

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

XOCKETS, INC.,

Plaintiff,

v.

NVIDIA CORPORATION, MICROSOFT  
CORPORATION, and RPX  
CORPORATION,

Defendants.

Civil Action No. 6:24-cv-453-LS

**DEFENDANT NVIDIA CORPORATION'S  
MOTION TO DISMISS ANTITRUST CLAIMS**

**Table of Contents**

**INTRODUCTION ..... 1**

**RELEVANT FACTUAL BACKGROUND..... 2**

**LEGAL STANDARD..... 3**

**I. Xockets Fails to Plausibly Allege a Section 1 Conspiracy Claim ..... 3**

***A. Xockets Does Not Plausibly Allege a Relevant Market or Market Power..... 4***

***B. Xockets Does Not Plausibly Allege a Conspiracy ..... 6***

***C. Xockets Fails to Plausibly Allege an Unreasonable Restraint ..... 10***

**II. Xockets Fails to Allege Facts Plausibly Supporting its Section 2 Claim..... 12**

**III. Xockets Fails to Plead Antitrust Injury ..... 13**

**IV. The Court Should Dismiss Without Leave to Amend..... 14**

**Table of Authorities****Cases**

<i>Acad. of Allergy &amp; Asthma in Primary Care v. Quest Diagnostics</i> , 2022 WL 980791 (W.D. Tex. Mar. 31, 2022).....	10, 12
<i>Anderson v. 21st Century Mortg. Corp.</i> , 2016 WL 11582928 (W.D. Tex. Mar. 10, 2017).....	3
<i>Apani Sw., Inc. v Coca-Cola Enters., Inc.</i> , 300 F.3d 620 (5th Cir. 2002) .....	4
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009) .....	3
<i>Assoc. News, Inc. v. Curtis Circulation Co.</i> , 1986 WL 13791 (S.D. Tex. Dec. 4, 1986).....	9
<i>Baseload Energy, Inc. v. Roberts</i> , 619 F.3d 1357 (Fed. Cir. 2010) .....	11
<i>Bass v. Phoenix Seadrill/78, Ltd.</i> , 749 F.2d 1154 (5th Cir. 1985) .....	11
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007) .....	3, 7, 10
<i>Bona Fide Conglomerate, Inc. v. SourceAmerica</i> , 691 F. App'x 389 (9th Cir. 2017) .....	9
<i>BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr.</i> , 49 F.4th 520 (5th Cir. 2022) .....	3
<i>Broadcast Music, Inc. v. CBS, Inc.</i> , 441 U.S. 1 (1979) .....	11
<i>Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.</i> , 429 U.S. 477 (1977) .....	13
<i>Buffalo Broad. Co. v. Am. Soc. of Composers, Authors &amp; Pubs.</i> , 744 F.2d 917 (2d Cir. 1984) .....	2, 8
<i>Cable Line, Inc. v. Comcast Cable Commc'ns of Penn., Inc.</i> , 767 F. App'x 348 (3d Cir. 2019) .....	13
<i>Campfield v. State Farm</i> , 532 F.3d 1111 (10th Cir. 2008).....	4, 6
<i>Clean Water Opportunities, Inc. v. Willamette Valley Co.</i> , 759 F. App'x 244 (5th Cir. 2019) .....	3
<i>Contiguity, LLC v. Conduent Bus. Servs., LLC</i> , 2024 WL 252068 (W.D. Tex. Jan. 22, 2024).....	15
<i>Ehredt Underground, Inc. v. Commonwealth Edison Co.</i> , 90 F.3d 238 (7th Cir. 1996) .....	14

<i>Fracalossi v. MoneyGram Pension Plan</i> , 2019 WL 5578561 (N.D. Tex. Oct. 29, 2019).....	15
<i>In re German Automotive Mfgs. Antitrust Litig.</i> , 2021 WL 4958987 (9th Cir. Oct. 26, 2021) .....	14
<i>JSW Steel (USA) Inc. v. Nucor Corp.</i> , 586 F. Supp. 3d 585 (S.D. Tex. 2022) .....	7
<i>Little Rock Cardiology Clinic PA v. Baptist Health</i> , 591 F.3d 591 (8th Cir. 2009) .....	4
<i>Marion Healthcare LLC v. S. Ill. Healthcare</i> , 2013 WL 4510168 (S.D. Ill. Aug. 26, 2013).....	4
<i>Maris Distrib. Co. v. Anheuser-Busch, Inc.</i> , 302 F.3d 1207 (11th Cir. 2002) .....	6
<i>Marucci Sports, L.L.C. v. Nat’l Collegiate Athletic Ass’n</i> , 751 F.3d 368 (5th Cir. 2014) .....	3
<i>Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986) .....	7, 10
<i>Mayor &amp; City Council of Baltimore, Md. v. Citigroup, Inc.</i> , 709 F.3d 129 (2d Cir. 2013) .....	9
<i>Michael E. Jones M.D., P.C. v. UnitedHealth Grp., Inc.</i> , 2020 WL 4895675 (S.D.N.Y. Aug. 19, 2020).....	13
<i>Monsanto Co. v. Spray-Rite Serv. Corp.</i> , 465 U.S. 752 (1984) .....	9
<i>Name.Space, Inc. v. ICANN</i> , 795 F.3d 1124 (9th Cir. 2015) .....	7, 10
<i>Nova Designs, Inc. v. Scuba Retailers Ass’n</i> , 202 F.3d 1088 (9th Cir. 2000) .....	13
<i>Nw. Wholesale Stationers, Inc. v. Pac. Stationery and Printing Co.</i> , 472 U.S. 284 (1985) .....	11
<i>Ohio v. Am. Express Co.</i> , 585 U.S. 529 (2018) .....	12
<i>Ohio v. Am. Express Co.</i> , 586 U.S. 529 (2018) .....	10
<i>Park Irmat Drug Corp. v. Express Scripts Holding Co.</i> , 911 F.3d 505 (8th Cir. 2018) .....	9
<i>Pollard Banknote L.P. v. Sci. Games Int’l, Inc.</i> , 2011 WL 13162042 (N.D. Ga. Jan. 18, 2011).....	6
<i>PSKS, Inc. v. Leegin Creative Leather Prods., Inc.</i> , 615 F.3d 412 (5th Cir. 2010) .....	4, 12

*R2 Invs. LDC v. Phillips*,  
401 F.3d 638 (5th Cir. 2005) ..... 3

*Somers v. Apple, Inc.*,  
729 F.3d 953 (9th Cir. 2013) ..... 14

*Texaco Inc. v. Dagher*,  
547 U.S. 1 (2006) ..... 11

*Top Rank, Inc. v. Haymon*,  
2015 WL 9948936 (C.D. Cal. Oct. 16, 2015) ..... 6

*Tunica Web Advert. v. Tunica Casino Operators Ass’n, Inc.*,  
496 F.3d 403 (5th Cir. 2007) ..... 9

*Vendever LLC v. Intermatic Mfg. Ltd.*,  
2011 WL 4346324 (N.D. Tex. Sept. 16, 2011)..... 3

*Walker v. Beaumont Independent School Dist.*,  
938 F.3d 724 (5th Cir. 2019) ..... 7

*Wampler v. Sw. Bell Tel. Co.*,  
597 F.3d 741 (5th Cir. 2010) ..... 4

*Witches Brew Tours LLC v. New Orleans Archdiocesan Cemeteries*,  
2022 WL 3586757 (E.D. La. Aug. 22, 2022)..... 4

**Secondary Sources**

7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 1508, p. 368 (5th ed. 2023) ..... 11

*Antitrust Guidelines for the Licensing of Intellectual Property*, U.S. Department of Justice and the Federal Trade Commission (Jan. 12, 2017)..... 11

Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 *Cornell L. Rev.* 297 (1991) ..... 1

## INTRODUCTION

At its core, the First Amended Complaint (“FAC”) pleads only a patent infringement dispute, like hundreds of others pending throughout the country. Seeking to avoid the rules for patent case assignments, Xockets ignored established antitrust law and imagined that Microsoft and NVIDIA formed a “buyers’ cartel” to negotiate only through Defendant RPX. The FAC earned media attention for its novel use of antitrust claims, but the allegations, accepted at face value, affirmatively *negate* any antitrust claims.

*First*, the FAC fails to plead the fundamental requirement of any antitrust complaint—a relevant market and market power in it. The FAC simply *assumes* that Microsoft and NVIDIA are the only potential buyers for rights to the Xockets patents and that they have market power, but the FAC’s factual allegations negate this theory. To establish a “monopsony” theory, “the market is not the market of competing sellers but of *competing buyers*.” Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 *Cornell L. Rev.* 297, 324 (1991) (emphasis added).

In this case, the “market” would include *every* potential buyer, not only Microsoft and NVIDIA. And the FAC itself states that many other motivated “buyers” are available for the Xockets patents and unhindered by the supposed agreement between Microsoft and NVIDIA, listing more than forty different companies. (FAC ¶ 235.) As just a few examples, the FAC identifies numerous competitors of Microsoft, including AWS, Google, Oracle, Coreweave, and others—all of which are outside the supposed conspiracy between NVIDIA and Microsoft. (*Id.*) The FAC further alleges that the Xockets patents are crucial to Microsoft’s business (making them even more valuable to Microsoft’s arch-competitors such as Google) and that a senior Google engineer knows all about the portfolio, because he created it. (*Id.*, ¶¶ 10, 12.) Thus, the FAC affirmatively *negates* any argument that NVIDIA and Microsoft have market power, establishing a huge market of potential buyers for the Xockets patents.

**Second**, the FAC fails to plead any conspiracy between Microsoft and NVIDIA to negotiate only through RPX, much less any unreasonable restraint of trade. The FAC points to NVIDIA’s and Microsoft’s membership in RPX, but the standard membership agreements unambiguously *permit* individual licensing, saying the *opposite* of what the FAC must plead. In any event, Xockets has already admitted in this litigation that such “[c]ollective licensing arrangements ... are legally permissible” where, as here, an “alternative opportunity to acquire individual rights is realistically available.” (PI Reply Br. at 17-18 (quoting *Buffalo Broad. Co. v. Am. Soc. of Composers, Authors & Pubs.*, 744 F.2d 917, 925 (2d Cir. 1984))). Nor has the FAC pled any facts plausibly supporting an inference that a separate “side agreement” exists among Defendants.

**Third**, the FAC fails to plead that the imaginary agreement between NVIDIA and Microsoft caused Xockets any antitrust injury, a prerequisite for the antitrust claims. Taking the pleadings at face value, Xockets can license or sell the patents to numerous motivated “buyers” and Xockets remains free, if it wants, to license the patents to NVIDIA and Microsoft (using RPX as negotiator). Nothing about the alleged agreement between NVIDIA and Microsoft impairs competition among those many potential buyers to the Xockets patents.

The FAC’s antitrust claims are a pretext and should be dismissed with prejudice.

### **RELEVANT FACTUAL BACKGROUND**

Xockets alleges that its patents are “essential to AI” (*id.*, ¶ 242), allowing AI to “be made widely available and affordable to *every business in every industry*” (*id.*, ¶¶ 19, 212) (emphasis added). Although Xockets asserts that its patents are therefore valuable to numerous potential buyers, Xockets narrowly focuses on a supposed agreement between only NVIDIA and Microsoft to negotiate for Xockets’ patents only through RPX. (*Id.*, ¶¶ 258, 281, 282.) Xockets alleges that NVIDIA and Microsoft formed this alleged buyers’ cartel in the Spring of 2024. Xockets infers this supposed agreement from allegations that (1) a “Xockets’ representative” sent unsolicited

communications to NVIDIA and Microsoft employees (*id.*, ¶¶ 281-82, 287) and (2) RPX and Xockets “began a dialogue” in which RPX said that it “was acting on behalf of its ‘members’” (*id.*, ¶ 284). As detailed below, the FAC includes many other potential buyers for the Xockets patents outside the alleged conspiracy (*id.*, ¶ 231) and fails to include any facts necessary to infer any separate agreement to negotiate a license to Xockets patents only through RPX.

### **LEGAL STANDARD**

To survive a motion to dismiss, a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Marucci Sports, L.L.C. v. Nat’l Collegiate Athletic Ass’n*, 751 F.3d 368, 373, 375 (5th Cir. 2014) (dismissing Sherman Act § 1 claim when complaint “present[ed] various conclusory allegations that support one of many inferential possibilities”). Mere “labels and conclusions” cannot withstand a motion to dismiss. *Twombly*, 550 U.S. at 555; *Clean Water Opportunities, Inc. v. Willamette Valley Co.*, 759 F. App’x 244, 246 (5th Cir. 2019); *Vendever LLC v. Intermatic Mfg. Ltd.*, 2011 WL 4346324, at \*8 (N.D. Tex. Sept. 16, 2011). To the contrary, legal conclusions are not “entitled to the assumption of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (citation omitted). Nor is the court required to “strain to find inferences favorable to the plaintiff.” *Anderson v. 21st Century Mortg. Corp.*, 2016 WL 11582928, at \*2 (W.D. Tex. Mar. 10, 2017) (Schydlower, J.) (citing *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005)).

### **ARGUMENT**

#### **I. Xockets Fails to Plausibly Allege a Section 1 Conspiracy Claim**

Xockets’ Section 1 claim requires it to “plausibly allege[]” that Defendants “(1) engaged in a conspiracy (2) that restrained trade (3) in a particular market.” *BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr.*, 49 F.4th 520, 525 (5th Cir. 2022). Xockets fails to plausibly allege facts establishing any of these three elements.



***A. Xockets Does Not Plausibly Allege a Relevant Market or Market Power***

Xockets' Section 1 claim fails "the first step" in alleging an antitrust claim, pleading facts plausibly establishing a cognizable relevant market and market power. *Wampler v. Sw. Bell Tel. Co.*, 597 F.3d 741, 744 (5th Cir. 2010); *Witches Brew Tours LLC v. New Orleans Archdiocesan Cemeteries*, 2022 WL 3586757, at \*4 (E.D. La. Aug. 22, 2022). Here, Xockets alleges that the relevant market is "the market for Xockets' patents" (FAC, ¶ 306), which it also labels "the market for purchase, acquisition, or licensing of technology covered by Xockets' patents" (*id.*, ¶ 295).

Xockets simply asserts that "Xockets' patents" constitute their own market, without attempting to address any other technologies or patents that could be reasonable substitutes. This failure to address interchangeable substitutes by itself warrants dismissal. *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 417-18 (5th Cir. 2010); *Apani Sw., Inc. v Coca-Cola Enters., Inc.*, 300 F.3d 620, 628 (5th Cir. 2002).

Even assuming that Xockets' patents define a relevant market, its own FAC negates any monopsony claim, affirmatively recognizing many other potential buyers or licensees of Xockets' patents. In "monopsony" cases like this one, courts look to the ***competing buyers*** to determine the existence of market power. (Pl.'s Mot. for Prelim. Inj. 26-27, ECF No. 5 (citing *Campfield v. State Farm*, 532 F.3d 1111, 1118 (10th Cir. 2008))); *Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 598 (8th Cir. 2009) ("as a matter of law, in an antitrust claim brought by a seller, a product market cannot be limited to a single method of payment when there are other methods of payment that are acceptable to the seller"); *Marion Healthcare LLC v. S. Ill. Healthcare*, 2013 WL 4510168, at \*11 (S.D. Ill. Aug. 26, 2013) (plaintiff "failed to include in the relevant markets all potential buyers of inpatient or outpatient services").

Here, the FAC repeatedly alleges that Xockets' technology is widely applicable, claiming that it is "essential to AI" and ensures that AI "can be made widely available and affordable to

*every business in every industry.*” (E.g., FAC, ¶¶ 19, 212, 242 (emphasis added).) And the FAC itself describes some of the many companies that would also be potential “buyers” in the market for rights to Xockets’ patents. “Every Major Cloud Provider, Server Maker and Leading AI Company” (*id.*, ¶ 231), as the FAC notes, is a potential purchaser or licensee of Xockets’ patents. For example, the FAC lists Microsoft as among several leading “cloud service providers” (“CSPs”), reciting that “AWS, Google Cloud, Microsoft Azure and Oracle Cloud Infrastructure will be among the first cloud service providers to offer” products allegedly impacted by Xockets’ technology. (*Id.*, ¶ 235.) Indeed, the FAC alleges that Dr. Parin Dalal, “Xockets co-founder and lead inventor,” currently works at Google and would thus be well aware of the potential ability to purchase or license the Xockets’ patents, if Google wanted to do so. (*Id.*, ¶¶ 10, 12.)

As other examples, the FAC points to one of NVIDIA’s major datacenter competitors, Intel, as a potential purchaser in the alleged market and alleges that it has close ties to Xockets—Intel’s current Chief Technology Officer was not only a Xockets Board Member but also a founding investor. (*Id.*, ¶¶ 11, 56.) The FAC also identifies many other companies, including six other CSPs, twelve “Sovereign AI Clouds,” and seventeen server makers, other hardware manufacturers, or other users—all of which would be potential purchasers in the alleged market. (*Id.*, ¶ 235.)

Nor are potential purchasers in the market limited to companies selling products. Indeed, the FAC’s focus on NVIDIA and Microsoft fails to account for other types of potential purchasers for the Xockets patents, such as patent assertion entities or patent aggregators other than RPX.

Nevertheless, in an attempt to limit the market to just NVIDIA and Microsoft, Xockets makes the conclusory assertion that “NVIDIA and Microsoft constitute a large part of the demand for Xockets’ patented technology.” (*Id.* ¶ 285). The FAC also alleges certain market shares of NVIDIA and Microsoft in *product* markets for “GPU-enabled AI servers” and “GPU-enabled AI

platforms,” respectively, not in the claimed market for rights to Xockets’ patents. (*Id.*, ¶¶ 297, 306.)

But “a defendant’s market share in a market other than the alleged relevant market is irrelevant,” where, as here, there is no “basis for such imputation.” *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1214-15 (11th Cir. 2002); *Top Rank, Inc. v. Haymon*, 2015 WL 9948936, \*8 (C.D. Cal. Oct. 16, 2015) (rejecting market power allegations that were “completely disconnected from the relevant market definition”). With respect to the alleged patent market, the FAC does not allege, nor could it, that NVIDIA or Microsoft have any control over whether or not other potential buyers choose to license or purchase Xockets’ patents. Moreover, the FAC itself alleges that “horizontal competitors” in a market for rights to Xockets’ patents could obtain a “competitive advantage” by seeking “an exclusive license.” (FAC, ¶ 288.) As an example, a Microsoft competitor—such as Google where the lead Xockets named inventor currently works—could try to obtain an exclusive license to gain a competitive advantage over Microsoft, regardless of Google’s market share in any “downstream” product market. Indeed, a party with a low product market share may have an increased incentive to try to obtain exclusive patent rights.

In short, the FAC lacks any well-pled facts to support Xockets’ claim that Defendants have monopsony power as potential buyers or licensees of its patents. *Campfield*, 532 F.3d at 1118 (“[w]hen there are numerous sources of interchangeable demand, the plaintiff cannot circumscribe the market to a few buyers in an effort to manipulate the buyers’ market share”); *Pollard Banknote L.P. v. Sci. Games Int’l, Inc.*, 2011 WL 13162042, at \*9 (N.D. Ga. Jan. 18, 2011) (plaintiff must “establish that the defendants possessed power in the [relevant] market” to survive dismissal).

### ***B. Xockets Does Not Plausibly Allege a Conspiracy***

Xockets also does not plausibly allege any conspiracy among Defendants. “[T]he crucial question is whether the challenged anticompetitive conduct stems from independent decision or

from an agreement, tacit or express.” *Twombly*, 550 U.S. at 553 (citation and quotation marks omitted). In the antitrust context, Xockets’ Section 1 claim cannot survive on allegations “as consistent with permissible competition as with illegal conspiracy” because such conduct “does not, standing alone, support an inference of antitrust conspiracy.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *Name.Space, Inc. v. ICANN*, 795 F.3d 1124, 130-31 (9th Cir. 2015) (affirming dismissal of antitrust claims and noting, “[w]e cannot . . . infer an anticompetitive agreement when factual allegations just as easily suggest rational, legal business behavior”); *JSW Steel (USA) Inc. v. Nucor Corp.*, 586 F. Supp. 3d 585, 596 (S.D. Tex. 2022) (“Any conduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.”).

Xockets has argued that NVIDIA’s membership in RPX constitutes direct evidence of a conspiracy, but the actual membership terms contradict this argument. The terms expressly provide that “neither this Agreement nor any other aspect of the relationship between the Parties, limits either Party’s ability to negotiate separate licenses for any patents, at any time, with any third-party patent owners independently, individually, directly, and confidentially on terms that are mutually acceptable to the negotiating parties.” (Dkt. No. 83-5, NVIDIA Ex. 1 (RPX-NVIDIA First Amendment to the Membership and License Agreement), ¶ 3.) The Court may consider the terms of the membership agreements for this motion, because the agreements are “referred to in the complaint and are central to the plaintiff’s claims.” *Walker v. Beaumont Independent School Dist.*, 938 F.3d 724, 735 (5th Cir. 2019); (e.g., FAC ¶¶ 3, 285, 679 (referring to engagement of RPX as an aspect of the putative conspiracy); *id.*, ¶¶ 277-79 (alleging membership in RPX as developing “collaborat[ion] . . . to create anti-competitive buyers’ cartels”); *id.*, ¶ 287 (alleging that the “very purpose of RPX and the reason for joining RPX is to form groups of potential

purchasers who can use collective purchasing”). The RPX agreement thus directly contradicts the alleged agreement by NVIDIA and Microsoft to negotiate only through RPX.

Plaintiff has also not alleged anything about RPX’s “[b]usiness” (*id.*, ¶¶ 273-280) suggesting that its members negotiate only through RPX. To the contrary, Xockets conceded during the preliminary injunction briefing that “[c]ollective licensing arrangements” like those engaged in by RPX “are legally permissible” where, as here, an “alternative opportunity to acquire individual rights is realistically available.” (PI Reply Br. at 17-18 (quoting *Buffalo Broad.*, 744 F.2d at 925).) Moreover, the cited statements merely note that RPX believed it could lower the “significant cost and risk of litigating” and “transaction costs” of negotiations for both patent owners and potential licensees, resulting in “wholesale” prices instead of “retail” prices<sup>1</sup>; that RPX saw itself as an “effective intermediary” and would have liked to become an “essential intermediary”<sup>2</sup>; and that RPX’s “syndicated transactions” include more than just the members’ subscription fees.<sup>3</sup> None of these allegations suffices as direct evidence of a conspiracy among Microsoft and NVIDIA to negotiate only through RPX.

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<sup>1</sup> FAC, ¶¶ 3, 274 (quoting FAC, Ex. 10); FAC, Ex. 10 (“[O]ur ability to transact on behalf of a large number of companies enables us to remove risk for the patent owner, which leads to more advantageous pricing. In effect, RPX can buy ‘wholesale’ on behalf of our client network, while our clients would otherwise pay ‘retail’ if transacting on their own.”); FAC, Ex. 11 (RPX seeks to help lower “significant defense and settlement costs” for potential licensees and “the significant cost and risk of litigating against a large number of companies” for patent owners); FAC, Ex. 12 at 1 (“Our patent risk management services help companies reduce patent-related risk and expense through subscription-based services that facilitate more efficient exchanges of value between owners and users of patents compared to transactions driven by actual or threatened litigation.”); FAC, Ex. 12 at 4 (RPX creates “lower transaction costs”).

<sup>2</sup> FAC, ¶ 275 (quoting FAC, Ex. 12); FAC, Ex. 12 at 4 (“Our ability to engage in transparent discussions with both operating companies and patent owners allows us to act as an effective intermediary between participants in the patent market.”); FAC, Ex. 12 at 6 (describing aspiration to become “the essential intermediary between patent owners and operating companies”).

<sup>3</sup> FAC, ¶ 278 (“syndicated licensing transactions . . . can include non-members and members (who make contributions beyond their regular subscription fees”).

Similarly, the FAC does not plead sufficient “circumstantial evidence,” which requires both (i) parallel conduct and (ii) “plus factors” tending to exclude the possibility of independent action. *Tunica Web Advert. v. Tunica Casino Operators Ass’n, Inc.*, 496 F.3d 403, 409 (5th Cir. 2007) (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)); *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 137 (2d Cir. 2013) (requiring “plus factors” that “lead to an inference of conspiracy” at the pleading stage).

Here, Xockets provides no plausible facts to support its allegations of parallel conduct. *Park Irmat Drug Corp. v. Express Scripts Holding Co.*, 911 F.3d 505, 517 (8th Cir. 2018) (“Because [plaintiff] fails to plausibly plead parallel conduct, no discussion of any ‘plus factors’ is necessary.”); *Bona Fide Conglomerate, Inc. v. SourceAmerica*, 691 F. App’x 389, 391 (9th Cir. 2017) (“‘Plus factors’ are relevant only if the complaint adequately alleges parallel conduct among the defendants.”). Merely asserting that Xockets unilaterally communicated with each Defendant and none of them responded is not a showing of parallel conduct. Indeed, “[i]t is well recognized that mere refusal by a group of defendants to deal with a plaintiff is not itself sufficient evidence of a conspiracy or concerted conduct.” *Assoc. News, Inc. v. Curtis Circulation Co.*, 1986 WL 13791, at \*7 (S.D. Tex. Dec. 4, 1986).

Moreover, Xockets has failed to plausibly allege any “plus factors” supporting an inference of any additional “side agreement” between NVIDIA and Microsoft to negotiate only through RPX. Xockets alleges that between March and June 2024, a “Xockets representative” reached out to various people at NVIDIA (FAC, ¶ 281) and that between March and April 2024, a Xockets representative reached out to various people at Microsoft (*id.*, ¶ 282). From these facts, Xockets jumps to the conclusion that NVIDIA and Microsoft must have “interacted with RPX to form a conspiracy” with each other. (*Id.*, ¶¶ 281-82.) But the FAC does not allege that Xockets’

communications with NVIDIA or Microsoft even mentioned Xockets, or that the contemplated offer was for the sale or license of the patents in contrast to a broader offer to buy the entire company.

Xockets further alleges that RPX and Xockets “began a dialogue” in May and June 2024 in which RPX said that it “was acting on behalf of its ‘members.’” (*Id.*, ¶ 284.) But the FAC does not allege that RPX ever indicated that NVIDIA or Microsoft specifically (as compared to others among RPX’s “more than 450 members” (*id.*, ¶ 273)) were interested in the Xockets patents or that they intended to negotiate for those patents at all, let alone exclusively through RPX.

Allegations as thin as these cannot support an inference of an antitrust conspiracy, because they are at least “as consistent with permissible competition as with illegal conspiracy.” *Matsushita Elec. Indus.*, 475 U.S. at 588 (1986); *Twombly*, 550 U.S. at 556-57 (“[W]hen allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.”); *Name.Space, Inc.*, 795 F.3d at 130-31 (“We cannot . . . infer an anticompetitive agreement when factual allegations just as easily suggest rational, legal business behavior”).

Accordingly, the Court should also dismiss the FAC for failure to plead facts supporting the alleged conspiracy.

### ***C. Xockets Fails to Plausibly Allege an Unreasonable Restraint***

A Section 1 claim must also allege facts showing that the claimed concerted conduct unreasonably restrained trade. *Acad. of Allergy & Asthma in Primary Care v. Quest Diagnostics*, 2022 WL 980791, at \*4 (W.D. Tex. Mar. 31, 2022) (quoting *Ohio v. Am. Express Co.*, 586 U.S. 529, 541 (2018)). While courts have determined that a few “naked” restraints are *per se* illegal, most restraints of trade require fact-intensive analyses under the rule of reason. *See 7 Areeda &*

Hovenkamp, *Antitrust Law*, ¶ 1508, p. 368 (5th ed. 2023); *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (“[Courts] presumptively appl[y] rule of reason analysis” and have “expressed reluctance to adopt ‘*per se*’ rules . . . where the economic impact of certain practices is not immediately obvious.”) (collecting cases) (quotation marks omitted).

The agreement alleged in the FAC is not subject to *per se* condemnation as alleged “price fixing.” (FAC, ¶¶ 287, 301.) Before any *per se* rule may be applied, courts must determine “whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to ‘increase economic efficiency and render markets more, rather than less, competitive.’” *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-20 (1979) (citations omitted). As described above, the FAC notes many reasons why both patent owners and potential licensees might want to work with RPX on a specific transaction, including lowering the “significant cost and risk of litigating” and “transaction costs” of negotiating. (*See supra* n.1 (quoting FAC, Ex. 10; FAC, Ex. 11; FAC, Ex. 12 at 1; FAC, Ex. 12 at 4)). Indeed, “public policy favors voluntary settlements which obviate the need for expensive and time-consuming litigation.” *Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1164 (5th Cir. 1985); *Baseload Energy, Inc. v. Roberts*, 619 F.3d 1357, 1361 (Fed. Cir. 2010) (discussing “strong public policy of encouraging settlements”) (citations omitted). Thus, patent aggregation activities, like other group purchasing agreements, are evaluated under the rule of reason. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery and Printing Co.*, 472 U.S. 284, 295 (1985); *Antitrust Guidelines for the Licensing of Intellectual Property*, DOJ and FTC at 16–17 (Jan. 12, 2017) (noting that such activities are analyzed under the rule of reason).

Because the *per se* rule does not apply, Xockets’ claims must be analyzed under the default rule of reason, which requires proving harm to competition in a relevant market. *Ohio v. Am.*



*Express Co.*, 585 U.S. 529, 541 (2018) (noting requirement of harm shown “in the relevant market”). Xockets’ rule of reason claims fail as a matter of law because, as discussed above, Xockets has not plausibly alleged a relevant market or Microsoft and NVIDIA’s monopsony power such that they could prevent anyone who wants to from seeking to license or purchase the Xockets patents. *PSKS, Inc.*, 615 F.3d at 417-18 (quotation omitted) (Where “plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all alleged factual inferences are granted in plaintiff’s favor, the relevant market is legally insufficient, and a motion to dismiss may be granted.”). Moreover, as described above, nothing about RPX’s actions to facilitate voluntary settlements between patent owners and potential licensees unreasonably restrains trade. (*See supra* n.1 (quoting FAC, Ex. 10; FAC, Ex. 11; FAC, Ex. 12 at 1; FAC, Ex. 12 at 4).)

Accordingly, the Court should dismiss Xockets’ Section 1 claim because it fails to sufficiently plead any of the three elements of such a claim.

## **II. Xockets Fails to Allege Facts Plausibly Supporting its Section 2 Claim**

To plead a conspiracy claim under Section 2 of the Sherman Act, a plaintiff must plausibly allege “(1) the existence of specific intent to monopolize; (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of the combination or conspiracy; and (4) an effect upon a substantial amount of interstate commerce.” *Acad. of Allergy & Asthma in Primary Care*, 2022 WL 980791, at \*9.

Xockets’ Section 2 conspiracy claim fails for the same reason its Section 1 claim fails: the FAC fails to plead market power and contains no allegations capable of supporting the existence of the alleged conspiracy or harm to competition. *Nova Designs, Inc. v. Scuba Retailers Ass’n*,

202 F.3d 1088, 1092 (9th Cir. 2000) (“Because [plaintiff’s] claim under § 1 fails, its claim of a conspiracy to monopolize under § 2 based on the same conduct necessarily fails as well.”).

In addition, Xockets’ Section 2 claim fails because Xockets alleges no facts showing that Defendants acted with the specific intent to obtain or maintain monopoly power. Xockets asserts that the alleged conspiracy “was undertaken for the specific purpose of obtaining monopsony power over the market for the purchase, acquisition, or licensing of technology covered by Xockets’ patents.” (FAC ¶ 303.) But such “[f]ormulaic recitations” of Defendants’ alleged intent to monopolize cannot satisfy Plaintiff’s burden. *Michael E. Jones M.D., P.C. v. UnitedHealth Grp., Inc.*, 2020 WL 4895675, at \*11 (S.D.N.Y. Aug. 19, 2020) (rejecting conclusory allegations that defendants engaged in conduct “with the intent to acquire, maintain, and/or increase their monopoly power”).

### III. Xockets Fails to Plead Antitrust Injury

Finally, Xockets’ antitrust claim fails for two additional reasons. *First*, Xockets fails to allege facts showing that its alleged injury flows from a reduction in competition in the relevant market. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977) (antitrust injury must flow “from that which makes the defendants’ acts unlawful,” *i.e.*, a reduction in competition). As discussed above, the FAC itself identifies numerous other potential “buyers” for the Xockets patents—including AWS, Google, Oracle, Coreweave, and many others, none of whom are alleged to be part of the putative conspiracy at issue between NVIDIA and Microsoft to license only through RPX. (FAC ¶ 235.) That “acknowledge[ment] that [Defendants are] not the only buyer[s]” of Xockets’ patents is fatal because it means the alleged agreement cannot have resulted in any market-wide harm to competition for Xockets’ patents. *Cable Line, Inc. v. Comcast Cable Commc’ns of Penn., Inc.*, 767 F. App’x 348, 351-52 (3d Cir. 2019) (dismissing monopsony claim where plaintiff acknowledged other buyers and “[did] not allege any facts concerning [them] and

how, if at all, [the defendant] unlawfully excluded them”); *Ehredt Underground, Inc. v. Commonwealth Edison Co.*, 90 F.3d 238, 240 (7th Cir. 1996) (“[I]t is hard to see how Ehredt suffered antitrust injury. . . . [I]t did not suffer from a monopsony. Although it alleges unlawful exclusion from a market, what ‘market’ could that be, given that it remained free to sell to other buyers . . . ?”).

**Second**, the FAC fails to allege any facts indicating that the purported conspiracy caused any harm to Xockets: Xockets failed to earn any revenue from any of these potential buyers (including NVIDIA or Microsoft) in its decade-long existence before the alleged conspiracy. (FAC ¶ 55.) Thus, the lack of demand for its patents remained the same both before and after Xockets asked RPX to get involved, contradicting any claim of harm from the alleged agreement. *In re German Automotive Mfgs. Antitrust Litig.*, 2021 WL 4958987, at \*2 (9th Cir. Oct. 26, 2021) (rejecting price-fixing conspiracy as “implausible because the [plaintiffs] have not alleged any facts suggesting that the price . . . increased while the alleged steel conspiracy was in effect or decreased after it ended”); *Somers v. Apple, Inc.*, 729 F.3d 953, 964 (9th Cir. 2013) (rejecting conspiracy claims because absence of allegations of price changes rendered theory implausible). In the end, Xockets offers only conclusory, speculative allegations of injury that are just as likely to arise from its own lack of commercial success and low patent quality as from the purported conspiracy. That is insufficient.

#### **IV. The Court Should Dismiss Without Leave to Amend.**

The Court should dismiss with prejudice because granting leave to amend would be futile. First, the FAC affirmatively negates Xockets’ antitrust causes of action. Thus, Xockets has “pled [itself] out of court” on these claims. *Fracalossi v. MoneyGram Pension Plan*, 2019 WL 5578561, at \*1, 3 (N.D. Tex. Oct. 29, 2019) (dismissing claim with prejudice because “[r]epleading is not allowed when a plaintiff has pled her way out of court”); *Contiguity, LLC v. Conduent Bus. Servs.*,

*LLC*, 2024 WL 252068, at \*3-4 (W.D. Tex. Jan. 22, 2024) (granting dismissal with prejudice and noting “Contiguity pleads itself out of court” where its “allegations refute its claims of infringement”). Second, as shown in the preliminary injunction hearing, Xockets has no additional facts it could plead to save its claims.

### **CONCLUSION**

Accordingly, the Court should dismiss Counts I and II from Xockets’ FAC with prejudice.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that, on November 12, 2024, the foregoing was electronically filed with the Clerk of Court using CM/ECF, and served via CM/ECF upon all counsel of record who are deemed to have consented to electronic service per Local Rule CV-5(b)(1).

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