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BECTON, DICKINSON AND COMPANY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

BECTON, DICKINSON AND COMPANY, Plaintiff / Defendant–in–Counterclaim, v. CYTEK BIOSCIENCES INC., MING YAN, ALFRED RILEY, DAVID VRANE, ZHENYU ZHANG, ZHENXIANG GONG, ALEX ZHONG, MARIA JAIMES, GIL REININ, and JANELLE SHOOK, Defendants / Plaintiff–in–Counterclaim.	C.A. No. 3:18–cv–00933–MMC **BECTON, DICKINSON AND COMPANY'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO DISMISS COUNT I OF CYTEK'S FIRST AMENDED COUNTERCLAIMS** Date: June 14, 2019 Time: 9:00 A.M. Courtroom: 7, 19th Floor

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I. INTRODUCTION

Cytek's Opposition ("Opp.") confirms that its FACC[1] does not cure the pleading deficiencies that led the Court to dismiss Cytek's first failed attempt to state a claim for injunctive relief under the UCL. Cytek's vague "information and belief" averments that at some unspecified point in time two additional potential Cytek customers allegedly feared losing access to unspecified BD reagents based on unspecified BD conduct exposes an easily toppled house of cards: Cytek again fails to allege either a UCL claim based on threatened tying or any entitlement to injunctive relief. Cytek's unchanged UCL claim based on the assignment provisions in BD's employment agreements likewise fails. The Court should dismiss the FACC with prejudice.

No basis for UCL injunction on Cytek's "tying" claim. After the Court rejected Cytek's allegations of a "tying policy" based on an alleged threat isolated to one customer made long ago (*see* Order at 7–8), Cytek amended its counterclaim to add vague allegations regarding two additional potential customers who are claimed at some unspecified time to have feared losing access to unspecified BD reagents. As BD's opening brief demonstrated, Cytek still fails to "answer the basic questions: who, did what, to whom (or with whom), where, and when?" *United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Constr. Trades Dep't, AFL–CIO*, 770 F.3d 834, 842 (9th Cir. 2014) (citation and quotation omitted). Cytek's Opposition confirms that its FACC omits the most rudimentary facts, including ***when*** these alleged events occurred; ***what***, if anything, BD actually communicated to the customers (and through whom); ***which*** reagents the customers use; and ***whether*** the potential customers still have any interest in purchasing a Cytek cytometer, and if not, why. Crucially, although Cytek's tying theory has been reduced to a claim that BD allegedly threatened to withhold ***UV reagents*** from these customers, ***the FACC does not allege that any of the "potential customers" even use UV reagents***. In short, Cytek fails by a wide margin to allege that any tying "threat" was ever made, much less that there are any threats that persist today, or "likely" will "result" in lost Cytek sales, as this Court required. *See* Order at 7. Indeed, Cytek's position is undermined

[1] All abbreviations not otherwise defined have the same meaning as in BD's Motion to Dismiss Count I of Cytek's First Amended Counterclaims, ECF No. 116 ("MTD").

by the FACC's own allegation that Cytek's rate of converting demonstrations to sales decreased not due to supposed tying threats (*see* Opp. at 13–14), but allegedly as a result of lawful statements BD purportedly made to customers, which Cytek no longer challenges. *See* FACC ¶ 41.

No basis for UCL "unfair" tying claim. Cytek's Opposition similarly cannot rescue its infirm UCL claim on the merits. Cytek abandons the position it took in opposing BD's prior motion to dismiss, and suggests that it no longer needs to allege facts showing any likelihood that the elements of the alleged tie will come into existence. Opp. at 9–10; *compare* ECF No. 103 at 16 n.12. Cytek's apparent contention that it need not show any likelihood of BD's conduct ripening into an actual illegal tie to make out a UCL incipient tying claim founders on both this Court's previous Order and well-settled precedent. Cytek's Opposition equally fails to defend the FACC's failure to allege the elements this Court recognized Cytek must plead.

First, Cytek's vague allegations regarding two new potential customers fail sufficiently to plead that any tying threat—which, as explained, Cytek does not adequately allege—"was ***likely*** to result in the loss of a sale by Cytek," such that any BD conduct likely threatened any substantial foreclosure of interstate commerce. Order at 7. Cytek's focus on allegations of interest by these two customers in evaluating the Aurora at some point in time fails to allege the likely loss of a sale from a tying threat—the "***such that***"—that this Court previously found lacking. *Id.*

Second, Cytek's failure to allege that the newly identified "potential customers" actually owned UV-enabled cytometers dooms Cytek's ability to allege the essential element of coercion: if the two new customers Cytek identifies did not own UV-enabled cytometers, BD's alleged power in the gerrymandered "UV reagent" market is irrelevant and cannot sustain a tying theory.

Third, Cytek fails to plead market power. Contrary to what the Opposition suggests, the FACC fails to plausibly allege a relevant product market restricted to UV reagents because it fails to aver facts permitting definition of the market ***after*** a BD customer has made the decision to build panels around UV reagents (thereby supposedly "locking" the customer into UV reagents), rather than ***before*** that decision is made, where Cytek admits alternatives to UV cytometers exist. And even if Cytek could narrowly define the product market as consisting only of UV reagents, Cytek's

allegations of market power still fall short. Cytek's allegations rest on "information and belief" pleading and other factors that, on their own, do not plausibly allege market power. For example, Cytek's reliance on BD's patent rights is circular, because allegations that BD's patent rights cover ***BD's*** UV reagents do not aver that such rights preclude other entry paths.

No basis for UCL injunction on assignment provisions. As to the assignment provisions, Cytek now claims that the existence of those provisions and BD's breach of contract claim against the Individual Defendants have created "uncertainty" for its business. Opp. at 20. But this attempt to recast its unchanged allegations falls short: Cytek cannot allege any non-speculative, imminent harm to itself, and lacks standing to bring a claim on behalf of third parties.

"[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (citation and quotation omitted). Contrary to Cytek's position (*see* Opp. at 15), Cytek's allegations do not raise "a reasonable expectation that discovery will reveal evidence" of the acts alleged in its FACC. *Twombly*, 550 U.S. at 556. Instead, Cytek's vague and conclusory allegations regarding BD's purported "tying conduct" and business "uncertainty" "stop[] short of the line between possibility and plausibility" and should be dismissed with prejudice. *Id*. at 546.

II. ARGUMENT

A. Cytek's Tying Allegations Fail to Plead Any Basis for a UCL Injunction

The Court rejected Cytek's earlier attempt to plead a UCL claim for a straightforward reason: Cytek failed to allege any ongoing or imminent harm, and instead rested its case on a supposed tying threat to a single customer that took place in 2017, well over a year before it asserted its counterclaim. Order at 11–12. Cytek relegates the need to allege an entitlement to injunctive relief to the end of its Opposition, and with good reason. As BD's opening brief demonstrated, the FACC still does not allege any facts to support Cytek's argument that there is tying conduct that is likely to recur, or that there is any continuing harm flowing from BD's past alleged conduct. *See* MTD at 11–13.

Downplaying the prior allegation about the 2017 incident (which this Court deemed insufficient and remains unaltered, *see* FACC ¶ 18), Cytek instead argues that the FACC now alleges

"multiple instances of the same threatening conduct." Opp. at 18. This assertion falls flat upon any examination of what Cytek has actually pled. Cytek's amended allegations (FACC ¶ 19) address two "potential customers" who are vaguely alleged to have recounted fearing at an unspecified time that they would lose access to some unspecified reagents sold by BD, and who did not purchase a Cytek cytometer despite at one point exploring that possibility. The FACC again fails to allege *when* any of these events supposedly occurred. Without any facts pled as to timing, there is no basis for Cytek's requested "inference" that BD's alleged conduct is continuing. Opp. at 18. What Cytek seeks is not an inference, but for this Court to impermissibly "assume facts not alleged." *Windy City Innovations, LLC v. Microsoft Corp.*, 193 F. Supp. 3d 1109, 1113 (N.D. Cal. 2016).[2]

Beyond its failure to plead any facts going to timing, Cytek does not allege any facts that would suggest these two customers were ever subject to any tying threat, much less any threat that continues today or poses any ongoing or threatened harm. Cytek's averments as to these two customers are even more attenuated than the 2017 allegation this Court already rejected. Cytek does not allege any facts concerning any communication that BD ever had with either customer, including any facts that would suggest that BD ever presented the tying arrangement alleged in the FACC to the customers. ***Indeed, the FACC does not allege that these two customers used the UV reagents that Cytek claims were the subject of BD's threatened tie, or that the customers even owned UV-functional cytometers.*** The FACC is likewise silent on whether these two customers still have any interest in purchasing an Aurora absent BD's alleged conduct.[3] In short, Cytek has not alleged that BD's supposed tying threats—even if sufficiently alleged, which they are not—are "likely to result in the loss of a sale by Cytek" (Order at 7), let alone that any such purported losses are ongoing. As

[2] Cytek's reliance on *Stickrath v. Globalstar, Inc.*, No. C07-1941 TEH, 2008 WL 344209 (N.D. Cal. Feb. 6, 2008) (cited in Opp. at 18-19), is misplaced. There, the question of potential injunctive relief did not depend on any inference that the defendant's alleged conduct was "ongoing"; rather, it hinged on whether members of a putative class had adequately alleged that they would in fact be injured by such conduct. *See id.* at *4.

[3] It is not the case, as the Opposition suggests, that "Cytek's potential customers are still declining to purchase Cytek's product" because of any threatened tie. Opp. at 2. The FACC does not plead any facts that would support this assertion.

BD has demonstrated, injunctive relief requires plausible allegations of ongoing injury *flowing from* the alleged conduct. *See* MTD at 12–13 (citing *In re Napster Inc. Copyright Litig.*, 354 F. Supp. 2d 1113, 1127 (N.D. Cal. 2005)). Those allegations—the "such that" this Court required (Order at 7)—are absent here.

As a last resort, Cytek suggests that the FACC alleges a "pattern" of past misconduct that supposedly is suggestive of ongoing harm. *See* Opp. at 18–19. "But in law as in mathematics[,] zero plus zero equals zero." *Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001). It makes no difference whether this Court evaluates the three customer allegations in the FACC (one of which this Court already rejected) individually or together. As just demonstrated, Cytek fails to plead any facts that would suggest there is any prospect of harm connected to any threatened BD tie. Cytek's position, moreover, is undercut by its other allegations. In inviting the Court to look past the gaps in its pleading, Cytek points to a supposed decrease in the "rate at which Cytek converts a demonstration of its Aurora product to a sale." Opp. at 13; FACC ¶ 41. The FACC, however, attributes this alleged decrease not to any threatened tying arrangement, but to BD's supposed statements to customers—protected speech that Cytek no longer even challenges.[4] *See* FACC ¶ 41. Cytek further undermines its own argument in the very same paragraph, as it admits that the conversion "rate" has "slightly recovered." *Id.* The FACC's own allegations cannot be reconciled with Cytek's theory that BD supposedly continues to make threats or cause additional harm.

In short, this is not a case where an injunction is proper because "past misconduct" continues to cause harm. The FACC nowhere avers the facts necessary to support that premise. Cytek's tying allegations should be dismissed, this time with prejudice, for failure to plead an entitlement to injunctive relief. *See In re Napster*, 354 F. Supp. 2d at 1127.

[4] The FACC abandoned any UCL claim based on allegations that BD "spread misinformation" about Cytek or its products, although Cytek still includes the same allegations as before concerning allegedly false statements. *See* FACC ¶¶ 36-39, 41. As BD detailed in its earlier motion to dismiss, such speech (if it ever occurred) would be protected by the *Noerr-Pennington* doctrine and/or California's litigation privilege, and would not be anticompetitive as a matter of law. *See* ECF No. 88 at 18–21; ECF No. 105 at 12–14.

B. Cytek Has Failed to State a Claim Under the UCL's "Unfair" Prong

Cytek's Opposition confirms that its tying-based UCL claim remains infirm. As an initial matter, Cytek misstates the substantive legal test for an incipient *per se* tying violation, the theory Cytek concedes its counterclaim purports to advance (Opp. at 14 n.8). When seeking to defeat BD's prior motion, Cytek conceded that it must allege a threatened *per se* tying violation. *See* ECF No. 103 at 1, 11–13 (asserting that Cytek must allege a "substantial threat" of establishing "each of the elements" of a *per se* tying violation). In defending against the present motion, Cytek now disclaims any burden to show a tying violation is likely. *See* Opp. at 9–10. This Court already rejected Cytek's current position, holding that Cytek failed to supply allegations that the supposed tying arrangement was "*likely* to result in the loss of a sale by Cytek." Order at 7 (emphasis added). Moreover, the remainder of Cytek's Opposition—by acknowledging that it must allege threatened foreclosure and other elements—effectively concedes that it must demonstrate a likely tying violation.

Requiring Cytek, as it originally conceded it must, to demonstrate a likely completed tying violation also comports with FTC Act Section 5, which the UCL "parallel[s]." *Cel–Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 166 (1999). The FTC cannot apply Section 5's incipiency standard, the Ninth Circuit held, to end-run "well forged" antitrust liability standards. *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 582 (9th Cir. 1980). To hold that the incipiency standard is satisfied without a likely tying violation would result in precisely that impermissible outcome.[5] Tellingly, Cytek offers no authority for its apparent position that the UCL would require a lesser showing than what is required for an action seeking to enjoin threatened tying. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969) (requiring "significant threat of injury" from impending or likely-to-recur violation for Clayton Act injunction) (cited in Cytek's first

[5] *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966), and *FTC v. Texaco, Inc.*, 393 U.S. 223, 224–31 (1968), contrary to Cytek's claim (Opp. at 9 n.2), fail to support its position. *Texaco* concerned an acknowledged tying practice that actually foreclosed the requisite volume of commerce. *See* 393 U.S. at 229–30. Neither is true here. *Brown Shoe* involved not tying, but payments for exclusivity; and, in sharp contrast to this case, the extent of the practice was admitted and the examiner had found the practice had "effectively foreclosed Brown's competitors." 384 U.S. at 319–20. The FTC in neither case condemned the mere possibility of a foreclosing tie, which is all Cytek asserts here.

Opposition, ECF No. 103 at 16 n.12).[6] Accordingly, Cytek must allege that a future tying violation is likely. It has not.

1. Cytek Fails to Allege Likely Foreclosure

Cytek's assertion (Opp. at 12) that its two new customer allegations sufficiently allege threatened foreclosure of "substantial sales in the cytometer market" (FACC ¶¶ 19, 48) fails. Paragraph 19 of the FACC fails to cure the deficiency this Court previously identified. As before, "Cytek does not plead any facts showing the customer to whom the tying arrangement was presented had any interest in purchasing a cytometer from Cytek, ***such that*** the arrangement was likely to result in the loss of a sale by Cytek." Order at 7 (emphasis added).

Cytek points to allegations of "interest" but entirely ignores the second part of this critical sentence in this Court's Order. As addressed in BD's opening brief (MTD at 21–22), Cytek's two new "potential customer" allegations do not plead that either customer was likely to have purchased a Cytek cytometer absent BD's alleged conduct. Cytek buries its response to this point in a footnote, arguing without any citation to the FACC that "it is reasonable for the Court to infer such intent based on Cytek's other allegations." Opp. at 12 n.7. Cytek again asks the Court to "infer" facts that are nowhere alleged, *i.e.*, that these customers possessed sufficient interest in Cytek's cytometers "***such that***" it is likely they would have purchased from Cytek absent the (insufficiently alleged) supposed BD tying threat. Order at 7.

Cytek's allegations of customer "interest" are themselves cursory. The FACC claims one customer was "in discussions" about a possible purchase, and that the other had apparently expressed "interest" in the Aurora to Cytek. FACC ¶ 19. But, more importantly, the FACC does not allege any connection between the customer's purported loss of interest and BD's alleged conduct. Cytek

[6] The UCL cases Cytek invokes (Opp. at 9) did not involve tying; and the court that sustained a UCL unfairness claim found an actual "reduction in competition," which is not alleged here. *Imperial Irrigation Dist. v. Cal. Indep. Sys. Operator Corp.*, No. 15-CV-1576-AJB-RBB, 2016 WL 4087302, at *13 (S.D. Cal. Aug. 1, 2016). *Compare Creative Mobile Techs., LLC v. Flywheel Software, Inc.*, No. 16- CV-02560-SI, 2016 WL 5815311, at *5 (N.D. Cal. Oct. 5, 2016) (dismissing UCL claim for failing to allege requisite effects). In *PeopleBrowsr, Inc. v. Twitter, Inc.*, No. C-12-6120 EMC, 2013 WL 843032 (N.D. Cal. Mar. 6, 2013), the court merely considered whether a UCL unfairness claim raised a federal question under the Sherman Act. *See id.* at *2.

does not allege what, if anything, BD actually communicated to the customers; what cytometers (if any) the customers subsequently purchased; or the reasons why the customers did not purchase from Cytek. As addressed further next, Cytek does not even allege the customers owned UV-enabled cytometers that required UV reagents, as would be necessary for any likelihood of Cytek losing a sale due to the BD tying threats that the FACC speculates occurred. In short, without any causal link between BD's alleged conduct and the "likely . . . loss of a sale" (Order at 7)—the "***such that***" this Court made clear is necessary—Cytek does not allege ***any*** likelihood of foreclosure, let alone foreclosure of a not-insubstantial volume of commerce.[7]

2. Cytek Fails to Plead Likely Coercion

Cytek also fails to plead coercion, an essential tying element, *see Cascade Health Sols. v. Peacehealth*, 515 F.3d 883, 912 (9th Cir. 2008), for a related reason: the FACC does not even allege that the customers Cytek identifies would be potentially susceptible to any coercion by BD.[8] This is because Cytek does not allege that any of the "potential customers" in the FACC ***actually owned*** a UV-enabled cytometer requiring UV reagents only available from BD. *See* FACC ¶¶ 18, 19; Opp. at 2; MTD at 21. Cytek instead vaguely asserts, based on "information and belief," that "the reagents that BD threatened to withhold included" UV reagents.[9] FACC ¶ 22. This allegation deserves no credit, as the facts in question are ***not*** "peculiarly within the possession and control" of BD. *Soo Park v. Thompson*, 851 F.3d 910, 928–29 (9th Cir. 2017) (citation and quotation omitted). Cytek could have asked these customers which reagents and cytometers they use. The Opposition's claim that BD's "dominant position" in the UV reagent market "dissuades customers from cooperating

[7] Cytek's allegations regarding the value of potential lost sales are irrelevant, because the FACC does not allege any likely lost sale due to BD's supposed conduct. *See* MTD at 22. Because Cytek fails to plead likely foreclosure, *a fortiori* it also fails to plead, as it must, a likely completed tying violation. *See* MTD at 15.

[8] The element of coercion also requires Cytek to plausibly plead that BD has market power in a relevant market. *See* MTD at 20. As BD explains next, *infra* at 9–13, Cytek fails to do so.

[9] Cytek's original counterclaims, by contrast, did allege that BD had threatened to withhold a "proprietary" UV reagent from one customer. CC ¶ 20 (ECF No. 72). Cytek struck that allegation from the FACC.

with" Cytek (Opp. at 15; *see* FACC ¶¶ 24, 40) has no bearing when it comes to customers that the FACC makes clear were willing to speak to Cytek about their interactions with BD.

Because Cytek does not plausibly allege that any of the customers required UV reagents, there is no basis for the Court to infer that any of these "potential customers" were even capable of being coerced by BD's supposed threats. The FACC fails to allege any likelihood of coercion given this fatal disconnect.

3. Cytek's UV Reagent Market Fails as a Matter of Law

(a) Cytek Fails to Allege a Relevant Product Market

BD demonstrated (MTD at 16–18) that Cytek's purported "global market for UV reagents" (Opp. at 10) is invalid. The Opposition only underscores that Cytek's gerrymandered market fails.

First, Cytek has not plausibly alleged a market encompassing "the product at issue as well as all economic substitutes for the product." Opp. at 10–11 (citing *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008)). Cytek offers no allegations that would establish that, ***before*** a customer assembles a panel, non-UV reagents are not an economic substitute for UV reagents. The FACC does not offer any allegations that there is a lack of reasonable interchangeability or cross-elasticity of demand between the reagents included in Cytek's purported product market (the UV-compatible reagents) and the reagents excluded from that market (non-UV reagents).[10] *See Tanaka v. Univ. of S. Cal*, 252 F.3d 1059, 1063 (9th Cir. 2001). Dismissal is warranted not based on the principle of facial implausibility (Opp. at 10–11), but rather because of a principle Cytek ignores: the FACC does not offer any factual allegations to show a lack of cross-elasticity between the products included in and excluded from Cytek's proposed market. *See, e.g.*,

[10] Under Cytek's deficient reasoning, every color of reagent would be its own product market. *See* FACC ¶ 21 (alleging that "each reagent"—red, green-yellow, blue, violet, and ultraviolet—"provides information regarding different characteristics of a cell"). Cytek does not allege any facts that could explain why, for instance, a red reagent would be economically interchangeable with a blue reagent, but a UV reagent stands on its own, before a panel is assembled. Rather, Cytek's own allegations make clear that Cytek is attempting to gerrymander a "UV only" reagent market because its abandoned allegations about the overall reagent market failed to plausibly plead BD's market power. *See* Order at 6.

Colonial Med. Grp., Inc. v. Catholic Healthcare W., No. C–09–2192 MMC, 2010 WL 2108123, at *3 (N.D. Cal. May 25, 2010).

Second, Cytek provides no reason for defining the market after a customer has decided to develop a panel requiring a UV reagent, rather than before. As BD demonstrated in its opening brief (MTD at 17), Cytek's own allegations show that customers know ***before*** they purchase a UV-functional cytometer that they will need to purchase UV reagents. *See* FACC ¶¶ 21, 23; *see also Apple Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1201 (N.D. Cal. 2008) (finding that correct perspective from which to define market is at the time customer makes a choice that knowingly limits its future options). In response, the Opposition looks to shift the analysis to the wrong perspective: to the customer's choices ***after*** it has decided to purchase a UV-enabled cytometer. Once a customer has designed a panel that includes UV reagents available from BD, so Cytek claims, the customer is locked into buying BD's UV reagents. Cytek, however, does not allege that customers are somehow forced into such a relationship with BD at the time they assemble panels and purchase cytometers. Cytek admits that there are alternatives to cytometers requiring UV technology (FACC ¶ 48), as well as other suppliers of UV cytometers (Opp. at 16), and fails to allege that UV reagents are essential ***at the time a customer develops a panel***. This is why Cytek's artificial "UV reagent" market is the "functional equivalent" of an invalid "contractually-created aftermarket." *Psystar*, 586 F. Supp. 2d at 1200–03 (cited in MTD at 17). UV reagents only are essential, under Cytek's allegations, ***because*** of a choice the customer previously made that Cytek does not allege was itself coerced.

Cytek's argument (Opp. at 16–17) that this is not a case where customers agreed to an alleged aftermarket restraint is thus a red herring that misses the point. Cytek does not dispute that markets defined after a purchase decision is made typically are invalid. *See, e.g.*, *Psystar*, 586 F. Supp. 2d at 1198. To succeed on its "lock-in" theory, Cytek must allege facts showing that the need to compete for ***un***locked-in customers does not constrain BD, either because BD changed its "policy" and market imperfections conceal it, or because BD has engaged in fraud. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 473–78 (1992); *Newcal*, 513 F.3d at 1048–49. Cytek alleges neither.

For one thing, Cytek does nothing more than recite the legal conclusion that BD instituted a "new . . . policy to withhold reagents to Aurora customers" only after customers were "locked in" to cytometers requiring BD reagents. FACC ¶¶ 24, 40. Cytek's averments are wholly conclusory and not supported by any well-pled facts.[11] For another, the courts in *Newcal* and *Kodak* required fraud and market imperfections, respectively, because restricting a market to post-purchase choices is inappropriate absent a reason why seeking to exploit locked-in purchasers is rational. *See Kodak*, 504 U.S. at 474–75; *Newcal*, 513 F.3d at 1048–49 (explaining "economic presumption" against lock-in theories). Cytek's lock-in theory flunks this essential reality test.

Cytek has not pleaded that BD would be able to keep attracting cytometer customers while allegedly requiring those who already purchased BD UV machines to refrain from buying from Cytek as a supposed condition for continued access to BD's UV reagents. Nor does Cytek allege any "market imperfections" that render competition for new cytometer customers insufficient to protect against restrictions on access to UV reagents in the aftermarket. Indeed, Cytek avers that only sophisticated customers purchase cytometers and reagents (*see* FACC ¶¶ 2, 21, 24) and that BD's purported tying "policy" is a matter of common knowledge, such that customers could look to avoid BD's UV-functional cytometers and buy elsewhere (*see* FACC ¶¶ 40, 48; Opp. at 16). These allegations stand in stark contrast to *Kodak* and *Newcal*, where life-cycle pricing difficulties and allegations of fraud justified ignoring competition in the foremarket and restricting the market to those customers who had already made purchases. *See Kodak*, 504 U.S. at 477 (holding evidence existed that "information costs and switching costs foil the simple assumption that the equipment and service markets act as pure complements to one another"); *Newcal*, 513 F.3d at 1050 (holding that allegations of fraud and deceit overcome "economic presumption" that "[c]ompetition in the initial market" will "suffice to discipline" aftermarket).

[11] Nor can Cytek cure this deficiency with its vague allegations that BD made "threats" to a handful of customers (FACC ¶¶ 24, 40), particularly where Cytek fails to allege elsewhere that the customers were actually subjected to these purported threats. *See supra* at 4-5, 8-9.

For all of these reasons, Cytek has failed to define a relevant product market, which warrants dismissal of the FACC.

(b) Cytek Fails to Allege Market Power

Cytek's tying claim also fails for the separate reason that Cytek does not sufficiently allege that BD has the requisite market power in a sufficiently defined market for UV reagents to coerce a tie.[12] *First*, this Court should not credit Cytek's allegation that BD possesses 100% market share in the UV reagent market. FACC ¶ 22. Cytek points to no authority that would permit it to plead this essential element solely on "information and belief." *See* MTD at 18.

Second, the other factors that Cytek invokes—including charging higher prices and holding patents (FACC ¶ 22)—do not plausibly allege market power. "[H]igh profits may be indicative of a variety of factors other than a monopoly power, such as an extraordinary market, operating efficiency, or high-quality management." *High Tech. Careers v. San Jose Mercury News*, No. CIV. 90–20579 SW, 1995 WL 115480, at *3 (N.D. Cal. Mar. 14, 1995), *aff'd*, 94 F.3d 651 (9th Cir. 1996). Further, as Cytek itself admits (Opp. at 11), BD's patents do not create a presumption of market power. *See Ill. Tool Works Inc. v. Indep. Ink Inc.*, 547 U.S. 28, 45 (2006). Nor do Cytek's patent allegations sufficiently allege entry barriers here. Cytek does not plausibly allege that BD's patents for UV reagents preclude potential competitors from developing similar products. Cytek only avers that the BD patents "cover[] [BD's] UV reagents"; Cytek fails to allege that the patents preclude other paths for commercializing UV reagents. FACC ¶ 22. Cytek's allegations regarding BD's supposed "litigiousness" (Opp. at 11) add nothing, both for this reason and because the cited lawsuit centered on "'copy–cat' non-UV products." *Id.*

Third, the Opposition wrongly contends that Cytek need not plead market power to state a claim under Section 16727 of the Cartwright Act. Opp. at 17–18. Here, Cytek inexplicably cites the same decision by Judge Ware (Opp. at 18) that was later vacated in a ruling that clarified, "*Morrison* does not stand for the proposition that a plaintiff need not establish market power." *Advanced*

[12] The Opposition confirms that Cytek is not asserting BD's market power in any other market, including the market for cytometer reagents generally. *See* Opp. at 11–12.

Microtherm, Inc. v. Norman Wright Mech. Equip. Corp., No. C 04–02266 JW, 2010 WL 11575007, at *2 (N.D. Cal. Nov. 22, 2010), *aff'd*, 525 F. App'x 612 (9th Cir. 2013) (unpublished). Cytek's argument that the "law of the case" doctrine disposes of this point (Opp. at 17) fares no better. Application of the doctrine "is discretionary," and for it to apply, "the issue in question must have been 'decided explicitly or by necessary implication in the previous disposition.'" *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000) (citation and alteration omitted). In dismissing Cytek's original UCL counterclaim, the Court did not specifically analyze whether Section 16727 requires market power, because Cytek had failed to state a claim for several other reasons. *See* Order at 6–7. BD again respectfully submits that Section 16727 does in fact requires a plaintiff to plead market power. *See* MTD at 20. Cases stating that Section 16727 does not require market power themselves invoke obsolete decisions presuming market power from unique assets, a doctrine the Supreme Court expressly rejected and California courts would no longer follow. *See id.*

* * *

Despite this Court's instructions, Cytek has again failed to plead the essential facts that would permit this Court to infer the existence of any tying policy that could harm competition. Cytek's tying-based UCL claim should be dismissed, this time with prejudice.

C. Cytek Fails to Allege Any Entitlement to an Injunction Based on the Assignment Provisions

Cytek's argument to resuscitate its rejected, entirely unchanged UCL claim based on the assignment provisions in BD's employment agreements pivots to a new focus. In both its original counterclaims and the FACC, Cytek conceded that the Court had dismissed BD's claim against it based on the assignment provisions, but nonetheless alleged that the existence of the assignment provisions and BD's breach of contract claim against the Individual Defendants have created "uncertainty" for its business. *See* FACC ¶¶ 53, 60, 62; CC ¶¶ 61, 63; Opp. at 20. Those allegations did not support a UCL injunction before, and do not change the outcome now, for two key reasons. *First*, Cytek lacks standing to assert a UCL claim because it does not allege any non-speculative, imminent harm to itself. Cytek instead relies wholly on the prospect of future harm to third parties

(the Individual Defendants) and to California employers generally. *See Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 323 (2011) (UCL confers no standing to protect third parties). *Second*, the Court might decline to enter relief in BD's favor against the Individual Defendants. Cytek therefore fails to identify any threat of ***irreparable*** harm that would warrant injunctive relief.

III. CYTEK SHOULD NOT BE GRANTED FURTHER LEAVE TO AMEND

Lastly, this Court should reject Cytek's argument that it should get a third bite at the apple based on a cryptic reference to "new acts of unfair competition" that it has supposedly discovered since filing the FACC. Opp. at 21. Such vague allusions do not provide grounds for leave to amend after a party has already had a chance to amend in response to a decision on a dispositive motion. *See, e.g.*, *Gonzalez v. Planned Parenthood of L.A.*, 759 F.3d 1112, 1116 (9th Cir. 2014) (emphasizing "the district court's discretion in denying amendment is particularly broad when it has previously given leave to amend" (citation omitted)); *see also Mililani Grp., Inc. v. O'Reilly Automotive, Inc.*, 621 F. App'x 436, 437 (9th Cir. 2015) (same). Cytek does not explain how it would cure the deficiencies that remain in the FACC, and instead offers only more innuendo. This Court need not entertain Cytek's serial attempts to launch a fishing expedition. Because Cytek "fail[s] to state what additional facts [it] would plead if given leave to amend . . . amendment would be futile," and the FACC should be dismissed with prejudice. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1052 (9th Cir. 2008).

IV. CONCLUSION

For the foregoing reasons, as well as those set forth in BD's opening brief, the Court should dismiss Count I of Cytek's First Amended Counterclaims with prejudice.

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Respectfully submitted,

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