FreeHand by Macromedia. As detailed in the First Amended
8 Complaint ("FAC"), Adobe unlawfully stripped the market of competition both through and
9 subsequent to the merger. After acquiring Freehand, Adobe crippled the program's development
10 and support, forcing graphic designers into purchasing Illustrator. Adobe has since dramatically
11 raised the price of Illustrator, while bundling Illustrator with other Adobe software targeted at
12 graphic designers, thereby obstructing potential competitors from entering the market. And even
13 though Adobe has effectively killed FreeHand, the company persistently refuses to make the
14 source code public – sealing off an avenue that has fostered many examples of important open
15 source software alternatives such as Linux, OpenOffice.org, and Mozilla.

16 As alleged, Adobe's actions have resulted in a market barren of competition and one
17 characterized by monopoly pricing. And aside from the general harm to the marketplace, loyal
18 FreeHand users have suffered from the fact that designs created in FreeHand are no longer
19 useable when imported into Illustrator.

20 A class of professional vector graphic illustration software users now seeks to restore
21 competition to the marketplace and recover for their injuries. Plaintiffs assert six claims on
22 behalf of themselves and the class: (1) unlawful monopolization under Section 2 of the Sherman
23 Act; (2) unlawful merger under Section 7 of the Clayton Act; (3) violation of California Business
24 and Professions Code § 16700; (4) violation of California Business and Professions Code §
25 17200; (5) violation of the Washington Consumer Protection Act, RCW 19.86.020; and (6)
26 violation of the Washington Consumer Protection Act, RCW 19.86.040.

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1 Adobe devotes the bulk of its motion to dismiss (“MTD”) to arguing that Plaintiffs’
2 claims are time-barred. The Court should reject this argument. The complaint describes in detail
3 how Adobe engaged in unlawful monopolization through activity occurring within the
4 limitations period. Moreover, Plaintiffs’ claims are timely under several well-recognized tolling
5 doctrines: (1) the discovery rule; (2) the continuing violation doctrine; (3) the different-use-of-
6 assets doctrine for § 7 Clayton Act claims; and (4) fraudulent concealment.

7 Adobe also invites the Court to analyze the claims in a “piecemeal” fashion and reject
8 any claim based on “monopoly broth.” Both positions contradict established law. District courts
9 are firmly instructed to analyze alleged monopolistic conduct as a whole, and a Section 2 claim
10 may indeed be based on allegations of monopoly broth, as this District recently noted in *Tele*
11 *Atlas N.V. v. NAVTEQ Corp.*, 2008 WL 4911230 (N.D. Cal. Nov. 13, 2008).

12 For these reasons, and as discussed in detail below, the Court should deny Adobe’s
13 motion to dismiss in its entirety.

14 **II. ARGUMENT**

15 **A. Rule 12(b)(6) Dismissal Is Reserved For “Extraordinary Cases”**

16 Dismissal is proper under Rule 12(b)(6) only in “extraordinary” cases. *U.S. v. Redwood*
17 *City*, 640 F.2d 963, 966 (9th Cir. 1981). A plaintiff’s claim should not be dismissed where “the
18 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
19 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).
20 Moreover, “[w]hen there are well-pleaded allegations, a court should assume their veracity and
21 then determine whether they plausibly give rise to an entitlement for relief.” *Id.* at 1950.

22 In deciding a motion to dismiss, courts should draw “all reasonable inferences from the
23 complaint in [Plaintiffs’] favor,” *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 949 (9th
24 Cir. 2009), and “accept the plaintiffs’ allegations as true and construe them in the light most
25 favorable to the plaintiffs.” *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167, 1177 (9th Cir.
26 2009). Extraneous material may not be used in testing a complaint’s legal adequacy. *See Levine*
27 *v. Diamantheset, Inc.*, 950 F.2d 1478, 1482 (9th Cir. 1991). “[D]efendants have the burden on a
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1 motion to dismiss to establish the legal insufficiency of the complaint.” *Yeksigian v. Nappi*, 900
2 F.2d 101, 104 (7th Cir. 1990); *see also Thomas v. Hickman*, 2007 U.S. Dist. LEXIS 9485, at *25
3 (E.D. Cal. Feb. 8, 2007) (“It is the burden of the party bringing a motion to dismiss . . .”).
4 Determining whether a complaint is facially plausible is a “context-specific task that requires the
5 reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 129 S.Ct. at 1950.

6 When a motion to dismiss is based on a statute of limitations, “it can be granted only if
7 the assertions of the complaint, read with the required liberality, would not permit the plaintiff to
8 prove that the statute was tolled.” *Cervantes v. City of San Diego*, 5 F.3d 1273, 1275 (9th Cir.
9 1993).

10 **B. Plaintiffs’ Claims Are Timely**

11 Adobe devotes much of its motion to arguing that Plaintiffs’ claims are barred by the
12 four-year statute of limitations under 15 U.S.C. § 15b as well as the California and Washington
13 antitrust and consumer protection statutes at issue. According to Adobe, Plaintiffs filed outside
14 the limitations period because Adobe acquired Macromedia in 2005, *i.e.*, six years before the suit
15 was filed. The Court should reject this argument for the following reasons.

16 1. Plaintiffs Were Injured By Adobe’s Acts Occurring Within The 17 Limitations Period

18 Under § 15b, “[a] cause of action accrues each time a plaintiff is injured by an act of the
19 defendants.” *Program Eng’g, Inc. v. Triangle Pubs., Inc.*, 634 F.2d 1188, 1194 (9th Cir. 1980).
20 As such, “if a party commits an initial unlawful act that allows it to maintain market control and
21 overcharge purchasers for a period longer than four years, purchasers maintain a right of action
22 for any overcharges paid within the four years prior to their filings.” *In re Busiprone Patent*
23 *Litig.*, 185 F. Supp. 2d 363, 378 (S.D.N.Y. 2002) (citing *Berkey Photo, Inc. v. Eastman Kodak*
24 *Co.*, 603 F.2d 263, 294-96 (2d Cir. 1979)).

25 Here, the First Amended Complaint clearly and sufficiently describes anti-competitive
26 conduct by Adobe that occurred and injured Plaintiffs within the limitations period. As alleged,
27 Adobe has: (1) continuously engaged in monopoly pricing of Illustrator; (2) crippled the
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1 development and support of FreeHand; (3) “bundled” Illustrator to obstruct potential competitors
2 from entering the market¹; and (4) refused to release FreeHand’s source code to the public.
3 FAC ¶¶ 1, 68, 74, 76, 77. Adobe’s conduct has enabled it not only to maintain a monopoly in the
4 relevant market, but caused injury to Plaintiffs and the other Class members by forcing them to
5 pay anti-competitive prices for professional vector graphic illustration software and rendering
6 graphics created in FreeHand useless. Simply because **one** of Adobe’s monopoly-advancing acts
7 – the acquisition of Macromedia – occurred prior to the limitations period does not make
8 Plaintiffs’ suit time-barred.

9 Furthermore, Adobe’s argument completely ignores the familiar tolling principle known
10 as the discovery rule. The discovery rule “postpones the beginning of the limitations period from
11 the date when the plaintiff is wronged to the date when he discovers he has been injured.” *In re*
12 *Copper Antitrust Litig.*, 436 F.3d 782, 789 (7th Cir. 2006) (discovery rule applies to federal
13 antitrust claims). Accordingly, while the merger with Macromedia occurred in 2005, Plaintiffs
14 did not know, and could not have known, that the merger would result in the discontinuation of
15 FreeHand until May 16, 2007 – the date Adobe announced it would cease development of
16 FreeHand and directed FreeHand users to switch to Illustrator. FAC ¶ 70. In fact, less than one
17 year prior to the announcement, Adobe publicly stated it had no intention of killing FreeHand,
18 and that support and development of the product would continue “based on our customer’s
19 needs.” *Id.* ¶ 69. As such, even focusing solely on the merger (and not the other anti-
20 competitive occurring within the limitations period), the claims are timely under a
21 straightforward application of the discovery rule.

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25 ¹ Specifically, Adobe bundles Illustrator with other Adobe graphics programs through its Illustrator
26 Creative Suite product. Among these programs are Bridge, InDesign, Photoshop, Version Cue, Acrobat
27 Professional, Dreamweaver, and GoLive. Adobe’s bundling imposes a significant entry barrier by
28 limiting the ability of potential rival professional software manufacturers to enter the market without a
full array of graphics software. *See* FAC ¶ 77.

1 None of the three cases cited by Adobe² shoulder its argument to the contrary. In each
 2 case, the court found a claim under Section 7 of the Clayton Act to be time-barred. These suits
 3 were brought by competitors, not consumers, and they narrowly challenged mergers as anti-
 4 competitive, rather than the broad array of anti-competitive conduct identified in the consumer
 5 class action complaint *sub judice* under Section 2 of the Sherman Act and the state statutes. It is
 6 well-acknowledged that consumers suffer injury from antitrust violations “much later” than
 7 competitors do; accordingly, the statute begins to run later in consumer cases. *See In re*
 8 *Wholesale Grocery Prods. Antitrust Litig.*, 722 F. Supp. 2d 1079, 1088-89 (D. Minn. 2010)
 9 (quoting Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 320c5 (3d ed. 2007)).
 10 Therefore, Adobe’s reliance on these opinions is misplaced and should be rejected by the Court.³

11 2. Adobe’s Monopolization Is A Continuing Violation

12 Aside from being timely asserted based on Adobe’s alleged conduct as well as the
 13 discovery rule, Plaintiffs’ claims are timely under the “continuing violation” doctrine. “A
 14 continuing violation is one in which the plaintiff’s interests are repeatedly violated, and, in these
 15 circumstances, a new cause of action accrues each time the plaintiff is injured by an act of the
 16 defendant.” *In re Busiprone*, 185 F. Supp. 2d at 378 (citing *Bankers Trust Co. v. Rhoades*, 859
 17 F.2d 1096, 1104 (2d Cir. 1988)).

18 Here, Adobe’s monopolization of the relevant markets has been continuing. The
 19 monopoly pricing of Illustrator has been continuing, as has the bundling of Illustrator, refusal to
 20 develop FreeHand, and refusal to make FreeHand’s source code public. FAC ¶¶ 1, 68, 74, 76,
 21 77, 88, 89. Because each repeated act has injured Plaintiffs, the continuing violation doctrine
 22 applies to toll the limitations period.

23 _____
 24 ² *Abbyy USA Software House, Inc. v. Nuance Commc’ns Inc.*, 2008 WL 4830740 (N.D. Cal. Nov.
 25 6, 2008); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1052 (8th Cir. 2000); *Midwestern*
Mach. Co. v. Nw. Airlines, Inc., 392 F.3d 265, 271 (8th Cir. 2004).

26 ³ Along with the Section 2 claim and state-law claims, the FAC also asserts a Section 7 Clayton
 27 Act claim in its second claim for relief. As discussed below in **Section II.B.3**, Adobe’s statute of
 28 limitations argument also fails as to the Section 7 claim under the different-use-of-assets doctrine.

1 3. Adobe Has Used FreeHand In A Manner Different From Its Pre-Merger
 2 Use

3 Plaintiffs' Section 7 Clayton Act claim is also timely, notwithstanding the fact that the
 4 merger occurred more than four years prior to the filing of suit. As acknowledged in Adobe's
 5 motion, courts recognize an exception to the four-year statute of limitations for Section 7 claims
 6 where "assets are used in a different manner from the way that they were used when the initial
 7 acquisition occurred, and that new use injures the plaintiff." *Abby USA Software House*, 2008
 8 WL 4830740, at *6; *see also* *Midwestern Machinery*, 392 F.3d at 270-72.

9 The exception is presented here. Prior to Adobe's acquisition of Macromedia in 2005,
 10 FreeHand was an actively developed product, and, in fact, a serial innovator in the professional
 11 vector illustration software market. *See* FAC ¶ 66. After the merger, Adobe completely stopped
 12 the development of FreeHand, instead opting to incorporate the software's many innovative
 13 features into Illustrator. *See id.* ¶ 74.⁴ The use of FreeHand before and after the merger could
 14 not be in starker contrast: Adobe took a living, breathing product and effectively crippled it while
 15 scavenging its features for Illustrator.

16 Adobe argues the exception does not apply because the death of FreeHand was an
 17 "unabated inertial consequence[]" of the merger. MTD at 11. This conclusion is contradicted by
 18 the complaint's well-pled allegations. Indeed, over one year **after** the merger, Adobe publicly
 19 stated it planned to "continue to support FreeHand," that it would develop FreeHand based on its
 20 customer's needs, and that the product would not be discontinued. *See* FAC ¶ 69.^{5 6} By Adobe's

21 _____
 22 ⁴ Adobe's first announced its decision to discontinue development of FreeHand fewer than four
 years before this suit was filed. *See* FAC ¶ 70.

23 ⁵ Adobe's statements appeared in a June 1, 2006, *Macworld* article entitled, "Adobe: GoLive and
 24 Freehand development will continue." FAC ¶ 69.

25 ⁶ Software companies, including Adobe, commonly sell competing products to the same market.
 26 For example, FontLab actively develops and support two different font typography software programs,
 27 FontLab Studio and Fontographer. Autodesk offers three different 3D modeling software programs:
 Softimage, Maya, and 3ds Max. And Adobe sells five different graphics editing programs: Photoshop,
 Photoshop Elements, Photoshop Lightroom, Photoshop Extended, and Fireworks.

1 own account in 2006, the continued development of FreeHand after the merger was not just a
2 possibility but the preferred outcome. There is simply no basis to conclude that the elimination
3 of FreeHand as a viable product was preordained at the time of the merger, when Adobe itself
4 indicated its intent to continue developing FreeHand as late as one year into the merger.^{7 8}

5 4. Adobe Fraudulently Concealed Its Anti-Competitive Conduct, Thereby
6 Tolling The Limitations Period

7 As discussed, Adobe's statute-of-limitations defense fails because (1) Plaintiffs' claims
8 are based upon Adobe's acts occurring within the limitations period, including under the
9 discovery rule; (2) Adobe's monopolization was a continuing violation; and (3) the different-use-
10 of-assets exception applies to the Adobe-Macromedia merger. In addition, the First Amended
11 Complaint sufficiently pleads fraudulent concealment by Adobe, which is an alternative basis to
12 toll the limitations period.

13 Under the doctrine of fraudulent concealment, "the statute of limitations for a cause of
14 action is tolled if the plaintiff proves that the defendant fraudulently concealed the existence of
15 the cause of action so that the plaintiff, acting as a reasonable person, did not know of its
16 existence." *Hennegan v. Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1302 (9th Cir. 1986).

17 Here, Plaintiffs have pled Adobe's concealment of its intentions with respect to the future
18 of FreeHand. On June 1, 2006, Adobe publicly stated that the company would not discontinue
19 FreeHand, but instead would continue to support and develop the software based on its
20 customers' needs. FAC ¶ 69. Accordingly, Adobe deliberately fostered the impression that the
21 Illustrator and FreeHand would co-exist after the merger; this turned out to be false when Adobe
22

23 ⁷ Adobe insists that all companies, including those created through merger, have "the right to make
24 unilateral product line and pricing decisions." MTD at 11. But such an unfettered right would render the
25 different-use-of-assets exception meaningless when such decisions deploy assets in a different manner
and result in monopolization.

26 ⁸ Alternatively, Adobe concealed its intention to eliminate FreeHand when it made the June 1,
27 2006 statement. If true, the limitations period was tolled under the doctrine of fraudulent concealment, as
discussed in **Section II.B.4** below.

1 revealed approximately one year later that it would no longer update FreeHand, and that users
2 would have to migrate to Illustrator. *Id.* ¶ 70.

3 Adobe argues that the June 1, 2006 statement did not conceal Adobe's intention to
4 discontinue FreeHand because the statement also noted Illustrator was "market leading" and that
5 customers should expect Adobe to "concentrate [its] development efforts" around Illustrator and
6 another piece of software in the fields of vector graphics/illustration and web
7 design/development. MTD at 9. The Court should reject this argument. Concentrating
8 development efforts around Illustrator is a far different proposition from killing off FreeHand to
9 establish Illustrator as the lone viable product in the market. Instead, common sense dictates that
10 Adobe, as a \$3.8 billion company,⁹ could "concentrate" its development efforts on Illustrator and
11 still devote ample resources to the development and support of FreeHand as an alternative
12 product. No reasonable person could read the June 1, 2006 statement as anything but Adobe's
13 expression of its intention to continue the development and support of FreeHand.

14 For all of these reasons, the Court should deny Adobe's motion to dismiss based on the
15 limitations period.

16 **C. A Section 2 Claim May Be Premised On "Monopoly Broth" And Should Not**
17 **Be Analyzed In A Piecemeal Fashion**

18 After unsuccessfully arguing that Plaintiffs' claims are time-barred, Adobe posits that
19 they cannot state a claim for "independent monopoly maintenance" based upon the after-effects
20 of the Adobe-Macromedia merger, and that Plaintiffs are precluded by law from stating a claim
21 for "monopoly broth." The Court should reject these flimsy arguments as well.

22 In ruling on a Section 2 claim, the Court must assess the anticompetitive effect of the
23 alleged monopolist's exclusionary practices "considered together." *LePage's Inc. v. 3M*, 324
24 F.3d 141, 162 (3d Cir. 2003). "As the Supreme Court recognized in *Cont'l Ore Co. v. Union*
25 *Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962), the courts

26 _____
27 ⁹ See http://en.wikipedia.org/wiki/Adobe_Systems (Adobe had revenue of \$3.8 billion in 2010).

1 must look to the monopolist's conduct taken as a whole rather than considering each aspect in
2 isolation.” *Id.* The standard precludes taking a “piecemeal approach” to analyzing Section 2
3 claims. *Glaberson v. Comcast Corp.*, 2006 WL 2559479, *12 n.10 (E.D. Pa. Aug. 31, 2006).

4 In this vein – and contrary to what Adobe urges in its motion – a Section 2 claim may
5 include a claim for so-called “monopoly broth.” This District has observed that what constitutes
6 “anticompetitive conduct” for purposes of a Section 2 violation can be a “vexing question.” *Tele*
7 *Atlas N.V. v. NAVTEQ Corp.*, 2008 WL 4911230, *1 (N.D. Cal. Nov. 13, 2008) (Seeborg, J.)
8 (anticompetitive conduct “can come in too many different forms, and is too dependent upon
9 context, for any court or commentator ever to have enumerated all the varieties” (quoting
10 *Carribbean Broadcasting Sys., Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080, 1087 (D.C. Cir.
11 1998)). As the Honorable Richard Seeborg noted, “‘anticompetitive’ conduct may include
12 otherwise *legal* conduct.”¹⁰ *Tele Atlas*, 2008 WL 4911230, at *1 (emphasis in original).
13 Additionally, “courts must consider all of an alleged monopolist’s related conduct in the
14 aggregate.” *Id.*

15 In establishing that conduct alleged to violate Section 2 must be analyzed holistically and
16 may include otherwise legal conduct, Judge Seeborg cited the Seventh Circuit’s “colorful[]”
17 opinion in *City of Mishawaka v. American Electric Power Co.*, 616 F.2d 976 (7th Cir. 1980).
18 *Tele Atlas*, 2008 WL 4911230, *2 n.1. There, the Seventh Circuit invoked the concept of
19 “monopoly broth” to illustrate the principle that “[t]here are kinds of acts which would be lawful
20 in the absence of monopoly but, because of their tendency to foreclose competitors from access
21 to markets or customers or some other inherently anticompetitive tendency, are unlawful under s
22 2 if done by a monopolist.” *City of Mishawaka*, 616 F.2d at 986 (quotation marks and citation
23

24 _____
25 ¹⁰ Examples of “otherwise legal” anticompetitive conduct noted by the court include exclusive
26 dealing arrangements and refusals to deal. *See Tele Atlas*, 2008 WL 4911230, at *1 (citing *U.S. v.*
27 *Microsoft*, 253 F.3d 34, 70-71 (D.C. Cir. 2001) (exclusive dealing arrangement); *Verizon Comm’ns Inc. v.*
28 *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (2004) (refusal to deal); *Aspen Skiing Co. v.*
Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) (same)). This is not an exhaustive list.

1 omitted) (“It is the mix of the various ingredients of utility behavior in a monopoly broth that
2 produces the unsavory flavor.”). Plainly, a monopoly broth runs afoul of Section 2.¹¹

3 Here, Plaintiffs have alleged in detail a host of activities that, if proven, would establish
4 Adobe’s monopolization of the market for professional vector graphic illustration software. To
5 summarize,

- 6 • Adobe acquired 100% of the Macintosh market and 80% of the Windows market
7 through its acquisition of FreeHand via the merger with Macromedia in 2005.
8 FAC ¶¶ 52, 53. Adobe accomplished the merger at the conclusion of the 10 year-
9 non acquisition period in the Federal Trade Commission’s consent order from
10 1994, which barred Adobe’s previous attempt to acquire FreeHand as a threat to
11 free competition. *Id.* ¶¶ 57-65.
- 12 • After acquiring FreeHand, Adobe continually and significantly raised the price of
13 Illustrator from \$399 up to \$599 by 2008. FAC ¶ 68.
- 14 • Adobe has crippled FreeHand as a viable alternative to Illustrator, eliminating its
15 development and support while forcing its customers to migrate to Illustrator.
16 FAC ¶¶ 72-74.
- 17 • Meanwhile, Adobe has bundled Illustrator with other Adobe graphic design
18 products, raising significant entry barriers for potential rivals to enter the market
19 without a full array of graphics software. FAC ¶ 77.

22 ¹¹ None of the cases cited by Adobe support the contrary proposition. *California Computer*
23 *Products, Inc. v. IBM Corp.*, 613 F.2d 727, 749 (9th Cir. 1979) holds that for conduct to violate the
24 antitrust laws, it must cause antitrust injury, which is hardly inconsistent with a monopoly broth claim.
25 Meanwhile, the Second Circuit opinion reversed a plaintiff’s verdict because the proof was “utterly
26 lacking,” not because it was based on monopoly broth. *Ne. Tel. Co. v. AT&T Co.*, 651 F.2d 76, 95 n.28
27 (2d Cir. 1981). Similarly, the Northern District of Illinois decision addressed the sufficiency of evidence
28 for monopolization claims, not whether a monopoly broth violates the Sherman Act. *See Am. Floral*
Servs., Inc. v. Florists’ Transworld Delivery Ass’n, 633 F. Supp. 201, 215 n.23 (N.D. Ill. 1986). Finally,
the language cited from *Southern Pacific Communications Co. v. AT&T Co.*, 556 F. Supp. 825, 888 n.69
(D.D.C. 1982) is pure *dicta* from a trial court and cannot support Adobe’s argument.

- 1 • Adobe has also refused requests to release FreeHand’s source code to the open-
2 source community, notwithstanding that FreeHand is a “dead” product as far as
3 Adobe is concerned. FAC ¶¶ 80-89.

4 In determining whether Adobe has violated the Sherman Act, the Court must consider its
5 conduct as a whole and without consideration as to whether any of the activities may be legal
6 when viewed in isolation. Under this guiding principle, Plaintiffs have stated a Section 2 claim.

7 **D. Adobe’s Conduct Violates California And Washington Law**

8 Adobe’s conduct, as alleged, also violates California and Washington law, specifically
9 the California Unfair Competition Law (“UCL”), Washington Consumer Protection Act
10 (“CPA”), and the California and Washington antitrust statutes.

11 Adobe argues that the state-law general consumer protection claims (California Unfair
12 Competition Law and RCW 19.86.020) should be dismissed because Plaintiffs have not
13 sufficiently alleged Adobe to have violated the antitrust laws. However, as demonstrated above,
14 the First Amended Complaint contains detailed allegations of multiple antitrust violations by
15 Adobe. Accordingly, the FAC not only states claims under the UCL and CPA, but for violations
16 of the California and Washington antitrust laws as well.

17 In addition, Adobe maintains that California’s Cartwright Act does not address unilateral
18 conduct. As this District has recognized, however, there is a valid Cartwright Act claim “[i]f a
19 ‘single trader’ pressures customers or dealers into pricing arrangements” *Davis v. Pacific*
20 *Bell*, 204 F. Supp. 2d 1236, 1243 (N.D. Cal. 2002) (citing *G.H.I.I. v. MTS, Inc.*, 147 Cal. App. 3d
21 256, 265 (1983)). Here, Plaintiffs have alleged multiple coercive acts by Adobe including: (1)
22 destroying FreeHand’s functionality; (2) bundling Illustrator with other products; and (3) raising
23 the price of Illustrator to supercompetitive prices. Thus, Plaintiffs have stated a valid Cartwright
24 Act claim.

25 For all of these reasons, the motion to dismiss should be denied as to the state-law claims.
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1 **III. CONCLUSION**

2 For the reasons discussed, Plaintiffs respectfully request that the Court deny Adobe's
3 Motion to Dismiss First Amended Complaint. In the alternative, should the Court dismiss any
4 portion of the First Amended Complaint, Plaintiffs respectfully request that they be afforded
5 leave to amend.

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8 Respectfully submitted,

9 BECK & LEE TRIAL LAWYERS

10 s/Jared H. Beck

11 Jared H. Beck

12 Counsel for Plaintiffs and the Proposed Classes

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