COMMENTS

Setting the Standard: A Fraud-based Approach to Antitrust Pleading in Standard Development Organization Cases

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INTRODUCTION

In high-technology sectors, uniform industry standards are crucial for ensuring product compatibility.[1] For decades, the government had the primary responsibility for developing these standards. Over the last several years, the government has increasingly delegated this responsibility to private standard development organizations (SDOs),[2] and Congress passed the Standards Development Organization Advancement Act of 2004 to encourage private organizations to assume this role.[3] SDOs rely on a consensus-based approach in which industry participants agree on which technology will comprise a particular standard.[4]

When companies participate in an SDO, they sacrifice their freedom to employ alternative technology; once the standard is decided upon, all companies conform their manufacturing to comply with it.[5] An SDO is thus in a position to augment the potential market power of any one patent by making it part of an industry-wide standard.[6] Re-

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1 See *Broadcom Corp v Qualcomm Inc*, 501 F3d 297, 303 (3d Cir 2007) (explaining that all manufactured components of cellular phone chipsets must be able to operate seamlessly with one another and that universal standards are necessary to ensure that this holds true for components originating from different manufacturers).

2 For example, the Telecommunications Industry Association (TIA) is made up of firms involved in the manufacture of products used in the communications industry. See TIA, *About TIA: TIA Facts at a Glance*, online at http://www.tiaonline.org/about (visited Aug 29, 2008).

3 See Standards Development Organization Advancement Act of 2004, Pub L No 108-237 § 102(3), 118 Stat 661, codified at 15 USC §§ 4301–05 (2000 & Supp 2004) ("Standards Development Act").

4 See generally Tor Winston, *Innovation and* Ex Ante *Consideration of Licensing Terms in Standard Setting* (EAG 06-3 Econ Analysis Group Discussion Paper, Mar 2006) (weighing the welfare benefits of added competition against the costs of reduced innovation).

5 Id at 3.

6 See *Broadcom*, 501 F3d at 314.

cognizing the potential for anticompetitive abuse,[7] SDOs will not accept any patented technology if a company refuses to abide by a commitment to license that technology on fair, reasonable, and nondiscriminatory (FRAND) terms or if the company refuses to make a full disclosure of its intellectual property rights.[8]

SDO participants have sued other SDO participants for antitrust violations, alleging that the defendants used deception in their dealings with the SDO in order to enhance the market power of their patents.[9] Consumers have also filed class action suits requesting damages arising out of this conduct.[10] These SDO cases are relatively new developments in antitrust law; only a handful of district court cases have been filed,[11] and the first suit brought by consumers was filed only recently.[12] But despite a growing amount of litigation, no court has specifically addressed an important procedural question relating to this new cause of action: are antitrust claims based on deception of an SDO sufficiently related to fraud to trigger Federal Rule of Civil Procedure 9(b), which imposes heightened pleading requirements on complaints alleging fraud?[13]

This Comment argues that the heightened pleading standards of Rule 9(b) are applicable to SDO deception claims. Yet it may be appropriate for courts to modify the traditional elements of common law fraud in cases where an enforcement agency is seeking prospective relief. Part I provides background information on the pleading standards under the Federal Rules as well as an overview of the elements of common law and regulatory fraud. Part II begins with a description of the antitrust law regime and how SDO claims fit into its framework. Part II then analyzes the special pleading issues that have arisen in antitrust cases as a result of the recent Supreme Court decision of *Bell Atlantic Corp v Twombly*.[14] Part III assesses the basic features of two

7 See id at 310.

8 See id at 304 (describing the FRAND policies employed by the major telecommunication SDOs).

9 See, for example, id at 315–16.

10 See, for example, Complaint, *Meyer v Qualcomm, Inc*, Civil Action No 08-00655, *1–3 (SD Cal filed Apr 10, 2008) (“Meyer Complaint”) (alleging that Qualcomm monopolized certain cellular telephone technology markets by deceiving private SDOs, which resulted in higher costs being passed on to consumers).

11 See, for example, Plaintiff’s Complaint and Demand for Jury Trial, *NVIDIA, Inc v Rambus*, Civil Action No 1:08-473 (MD NC filed July 11, 2008) (“NVIDIA Complaint”); Plaintiff’s Motion for Prima Facie Evidentiary Weighting, *Hynix Semiconductor v Rambus*, Civil Action Nos 00-20905, 05-00334, 06-00244 (ND Cal filed Jan 9, 2008) (“Hynix Motion”); *Broadcom v Qualcomm*, 2006 WL 2528545, *1 (D NJ).

12 See Meyer Complaint at *1.

13 See FRCP 9(b).

14 127 S Ct 1955, 1966 (2007).

types of SDO claims. Part IV examines a two-prong test for applying heightened pleading standards that courts have developed in the context of inequitable conduct before the US Patent and Trademark Office (PTO), and in the context of fraud claims under *Walker Process Equipment, Inc v Food Machinery & Chemical Corp*,[15] which addressed allegations that a patent was obtained through fraudulent activity.[16] Part V argues that this two-prong approach is applicable to SDO deception claims, thereby making heightened pleading standards appropriate for these claims.

I. Federal Pleading Standards in Fraud Cases

Parts I.A and I.B provide a basic overview of the two pleading standards that the federal courts use: notice pleading and heightened pleading. These subparts then briefly describe the policy rationales for the two systems. This discussion serves as the basis for later analysis of the reasons for applying heightened pleading in areas outside the traditional domain of common law fraud.

A. Notice Pleading

For the majority of federal civil claims, notice pleading is the governing standard.[17] The hallmark of notice pleading is Federal Rule of Civil Procedure 8(a), which states that plaintiffs need only provide a "short and plain statement" demonstrating why they are entitled to relief.[18] Notice pleading is intended to ensure that plaintiffs have their day in court.[19] This lenient standard frees plaintiffs from having to plead precise legal theories or perfectly allege all of the elements of a particular claim.[20] Courts deem complaints sufficient as long as they provide the bare minimum of facts necessary to put the defendant on

15 382 US 172 (1965).

16 See *Walker Process*, 382 US at 179–80 (Harlan concurring) (emphasizing the narrowness of the Court's holding due in part to the concern that encouraging a flood of antitrust suits in this area could disrupt the patent system). See also, for example, *Solarex Corp v Arco Solar, Inc*, 121 FRD 163, 178–79 (EDNY 1988) (classifying inequitable conduct as a type of fraud and noting that Rule 9(b) serves to prevent plaintiffs from using vague charges of inequitable conduct as a pretext for discovery). These claims are further explained in Part III.

17 See *Hickman v Taylor*, 329 US 495, 501 (1947) (stating that the Federal Rules of Civil Procedure restrict the pleadings to the task of general notice-giving).

18 FRCP 8(a).

19 See *Swierkiewicz v Sorema NA*, 534 US 506, 514 (2002).

20 See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 Ariz L Rev 987, 1001 (2003). The drafters of the Federal Rules believed that this system was a substantial improvement over the then-prevailing code pleading system. See *United States v Uni Oil*, 710 F2d 1078, 1080–81 n 1 (5th Cir 1983); David M. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 Cornell L Rev 390, 395–96 (1980).

notice.[21] By setting a relatively low threshold for sufficiency, notice pleading shifts courts' emphasis away from the pleadings and toward the trial stage.[22]

B. Heightened Pleading

Rule 9(b) is an exception to the general rule of notice pleading. In cases alleging fraud or mistake, a "short and plain statement" of the claims is not sufficient. Rule 9(b) instead requires that these claims be pled with specificity.[23]

Judges have long characterized Rule 9(b) as an important component of the Federal Rules. Courts have cited three important policy grounds justifying heightened pleading for fraud claims. These include giving defendants adequate notice, preventing abuse of the litigation process, and protecting defendants from the harm associated with fraud accusations.[24]

Heightened pleading in fraud claims ensures that defendants are fully informed of the charges against them. A fraud claim is often relatively amorphous because it involves misperception or misunderstanding between the parties as to the realities of an agreed-upon transaction.[25] Thus, when parties bring suits alleging fraud, opponents will have difficulty understanding the claim unless they receive a detailed account of how the plaintiff's perception differed from the defendant's.[26]

Heightened pleading standards also prevent plaintiffs from engaging in abusive litigation practices. By requiring a plaintiff to state his case with specificity, courts can screen out baseless claims brought solely to harass defendants or as a pretext to use discovery to search for evidence of unrelated misconduct.[27] In areas such as securities law, for example, high litigation costs, asymmetrical discovery costs, and relaxed pleading standards could lead to a significant number of baseless fraud claims.[28]

Finally, courts often cite the need to reduce the amount of unfounded fraud allegations because they cause a disproportionate amount

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21 Fairman, 45 Ariz L Rev at 1001 (cited in note 20).

22 See Edward Cavanagh, *Pleading Rules in Antitrust Cases: A Return to Fact Pleading?*, 21 Rev Litig 1, 5–6 (2002).

23 See FRCP 9(b).

24 See William M. Richman, Donald E. Lively, and Patricia Mell, *The Pleading of Fraud: Rhymes without Reason*, 60 S Cal L Rev 959, 961 (1987).

25 See *Breeden v Richmond Community College*, 171 FRD 189, 202 (MD NC 1997); *Miller v Merrill Lynch*, 572 F Supp 1180, 1184 (ND Ga 1983).

26 See *Miller*, 572 F Supp at 1184.

27 Charles Alan Wright and Arthur R. Miller, 5 *Federal Practice and Procedure* § 1296 (West 2d ed 1990).

28 *In re Caere Corporate Securities Litigation*, 837 F Supp 1054, 1060 (ND Cal 1993).

of harm to business relationships.[29] Fraud actions typically seek to undo settled transactions and thus inject a degree of uncertainty into the relationships and agreements between parties.[30] In addition, business goodwill is a key asset. Even mere allegations of fraud can seriously damage that goodwill, so plaintiffs should be discouraged from tossing them in a general complaint without compelling reasons.[31]

Because of these concerns, plaintiffs bringing fraud claims must allege the elements of common law fraud, except for intent and knowledge, with specificity.[32] The next Part explores these elements in greater detail.

C. Elements of Common Law Fraud and Regulatory Fraud

1. Elements of a common law fraud claim.

Five elements make up a common law fraud claim: (1) the defendant made a false statement of material fact; (2) the defendant knew the statement to be false; (3) the defendant intended that the false statement induce the plaintiff to act; (4) the plaintiff reasonably relied on the false statement; and (5) the plaintiff suffered damages as a result of his reasonable reliance on the false statement.[33]

a) False statement of material fact. Materiality is determined using either the reasonable man standard or the specific notice standard set forth in the Second Restatement of Torts.[34] Under the reasonable man standard, a fact is material if the defendant should have known that his misrepresentations about that fact would be considered important by the person to whom they were addressed.[35] Using this approach, courts have found particular facts are material even if the plaintiff had not explicitly mentioned their importance.[36] Courts have

29 See, for example, *Bankers Trust Co v Old Republic Insurance Co*, 959 F2d 677, 683 (7th Cir 1992). See also *Breeden*, 171 FRD at 200.

30 See *Breeden*, 171 FRD at 202.

31 See *Bankers Trust*, 959 F2d at 683.

32 See FRCP 9(b) ("Malice, intent, knowledge, and other condition of mind of a person may be averred generally.").

33 *Tricontinental Industries Ltd v PriceWaterhouseCoopers*, 475 F3d 824, 841 (7th Cir 2006).

34 Restatement (Second) of Torts § 538(2) (1977). The Restatement defines an item as material if:

> (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

35 See *In re Mercer*, 246 F3d 391, 416 (5th Cir 2001).

36 See for example *Williams v Miller Pontiac Co*, 409 SW 2d 275, 279 (Mo App 1966). The Court held that the defendant's resetting of the speedometer in a car sold to the plaintiff to make it appear as if the car was new amounted to the concealment of a "clearly material" fact. The court

applied the specific notice portion of the Restatement's test in cases where the defendants knew that the plaintiff viewed a particular fact as important.[37] One factor that courts commonly look to in deciding whether a defendant likely knew or should have known that the plaintiff would have found a given fact material is the sufficiency of the connection between the transaction and the alleged misrepresentation.[38] By requiring plaintiffs to establish materiality, courts ensure that judicial intervention is limited to only those cases where a truly important error has occurred.

b) Knowledge of a statement's falsity. Under common law fraud, the knowledge element raises two distinct questions. The first is whether a defendant had knowledge of a statement's falsity at the moment when the misrepresentations were made.[39]

The knowledge element also raises the question of whether an employee's knowledge should be imputed to his firm.[40] This inquiry normally begins with the general law of agency, under which an agent's knowledge is imputed to a principal if he has a duty to disclose the information to the principal.[41] The knowledge requirement serves an important screening function by separating deliberate fraud from situations where a party simply acted negligently.[42] Rule 9(b) does not, however, require specific pleading of knowledge in fraud cases.[43] The relaxation of the heightened pleading requirements for this element is due in part to the difficulty of pleading a defendant's actual mental state.[44]

maintained that the defendant had committed a material misrepresentation despite the fact that the plaintiff never asked whether the car was new or used and the defendant never explicitly stated in the contract or in the oral negotiations of the sale that the car was new. See id at 277.

37 See *Professional Cleaning v Kennedy Funding, Inc*, 245 Fed Appx 161, 167 (3d Cir 2007) (noting that the plaintiff corporation explicitly stated that it needed a certain amount and that the defendant was aware of the plaintiff's needs). See also *Wal-Mart Stores, Inc v AIG Life Insurance Co*, 901 A2d 106, 116 (Del 2006) (holding that the companies made material misrepresentations when they failed to provide critical information about the tax breaks associated with a particular financial vehicle that the plaintiff was interested in for its tax benefits).

38 See *Yurchak v Atkinson & Mullen Travel, Inc*, 207 Fed Appx 181, 184 (3d Cir 2006) (holding that assurances of general safety on jetskiing would not have been material to the decision to purchase a vacation package that did not include jetski rental).

39 See *Addison v Distinctive Homes, Ltd*, 836 NE2d 88, 94 (Ill App 2005).

40 See, for example, *Long Island Savings Bank v United States*, 503 F3d 1234, 1250 (Fed Cir 2007) (holding a bank accountable for the CEO's fraud because his knowledge was imputed to the bank); *Metro Communications Corp v Advanced MobileComm Technologies, Inc*, 854 A2d 121, 146 & n 48 (Del Ch 2004) (holding a corporation responsible for a fraudulent email sent by an agent acting in his capacity as a representative of the corporation).

41 Restatement (Second) of Agency § 275 (1958).

42 *Stromberger v 3M Co*, 990 F2d 974, 978 (7th Cir 1993) (emphasizing the difference between a fraud claim and that of negligent misrepresentation).

43 FRCP 9(b).

44 See *Connecticut National Bank v Fluor Corp*, 808 F2d 957, 962 (2d Cir 1987).

c) Intent to induce plaintiff to act. As with knowledge, Rule 9(b) exempts plaintiffs from having to plead intent with specificity.[45] Plaintiffs, however, must nevertheless provide enough factual detail to strongly support their allegations of fraudulent intent.[46] One way for plaintiffs to meet this requirement is to provide evidence that the defendants stood to benefit in some way from the fraud.[47] Establishing that a defendant stood to benefit from fraud requires particular attention to the nature of the transaction and the industry in which it occurred.[48] The key factor in many cases is that the statements were carefully tailored to eliminate the specific concerns preventing the plaintiff from entering into the transaction.[49] In looking for fraudulent intent, courts will often closely scrutinize cases in which defendants only had one interaction with the plaintiffs. Because the defendants anticipate no future dealings with the plaintiffs, they face fewer consequences if their misrepresentations are discovered and thus may have a stronger motive to commit fraud.[50]

d) Reliance on the material misrepresentations. Once a plaintiff has established the elements of knowledge, materiality, and fraudulent intent, he must demonstrate that he reasonably relied on the material misrepresentations when he decided to enter into the transaction.[51] To determine whether there was reliance, courts have looked to the relationship between the defendant's misrepresentation and the plaintiff's final decision to engage in the transaction, often finding reliance where the plaintiff depended on the professional opinion or expertise of the defendant.[52]

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45 FRCP 9(b).

46 *Connecticut National Bank*, 808 F2d at 962 ("It is reasonable to require that the plaintiffs specifically plead those events [that] give rise to a strong inference that the defendants had an intent to defraud.") (internal quotations omitted).

47 See *Tricontinental*, 475 F3d at 841.

48 See id (holding that accountant's motivation to generate additional fees was offset by concern over maintaining good reputation and thus plaintiffs had to allege more to establish fraudulent intent).

49 See *Wal-Mart*, 901 A2d at 111, 116 (noting that Wal-Mart sought and received specific assurances that the insurance policies would reduce tax liability before agreeing to any purchases and thus the misrepresentations about tax features were clearly designed to induce the purchase). See also *Professional Cleaning*, 245 Fed Appx at 167 (holding that a reassurance made to quell plaintiff's uncertainty of transactions was designed to induce plaintiff to close the deal).

50 See *Cobalt Operating LLC v James Crystal Enterprises, LLC*, 2007 WL 2142926, *3 (Del Ch). See also *Tam v Spitzer*, 1995 WL 510043, *5 (Del Ch) (explaining that after defendant lost a key client, she was faced with an urgent need to unload the business).

51 See *Tricontinental*, 475 F3d at 841.

52 See *Wal-Mart*, 901 A2d at 116. See also *Siegel v Levy Organization Development Co, Inc*, 607 NE2d 194, 199 (Ill 1992) (finding that buyers properly relied on the assurances of the architect designing their condominium).

In determining reasonableness, courts look to the expertise and sophistication of the parties and the environment in which the transaction occurred.[53] Another key consideration is the degree to which the plaintiff has access to information that would put him on notice as to the falsity of the alleged misrepresentations.[54] The fact that a plaintiff had some access to relevant information, however, will not automatically preclude a finding of reasonable reliance.[55]

e) Damages resulting from the misrepresentations. The final element of a fraud claim is that the fraudulent conduct caused harm. Plaintiffs must first establish that the conduct in question was the proximate cause of the specific injury.[56] A misrepresentation can be the proximate cause of financial losses only if the losses "are within the foreseeable risk of harm that it creates."[57] The proximate causation requirement prevents the fraud cause of action from being used for recovery where the misrepresentations were only coincidental to the actual loss.[58] In certain types of fraud cases, such as consumer class action suits for defective products, plaintiffs must also establish that the misrepresentations caused a type of injury for which the law permits recovery.[59] Courts often dismiss these claims because a common theory of recovery—such as loss of prospective resale value—is too speculative to serve as the basis for common law fraud claims.[60] These restrictions serve to ensure that the fraud complaints are not used to force manufacturers to indemnify consumers against harms that may never occur.[61]

2. Elements of regulatory fraud.

In regulatory fraud cases, courts have modified or eliminated certain elements of the traditional fraud claim depending on whether the

53 See *Schreiber v Plum Creek Timber Co*, 1996 WL 1833, *3 (9th Cir). See also *Nuveen Premium Income Municipal Fund v Keegan*, 200 F Supp 2d 1313, 1321 (WD Okla 2002) ("Evidence as to plaintiff's level of financial sophistication properly bears on the issue of reasonable reliance in [the] context [of common law fraud].").

54 See, for example, *Gruman Allied Industries v Rohr Industries, Inc*, 748 F2d 729, 737 (2d Cir 1984); *Gregg v YA Co, Ltd*, 2007 WL 4570889, *14 (ED Tenn).

55 See, for example, *Tam*, 1995 WL 510043 at *9 (holding that the buyer justifiably relied on the seller's representations, despite the fact that she was presented with the opportunity to conduct a limited examination of the seller's records).

56 See, for example, *Manhattan Motorcars, Inc v Automobili Lamborghini*, 244 FRD 204, 212 (SDNY 2007).

57 Restatement (Second) of Torts § 548, comment a (1977).

58 *Greenberg v De Tessieres*, 902 F2d 1002, 1004 (DC Cir 1990) (declining to uphold a claim for fraud due to a "fortuitous and coincidental" omission by an investment advisor).

59 See, for example, *Briehl v General Motors Corp*, 172 F3d 623, 629 (8th Cir 1999); *Yost v General Motors Corp*, 651 F Supp 656, 658 (D NJ 1986); *Wallis v Ford Motor Co*, 208 SW3d 153, 159 (Ark 2005).

60 See *Briehl*, 172 F3d at 629.

61 See *Frank v DaimlerChrysler Corp*, 292 AD2d 118, 127 (NY App Div 2002).

action is a private damages suit or a suit brought by an enforcement agency seeking prospective relief. The securities laws, for example, operate under a system of dual enforcement by private parties and the Securities and Exchange Commission.[62] Regulatory fraud cases offer important guidance because SDO claims may be brought as either private monopolization claims or as administrative actions by the Federal Trade Commission, thereby warranting the same two-tiered approach.[63]

Congress enacted the securities laws to ensure that the markets for publicly traded securities operated in an environment of honest and full disclosure.[64] Section 10(b) of the Securities Exchange Act of 1934[65] prohibits the use of "any manipulative or deceptive device or contrivance" by any person in connection with the sale of a security.[66] Federal courts have long recognized an implied private right of action stemming from § 10(b) that allows individual investors to recover damages for fraudulent misrepresentations.[67] The SEC has also prohibited the use of deceptive conduct under Rule 10b-5.[68]

Important differences remain, however, between claims based on the securities laws and those at common law. The Supreme Court stated that the "content of common-law fraud has not remained static . . . . It has varied, for example, with the nature of the relief sought, the relationship between the parties, and the merchandise in issue."[69] The typical factual situation surrounding a common law fraud claim is "light years away from the world of commercial transactions to which Rule 10b-5 is applicable."[70] The securities laws were specifically designed to address the shortcomings of the common law by imposing higher standards in the industry and charging the SEC with maintaining those standards.[71] Thus, when the SEC brings a claim under the securities laws seeking a prophylactic injunction, it is not subject to the traditional requirements of reliance and damages; requiring these retrospective elements would defeat the purpose of prospective relief.[72] Pri-

62 See *Herman & MacLean v Hudleston,* 459 US 375, 380 (1983). See also *Fort Pierce Utilities Authority v Department of Energy*, 503 F Supp 1014, 1024 (DDC 1980).

63 See, for example, *Broadcom Corp v Qualcomm Inc*, 501 F3d 297 (3d Cir 2007) (private monopolization claim); *In re Dell Computer Corp*, 121 FTC 616 (1996) (FTC action).

64 See *SEC v Capital Gains Research Bureau, Inc*, 375 US 180, 186 (1963).

65 Securities Exchange Act of 1934 § 10(b), 48 Stat 881, 891, codified at 15 USC § 78j(b) (2000).

66 Id.

67 See *Herman*, 459 US at 380.

68 See 17 CFR § 240.10b-5(b) (2006). See also *Blue Chip Stamps v Manor Drugs Stores*, 421 US 723, 729–31 (1975).

69 *Capital Gains*, 375 US at 193.

70 *Blue Chip Stamps*, 421 US at 745.

71 See *Herman*, 459 US at 389.

72 See *Capital Gains*, 375 US at 195.

vate suits, however, must still establish both reliance and damages.[73] Despite these differences from their common law counterparts, securities fraud claims are still subject to heightened pleading requirements.[74]

The modification of the elements of securities fraud claims ensures that the traditional structure of common law fraud does not impede the SEC in fulfilling its statutory duty. Enforcement agencies would be hamstrung if courts were to apply the requirements of common law fraud rigidly even when those requirements are inconsistent with statutory goals. Other regulatory fraud areas other than securities also follow this approach.[75]

II. PLEADING STANDARDS IN ANTITRUST LAW

This Part explores the various issues that have arisen regarding pleading standards for antitrust cases. Because SDO deception is a new type of antitrust violation, Part II.A first provides a brief overview of the antitrust laws. Part II.B then examines the pleading issues that have arisen in antitrust cases.

A. Background on Antitrust Law

1. The Sherman Act.

Antitrust law protects the American system of free market capitalism by promoting the goals of open competition.[76] The Sherman Act[77] is one of the primary governing statutes in this area. The Act prohibits two broad categories of behavior: § 1 outlaws conspiracies in restraint of trade[78] and § 2 prohibits monopolization and attempted monopolization by any individual or corporation.[79] The key distinction between § 1 and § 2 is that the former deals with collusive behavior whereas the latter deals with unilateral activities.[80] Section 1 violations

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73 See *Caremark, Inc v Coram Healthcare Corp*, 113 F3d 645, 648 (7th Cir 1997).

74 See *Tellabs, Inc v Makor Issues & Rights, Ltd*, 127 S Ct 2499, 2507 (2007) (noting that securities fraud claims were originally subject to Rule 9(b) and are now subject to the even more stringent pleading standards enacted by Congress specifically for securities fraud).

75 See *United States v Stewart*, 872 F2d 957, 960 (10th Cir 1989) (holding that the government does not have to prove reliance in mail fraud cases because the statute is designed to deter prospectively schemes to defraud). See also *United States v Rowe*, 56 F2d 747, 749 (2d Cir 1931) (holding that the government does not have to prove actual damages under the mail fraud statute).

76 See *United States v Topco Associates, Inc*, 405 US 596, 610 (1972) (characterizing the antitrust laws as the "Magna Carta of free enterprise").

77 The Sherman Act, 26 Stat 209 (1890), codified as amended at 15 USC §§ 1–7 (2000 & Supp 2004)

78 See 15 USC § 1.

79 See 15 USC § 2.

80 See *Copperweld Corp v Independence Tube Corp*, 467 US 752, 767–68 (1984). In *Copperweld*, the Court explained that § 1 liability is more rigorously applied than § 2 liability be-

include conspiracies designed to eliminate competition and raise prices, such as agreements among competitors to fix prices, allocate markets, or restrict output.[81] Section 1 violations are often the most serious antitrust offenses because they normally offer no procompetitive benefits and are thus unequivocally harmful.[82] Courts have adopted a more cautious approach with § 2 claims, however, due to the recognition that a single firm may achieve a commanding position in a market because it is a superior competitor.[83]

2. The Clayton Act.

The Clayton Act[84] supplements the Sherman Act by allowing private parties to bring civil suits to recover for antitrust injuries; all such suits are subject to mandatory treble damages.[85] The Clayton Act also charges the DOJ and the FTC with enforcing the provisions of the antitrust laws.[86] By allowing private damage suits to supplement agency enforcement, Congress demonstrated a clear intent for antitrust laws to operate under a system of dual enforcement.[87]

B. Antitrust Pleading and the *Twombly* Decision

Courts have struggled to apply the requirements of notice pleading to complex and discovery-intensive antitrust cases.[88] The general standard for antitrust claims is notice pleading under Rule 8(a).[89] Given the high costs associated with antitrust discovery, however, com-

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cause many of the § 1 violations, such as price fixing, bid rigging, and market allocation, are so clearly harmful to consumers as to require automatic condemnation under the antitrust laws. See id. Coordinated behavior also presents a higher risk of anticompetitive conduct than single firm action. In contrast, § 2 liability is applied more cautiously due to the recognition that aggressive competition by a dominant firm may incorrectly be interpreted as anticompetitive behavior. Id.

81 See *Stop & Shop Supermarket Co v Blue Cross & Blue Shield of Rhode Island*, 373 F3d 57, 61 (1st Cir 2004).

82 See *Eastern Food Services v Pontifical Catholic University Services Association*, 357 F3d 1, 4 (1st Cir 2004) (explaining that § 1 violations involve conduct that has been shown to have no redeeming benefits to consumers whatsoever).

83 See *United States v Alcoa*, 148 F2d 416, 430 (2d Cir 1945) ("The successful competitor, having been urged to compete, must not be turned upon when he wins.").

84 The Clayton Act, 38 Stat 730 (1914).

85 See 15 USC § 15(a) (2000). The availability of treble damages under the Clayton Act provides plaintiffs with an additional incentive to bring a private suit but also increases the potential for abuse of the litigation process. For a discussion of similar concerns, see Part.IV.B.2.

86 See 15 USC § 21 (2000).

87 See *Hawaii v Standard Oil Co of California*, 405 US 251, 262 (1972) (explaining that Congress provided treble damages to encourage private enforcement of the antitrust laws in addition to government enforcement).

88 See Cavanagh, 21 Rev Litig at 2 (cited in note 22) (outlining a tendency of some lower courts to impose heightened pleading requirements in antitrust cases).

89 See *Twombly*, 127 S Ct at 1965.

mentators have argued that defendants should not have to spend millions of dollars in defending antitrust complaints consisting of only a few vague paragraphs.[90] Corporations often settle even nonmeritorious antitrust claims simply because the cost of prevailing at trial is prohibitive.[91] Acknowledging these concerns, the Supreme Court hinted in *Associated General Contractors of California, Inc v California State Council of Carpenters*[92] that it might support heightened pleading for antitrust cases by recognizing that their fact-intensive nature may require additional judicial scrutiny at the pleading stage.[93] Citing this proposition, some lower courts have begun to impose higher pleading requirements than those in Rule 8(a) in complex antitrust cases.[94] These concerns resemble the concerns that courts have raised when applying Rule 9(b)'s heightened pleading requirements to common law fraud claims.

The Court directly addressed these policy concerns in *Twombly* and seemingly rejected the argument that these concerns warranted the application of Rule 9(b) to antitrust cases.[95] On its face, the majority opinion purported to clarify that courts may *only* impose heightened pleading requirements in matters that fall under one of the specifically enumerated exceptions listed in the Federal Rules.[96] *Twombly* involved an alleged conspiracy by the major telecommunications firms not to enter into one another's markets and to prevent the success of

90 See, for example, Henry J. Reske, *Tinkering with Procedure: Federal Committee Backs Automatic Disclosure, Restrained Rule 11*, 78 ABA J 14, 20 (1992) (quoting the then-chair of the American Bar Association Section on Antitrust as stating that in an ordinary lawsuit "you get one or two paragraphs in a complaint that charge the defendants over a period of 35 years have conspired to monopolize a product market worldwide, and that's all it says").

91 See Cavanagh, 21 Rev Litig at 11 & n 81 (cited in note 22), citing Marilyn F. Johnson, Karen K. Nelson, and A.C. Pritchard, In re Silicon Graphics Inc*: Shareholder Wealth Effects Resulting from the Interpretations of the Private Securities Litigation Reform Act's Pleading Standard*, 73 S Cal L Rev 773, 782–83 (2000) (explaining how straightforward cost-benefit analysis will induce firms to settle nonmeritorious claims rather than spend the considerable resources to defend against them).

92 459 US 519 (1983).

93 See id at 528 n 17.

94 See Cavanagh, 21 Rev Litig at 13 n 92 (cited in note 22) (noting that *Associated General*'s footnote 17 provided some support for courts to take this approach). See also *Seagood Trading Corp v Jerrico, Inc*, 924 F2d 1555, 1576 (11th Cir 1991) (finding circumstantial evidence insufficient to "implicate the distributor in an unlawful conspiracy"); *Monument Builders of Greater Kansas City, Inc v American Cementary Association of Kansas*, 891 F2d 1473, 1480 (11th Cir 1985) (stating that while the Rule 8(a)(2) pleading standard does not change from case to case, what constitutes sufficient notice does change and in a complex, multiparty suit may require more information to meet this requirement than a simple, single-party case); *Furlong v Long Island College Hospital*, 710 F2d 922, 927–28 (2d Cir 1983) (stating that a more detailed pleading requirement in antitrust cases obliges a plaintiff to give some thought to the theory of his case, which may ultimately reveal that there is no case).

95 See *Twombly*, 127 S Ct at 1973 n 14.

96 See id.

new entrants, thereby violating the prohibition on conspiracies in restraint of trade contained in § 1 of the Sherman Act.[97] The complaint noted the defendants' parallel behavior but did not provide any additional evidence showing that they had colluded. The district court judge dismissed the complaint for failure to state a claim,[98] noting that under settled antitrust law, a § 1 claim based exclusively on allegations of parallel behavior cannot withstand a motion for summary judgment.[99] The reason is that parallel behavior is perfectly consistent with independent business decisions and, standing alone, does not support an inference of conspiracy.[100] In *Twombly*, the majority extended this rationale to the pleading stage, holding that a § 1 claim alleging parallel behavior alone is insufficient; such a claim must state enough facts to suggest that an agreement was made.[101] The Court took great care to distinguish this new requirement for § 1 complaints from the heightened pleading standards required under Rule 9(b).[102] The majority insisted that the case only established that assertions of parallel conduct, without more, fail to state a claim for relief under the antitrust laws, even under Rule 8(a)'s liberal pleading standard.[103]

Though *Twombly* dealt with a § 1 claim as opposed to a § 2 claim, the Court's policy reasons for requiring additional facts in the complaint apply to antitrust cases generally. The Court cited cases and commentary noting the high costs of needless antitrust discovery and thereby affirmed that such considerations are relevant when a judge is evaluating the sufficiency of an antitrust complaint.[104] This reference would seem to suggest that the Court would be receptive to a heigh-

97 See id at 1962. Recall that § 1 of the Sherman Act prohibits conspiracies in restraint of trade. See Part II.A.1.

98 *Twombly*, 127 S Ct at 1962–63.

99 Id at 1964, citing *Matsushita Electric Industrial Co v Zenith Radio Corp*, 475 US 574 (1986).

100 See *Matsushita*, 475 US at 597–98.

101 See *Twombly*, 127 S Ct at 1965. This is an important distinction because the nonmoving party usually has to meet a higher standard for defeating a motion for summary judgment than for defeating a motion for judgment on the pleadings. See *Gulf Coast Bank & Trust Co v Reder*, 355 F3d 35, 37–38 (1st Cir 2004).

102 See *Twombly*, 127 S Ct at 1973 n 14.

103 See id at 1966.

104 See id at 1967, citing *Associated General*, 459 US at 528 n 17 (noting that district judges must have power to insist upon some specificity before allowing massive discovery to commence); *Car Carriers, Inc v Ford Motor Co*, 745 F2d 1101, 1106 (7th Cir 1984) ("[T]he costs of modern federal antitrust litigation . . . counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint."). See also William H. Wagener, Note, *Modeling the Effect of One-way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 NYU L Rev 1887, 1898–99 (2003) (explaining that antitrust plaintiffs have the capacity to structure claims so as to expose defendants to much higher discovery costs).

tened pleading standard for § 1 claims.[105] Yet the majority specifically disavowed creating a heightened pleading standard for all antitrust claims,[106] noting that it was not concerned with the specificity of the complaint, but rather with the adequacy of the claim for relief itself.[107] Though there has definitely been some confusion in the lower courts,[108] *Twombly* can be read, at least on its face, to prohibit federal district judges from imposing heightened pleading standards for antitrust cases outside the confines of Rule 9.

III. SDO Cases

Having provided a basic overview of the antitrust laws and the pleading standards for antitrust suits, it is now appropriate to examine the issues raised when pleading SDO claims. As noted above, § 2 of the Sherman Act is designed to prevent unilateral conduct that could seriously damage competition. One important area of § 2 case law involves the abuse of patents, which are a central feature of SDO claims. Though patent holders normally enjoy a limited monopoly privilege, this privilege is not absolute.[109] Courts have invalidated attempts to obtain a patent unlawfully from the PTO[110] or to acquire a patent unlawfully just to achieve a monopoly.[111] A common theme in these cases is the recognition that patents operate as a carefully circumscribed exception to the general rule of free competition. Attempts to go outside the lawful boundaries of this limited monopoly privilege therefore present anticompetitive threats and must be checked by the Sherman Act.[112] Willful deception of an SDO falls under this class of § 2 violations because it involves the unlawful extension of a patent's market power through deceptive conduct.[113]

SDO cases have been brought by private parties, but also by the FTC as part of its mission to enforce the antitrust laws. The FTC has assumed an active role in deterring deceptive conduct in standard setting due to the serious anticompetitive threat that such conduct poses,

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105 See *Iqbal v Hasty*, 490 F3d 143, 155 (2d Cir 2007) (explaining that the language in *Twombly* could be read broadly to require heightened pleading standards in § 1 cases).

106 *Twombly*, 127 S Ct at 1973 n 14. Justice Stevens strongly disagreed in dissent. See id at 1985 (Stevens dissenting) ("While the majority assures us that it is not applying any heightened pleading standard . . . I have a difficult time understanding its opinion any other way.").

107 Id at 1973 n 14 (majority). In essence, the majority declared that a § 1 claim alleging only parallel conduct states no antitrust claim at all. See id at 1983.

108 See *Iqbal*, 490 F3d at 155–56.

109 See *Sears, Roebuck & Co v Stiffel Co*, 376 US 225, 230 (1964).

110 See *Walker Process*, 382 US at 176–77.

111 See *SCM Corp v Xerox Corp*, 645 F2d 1195, 1208 (2d Cir 1981).

112 See *United States v Line Material Co*, 333 US 287, 308 (1947).

113 See *Broadcom Corp v Qualcomm Inc*, 501 F3d 297, 317 (3d Cir 2007).

especially in high-technology sectors.[114] Two distinct types of claims have emerged in this area: those involving a failure to disclose intellectual property rights to the SDO and those involving a firm's failure to abide by its FRAND commitments. This Part provides an overview of the cases that have been brought under both theories.

A. Nondisclosure of Intellectual Property Rights

The FTC's first major nondisclosure case involved the computer hardware industry.[115] The FTC charged Dell Corporation with deliberately failing to inform the Video Electronics Standards Association (VESA) that it owned patents on critical components of the proposed design standard for the VESA-local (VL) computer bus.[116] Prior to accepting any technology, VESA bylaws required a certified disclosure from each participant outlining all intellectual property rights related to the proposed standard.[117] Dell's VESA representative affirmed in writing that the company owned no such rights even though Dell had obtained a patent on a crucial component of the proposed standard one year earlier.[118] The FTC determined that through this deception, Dell had engaged in unilateral anticompetitive conduct.[119]

The FTC faced a second nondisclosure case involving the computer hardware industry in *In re Rambus, Inc*.[120] The FTC charged that the defendant deliberately violated the disclosure policies of the Joint Electronic Device Engineering Council (JEDEC), the standard-setting body for computer memory chips.[121] The FTC claimed that Rambus used information gathered at JEDEC meetings to amend its existing patents on file with the PTO to cover the proposed standard more precisely.[122] Despite being fully aware of the JEDEC bylaws requiring disclosure, Rambus never informed the organization about these patents or the planned amendments.[123] The FTC distinguished deceptive conduct occurring in a normal competitive environment from that undertaken in a standard-setting process.[124] The FTC held that Rambus's ac-

114 See, for example, *In re Rambus, Inc*, 2006 FTC LEXIS 60, *284, reversed 522 F3d 456 (DC Cir 2008); *In re Dell*, 121 FTC 616 (1996).

115 See *In re Dell*, 121 FTC 616.

116 Id at 617.

117 Id at 623–24.

118 Id at 617.

119 *In re Dell*, 121 FTC at 618.

120 2006 FTC LEXIS 60, reversed 522 F3d 456 (DC Cir 2008).

121 Complaint, *In re Rambus, Inc*, No 9302, *6 (June 18, 2002), available online at http://www.ftc.gov/os/adjpro/d9302/020618admincmp.pdf (visited Aug 29, 2008).

122 Id at *15.

123 Id.

124 See *In re Rambus*, 2006 FTC LEXIS 60 at *71–75.

tions constituted unilateral exclusionary conduct in violation of § 2 of the Sherman Act, explaining that deceptive conduct in a competitive market is ordinarily discovered in time to be countered by rival firms but that in a standard-setting environment, it often escapes notice until after lock-in occurs.[125] In addition to the FTC's investigation, private lawsuits have been filed due to Rambus's alleged deception of JEDEC.[126]

The *In re Rambus* decision was recently vacated by the DC Circuit.[127] In its decision, the court cited two main objections to the lower court's decision: the FTC's alternating theories of liability[128] and the weakness of the evidence that the Commission relied on in its findings.[129] The DC Circuit's decision raises questions as to the correct antitrust theory for SDO deception cases and potentially conflicts with the Third Circuit's opinion in *Broadcom Corp v Qualcomm Inc*.[130] The DC Circuit's opinion does not, however, question the fact that antitrust claims will be available to some SDO claimants. Similarly, like the other courts addressing SDO claims, the DC Circuit did not address the sufficiency of the pleadings.

B. False FRAND Commitments

In *Broadcom*, the Third Circuit extended the approach the FTC took in *In re Rambus*. *Broadcom* was the first antitrust suit in which an SDO participant sued another SDO participant for anticompetitive conduct stemming from a failure to abide by a FRAND commitment, rather than a failure to disclose.[131] The district court initially dismissed the complaint for failure to state a claim, but the Third Circuit re-

125 Id at *2.

126 See for example, NVIDIA Complaint; Hynix Motion.

127 See *In re Rambus*, 522 F3d at 469. At the time of this writing, the DC Circuit has not yet ruled on the FTC's petition for an en banc rehearing of the case. See Petition for Respondent Federal Trade Commission for Rehearing en Banc, *Rambus v FTC*, Civil Action Nos 07-1086, 07-1124 (DC Cir filed June 6, 2008), online at http://www.ftc.gov/os/caselist/0110017/080606rambus rehearingpetition.pdf (visited Aug 29, 2008).

128 *In re Rambus*, 522 F3d at 463–64. The court asserted that the FTC was required to prove that Rambus's non-disclosure would have led the JEDEC to adopt other nonproprietary technology. See id. The FTC, however, had only established that the nondisclosure would have led JEDEC either to adopt other technologies or to demand FRAND commitments. Id at 463. The DC Circuit dismissed this latter theory, holding that an otherwise lawful monopolist who uses deception to extract higher prices does not automatically engage in anticompetitive conduct. See id at 464.

129 Id at 468–69 (noting serious concerns about the strength of the Commission's evidence regarding the scope of JEDEC's patent disclosure policies).

130 501 F3d 297 (3d Cir 2007). See also *In re Rambus*, 522 F3d at 466–67 (noting two possible interpretations of *Broadcom* and rejecting the interpretation that would conflict with Supreme Court precedent).

131 *Broadcom*, 501 F3d at 313 ("As Qualcomm is at pains to point out, no court nor agency has decided this *precise* question and, in that sense, our decision will break new ground.").

versed.[132] The plaintiff alleged that the defendant in the case, Qualcomm, promised the European Telecommunications Standards Institute (ETSI) that it would license its essential patents for the proposed Wideband CDMA standard for cellular phone chipsets on FRAND terms.[133] Once these patents were accepted into the standard, Qualcomm began a pattern of discriminatory and anticompetitive behavior, such as charging double royalty rates to manufacturers who used components manufactured by Qualcomm's competitors.[134] Qualcomm also allegedly provided discounts and other unlawful payments to customers who agreed to use only its components in their chipsets.[135] The Third Circuit deemed that these allegations, if proven true, would state claims under § 2 of the Sherman Act for monopolization and attempted monopolization.[136] One noteworthy feature of the case is that the complaint alleged that Qualcomm's conduct constituted both a § 2 violation and common law fraud.[137] The Third Circuit agreed and reinstated both claims.[138]

Failing to disclose essential patents or making a false FRAND commitment thus may trigger liability under § 2 of the Sherman Act.[139] Both types of conduct involve an attempt to expand market power through the misuse of patent monopolies. Because SDO operations are subject to an increasing amount of antitrust litigation by private parties and the FTC, it is critical that courts establish the proper pleading standards for these cases.

IV. Heightened Pleading: Inequitable Conduct and *Walker Process* Fraud

Under a straightforward reading of *Twombly*, courts seeking to impose a heightened pleading standard must do so within the proper framework of Rule 9(b).[140] Rule 9(b)'s language, however, does not restrict heightened pleading to only common law fraud claims.[141] The

132 Id at 305–06.

133 Id at 304.

134 Id at 318.

135 *Broadcom*, 501 F3d at 318.

136 Id at 303.

137 See First Amended Complaint, *Broadcom Corp v Qualcomm, Inc*, No 05-3350, *45, 56–57 (D NJ filed Sept 19, 2005), available on Lexis at 2005 US Dist Ct Pleadings 3350A.

138 See *Broadcom*, 501 F3d at 323.

139 According to the DC Circuit, SDO deception claims only give rise to antitrust liability if the claimants can demonstrate that they would not have adopted that standard absent the defendant's deception. See *In re Rambus*, 522 F3d at 466–67. On the other hand, the DC Circuit noted that *Broadcom* could be read to stand for the premise that an otherwise lawful monopolist who uses deceit to raise prices commits a violation of the Sherman Act. See id at 466.

140 See note 106 and accompanying text.

141 See *Micro Motion, Inc v Exac Corp*, 112 FRD 2, 3 (ND Cal 1985).

Rule contains no "exceptions for . . . particular types of fraud"[142] and thus presents no textual barrier to courts applying it to fraudulent conduct outside of the common law.[143] Thus, courts have some room to apply Rule 9(b) to new causes of action provided that they link the new claim to fraud. Lower courts have already developed a two-pronged method of accomplishing this task in two contexts: inequitable conduct and *Walker Process* fraud. Using this test, courts first examine the elements of fraud to determine if the new cause of action is similar to common law fraud. They then examine the traditional policy rationales for heightened pleading to determine if they are also applicable to the new cause of action. By providing an overview of this test, this Part lays the groundwork for the argument that heightened pleading is appropriate for SDO claims.

A. Inequitable Conduct

Inequitable conduct involves misrepresentations or omissions by a patent applicant to a PTO examiner during the evaluation of the patent application.[144] Though inequitable conduct is related to fraud, there are two key differences between the two. Inequitable conduct encompasses actions outside traditional common law fraud, such as misrepresentations that were made with a reckless disregard for their truth even if the applicant did not actually intend to deceive the PTO.[145] Inequitable conduct is also governed by a much broader standard of materiality than common law fraud.[146] As a result of these differences, courts have found inequitable conduct even in cases where parties offered defenses, such as subjective good faith, that normally would bar a common law fraud claim.[147]

A key reason for the broader scope of inequitable conduct is that patent applicants have a duty of complete good faith and fair dealing with respect to their representations before the PTO.[148] In addition, courts have cited the need to maintain the integrity of the patent system to justify expanding the scope of inequitable conduct beyond common

142 *Chiron Corp v Abbott Laboratories*, 156 FRD 219, 221 (ND Cal 1994).

143 Id at 221.

144 See *Norton v Curtiss*, 433 F2d 779, 785–86 (CCPA 1970).

145 Id at 797.

146 See *American Hoist & Derrick Co v Sowa & Sons, Inc*, 725 F2d 1350, 1362 (Fed Cir 1984) (holding that materiality under the PTO standard is based on whether there is a substantial likelihood that a reasonable examiner would find it important to consider the information in evaluating the patent application).

147 See *Argus Chemical Corp v Fibre Glass-Evercoat Co*, 759 F2d 10, 14–15 (Fed Cir 1985) (finding that a lawyer's good faith when patents were issued did not negate inequitable conduct).

148 See *Norton*, 433 F2d at 793.

law fraud.[149] Courts have applied Rule 9(b) to inequitable conduct based on the legal similarities of the claims as well as the applicability of the policy concerns justifying heightened pleading in inequitable conduct cases.[150]

1. Similarity of inequitable conduct to common law fraud.

Fraud and inequitable conduct share a number of features.[151] Because both common law fraud and inequitable conduct can result in the potential invalidation of the patent—and require the same standard of proof—courts have found it logical to impose the same pleading standard.[152] Other courts have noted that Rule 9(b) was designed to address fraudulent conduct, and there is no doubt that fraudulent conduct is the central component of both claims.[153] Though the two claims are not identical, the minor "technical distinction is not relevant to the question of how the affirmative defense must be pleaded."[154] Given the significant overlap between the two claims, inequitable conduct appears close enough to common law fraud to warrant heightened pleading standards.

2. Policy justifications for heightened pleading of inequitable conduct.

The similarities of inequitable conduct to common law fraud provide a strong argument for holding it to heightened pleading standards. Courts, however, have also emphasized key policy reasons for heightened pleading in inequitable conduct claims. These policy concerns mirror two of the three traditional justifications for heightened pleading requirements in common law fraud: preventing undue harm from careless use and stopping misuse of the claim.[155]

In the 1980s, the Federal Circuit expressed concern about the sheer number of claims alleging inequitable conduct, reminding attorneys that "'inequitable conduct' is not or should not be a magic incanta-

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149 See *Kansas Jack, Inc v Kuhn*, 719 F2d 1144, 1151 (Fed Cir 1983).

150 The Federal Circuit has conclusively answered the question of the appropriate standards and has held that inequitable conduct must be pled with specificity in all patent cases. See *Ferguson Beauregard/Logic Controls, Inc v Mega Systems, LLC*, 350 F3d 1327, 1344 (Fed Cir 2003).

151 See *Pfizer, Inc v International Rectifier Corp*, 538 F2d 180, 186 (8th Cir 1976).

152 See *Northern Engineering & Plastics Corp v Blackhawk Molding Co*, 1979 US Dist LEXIS 11136, *3 (ND Ill).

153 See *Samsung Electronics Ltd v Texas Instruments*, 1996 WL 343330, *2 (ND Tex).

154 See *Chiron*, 156 FRD at 221. Compare *Quantum Corp v Western Digital Corp*, 1988 US Dist LEXIS 16332, *17–18 (ND Cal) (concluding with little explanation that inequitable conduct does not give rise to common law fraud, which is the subject of Rule 9(b)), with *Samsung*, 1996 WL 343330 at *2 n 4 (noting that the Northern District of California had previously concluded that inequitable conduct was legally akin to fraud and had not disavowed that prior stance).

155 See Part I.B.

tion to be asserted against every patentee."[156] The same court later lamented that "the habit of charging inequitable conduct in almost every major patent case has become an absolute plague."[157] By heightening pleading standards, Rule 9(b) can serve as an effective means of discouraging overzealous attorneys from filing frivolous inequitable conduct claims, thereby avoiding unnecessary damage to the patent bar.[158]

In addition to the undue harm caused by careless use of inequitable conduct claims, courts have applied heightened pleading to inequitable conduct based on the claims' vulnerability to abuse. Heightened pleading can prevent the use of inequitable conduct claims as a means to get to the discovery stage,[159] an important consideration given the sensitive nature of information underlying one's patents. Moreover, if the attorneys who represent the party accused of inequitable conduct are also representing the party before the PTO, opposing counsel will often seek to have those attorneys disqualified, thereby delaying the application process.[160] A company can thus use claims of inequitable conduct to disrupt a competitor's patent applications.[161] This heightened vulnerability to misuse further strengthens the argument that heightened pleading requirements are essential for inequitable conduct claims.

B. *Walker Process* Fraud

Courts have used the same two-step approach in cases alleging *Walker Process* fraud. *Walker Process* fraud differs from inequitable conduct claims in that it involves deception of the PTO that is so egregious that it not only invalidates the patent but also renders the patent holder liable under § 2 of the Sherman Act.[162]

1. Similarity between *Walker Process* fraud and common law fraud.

Walker Process claims are even more closely related to common law fraud than inequitable conduct. The Federal Circuit has taken steps to clarify the important differences between *Walker Process* fraud and

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156 *FMC Corp v Manitowoc Co*, 835 F2d 1411, 1415 (Fed Cir 1987).

157 *Burlington Industries v Dayco Corp*, 849 F2d 1418, 1422 (Fed Cir 1988).

158 See *Samsung*, 1996 WL 343330 at *2.

159 See *Solarex Corp v Arco Solar, Inc*, 121 FRD 163, 178–79 (EDNY 1988).

160 See *Chiron*, 156 FRD at 221.

161 See *Nintendo of America, Inc v Magnavox Co*, 707 F Supp 717, 732–33 (SDNY 1989). The district court delayed ruling on a motion to disqualify attorneys from acting as trial counsel in a patent infringement claim until the inequitable conduct counterclaim had been resolved. Finding no inequitable conduct, the court denied the motion to disqualify. See id.

162 See *Walker Process*, 382 US at 177.

inequitable conduct[163] and has declared that "common law fraud [is] needed to support a *Walker Process* counterclaim."[164] This is an important distinction from inequitable conduct, which, as noted above, covers a broader range of conduct than common law fraud. For example, the crime-fraud exception states that attorney-client privilege will be waived in cases where it is used to further a crime or a fraud.[165] Following the Federal Circuit's guidance, lower courts have required a showing of *Walker Process* fraud, as opposed to inequitable conduct, before invoking the crime-fraud exception to attorney-client privilege in patent cases.[166] Since courts equate *Walker Process* fraud with common law fraud, *Walker Process* fraud can qualify under this standard; inequitable conduct, however, cannot.[167] Since common law fraud lies at the heart of a *Walker Process* claim, it almost certainly warrants treatment under Rule 9(b).[168]

2. Policy justifications for heightened pleading of *Walker Process* fraud.

As with inequitable conduct, *Walker Process* claims parallel two of the policy justifications for heightened pleading in common law fraud: limiting damage from careless use and preventing abusive litigation. Careless use of *Walker Process* claims could cause significant damage by upsetting the delicate balance between the policies of patent and antitrust law.[169] If courts allow *Walker Process* claims to proliferate unchecked, the patent system itself might suffer a chilling effect.[170] Because *Walker Process* claims are often brought as counterclaims for patent infringement,[171] firms may be fearful of defending

163 See *Nobelpharma AB v Implant Innovations, Inc*, 141 F3d 1059, 1070 (Fed Cir 1998).

164 *In re Spalding Sports Worldwide, Inc*, 203 F3d 800, 807 (Fed Cir 2000), quoting *Nobelpharma*, 141 F3d at 1069.

165 See *In re Federal Grand Jury Proceedings*, 938 F2d 1578, 1581 (11th Cir 1991) (holding that the "attorney client privilege does not shield communications made in furtherance of a crime or fraud").

166 See *DOT Connectors, Inc v JB Nottingham & Co, Inc*, 2001 WL 34104927, *2 (ND Fla). See also *Marusiak v Adjustable Claim Co*, 2002 WL 31886834, *2 (ND Ill) ("The rulings of the Federal Circuit on this issue distinguish 'inequitable conduct' from common law or '*Walker Process*' fraud.").

167 See *Marusiak*, 2002 WL 31886834 at *2–3.

168 See *Abbott Laboratories v Mylan Pharmaceuticals, Inc*, 2007 WL 625496, *3 (ND Ill).

169 See *Nobelpharma*, 141 F3d at 1069, citing *Walker Process*, 382 US at 179–80 (Harlan concurring) (requiring higher standards for *Walker Process* claims than inequitable conduct claims in order to preserve the proper balance between antitrust and patent law).

170 See *Walker Process*, 382 US at 179–80 (Harlan concurring).

171 See *Nobelpharma*, 141 F3d at 1068.

valid patents due to the risk of treble damages.[172] If a company foresees that it cannot risk defending a patent, it may decide not to engage in the research and development for the anticipated invention. If this effect becomes widespread, the overall level of innovation may decline.

Walker Process claims also present a high risk of abuse due to their frequent occurrence in patent litigation between rival firms. *Walker Process* claims offer firms the ability to invalidate a rival's patent, subject the rival to treble damages, and invalidate a rival's attorney-client privilege.[173] These incentives for abuse require that courts diligently screen out baseless claims through the use of heightened pleading.

The broad language of Rule 9(b) and the development of the two-part test give courts needed flexibility to apply heightened pleading standards to new causes of action. At the same time, this test ensures that heightened pleading standards are properly kept within the bounds of Rule 9(b).

V. Analysis of the SDO Complaints and Their Compatibility with a Fraud-based Claim

The two-part test for heightened pleading provides a useful framework for SDO claims. Part V.A demonstrates that SDO claims brought by private parties can map well onto the five-part structure of a common law fraud claim. Because the FTC as well as private parties can bring SDO claims, however, consideration must be given to the FTC's authority to seek prospective injunctive relief, pursuant to its role as an enforcement agency,[174] in determining whether to require all five elements to be pled. Given these concerns, it may be necessary for courts to modify one or more of these elements in cases brought by the FTC.[175] In this regard, SDO claims brought by the FTC track other types of regulatory fraud claims in which courts have eliminated certain elements of common law fraud.

172 See *Walker Process*, 382 US at 179–80 (Harlan concurring) (explaining the concern that antitrust lawsuits may "chill" innovation and patents due to fear of the "punitive consequences of treble-damage suits").

173 See *Nobelpharma*, 141 F3d at 1070 (discussing treble damages); *Marusiak*, 2002 WL 31886834 at *2 (discussing invalidation of attorney-client privilege).

174 See Federal Trade Commission Act of 1914, Pub L No 63-203, 38 Stat 717, codified as amended at 15 USC § 53(b) (2000).

175 See Part I.C.2 for discussion of this approach in securities fraud cases.

A. Mapping SDO Claims onto the Common Law Fraud Structure

1. False statement of material fact.

Materiality is an important component of the claims that have been brought by both the FTC and private parties. In the nondisclosure cases, the FTC has placed heavy emphasis on the fact that the information withheld was clearly covered by the disclosure policy and that the defendants knew or reasonably should have known that they were withholding essential information.[176] In reversing the *In re Rambus* decision, the DC Circuit also recognized that a critical question is whether patent disclosure policies put defendants on notice as to what facts the SDO considers material.[177] Likewise, the Third Circuit determined that a FRAND commitment was a nonnegotiable prerequisite to getting any patents accepted into the standard.[178] Thus, an essential question in SDO suits is whether the defendants knew or should have known that their patent disclosures or FRAND commitments were material.

As with common law fraud claims, courts will have to determine whether SDO participants who misrepresent their existing patents or FRAND commitments are aware that their misrepresentations are material. SDO participants are highly sophisticated parties who are very familiar with the functioning of the process and its legal and contractual restraints, including the common requirements of disclosure and FRAND commitments.[179] Such familiarity would appear to be sufficient for finding materiality based on the Restatement's reasonable man standard.[180] However, as the DC Circuit noted, it is still important to examine the disclosure policies to determine what SDO participants are actually required to disclose.[181] Since SDOs often send out disclosure sheets and FRAND requirements prior to adopting technology into each particular standard, all member firms are arguably put on specific notice.[182] If the SDO's disclosure requirements are clear,

176 See *In re Rambus*, 2006 FTC LEXIS 60 at *155–56 (noting that Rambus was aware of JEDEC policies and those policies required members to disclose fully relevant patent information); *In re Dell*, 121 FTC 616, 618 (1996) (emphasizing that the SDO would have selected another standard if it had known about the patents and that Dell was aware of this fact).

177 See *In re Rambus*, 522 F3d at 468 ("[JEDEC's disclosure policy] speaks fairly clearly of disclosure obligations related to patents and pending patent applications, but says nothing of unfiled work in progress on potential amendments to patent applications.").

178 See *Broadcom*, 501 F3d at 309 n 4.

179 See, for example, id at 313.

180 See Restatement (Second) of Torts § 538(2).

181 See *In re Rambus*, 522 F3d at 467–68.

182 See, for example, *Broadcom*, 501 F3d at 309 n 4 (explaining that ETSI bylaws require that ETSI receive FRAND commitments before it makes any move to adopt patented technology into a standard); *In re Dell*, 121 FTC at 617 (noting that Dell's disclosure form was sent out to all members before the vote was taken to adopt the technology into a standard).

a reasonable person, especially a sophisticated party, would know exactly what information the SDO considers material. This mirrors the Restatement's specific notice analysis for common law fraud claims.[183]

2. Knowledge of a statement's falsity.

The second element of a common law fraud claim is that the defendant actually knew that the statement he made was false at the time he made it. The question of timing can present a critical issue for SDO deception claims based on false promises to license under FRAND terms. The *Broadcom* case illustrates this point effectively. The difference between a mere licensing dispute and the monopolization claims at issue turned on whether Qualcomm knew when it made the FRAND commitment that the representation was false.[184] A representation made in good faith should not give rise to antitrust liability merely because two parties later disagree as to what constitutes a reasonable licensing fee. This echoes the reasoning of *Addison v Distinctive Homes, Ltd*:[185] the line between fraud and a mere business dispute is defined by whether the defendant knew his representations were false at the time he made them.[186]

Where the party is charged with concealing ownership of its intellectual property rights, agency concerns may arise regarding what sort of knowledge should be imputed between agent and principal. For example, if a firm operates an incentive system where its engineers are awarded bonuses based on the royalties the firm earns from its patents. Engineers may then have an incentive to hide the existence of a patent from upper management and thereby the SDO. If the firm sends out a request for information as to which of its patents constitutes essential technology for a proposed standard, these engineers may fail to inform management of a particular patent in hopes that the firm will be able to charge higher royalty rates because it did not make a FRAND commitment. The Dell case involved a similar question: whether Dell should be held responsible for its SDO representative's written statement that Dell did not own any relevant patents.[187] The FTC resolved this question by declaring that the SDO representative was acting as Dell's agent and the corporation was thus responsible for his representations.[188] This sort of inquiry is exactly the type often conducted

183 See Restatement (Second) of Torts § 538(2)(b).
184 See *Broadcom*, 501 F3d at 315–16.
185 836 NE2d 88 (Ill App 2005).
186 See id at 94.
187 See *In re Dell*, 121 FTC at 617.
188 See id.

when imputing knowledge in fraud claims.[189] As *In re Dell*[190] and *Broadcom* demonstrate, the knowledge requirement is consistent between claims brought by private parties and enforcement agencies.

3. Intent to induce plaintiff to act.

In determining whether a deceptive statement was intended to induce a plaintiff to act, courts have considered the context in which the misrepresentations were made and their relationship to the transaction. Fraudulent intent is a critical component of the SDO claims brought by private parties and the FTC. In the *Broadcom* case, the Third Circuit was careful to emphasize that Qualcomm's false FRAND commitment was anticompetitive because it was made with the intention of inducing ETSI to adopt its technology into the standard and thereby augment its market power.[191] It was not enough for Qualcomm merely to keep silent about its licensing terms; it had to convince ETSI that it was irrevocably committed to FRAND terms.[192] In *In re Dell*, the FTC likewise determined that Dell's conduct violated the antitrust laws because it intentionally misled VESA into adopting a standard for which Dell held essential patents through its misrepresentations.[193]

The nature of patent lock-ins is also consistent with traditional fraud analysis. Once an SDO accepts essential technology into the standard, all participants are locked into using it.[194] Corporate officials trying to deceive an SDO are thus aware that all they have to do is maintain the façade until the technology is locked into place. Even if the misrepresentation is then discovered, the sunk costs of research and development are often so high that competitors feel compelled to pay the unreasonably high royalty rates that the patent holder demands.[195] While it is true that industry participants may continue to interact with the SDO, each particular standard-selection cycle is akin to a one-time transaction: once a particular standard is set and lock-in occurs, there are no further negotiations.[196]

4. Reliance on the material misrepresentation.

Reliance is an important component of common law fraud claims because it establishes that the misrepresentations actually played a

189 See Part I.C.1.b.
190 121 FTC 616 (1996).
191 See *Broadcom*, 501 F3d at 315–16.
192 See id at 313.
193 See 121 FTC at 617–19.
194 See *Broadcom*, 501 F3d at 310.
195 See id.
196 See id at 310–12.

role in inducing the plaintiff to make the transaction. The *Broadcom* case incorporated this element into the monopolization claim, going so far as to use language describing the actual reliance by the SDO on Qualcomm's FRAND commitment.[197] Since ETSI could not accept technology into a standard until it received full disclosures and FRAND commitments,[198] reliance on Qualcomm's promise was virtually inevitable. The FTC claims brought against Dell and Rambus demonstrate that reliance is also consistent with suits brought by an enforcement agency. The VESA members relied on Dell's statement that it owned no patents on the proposed standard in voting to adopt a standard they believed did not infringe on any patent rights.[199] Likewise, the JEDEC participants operated under the assumption that all members were committed to complying fully with the affirmative disclosure policies.[200] Because of the disclosure policies and the rules that prohibit SDOs from adopting patented technology absent FRAND commitments, cases without any reliance are likely to be instances where the technology is never adopted as the standard. In such cases, there is no threat of competitive harm, and the FTC has no reason to intervene. This differs from other regulatory fraud cases, such as those involving securities laws, where reliance is not required.[201]

Determining whether reliance is reasonable requires a close examination of the facts in SDO cases. As noted earlier, in common law fraud cases, the sophistication of the parties and their access to relevant information are key considerations for determining whether reliance is reasonable.[202] These factors are important in SDO cases as well. The majority of SDO participants are highly sophisticated parties, a factor that weakens claims of reasonable reliance in common law fraud cases.[203] SDO members who actually own patents that would be covered by the proposed standard, however, have greater access to information about those patents than the SDO or the other participants. With respect to FRAND commitments, the information gap is even more pronounced. It would be exceedingly difficult for an SDO or a participating firm to verify independently the mental state of a patent-

197 See id at 315–16 (noting that "the alleged anticompetitive conduct was the intentional false promise that Qualcomm would license its WCDMA technology on FRAND terms, *on which promise the relevant SDOs relied*") (emphasis added).

198 *Broadcom*, 501 F3d at 315–16.

199 See *In re Dell*, 121 FTC at 618.

200 See *In re Rambus*, 2006 FTC LEXIS 60 at *155–56.

201 See Part I.C.2 for discussion of securities fraud cases brought by the SEC in which courts noted that the prophylactic purpose of the SEC action would be thwarted if it was forced to wait until actual harm occurred.

202 See notes 53 and 54 and accompanying text.

203 See *Gruman Allied Industries v Rohr Industries, Inc*, 748 F2d 729, 737 (2d Cir 1984).

holder's representatives at the time they agree to grant licenses on FRAND terms. Such disparity in the parties' access to the relevant information would strengthen claims of reasonable reliance in common law fraud cases, especially given the Restatement's view on the absence of a plaintiff's duty to investigate.[204] Thus, the same considerations that often help determine whether there has been reasonable reliance in common law fraud cases are present in SDO cases as well.

5. Damages resulting from the misrepresentations.

SDO claims brought by private parties must allege both that the damages were proximately caused by the defendant's deception and that the resulting damage was of the type that the antitrust law attempts to prevent. Fraud-based damages depend on whether the claims are speculative or the causal chain is too tenuous. As with fraud cases, antitrust plaintiffs must first demonstrate that the defendant's conduct proximately caused their injuries.[205] Plaintiffs seeking to recover under the antitrust laws, however, must also establish that the defendant's anticompetitive conduct caused them injury of the type against which the antitrust laws are designed to protect.[206] This showing does not limit recovery to those plaintiffs who have actually been driven from the market, but "the case for relief [is the] strongest where competition has been diminished."[207] Thus, private SDO claims are subject to a slightly higher requirement for damages than most common law fraud claims.

Courts should not require that SDO claims brought by the FTC allege damages; these claims will often seek purely prospective relief. For example, at the time the FTC concluded the *In re Dell* adjudication, Dell had not yet received any royalties and therefore had not caused any actual anticompetitive injury.[208] The FTC's sole relief in that case was prospective in nature: a prohibition on any future attempts by Dell to assert its patent rights.[209] Likewise, the FTC in *In re Rambus* contemplated both remedial and prospective relief for Rambus's anticompetitive conduct.[210] Like the SEC,[211] the FTC should remain free to fashion prospective relief without waiting for actual harm to occur.

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204 See Restatement (Second) of Torts §540 (stating that unless a misrepresentation is so apparent as to fall under § 541's "obvious" exception, a plaintiff may justifiably rely on a material misrepresentation of fact, even if the misrepresentation could have been discovered through an investigation).

205 See *Empagran S.A. v F. Hoffman-LaRoche, Ltd*, 417 F3d 1267, 1271 (DC Cir 2005); *McDonald v Johnson & Johnson*, 722 F2d 1370, 1374 (8th Cir 1983).

206 See *Brunswick Corp v Pueblo Bowl-O-Mat, Inc*, 429 US 477, 489 (1977).

207 Id at 489 n 14.

208 See *In re Dell*, 121 FTC at 618.

209 See id at 620.

210 See *In re Rambus*, 2006 FTC LEXIS 60 at *286–87.

B. Similarity of SDO Policy Concerns

On balance, SDO claims map well onto the structure of a common law fraud claim. SDO claims also raise the same types of policy concerns that courts have raised when applying heightened pleading to inequitable conduct and *Walker Process* fraud, which in turn reflect the policy concerns for heightened pleading in common law fraud cases.

1. Inequitable conduct.

The SDO structure presents very similar problems to those cited by courts regarding inequitable conduct. Inequitable conduct claims are tempting targets for misuse because they offer the possibility of invalidating a rival's patent or slowing down a current patent application.[212] SDO claims are likewise vulnerable to this type of misuse, as firms that have infringed a valid patent may be tempted to allege SDO deception as a counterclaim in order to shield their own misconduct and prevent the patent holder from enforcing the patent.[213] Thus, SDO claims can raise similar risks of abuse as inequitable conduct claims do.

Courts have also cited the need to protect the patent system from harm caused by the careless overuse of inequitable conduct claims. The environment within an SDO could just as easily be disrupted by a flood of antitrust suits brought by either private parties or the enforcement agencies.[214] The FTC has noted that an environment of mutual trust and cooperation is an important feature of private standard setting.[215] If firms cannot participate in such organizations without constant fear of monopolization claims or heavy government intrusion, this delicate environment may disappear entirely. The FTC and DOJ are both aware of this risk and have indicated that they will take a flexible approach in matters involving standard setting due in part to the procompetitive benefits that such activity offers.[216] Given the immense benefits that private standard setting can offer,[217] allowing unrestrained litigation to disrupt the SDO system would be detrimental to the public interest. This argument mirrors the Federal Circuit's concern about maintaining the integrity of the patent system.

211 See *SEC v Capital Gains Research Bureau, Inc*, 375 US 180, 195 (1963) (concluding that Congress did not intend to require "proof of intent to injure or actual injury" in fraud suits brought by the SEC).

212 See *Chiron Corp v Abbott Laboratories*, 156 FRD 219, 221 (ND Cal 1994).

213 See, for example, *Qualcomm Inc v Broadcom Corp*, 2007 WL 2261799, *2 (SD Cal).

214 See *In re Rambus*, 2006 FTC LEXIS 60 at *155.

215 See id.

216 See DOJ and FTC, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 1, 7 (Apr 2007), online at http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf (visited Aug 29, 2008).

217 See Standards Development Act § 102(4), 118 Stat at 662.

2. Walker Process fraud.

SDO claims also raise the same overuse concerns cited in *Walker Process* cases. When a party commits fraud on the PTO, it undeniably uses deception to circumvent the safeguards put in place to ensure that only valid patent monopolies are granted.[218] However, the Supreme Court has noted that setting too low a threshold for *Walker Process* claims would also cause harm by chilling the pursuit of patents.[219] As noted above, the SDO environment of trust and cooperation, essential for private standard setting, would likewise be damaged by a flood of antitrust suits.

Walker Process fraud cases are most frequently brought by parties who face liability for patent infringement,[220] thus presenting a significant risk of misuse. *Walker Process* claims can offer a firm the chance not only to invalidate a rival's patent but also to obtain treble damages. In cases where a downstream manufacturer brings suit against a patent holder, the claims could be used as leverage to extract favorable licensing terms. There is a similar risk in SDO cases: the majority of the private litigation involving SDOs has been between direct competitors or between patent holders and downstream manufacturers.[221] Because an SDO is normally made up of multiple industry participants who may be competitors or downstream customers of one another, it is likely that the majority of future litigation will arise in situations presenting heightened risks of abuse, raising the same concerns as *Walker Process* suits.[222]

One possible counterargument to this assertion is that private SDOs differ from the PTO in that the PTO is a government entity entrusted with implementing the constitutional mandate of the Copy-

218 See *Nobelpharma AB v Implant Innovations, Inc*, 141 F3d 1059, 1070 (Fed Cir 1998) (holding that *Walker Process* fraud requires a showing of clear intent to deceive the examiner and thereby gain an invalid patent).

219 See *Walker Process*, 382 US at 352 (Harlan concurring).

220 See *Molecular Diagnostics Laboratories v Hoffmann-La Roche Inc*, 402 F Supp 2d 276, 279 n 4 (DDC 2005).

221 See generally *Broadcom*, 501 F3d at 303 (addressing monopolization claims between rival firms); *Qualcomm*, 2007 WL 2261799 at *2 (resolving a patent infringement suit between rival firms in which SDO deception was pled as a defense); *Rambus, Inc v Infineon Technologies AG*, 330 F Supp 2d 679, 681–83 (ED Va 2004) (resolving a patent infringement suit between patent holder and downstream manufacturer in which SDO deception was pled as a fraud counterclaim); Hynix Motion (asserting monopolization, common law fraud and equitable estoppel claims asserted against defendant patent holder by plaintiff manufacturers based on SDO deception).

222 The litigation between NVIDIA and Rambus demonstrates that the potential for strategic misuse of SDO antitrust claims is not merely a hypothetical threat. Rambus filed its initial complaint for patent infringement against NVIDIA on July 10, 2008. See Plaintiff's Complaint for Patent Infringement and Jury Demand, *Rambus v NVIDIA*, Civil Action No 08-03343 (ND Cal filed July 10, 2008). In less than twenty-four hours, NVIDIA retaliated with an antitrust suit based on Rambus's alleged deception of JEDEC. See NVIDIA Complaint.

right and Patent Clause.[223] Inferences drawn from *Walker Process* cases might then be of limited relevance to SDO deception cases. The Standards Development Act, however, specifically noted that many private SDOs now fulfill a role that was once the sole responsibility of the government.[224] Thus, SDOs take on an agency-like role, making analogies to the PTO fully appropriate. Moreover, by removing treble damages for private standard-setting activities, Congress narrowed the difference in its treatment of public and private standard setting.[225] Treble damages are a keystone feature of the antitrust laws; Congress eliminates them only in rare cases to serve important objectives. The blurred line between government action and private action in this area demonstrates that SDOs are not completely dissimilar to the PTO. Thus, *Walker Process* claims still serve as a guide for SDO deception.

One final criticism goes to the propriety of relying on inequitable conduct and *Walker Process* claims for guidance on general antitrust claims. Arguably, courts should hesitate before adopting procedures drawn from specialized matters that generally fall under the purview of the Federal Circuit. However, courts have successfully applied Rule 9(b) to antitrust cases that do not involve patents.[226] Thus, there is no fundamental problem with applying Rule 9(b) to SDO cases even though they are matters of general antitrust law.

SDO claims meet both prongs of the test that courts have used to apply heightened pleading outside the traditional common law fraud claims. SDO deception cases map well onto the five-part structure of a common law fraud claim and can be modified as needed along the lines of the securities fraud cases. They also present the types of policy concerns that courts have cited as the reason for extending heightened pleading to include inequitable conduct and *Walker Process* fraud claims. SDO claims, therefore, meet the requirements for heightened pleading standards.

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223 US Const Art I, § 8, cl 8.

224 See Standards Development Act § 102(3), 118 Stat at 661, codified at 15 USC § 4301.

225 See id § 105, 118 Stat at 663–64, codified at 15 USC § 4303.

226 See, for example, *Lum v Bank of America*, 361 F3d 217 (3d Cir 2004). The complaint alleged that a group of banks had conspired to fix the prime interest rate that was available to customers. See id at 221. As part of the alleged conspiracy, the banks were accused of agreeing to falsify the prime rates that they reported to outside financial indices. Id at 228. The Third Circuit noted that Rule 8(c) normally governs antitrust claims but applied Rule 9(b) to the case because the claims alleged fraud as the basis of the antitrust violation. See id. See also *In re Insurance Brokerage Antitrust Litigation*, 2006 WL 2850607, *1 (D NJ). The *In re Insurance Brokerage* complaint alleged that brokers and insurers had conspired in a massive bid-rigging and market allocation scheme for the insurance market. See id at *2. As part of the conspiracy, the brokers and insurers misled their customers about the extent of brokerage fees and commissions, and actively sought to create the false appearance of a competitive market. Id at *11. The court held that the antitrust claim was based largely on a conspiracy to defraud and thus required the application of Rule 9(b). See id.

CONCLUSION

With increasing recognition that deception of an SDO is a potential antitrust violation, SDO litigation will probably increase in the near future. It is therefore critical for courts to determine the appropriate pleading standards for these claims. The heightened pleading standards of Rule 9(b) are compatible with antitrust claims based on SDO deception. These claims are sufficiently akin to common law fraud to warrant heightened pleading. Furthermore, the claims raise very similar policy concerns to those cited in two areas where judges have already applied heightened pleading standards. Courts should, therefore, require heightened pleading by parties bringing antitrust claims for deception of an SDO.