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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

SOUL'D OUT PRODUCTIONS, LLC, an Oregon limited liability company,

Plaintiff,

v.

ANSCHUTZ ENTERTAINMENT GROUP, INC. (a Colorado corporation); **THE ANSCHUTZ CORPORATION** (a Delaware corporation); **GOLDENVOICE, LLC** (a California company); **AEG PRESENTS, LLC** (a Delaware company); and **COACHELLA MUSIC FESTIVAL, LLC** (a Delaware company),

Defendants.

Case No. 3:18–cv–00598-MO

MOTION TO DISMISS SECOND AMENDED COMPLAINT

By Defendants Anschutz Entertainment Group, Inc.; The Anschutz Corporation; Goldenvoice, LLC; AEG Presents, LLC; and Coachella Music Festival, LLC

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LOCAL RULE 7-1 CERTIFICATION

Pursuant to LR 7-1(a)(1), Defendants Anschutz Entertainment Group, Inc., The Anschutz Corporation, Goldenvoice, LLC, AEG Presents, LLC, and Coachella Music Festival, LLC (collectively "AEG") conferred in good faith with counsel for Plaintiff Soul'd Out Productions, LLC ("Soul'd Out" or "Plaintiff") on November 6, 2018 regarding the bases for its motion. The parties were unable to resolve their differences and thus AEG brings this motion to dismiss Plaintiff's Second Amended Complaint ("SAC") (Dkt. No. 35) in its entirety.

MOTION

AEG, by and through its undersigned counsel, hereby moves the Court to dismiss the SAC under Fed. R. Civ. P. 12(b)(6) on the grounds that (1) Plaintiff has failed to plausibly allege essential elements of an antitrust claim, including market definition, market power, or antitrust standing; (2) Plaintiff has failed to plausibly allege a claim for intentional interference with contract or economic relations; and (3) Plaintiff's unfair competition claim, by virtue of being premised on its other claims, must fail for the same reasons. The grounds for AEG's motion are set forth below in the accompanying memorandum of law.

LEGAL MEMORANDUM

For the third time, Plaintiff has filed suit against AEG, challenging the radius clause in contracts with artists performing at the Coachella Valley Music and Arts Festival ("Coachella"). And for the third time, Plaintiff has failed to plausibly allege an antitrust claim.

At bottom, this case is about three artists who decided to perform at Coachella rather than at Plaintiff's own festival, Soul'd Out, which was scheduled for the same weekend as Coachella. Plaintiff claims that the radius clause "effectively locks these artists out of other markets" and deprived Plaintiff of the artists it purportedly needed to compete. SAC ¶¶ 13, 84. But, as this

Court previously recognized, Plaintiff cannot plead even the most basic elements of an antitrust claim: (1) a relevant antitrust market (2) in which Coachella has market power. *See* 10/4/18 Hr'g Tr. 39:20-41:15. As counsel for AEG argued at the initial motion to dismiss hearing, holding Plaintiff to this pleading burden is important because Plaintiff *cannot* define a relevant market in which Coachella has market power.

The *only* case Plaintiff cites that has ever sustained a claim challenging a radius clause on a motion to dismiss provides useful guidance on what Plaintiff must plead. That case, an unpublished decision from a different Circuit, involved highly unique facts that do not apply here, including:

- "*virtually every* nationally recognized EDM artist performed at one or more of [defendant's] events each year" and was therefore subject to defendant's radius clause; and

- as a result, defendant had market power in the market for "EDM performances by nationally recognized EDM artists" in Metro Detroit.

React Presents, Inc. v. Eagle Theater Entm't, LLC, No. 16-13288, 2017 WL 3616547, *9-11 (E.D. Mich. Aug. 23, 2017) (emphasis added). Put simply, the *React Presents* court found plausible plaintiff's allegations that defendant's radius clauses had "locked up" *all* artists of a particular genre (electronic dance music or "EDM") in a particular region, preventing plaintiff from having the EDM artists it needed to compete.

At the initial motion to dismiss hearing, the Court provided Plaintiff with guidance about what it needed to allege with respect to "interchangeability" and "cross-elasticity of demand" for purposes of defining a relevant antitrust market. 10/4/18 Hr'g Tr. 23:3-25:10. Notwithstanding this guidance, Plaintiff fails once again to identify any category of artists, or any geographic region, in which Coachella has market power. For example, Plaintiff promotes a soul music

festival whereas Coachella spans numerous musical genres. Plaintiff has not – and cannot – allege that Coachella's radius clause "locks up" the hundreds (if not thousands) of soul artists available to perform at Plaintiff's festival in Portland, Oregon. Instead, Plaintiff asserts numerous putative markets (including markets for "hard-ticket concert promotion in the Pacific Northwest" and "open-air festivals in the United States") all of which have nothing to do with the artists available to Plaintiff. While Plaintiff makes passing reference to the 180 artists who allegedly perform at Coachella, Plaintiff never explains how radius clauses with these 180 artists give AEG market power over the *thousands* of artists available to Plaintiff in any given year. Plaintiff's inability to allege a plausible product or geographic market, or AEG's market power in that market, once again dooms its antitrust claims. Because Plaintiff has not – and cannot – cure this defect with further amendment, Plaintiff's antitrust claims should be dismissed with prejudice.

In addition to Plaintiff's failure to allege a relevant market or market power, Plaintiff's antitrust claims fail because Plaintiff lacks antitrust standing. Plaintiff cannot have standing to bring an antitrust claim when it is not a customer or competitor in the relevant market where the alleged conduct occurred. Plaintiff has tried to obscure these pleading defects by alleging a variety of antitrust theories to see "what sticks." But Plaintiff fails to allege the essential elements of a tying claim, fails to allege a conspiracy among promoters, and fails to allege a "hub-and-spoke" conspiracy among artists.

Plaintiff's non-antitrust claims fail as well. Plaintiff alleges that AEG intentionally interfered with its economic relationship with three artists. But again, Plaintiff fails to allege any facts showing that AEG had knowledge of this relationship at the time it entered into agreements with these artists. AEG could not have *intentionally* interfered with a contract or economic

relationship that it did not know about in the first place. Finally, Plaintiff re-alleges its unfair competition claim. But this claim rises and falls with its other claims. Given Plaintiff's failure to plausibly allege any of its claims, even after guidance from the Court, the SAC should be dismissed in its entirety and with prejudice.

BACKGROUND

Coachella is an annual music festival founded in 1999 that takes place at Indio, California over two consecutive three-day weekends featuring artists across numerous musical genres. SAC ¶¶ 2, 4, 72, 73, 74. This year, Coachella took place from April 13-15 and April 20-22, 2018. *Id.* ¶ 74. Coachella's artist contract includes a radius clause to prevent competitors from unfairly free-riding on Coachella's investment in its artist lineup and investment in bringing those artists to California to perform at the festival. *See* Compl. (Dkt. No.1) ¶¶ 5, 55. Under the radius clause, an artist may not perform in (a) "any North American Festival," defined as "any engagement with 4 or more artists," "from December 15, 2017 until May 1, 2018" or in (b) "Los Angeles, Orange, Riverside, San Bernadino, Santa Barbara, Ventura or San Diego Counties from December 15, 2017 until May 1, 2018." SAC ¶ 5. Outside of these seven counties, an artist may play any non-festival concert at any time. *Id.*

Plaintiff Soul'd Out Productions founded the Soul'd Out Music Festival in 2010 in Portland, Oregon. *Id.* ¶ 56. The Soul'd Out Music Festival focusses "solely on soul music." 10/4/18 Hr'g Tr. 25:18. This year, the Soul'd Out Music Festival took place the same weekend as Coachella from April 18-22, 2018. *See* SAC ¶ 56; *see also* http://www.souldoutfestival.com/. In April 2018, Plaintiff filed a lawsuit against AEG, challenging the radius clause in the Coachella artist agreements. Compl. (Dkt. No.1). In October 2018, the Court dismissed Plaintiff's First Amended Complaint ("FAC") in full and partially with prejudice. Order (Dkt.

No. 34). On October 25, 2018, Plaintiff filed the SAC alleging that the radius clause (1) violates the antitrust laws (Claims I, II, and III); (2) intentionally interferes with Plaintiff's contracts and relationships with certain artists (Claims IV, V, and VI); and (3) violates California unfair competition law (Claim VII).

In support of Plaintiff's intentional interference claim, Plaintiff continues to allege that three artists, Tank and the Bangas, SZA, and Daniel Caesar, refused to play the Soul'd Out Music Festival as a result of the radius clause. SAC ¶¶ 118, 127, 134. By Plaintiff's own account, however, only one of these artists—Tank and the Bangas—ever agreed to play the Soul'd Out Music Festival. *See id.* ¶¶ 117, 118. At least two of these artists—SZA and Daniel Caesar—agreed to play Coachella before they were ever approached by Plaintiff. *See* FAC ¶¶ 66, 73; SAC ¶¶ 127, 134.

For the reasons set forth below, AEG respectfully requests that the Court dismiss the SAC in its entirety and with prejudice.

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Under this standard, a plaintiff must allege "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citation omitted). A claim is "plausible" only if a plaintiff has pled "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). While the Court must accept all factual allegations pleaded in a complaint as true, it is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Daniels-Hall v. Nat'l*

Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010) (citation omitted).

In the antitrust context, courts must be particularly rigorous in ensuring that a plaintiff's claims rise to the level of plausibility. As the Supreme Court has cautioned: "proceeding to antitrust discovery can be expensive," so "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Twombly*, 550 U.S. at 558-59 (internal quotations omitted). The concerns about discovery are particularly acute in this case. At the initial motion to dismiss hearing, the Court recognized that Plaintiff's failure to plead plausible product and geographic markets creates significant problems for determining the proper scope of discovery – it "makes the case really unworkable because we don't really know at this point who needs to be deposed and what questions need to be asked and what documents collected from either potentially a huge swathe of economic activity in America or a much narrower one." 10/4/18 Hr'g Tr. 40:10-15. Despite the Court's guidance on more precisely defining the markets at issue, the SAC is even *less* precise than the FAC, sweeping in a far broader "swathe of economic activity," including AEG's extensive promotions business that has nothing to do with Coachella or the radius clauses at issue. *See, e.g.*, SAC ¶¶ 61-71 (detailing AEG's music industry businesses, including concert venues, promotion businesses, festival businesses, and ticketing business). It is therefore particularly critical that the Court once again "insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Twombly*, 550 U.S. at 558.

ARGUMENT

I. PLAINTIFF FAILS TO STATE AN ANTITRUST CLAIM (CLAIMS I, II, III).

Plaintiff challenges AEG's radius clause under Section 1 of the Sherman Act (Claim I), Oregon's antitrust statute (Claim II), and California's Cartwright Act (Claim III). The legal

standards that apply to each of Plaintiffs' three antitrust claims are the same,[1] and those claims fail for the same reasons. Each of Plaintiffs' antitrust "claims" is divided up into six "counts." Each of those six "counts" fails because Plaintiff has not alleged a plausible product market, a plausible geographic market, Coachella's market power in that market, or that Plaintiff has antitrust standing. Finally, counts two through six of Plaintiffs' three antitrust claims fail for additional, independent reasons as well. Each of these arguments is set forth below.

A. Plaintiff Fails to Allege a Plausible Product Market (Counts 1-6).

A relevant market is an essential pleading element of Plaintiff's antitrust claims. *See Tanaka v. Univ. S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) ("Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim."). To plead a relevant antitrust market, Plaintiff must plausibly allege both a relevant product market and a relevant geographic market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

It is not sufficient to define *any* market; rather the market must be the one relevant to evaluating Plaintiff's claims. *See, e.g., L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 422 (11th Cir. 1984) ("[P]roof regarding the economic significance (or relevance) of the market allegedly influenced by the defendant's conduct" is necessary to evaluate "the market power of the parties involved and the anticompetitive effect of an alleged restraint."). As this Court recognized during the hearing on AEG's initial motion to dismiss, "the core of [Plaintiff's] case" is that the radius clause deprives Plaintiff of the *artists* it needs to compete. *See* 10/4/18 Hr'g Tr. 23:21-2. But instead of defining its market from the perspective of the soul artists that

[1] *See Name.Space, Inc. v. Internet Corp. for Assigned Names & Nos.*, 795 F.3d 1124, 1134 n.5 (9th Cir. 2015) ("[T]he analysis under the Cartwright Act, Cal. Bus. & Prof. Code §§ 16700-16770, is identical to that under the Sherman Act . . . ."); *see also Or. Laborers-Emp'rs Health & Welfare Tr. Fund v. Philip Morris, Inc.*, 17 F. Supp. 2d 1170, 1176 n.2 (D. Or. 1998) ("Chapter 646.715(2) requires that state courts look to federal case law for guidance and Oregon courts have adopted the federal per se and rule of reason analyses.") (citation omitted).

Plaintiff requires for its Soul'd Out festival, Plaintiff has alleged markets that are even more convoluted than those in the FAC that the Court previously rejected. Plaintiff appears to allege more than a dozen different "markets," including among others:

- "hard-ticket concert dates and other events in the Pacific Northwest" (SAC ¶ 13)
- "the concert tour market" (*Id.* ¶¶ 31-32)
- "the concert festival market" (*Id.* ¶¶ 40-41)
- "music concert markets in the Pacific Northwest" (*Id.* ¶ 61)
- "open air music festivals" (*Id.* ¶ 79)
- "the promoter market, venue market and ticket company markets" (*Id.* ¶ 108)
- "a market for hard ticket concert promotion in Washington and Oregon" (*Id.* ¶ 150)
- "hard-ticket concert performances and 'themed events' in the Pacific Northwest" (*Id.* ¶ 163)
- "the festival market" (*Id.* ¶ 183)
- "market for live, popular music performances in which four or more artists are performing on the West Coast of the United States (California, Oregon, Washington, Arizona, and Nevada)" (*Id.* ¶ 188)
- "concert, 'festival,' and 'themed event' promoters" (*Id.* ¶ 192)

This alone is reason to dismiss Plaintiff's antitrust claims. *See Bay Area Surgical Mgmt. LLC v. Aetna Life Ins. Co.*, 166 F. Supp. 3d 988, 997 (N.D. Cal. 2015) (dismissing claim because "market definition is vague and should be alleged with greater specificity"); *Sumotext Corp. v. Zoove, Inc.*, No. 16-cv-01370-BLF, 2016 WL 6524409, *3 (N.D. Cal. Nov. 3, 2016) (same).

Because Plaintiff's allegations are so unclear, counsel for AEG confirmed with counsel for Plaintiff during the parties' meet and confer that the principal markets Plaintiff is apparently alleging are the following, neither of which focus on the artists that Plaintiff supposedly requires

to compete: (1) a market for hard-ticket concert promotion in Oregon and Washington, *see* SAC ¶¶ 32-40, and (2) a market for open-air concert festivals in the United States, *see id.* ¶¶ 41-52. Both markets are facially unsustainable.

As the Court recognized at the initial motion to dismiss hearing, a properly defined relevant product market is comprised of those products that are "reasonably interchangeable by consumers for the same purposes." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). More specifically, the relevant product market "includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." *Tanaka*, 252 F.3d at 1063 (9th Cir. 2001). An antitrust claim may be dismissed where "the relevant market definition is facially unsustainable." *Gold Medal LLC v. USA Track & Field*, 187 F. Supp. 3d 1219, 1226 (D. Or. 2016) (quoting *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008)). That is, where "the 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 factual inferences are granted in plaintiff's favor." *Colonial Med. Grp., Inc. v. Catholic Healthcare W.*, No. C-09-2192 MMC, 2010 WL 2108123, at *3 (N.D. Cal. May 25, 2010) (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436-37 (3d Cir. 1997)). Neither product market survives this test.

Plaintiff's first market – the market for "hard-ticket concert promotion" – is facially unsustainable because it is defined from the wrong perspective. Plaintiff defines the market from the perspective of the concertgoer, when it is the *artist* that purchases promotion services. *See Truck-Rail Handling, Inc. v. Burlington N. & Santa Fe Ry. Co.*, 244 Fed. Appx. 130, 132 (9th Cir. 2007) (rejecting product market that was "not defined from the perspective of the end

consumer, as the cases require"). The SAC recognizes that "[t]he concert promoter enters into a contract with the artist to promote the concert . . ." SAC ¶ 33. Yet, Plaintiff makes no allegations showing why an artist would not use the same promoter for any type of performance, whether it is a concert, festival, or other event. Instead, Plaintiff erroneously focuses on the distinction between "hard-ticket concerts" and "open air festivals" from the perspective of the *concertgoer*. *See id.* ¶¶ 40, 43. This distinction is irrelevant for defining a market to evaluate the effects of contracts (like radius clauses) between promoters and *artists*, as in this case. Even if it were appropriate to define the market from the perspective of concertgoers, Plaintiff does not allege why all genres of music are somehow reasonably interchangeable from the perspective of concertgoers (e.g., jazz and heavy metal).

Plaintiff's second market – the market for "open-air concert festival[s]" – is also flawed. In addition to focusing on *concertgoers* rather than *artists*, Plaintiff limits the alleged market to "large, outdoor festivals," such as Coachella, Lollapalooza, and Bonnaroo, when Plaintiff's only allegation relating to substitutability is that "[f]estivals offer their customers a different experience from single concerts." *Id.* ¶¶ 42-44. If this is how customers measure substitutability, the relevant product market should also include indoor festivals and festivals of different sizes and genres, including comedy festivals, renaissance festivals, BBQ festivals, or any other festival that provides the customer with a "different experience." *See Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir. 1995) ("If consumers view the products as substitutes, the products are part of the same market."); *see also Ugg Holdings, Inc. v. Severn*, No. CV 04-1137-JFW (FMOx), 2004 WL 5458426, *4 (C.D. Cal. Oct. 1, 2004) (rejecting market limited to "sheepskin, fleece-lined boots" where complaint failed to address cross-elasticity of demand of other boots). Indeed, Plaintiff alleges that "the customer for a concert festival typically does not purchase

tickets to see a particular artist, or necessarily even a particular genre of music." SAC ¶ 44. Instead, "the typical festival-goer purchases tickets for the right to enjoy the *festival experience*." *Id* (emphasis added); *see also Theatre Party Assoc., Inc. v. Shubert Org., Inc.*, 695 F. Supp. 150, 154-55 (S.D.N.Y. 1988) (rejecting market where "[p]laintiff has failed to explain why other forms of entertainment, namely other Broadway shows, the opera, ballet, or even sporting events are not adequate substitute products").

Plaintiff's product markets also fail because its allegations are contradictory. During the initial motion to dismiss hearing, Plaintiff argued that Soul'd Out and Coachella are "both popular music festivals" that compete for "the same artists." 10/4/18 Hr'g Tr. 25:16-21. Yet, the SAC reverses course and alleges that "the Soul'd Out Music Festival *does not compete* directly with Coachella" in the festival market. SAC ¶ 59 (emphasis added). In fact, Plaintiff alleges that "Coachella is not directly impacted by Soul'd Out Music Festival because there is *little if any interchangeability* between the market for these products, and there is no identifiable cross-elasticity of demand between these products." *Id.* ¶ 59 (emphasis added). If the Soul'd Out Music Festival, which describes itself as a "festival" and features more than 50 artists, *see* www.souldoutfestival.com, is not a "festival" for purposes of Plaintiff's market definition, there is no way for AEG to even guess at what products purportedly belong in the market. *See Unigestion Holding, S.A. v. UPM Tech., Inc.*, 305 F. Supp. 3d 1134, 1149 (D. Or. 2018) (rejecting market because of "failure clearly to define the scope of the relevant product market"); *see also Orchard Supply Hardware LLC v. Home Depot USA, Inc.*, 939 F. Supp. 2d 1002, 1010 (N.D. Cal. 2013) ("Plaintiff must provide enough facts [about the relevant market] to enable the opposing party to defend itself effectively.") (internal quotations omitted).

Even more fundamentally, as this Court recognized, if Plaintiff's festival and Coachella *do not even compete* in the same relevant market as Plaintiff argues, then Plaintiff has not satisfied its burden of pleading an antitrust claim based on interchangeability:

> THE COURT: And what interchangeability requires, the core concept involved is that you and the defendant are really offering to customers something close to fundamentally the same product, so that if you were offering -- well, certainly if you were offering speeches by noted politicians and they were offering a music festival, then however that music festival might be harming you, you wouldn't have product interchangeability, right?
>
> MR. ALDRICH: I would agree, Your Honor.
>
> THE COURT: And it could even happen to some degree with musicians, right? If you were a promoter of, you know, symphonies and somehow you felt that got in the way, that Coachella was getting in your way, you'd have a real problem, I suppose, with interchangeability, right?
>
> MR. ALDRICH: Depending on the facts, it could, yes.
>
> THE COURT: So I think the idea is that what you're offering, and in fact what the market is offering, the market you want to define by the product, it has to be in the ballpark of what Coachella is offering?
>
> MR. ALDRICH: Sure.

10/4/18 Hr'g Tr. 24:8-25:2. Because Plaintiff now asserts that it does not even *compete* with Coachella because their products are not *interchangeable*, it is impossible to understand how Plaintiff could be harmed by Coachella's radius clauses. *Innovation Marine Protein, LLC v. Pac. Seafood Grp.*, No. 6:17-cv-00815-MC, 2018 WL 1461501, *5 (D. Or. Mar. 23, 2018) (dismissing claim where plaintiff did not compete with defendant in relevant market). The Court already has recognized as much: "So *to show harm to the market*, you have to talk about a market that's a product market, and to talk about a product market, you have to describe not your business but a market in which the product is interchangeable with Coachella." 10/4/18 Hr'g Tr.

26:9-13 (emphasis added). Plaintiff's failure to define a product market in which both parties compete fatally undercuts Plaintiff's theory of market-wide harm to competition.

B. Plaintiff Fails to Allege a Plausible Geographic Market (Counts 1-6).

Plaintiff's alleged geographic markets also are deficient. The relevant geographic market is the "area in which the seller operates, and to which the purchaser can practicably turn for supplies." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 359 (1963) (internal quotations omitted). Plaintiff alleges two geographic markets: (1) a market in Oregon and Washington ("the Pacific Northwest") for hard-ticket concert promotion and (2) a market in the United States for open-air festivals. SAC ¶¶ 32-50.

Plaintiff's alleged market for the "Pacific Northwest" fails because, like the alleged product market, it is defined from the wrong perspective. As this Court recognized, "perspective" is important "[b]ecause we're talking about economic decisions being made within a certain geographic area." 10/4/18 Tr. 30:15-16. Here, Plaintiff limits the market for hard-ticket concert promotion to Oregon and Washington because "[i]ndependent concert promoters generally operate regionally" and "hard-ticket concert consumers in Washington and Oregon are willing to commute approximately 3-5 hours to see concerts." SAC ¶¶ 208, 210. Neither of these allegations has anything to do with where "the *purchaser* can practicably turn for" promotion services. *Phila. Nat'l Bank*, 374 U.S. at 359 (emphasis added). As discussed above, it is the *artist* that purchases promotion services, not concertgoers or other promoters. Plaintiff makes no allegations showing where artists can practicably turn for promotion services. Moreover, Plaintiff's own allegations suggest that the market is broader than Oregon and Washington. AEG is based in Los Angeles, and yet somehow allegedly has power in the market for hard-ticket concert promotion. SAC ¶ 212.

Plaintiff's alleged United States market also fails because it is contradicted by Plaintiff's own allegations. Plaintiff alleges "that the average festival attendee travels twice as long as the average concert-goer" and cites to a Ticketmaster article from 2015. SAC ¶ 46, n.2 (citing https://insider.ticketmaster.com/concert-road-trips/). However, according to Ticketmaster data, "festival attendees average 3.14 hours behind the wheel" and many fans are willing to travel *internationally* and to even "cross the Atlantic to catch their favorite bands." *Id.* If customers are willing to travel further to attend a festival than a concert, Plaintiff's own allegations suggest that the market for open-air festivals is broader than the United States. In fact, Plaintiff alleges that "people travel 903 miles to get to a U.S. festival," which suggests that the relevant geographic market must include all of North America.[2] Because Plaintiff's relevant geographic market is flatly contradicted by its own allegations, its market for open-air festivals in the United States fails as a matter of law. *See QSGI, Inc. v. IBM Glob. Fin.*, No. 11-CV-80880-RYSKAMP, 2012 WL 13019046, *4 (S.D. Fl. July 31, 2012) ("[I]nconsistent allegations" do not "raise [plaintiff's] right to relief above the speculative level").

C. Plaintiff Fails to Allege Market Power (Counts 1-6).

Plaintiff's antitrust claims also fail because the SAC still fails to plausibly allege that Coachella has market power in a relevant market. *See Rick-Mik Enters., Inc. v. Equilon Enters. LLC*, 532 F.3d 963, 972 (9th Cir. 2008) ("A failure to allege power in the relevant market is a sufficient ground to dismiss an antitrust complaint."). As an initial matter, Plaintiff cannot allege market power because it has failed to properly define an antitrust market. *See Payment Logistics Limit. v. Lighthouse Network, LLC*, No. 3:18-cv-00786-L-AGS, 2018 WL 5311907, *5 (S.D.

[2] By way of example, Tijuana, Mexico is less than 200 miles from Indio, California, where Coachella takes place. *See* www.googlemaps.com. Toronto, Canada is roughly 500 miles from Chicago, Illinois, where Lollapalooza takes place. *See id.*

Cal. Oct. 24, 2018) ("Where, as here, [plaintiff] fails to sufficiently allege a relevant market definition, the Court deems it impossible to determine market power.").

Setting aside market definition, Plaintiff's allegations are insufficient to establish that Coachella has market power in *any* relevant market. As this Court recognized at the initial motion to dismiss hearing, it is not enough to allege that a defendant is "large" or "profitable." 10/4/18 Hr'g Tr. 37:10-18; *see also E & E Co. v. Kam Hing Enters., Inc.*, No. C-08-0871 MMC, 2008 WL 3916256, at *3 (N.D. Cal. Aug. 25, 2008) (defendants being "among the largest importers" and "one of the three largest suppliers" insufficient to show market power) (citations omitted). Instead, a plaintiff must show that the defendant "can restrict marketwide output and, hence, increase marketwide prices." *Rebel Oil. Co.*, 51 F.3d at 1434; *see also Witt Co. v. RISO, Inc.*, 948 F. Supp. 2d 1227, 1243-44 (D. Or. 2013) ("Market power is the ability to raise prices above those that would be charged in a competitive market.") (internal quotations omitted). Market power is required in antitrust cases because "[w]ithout market power to increase prices above competitive levels, and sustain them for an extended period, a [defendant's] actions do not threaten consumer welfare." *Rebel Oil Co.*, 51 F.3d at 1434.

Market power may be demonstrated through direct or circumstantial evidence. Direct evidence of market power requires a plaintiff to show that by reducing its own input, a defendant was able to charge supracompetitive prices. *Id.*; *see also Auto Sound Inc. v. Audiovox Electronics Corp.*, No. 12-762 JVS (MLGx), 20012 WL 12892938, *5 (C.D. Cal. Dec. 3, 2012) ("A plaintiff can show market power directly, by establishing that the defendant, by actually reducing its own input, raised market prices"). Circumstantial evidence of market power requires a plaintiff to: "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing

competitors lack the capacity to increase their output in the short run." *Rebel Oil Co.*, 51 F.3d at 1434; *see also Witt Co.*, 948 F. Supp. 2d at 1244 ("Plaintiff must plead allegations regarding barriers to entry and the lack of ability by competitors to increase their share of the market.").

A market share of less than 30 percent of the relevant market is insufficient to confer market power. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26 & n.43 (1984); *see also Prime Healthcare Servs., Inc. v. Serv. Emps. Int'l Union*, 642 F. App'x 665, 667 (9th Cir. 2016) ("[N]umerous cases hold that a market share of less than 50 percent is presumptively insufficient to establish market power.") (quoting *Rebel Oil Co.*, 51 F.3d at 1438). Relatedly, in cases challenging exclusive contracts like the radius clauses at issue here, a plaintiff must show that the contracts "foreclose competition in a substantial share of the line of commerce affected." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). Courts have routinely "quantified substantial share as 40% to 50% of the relevant market." *Nicolosi Distrib., Inc. v. FinishMaster, Inc.*, No. 18-CV-03587-BLF, 2018 WL 4904918, at *5 (N.D. Cal. Oct. 9, 2018) (citation omitted); *see also Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) (38% insufficient to show substantial foreclosure where plaintiff had alternative sources of distribution and exclusivity arrangements were less than one year in duration). Plaintiff cannot establish AEG's market power under either standard.

First, Plaintiff alleges no direct evidence of market power. Plaintiff asserts that AEG has market power in the (1) market for concert promotion in the Pacific Northwest, *see* SAC ¶¶ 61, 155, and (2) the market for open-air festivals in the United States, *see id.* ¶ 167.[3] However,

[3] Like Plaintiff's market definition allegations, Plaintiff's market power allegations are confusing and unclear. Plaintiff asserts that AEG, or sometimes Coachella, has power in various markets, some of which are completely divorced from any relevant market.

nowhere does Plaintiff allege that AEG has reduced output below, or increased price above, *competitive levels* in either market.

Second, Plaintiff also does not allege any circumstantial evidence of market power. Plaintiff not only fails to define the relevant markets, it fails to show that AEG has high market share in either market. With respect to the concert promotion market, Plaintiff alleges that AEG is "the second largest concert promoter in the United States." *Id.* ¶ 2. It also alleges that AEG is "the exclusive concert promoter for a number of artists," *id.* ¶ 67, and that it owns other promotion companies, *id.* ¶¶ 65, 66, 68. None of these allegations tells the Court anything about AEG's market share of any alleged relevant market. *See Rick-Mik Enters.*, 532 F.3d at 972 (allegation that "[defendant] rank[s] number one in the industry" insufficient to show market power). The SAC fails to even allege the total number of concert promoters in the Pacific Northwest. Thus, the Court cannot plausibly infer that AEG controls a dominant share of the concert promotion market. *See id.* at 972 (refusing to find market power were plaintiff failed to allege "what percentage of gasoline franchises are [defendant's] as compared to other franchises"); *Cherrone v. Florsheim Dev.*, No. 2:12-02069 WBS CKD, 2013 WL 772526, *3 (E.D. Cal. Feb. 28, 2013) (market power not alleged where complaint failed to allege "the percentage of homes in the relevant market built by [defendant] compared to other builders"). Nor does Plaintiff allege that competing promoters face barriers to entry in the Pacific Northwest or that such promoters lack the capacity to compete with AEG for artists.[4]

With respect to the open-air festival market, Plaintiff similarly fails to allege AEG's or

[4] *See Rebel Oil Co.*, 51 F. 3d at 1439 ("The plaintiff must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge the predator's high price."); *see also United Energy Trading, LLC v. Pac. Gas & Electric Co.*, 177 F. Supp. 3d 1183, 1192 (N.D. Cal. 2016) (refusing to find market power where plaintiff failed to allege that "requirements bar rivals from entering the market" or that "rivals lack capacity to challenge [defendant's] prices").

Coachella's market share. Plaintiff alleges that Coachella is "one of the largest, open-air music festivals in the world." SAC ¶ 2. Not only does this allegation refer to the wrong geographic market (Plaintiff alleges a United States market), the SAC does not identify the total number of open-air festivals in the United States, or any other information about the festival market from which the Court could infer that AEG controls a dominant share. In *Auto Sound Inc.*, the court rejected similar allegations, finding that the plaintiff failed to plead any facts relating to the market share of any market participants. 2012 WL 12892938, *5. While the plaintiff alleged facts relating to defendant's number of employees and annual sales, these allegations were irrelevant, as they are in this case, because Plaintiff did "not put these numbers in context." *Id.* Moreover, the SAC fails to allege any barriers to entry in the festival market, or that other large, outdoor festivals, such as Lollapalooza or Bonnaroo, are unable to increase output to compete with Coachella.

Third, and perhaps most importantly, Plaintiff fails to show how AEG has market power "over artists" or that Coachella's radius clause somehow denies Plaintiff access to the artists that Plaintiff's Soul'd Out festival requires to compete. *See, e.g.*, SAC ¶ 108. Plaintiff's allegations fail from the start because it does not *plead* a product or geographic market for artists, much less the market share of such artists subject to Coachella's radius clause. *See, e.g.*, *Top Rank, Inc. v. Haymon*, No. CV 15-4961-JFW (MRWx), 2015 WL 9948936, *8 (C.D. Cal. Oct. 16, 2015) (rejecting market power allegations that were "completely disconnected from the relevant market definition"). Plaintiff's only allegation is that "approximately 180 different artists played at Coachella." SAC ¶ 74. Even assuming each of these artists signed a radius clause, this allegation is meaningless without knowing the total number of artists in a relevant product and geographic market. Without this information, there is no way to assess what portion of the market is

purportedly "locked up" by Coachella. *See, e.g., Top Rank, Inc.*, 2015 WL 9948936, at *8 (no market power where there were "no facts" regarding "how many [championship caliber boxers] there are, how many promoters promote them, how many managers manage them, or how many of them [defendants] manage").

By comparison, in *React Presents*, a case heavily relied upon by Plaintiff, the court found that the defendant had market power in the market for EDM artists in Metro Detroit because "[defendant] produced four music festivals per year featuring as many as 100 EDM artists at each festival." 2017 WL 3616547, at *11. As a result, "*virtually every nationally recognized EDM artist* performed at one or more of [defendant's] events each year." *Id.* (emphasis added). The *React Presents* court only denied the defendant's motion to dismiss because the plaintiff could plausibly allege a particular category of musicians in a particular geographic region over which the defendant had market power. Specifically, the court found that EDM artists constituted a distinct "submarket" based on industry and public recognition and the product's unique and distinct uses, qualities, price, and price sensitivity. Plaintiff has failed to establish a similarly distinct submarket. *Id.* at *9-10.

Here, in stark contrast, Coachella takes place once each year and features artists from *many* different genres, ranging from established to up-and-coming artists. *See* SAC ¶¶ 4, 75. Plaintiff does not – and cannot – allege that Coachella books "virtually every" artist in every genre available. Nor does Plaintiff allege that Coachella has market power with respect to soul artists, the artists Plaintiff requires for its own festival.[5] According to the Bureau of Labor

[5] Plaintiff acknowledges that not all Coachella performers are interchangeable with the artists it books for Soul'd Out. According to Plaintiff, it only "presents artists from a narrow set of genres." SAC ¶ 58. This is why, among other reasons, Plaintiff alleges that there is "no . . . cross-elasticity of demand between" Coachella and Soul'd Out. *Id.* ¶ 59. The court in *React Presents* similarly found that not all artists are interchangeable. As the court put it: "just as rock

Statistics, there were more than 172,000 musicians and singers working in the United States in 2016.[6] It is implausible that Coachella has market power over artists when less than one percent of all artists performed at the festival or were subject to its radius clause. *Cf. Jefferson Parish*, 466 U.S. at 26 & n. 43 (30 percent insufficient to establish market power); *Prime Healthcare*, 642 F. App'x at 667 ("50 percent is presumptively insufficient to establish market power"). Plaintiff's failure to plausibly allege market power again, even with guidance from the Court, is reason to dismiss Plaintiff's antitrust claims with prejudice.

D. Plaintiff Lacks Antitrust Standing (Counts 1-6).

All of Plaintiffs' antitrust claims also fail because the SAC shows that Plaintiff lacks antitrust standing. To establish antitrust standing, Plaintiff must allege facts sufficient to show that it suffered "antitrust injury." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 109 (1986). That is, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). A "corollary" to the antitrust injury inquiry is the requirement "that the injured party be a participant in the same market as the alleged malefactors." *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 148 (9th Cir. 1989) (internal quotations omitted); *see also Innovation Marine Protein, LLC*, 2018 WL 1461501, *7 (Mar. 23, 2018) (dismissing antitrust claim where plaintiff was not a participant in the relevant market).

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concerts have a distinctive customer base, common sense supports [the] assertion that consumers do not view non-rock concerts as substitutes for rock concerts." 2017 WL 3616547, *10 (internal quotations omitted).

[6] *See* Bureau of Labor Statistics, "Quick Facts: Musicians and Singers," *available at* *https://www.bls.gov/ooh/entertainment-and-sports/musicians-and-singers.htm#TB_inline?height=325&width=325&inlineId=qf-number-jobs* (last updated April 13, 2018).

Here, Plaintiff alleges in no uncertain terms that "the Soul'd Out Music Festival *does not compete* directly with Coachella" in the alleged festival market. SAC ¶ 59 (emphasis added). Unlike Coachella, Plaintiff contends that Soul'd Out "does not have nationwide draw. It is not a destination event. The cost of attendance is a fraction of Coachella's and other outdoor festivals." *Id.* (emphasis added). Plaintiff goes so far as to say that "there is no identifiable cross-elasticity of demand between these products." *Id.* In fact, Plaintiff alleges it is not a festival at all, but instead "is in the market for hard-ticket concert promoters." *Id.* ¶ 60. Plaintiff cannot show antitrust injury when by its own admission, it is not a competitor (or a customer) in the alleged festival market where the alleged wrongdoing occurred.

E. Counts 2, 3, 4, 5, and 6 of Plaintiffs' Antitrust Claims Fail for Additional, Independent Reasons.

Each of Plaintiff's antitrust claims (Claims I, II, and III) fail for the reasons set forth above, namely, Plaintiff's failure to plead a relevant product market, relevant geographic market, market power, and antitrust standing. Counts two through six of Plaintiff's antitrust claims also fail for additional, independent reasons as set forth below.

i. Plaintiff Fails to Allege a Tying Claim (Count 2).

Plaintiff alleges a tying claim after previously conceding that it was not bringing such a claim in the First Amended Complaint. *See* Pl.'s Response to Defs.' Mot. to Dismiss (Dkt. No. 19) at 24. To state a tying claim, Plaintiff must plausibly allege:

> (1) that the defendant tied together the sale of two distinct products or services; (2) that the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product; and (3) that the tying arrangement affects a 'not insubstantial volume of commerce in the tied product market.'[7]

[7] The Ninth Circuit also requires that the defendant have an economic interest in the tied product. *Cty of Tuolumne v. Sonora Cty. Hosp.*, 236 F.3d 1148, 1157 (9th Cir. 2001).

Rick-Mik Enters. Inc., 532 F.3d at 971 (internal quotations omitted). Plaintiff's allegations fail to satisfy these elements.[8]

First, Plaintiff fails to allege a tie. "[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to *force* the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish*, 466 U.S. at 12 (emphasis added). "[W]here the buyer is free to take either product by itself there is no tying problem…" *Robert's Waikiki U-Drive, Inc. v. Budget Rent-a-Car Sys., Inc.*, 732 F.2d 1403, 1407 (9th Cir. 1984) (quotation omitted) (alteration in original); *see also Cissne v. CHS, Inc.*, No. CV-06-100-LRS, 2007 WL 1747162, *2 (E.D. Was. June 15, 2007) ("Where the buyer is expressly and realistically free to buy elsewhere, the absence of a tie is readily demonstrated.").

Here, Plaintiff alleges that AEG tied together "open air music festivals" (the tying product) and "hard-ticket concert performances and 'themed events' in the Pacific Northwest" (the tied product). SAC ¶¶ 163, 220, 278. More specifically, Plaintiff alleges that "if an artist performs at Coachella, that artist is required to use AEG's concert promotion business or venues if he or she wants to perform within the radius . . ." *Id.* ¶ 168. But nothing in the radius clause requires an artist who performs at Coachella to use AEG's promotion services or AEG venues.

[8] Plaintiff alleges that the radius clause is a *per se* unlawful tying arrangement. However, the Supreme Court has "reject[ed] the application of a *per se* rule that all tying arrangements constitute antitrust violations." *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 36 (2006) (citation omitted). Moreover, the Ninth Circuit generally requires the plaintiff to show anticompetitive effects in the tied product market. *See Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1201 (9th Cir. 2012) ("[P]laintiffs must also allege facts showing that an injury to competition flows from the . . . tying arrangements."); *Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1089 (9th Cir. 2009) ("The injury caused by an unlawful tying arrangement is reduced competition in the market for the tied product."); *see also Sidibe v. Sutter Health*, 4 F. Supp. 3d 1160, 1179 (N.D. Cal. 2013) ("[T]he tying claims fail because the SAC does not plead facts showing any negative impact on competition in the tied markets."). Accordingly, Count 2 should be evaluated under the rule of reason.

Id. ¶ 5. Moreover, under the radius clause, an artist may perform at *any* non-festival event anywhere in the United States (with the exception of a handful of counties in California for five months). *Id.* Artists have any number of choices: they can perform at Coachella (or not), they can perform at AEG events or venues (or not), and/or they can perform at events by other promoters or venues (or not). Such an arrangement clearly is not a tie. *See, e.g., Sambreel Holdings LLC v. Facebook, Inc.*, 906 F. Supp. 2d 1070, 1080 (S.D. Cal. 2012) (no tie where "Facebook users have a choice; they can comply with Facebook's terms and uninstall the software, or they can maintain [plaintiff's] applications and opt to use other social networking sites"); *see also Live Universe, Inc. v. MySpace, Inc.*, 304 Fed. App'x 554, 557 (9th Cir. 2008) (no tie where "[c]onsumers remain free to choose which online social networks to join . . .").

Second, Plaintiff fails to plausibly allege two distinct product markets. *Jefferson Parish*, 466 U.S. at 21 ("[A] tying arrangement cannot exist unless two separate product markets have been linked."). Here, Plaintiff alleges that AEG tied together "open air music festivals and hard-ticket concert performances and 'themed events' in the Pacific Northwest." SAC ¶¶ 163, 220, 278. Neither market is plausibly alleged. Plaintiff's alleged market for open air music festivals (the tying product) is defective for the reasons set forth above. Plaintiff's alleged market for "hard-ticket concert performances and 'themed events'" (the tied product) is not explained anywhere. While there are allegations related to hard-ticket concert performances, Plaintiff alleges no facts relating to "themed events" and how they purportedly belong in the same market.

Third, Plaintiff fails to allege market power in the tying product market. As discussed above, Plaintiff fails to allege any facts showing that AEG has market power in the market for open-air festivals. In tying cases, courts have also routinely found that "the law 'prohibits an antitrust claimant from resting on market power that arises solely from contractual rights that

consumers knowingly and voluntarily gave to the defendant.'" *Oracle Am., Inc. v. CedarCrestone, Inc.*, 938 F. Supp. 2d 895, 908 (N.D. Cal. 2013) (quoting *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1048 (9th Cir. 2008)); *see also Rick-Mik Enters., Inc.*, 532 F.3d at 973 (same). That is precisely what Plaintiff purports to do here. Plaintiff alleges that the radius clause – which artists voluntarily enter into with AEG – somehow gives AEG market power over the artists. Market power cannot legally be inferred from this type of voluntary arrangement. *See* SAC ¶¶ 2-3 (Coachella "is a sought-after performance venue for rising and established artists."); *see also Creative Mobile Techs., LLC v. Flywheel Software, Inc.*, No. 16-cv-02560-SI, 2016 WL 5815311, *4 (N.D. Cal. Oct. 5, 2016) ("contractual obligations [are] not a cognizable source of market *power*") (internal quotations omitted). Plaintiff's tying claim should be dismissed with prejudice.

ii. The Quick Look Doctrine Does Not Apply (Count 3).

Plaintiff asks the Court to apply the "quick look" doctrine to Plaintiff's antitrust claims in Count 3. As a threshold matter, the quick look doctrine is not a cognizable claim, it is a standard of review, and Plaintiff does not explain which claims (if any) Plaintiff believes are subject to that standard of review.

Nevertheless, the quick look doctrine only applies where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999). Where, as here, "an arrangement 'might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition,' then a 'quick look' form of analysis is inappropriate." *Cal. ex rel. Harris. v. Safeway, Inc.*, 651 F.3d 1118, 1134 (9th Cir. 2011) (quoting *Cal. Dental*, 526 U.S. at 771). Moreover, the Supreme Court recently reaffirmed

in *Ohio v. American Express Company* that for "vertical agreements," like those between AEG and artists challenged here, courts must apply a full rule of reason analysis and the quick look doctrine does not apply. 138 S.Ct. 2274, 2303 (2018); *see also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 318 (3d Cir. 2010) ("Under the Supreme Court's jurisprudence, virtually all vertical agreements now receive a traditional rule-of-reason analysis.").

The rule of reason applies to Plaintiff's claims. Even prior to the Supreme Court's dispositive ruling in *American Express*, the *React Presents* court refused to apply the quick look doctrine to radius clauses in artist contracts. 2017 WL 3616547, at *7. The court found "the likelihood of anticompetitive effects of the radius clauses at issue is comparably not as obvious or as easily ascertained as with [other] restraints," such as "an absolute ban on competitive bidding" or "a horizontal agreement among . . . participating dentists to withhold from their customers a particular service that they desire." *Id.* (internal quotations omitted). The court also found "the procompetitive justification proffered by [defendant]—to protect attendance at [defendant's] events from being diminished by fans attending another performance of a featured artist elsewhere near the same date and location—is not as easily rejected." *Id.* The same is true here. The Coachella radius clause is not an "absolute ban" on artist performances. Instead, it applies primarily to *festivals* in North America. Furthermore, the same procompetitive justification acknowledged by the *React Presents* court applies here: Plaintiff *conceded* in its initial complaint that the radius clause prevents other festivals like Soul'd Out from unfairly free-riding on AEG's investment in selecting its artist lineup and bringing those artists to the West Coast to play at the Coachella festival. *See* Compl. (Dkt. No. 1) ¶ 55.

iii. Plaintiff Fails to Allege a Conspiracy Among Promoters (Count 4).

Plaintiff again alleges that AEG entered into some type of agreement with other festival promoters. SAC ¶¶ 183, 240, 298. Plaintiff's horizontal conspiracy claim is just as baseless as it was in the FAC and should be dismissed with prejudice. In order to plead a conspiracy under Section 1 of the Sherman Act, Plaintiff must allege "enough factual matter (taken as true) to suggest that an agreement was made." *Twombly*, 550 U.S. at 556. Plaintiff must allege facts showing a "unity of purpose or common design and understanding, or a meeting of minds in an unlawful arrangement. . . ." *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

Here, the only fact supporting Plaintiff's assertion of a conspiracy is that Coachella's radius clause "created exceptions for three competing festivals: SXSW in Austin, Texas, Ultra in Miami, and Jazz Fest in New Orleans." SAC ¶¶ 111, 184, 241, 299. In other words, the mere fact that AEG chose to exempt three festivals from its radius clause means the promoters of those festivals must have conspired. Permitting such a conclusory allegation to survive would eviscerate Plaintiff's pleading burden. The SAC does not allege that AEG communicated with any of the festivals, much less that there was a meeting of minds in some type of unlawful arrangement. The SAC does not even allege that the other festivals used radius clauses with similar exceptions. The baseless nature of Plaintiff's claim is only underscored by Plaintiff's suggestion that AEG conspired with Jazz Fest, a festival that is co-produced by AEG. *Id.* ¶ 102. It is well-established that a firm cannot conspire with itself. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 770 (1984). Plaintiff's naked assertion that AEG conspired with other festival promoters in drafting its radius clause should be dismissed with prejudice.

iv. Plaintiff Fails to Allege a West Coast Market (Count 5).

Plaintiff purports to allege an "alternative" market in Count 5 comprised of the "market for live, popular music performances in which four or more artists are performing on the West Coast of the United States (California, Oregon, Washington, Arizona, and Nevada)." SAC ¶¶ 188, 245, 303. As a threshold matter, Plaintiff does not explain which claims (if any) Plaintiff believes are subject to this "alternative" market. More fundamentally, the market fails because the allegations set forth in Count 5 are conclusory. Plaintiff alleges no facts relating to a product market for "live, popular music performances" involving four or more artists or to a West Coast market. The Court rejected a nearly identical market alleged in the FAC because it was conclusory, and should do so again here. *See* FAC ¶¶ 80, 81; 10/4/18 Hr'g Tr. 39:20-40:25.

v. Plaintiff Fails to Allege a Hub and Spoke Conspiracy (Count 6).

Plaintiff makes a new and entirely unsubstantiated "hub and spoke" conspiracy allegation against AEG in which Plaintiff alleges that AEG facilitated a horizontal agreement among artists to boycott Plaintiff. SAC ¶¶ 191, 249, 307. To state a hub and spoke conspiracy claim, Plaintiff must plausibly allege: "(1) a hub, such as a dominant purchaser; (2) spokes, such as competing manufacturers or distributors that enter into vertical agreements with the hub; and (3) the rim of the wheel, which consists of horizontal agreements among the spokes." *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1192 (9th Cir. 2015). Plaintiff apparently alleges that AEG is the "hub" and artists are the "spokes."

Plaintiff's claim fails because it does not allege facts showing that artists conspired to boycott non-AEG venues and promoters. In support of its claim, Plaintiff's only allegation is that artists *knew* about the radius clause. SAC ¶ 249. Mere knowledge of a business practice is insufficient as a matter of law to allege an antitrust conspiracy. *See, e.g., Kendall v. Visa U.S.A.,*

Inc., 518 F.3d 1042, 1048 (9th Cir. 2008) ("[M]erely charging, adopting, or following the fees set by a Consortium is insufficient as a matter of law to constitute a violation of Section 1 of the Sherman Act"). To plead a conspiracy, a plaintiff must allege "a conscious commitment to a common scheme designed to achieve th[e] unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). Plaintiff does not – and cannot – allege such facts here, and therefore Plaintiff's hub and spoke conspiracy claim should be dismissed with prejudice.

II. PLAINTIFF FAILS TO STATE AN INTENTIONAL INTERFERENCE CLAIM (CLAIMS IV, V, VI).

Each of Plaintiff's claims for intentional interference with contract and economic relations fail because Plaintiff does not, and cannot, allege that (1) AEG had knowledge of Plaintiff's purported relationships with Tank and the Bangas, SZA, or Daniel Caesar at the time it signed its agreements with these artists; (2) that AEG intended to interfere with these alleged relationships when they signed the radius clause; or (3) that the radius clause was independently wrongful.[9] Each of these claims must be dismissed.

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[9] The elements of these claims overlap. To state a claim for intentional interference with prospective economic advantage under California law (Count IV), plaintiff must plausibly allege: (1) "an economic relationship between the plaintiff and another, containing a probable future economic benefit or advantage to plaintiff"; (2) the "defendant's knowledge of the existence of the relationship"; (3) the "defendant's intentional conduct designed to interfere with or disrupt the relationship"; (4) "actual disruption" of the relationship; (5) "damage to the plaintiff as a result of defendant's acts." *Marin Tug & Barge, Inc. v. Westport Petroleum, Inc.*, 271 F.3d 825, 831 n.8 (9th Cir. 2001) (citing *Della Penna v. Toyota Motor Sales, USA, Inc.*, 902 P.2d 740, 743 n.1 (Cal. 1995)).

To state a claim for intentional interference with contractual relations under California law (Count V), Plaintiff must plausibly allege "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 55 (1998) (citation omitted).

Finally, to state a claim for intentional interference with economic relations under Oregon law (Count VI), Plaintiff must plausibly allege "(1) the existence of a professional or business relationship; (2) intentional interference with that relationship; (3) by a third party; (4)

A. Plaintiff Fails to Allege that AEG had Knowledge of a Contract or Relationship.

To state a claim for intentional interference, Plaintiff must allege sufficient facts to show that AEG had knowledge of the purported economic relationship at the time it allegedly interferes with that relationship. *See Marin Tug & Barge, Inc.*, 271 F.3d at 831 n.8 (plaintiff must show "defendant's knowledge of the existence of the relationship" to plead intentional interference with prospective economic advantage); *Quelimane Co.*, 19 Cal. 4th at 55 (plaintiff must plead "defendant's knowledge of this contract" to plead intentional interference with contract); *Nw. Natural Gas Co.*, 328 Or. at 497 (plaintiff must plead "intentional interference with [a] relationship" to plead intentional interference with economic relations). Here, Plaintiff has not – and cannot – allege that AEG had knowledge of any contract or economic relationship between Plaintiff and artists at the time AEG signed its agreements with those artists, and therefore each of those intentional interference claims fail.

At the initial motion to dismiss hearing, the Court recognized that Plaintiff's contrary legal view was "wrong" and dismissed Plaintiff's tort claims with leave to amend:

> THE COURT: The real issue is do you allege and can you allege that defendant was aware of any actual or potential relationship when the musicians signed the radius clause? You're focusing on when the radius clause was enforced.
>
> MR. ALDRICH: Yes, Your Honor. So --
>
> THE COURT: And I think that's the wrong point in time to think about intentional interference. I think you have to think about it in terms of when the radius clause was signed.

See 10/4/18 Hr'g Tr. 42:17-25. While Plaintiff was given leave to amend to allege facts establishing AEG's knowledge of Plaintiff's contracts or relationships with artists, Plaintiff has

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accomplished through improper means or for an improper purpose; (5) a causal effect between the interference and damage to the economic relations and (6) damages." *Nw. Nat. Gas Co. v. Chase Gardens, Inc.*, 328 Or. 487, 497 (1999) (citations omitted).

failed to add such facts to the SAC. For example, the only artist with whom Plaintiff alleges it *ever* had a contract or relationship was Tank and the Bangas. SAC ¶¶ 113-139. However, Plaintiff does not allege that AEG had any knowledge of this contract or relationship at the time AEG signed its agreement with the group, or even that AEG contracted with Tank and the Bangas for Coachella *after* Plaintiff's agreement was executed. AEG could not have known about an agreement with Plaintiff that did not exist at the time it was negotiating with Tank and the Bangas. *See ErgoCare, Inc. v. D.T. Davis Enters., Ltd.*, No. CV 12-02106, 2013 WL 12246342, at *7 (C.D. Cal. Dec. 26, 2013) (dismissing claim where no allegation that defendant "knew it was interfering with a contractual relationship and intended to induce a breach of contract, or knew that interference with a contract '[wa]s certain or substantially certain to occur as a result of [its] action.'") (citation omitted).

Similarly, Plaintiff alleges that the only other artists, Daniel Caesar and SZA, turned down offers to perform at the Soul'd Out Music Festival because they already had *existing* agreements to perform at Coachella. *See* SAC ¶¶ 127, 134; *see, e.g., Dolin v. Facebook, Inc.*, No. C 18-0950, 2018 WL 2047766, at *4 (N.D. Cal. May 2, 2018) (dismissing claim in part because allegation that defendant must have known about plaintiff's economic relationship with defendant's customers was too speculative). Plaintiff does not allege that AEG had any knowledge of Plaintiff's specific contracts or relationships with these artists *before* signing them to play Coachella. Accordingly, Plaintiff has failed to plead a claim for intentional interference, and Plaintiff's Fourth, Fifth, and Sixth Claims for relief should be dismissed.

B. Plaintiff Fails to Allege that AEG Intentionally Interfered with a Contract or Relationship.

Plaintiff must allege sufficient facts showing that AEG *intentionally* interfered with a contract or economic relationship. Plaintiff alleges no facts showing that AEG *intended* to

interfere with Plaintiff's contracts or relationships when it drafted or negotiated its artist agreements. *See Marin Tug & Barge, Inc.*, 271 F.3d at 831 n.8; *Quelimane Co.*, 19 Cal. 4th at 55; *Nw. Natural Gas Co.*, 328 Or. at 497. In fact, the SAC concedes that radius clauses are not somehow aimed at Plaintiff by affirmatively alleging that "AEG requires all or substantially all artists who perform at Coachella to execute an agreement containing the Radius Clause . . . ." SAC ¶ 78. If *all* artists are bound by the clause, then they were not specifically intended to interfere with relationships (if any) between Plaintiff and Tank and the Bangas, SZA, or Daniel Caesar. At most, Plaintiff's allegations show that AEG and artists sought nothing more than to honor the terms of pre-existing commitments.

C. Plaintiff Fails to Allege that AEG's Conduct was Independently Wrongful.

To state a claim for intentional interference, Plaintiff must allege that AEG's conduct was wrongful by some measure independent of the alleged interference itself. *See Nw. Natural Gas Co.*, 328 Or. at 498; *Della Penna*, 902 P.2d at 751. Where, as here, the plaintiff has failed to plausibly allege that the defendant's conduct violates the law, courts dismiss claims for intentional interference because the conduct is not independently wrongful. *See Song Fi, Inc. v. Google, Inc.*, No. C 14-5080 CW, 2016 WL 1298999, at *12 (N.D. Cal. Apr. 4, 2016) (dismissing claim because plaintiffs "fail to allege any wrongful conduct other than the fact of interference itself"); *Hsu v. OZ Optics Ltd.*, 211 F.R.D. 615, 621 (N.D. Cal. 2002) (same); *Int'l Longshore & Warehouse Union v. ICTSI Or., Inc.*, 15 F. Supp. 3d 1075, 1108-10 (D. Or. 2014) (dismissing claim in part because plaintiff did not sufficiently allege that the defendant acted with an "improper purpose or improper means").

For the reasons set forth above, because Plaintiff fails to plausibly allege that AEG's conduct violated the antitrust laws, AEG's conduct cannot serve as the basis for an intentional

interference claim. While Plaintiff cites to California Business and Professional Code § 16600 and Oregon's common law on non-compete agreements, the Court dismissed these claims against AEG *with prejudice* because Plaintiff did not have standing to bring those claims, Order (Dkt. No. 34), and Plaintiff cannot circumvent this Court's order by repackaging them as tort claims. *See Bowhead Info. Tech. Servs, LLC, v. Catapult Tech.*, 377 F. Supp. 2d 166, 175 (D.D.C. 2005) (assuming for purposes of tortious interference claim that non-compete agreement was valid because plaintiff lacked standing to challenge agreement).[10] For each of these independent reasons, Plaintiff's Fourth, Fifth, and Sixth Claims should be dismissed with prejudice.

III. PLAINTIFF FAILS TO STATE A CLAIM FOR UNFAIR COMPETITION (CLAIM VII).

Plaintiff alleges that AEG engaged in "unlawful and "unfair" practices and is therefore liable under California's Unfair Competition Law ("UCL"). SAC ¶ 365. Plaintiff's claim fails at the threshold because the UCL does not apply to claims brought by non-residents of California for conduct that occurred outside of California. *Tidenberg v. Bidz.com, Inc.*, No. CV 08-5553 PSG (FMOx), 2009 WL 605249, *4 (C.D. Cal. Mar. 4, 2009) ("[T]he UCL was neither designed or intended to regulate claims of non-residents arising from conduct occurring entirely outside of

[10] Plaintiff alleges that AEG's actions were wrongful because AEG "fraudulently informed artists that the Soul'd Out Music Festival is a 'festival' within the meaning of the Radius Clause, whereas it is not." SAC ¶¶ 322, 334, 346. This is nonsense. Counsel for Plaintiffs conceded at the initial motion to dismiss hearing that Coachella and Soul'd Out "are both popular music festivals, as defined by their radius clause, which defines festivals as any performance with four or more performers." 10/4/18 Hr'g Tr. 25:13-16. Moreover, Plaintiff's own website calls itself a "music festival." *See* http://www.souldoutfestival.com/. Plaintiff has not – and cannot – allege that AEG knew that Plaintiff's own representations (to the public and now to the Court) regarding its status as a "music festival" were false or that AEG intended to deceive anyone. *Hackethal v. Nat'l Cas. Co.*, 189 Cal. App. 3d 1102, 1111 (Cal. Ct. App. 1987) (California elements of fraud: (1) misrepresentation; (2) knowledge of the falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damage).

California."); *see also Nw. Mortg., Inc. v. Super. Ct.*, 72 Cal. App. 4th 214, 222-23 (1999) (dismissing UCL claim brought by non-residents for conduct outside of California). Plaintiff is a resident of Oregon bringing a claim for conduct that occurred *in Oregon*. That is, the purported enforcement of the radius clause against the Soul'd Out festival.

Plaintiff's claim also fails because its allegations are insufficient to show an act or practice that is unlawful or unfair under California Business & Professional Code § 17200.[11] *See, e.g. Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1554 (2007) (citation omitted). Plaintiff's claim that AEG's conduct is "unlawful" for purposes of the UCL rises or falls with the rest of its claims, which all fail for the reasons set forth above. *See Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012) ("To be 'unlawful' under the UCL, the advertisements must violate another 'borrowed' law.") (citing *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 179-80 (1999)). As with its tort claims, Plaintiff tries to bootstrap its UCL claim by citing to California Business and Professional Code § 16600 and Oregon's common law on non-compete agreements. SAC ¶¶ 356-358. But the Court dismissed these claims *with prejudice*, Order (Dkt. No. 34), and cannot circumvent this Court's order by arguing those laws are violated in the context of its UCL claim.[12] Plaintiff's claim that the radius

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[11] Plaintiff does not allege that AEG engaged in conduct that is fraudulent, an alternative basis of liability under the UCL.

[12] *See, e.g., Ng v. US Bank, NA*, No. 15-CV-04998-KAW, 2016 WL 5390296, at *8 (N.D. Cal. Sept. 26, 2016), *aff'd sub nom. Ng v. U.S. Bank, NA*, 712 F. App'x 665 (9th Cir. 2018) ("Plaintiff cannot plead a UCL claim based on unlawful business practices because the predicate violations have been dismissed with prejudice" due in part to the fact that Plaintiff lacked standing to bring predicate claim) (citing *Pantoja v. Countrywide Home Loans, Inc.*, 640 F. Supp. 2d 1177, 1191 (N.D. Cal. 2009) ("[S]ince the Court has dismissed all of Plaintiff's predicate violations, Plaintiff cannot state a claim under the unlawful business practices prong of the UCL")); *Monreal v. GMAC Mortg.*, LLC, 948 F. Supp. 2d 1069, 1076 (S.D. Cal. 2013) ("Because the Court dismisses each of Plaintiff's individual claims, none of these claims can serve as the predicate acts under the UCL's unlawful prong."); *Simila v. Am. Sterling Bank*, 2010

clause is unlawful therefore fails for all the reasons discussed herein.

Similarly, Plaintiff's claim that AEG's conduct is "unfair" fails because Plaintiff fails to allege facts showing:

> [1] conduct that threatens an incipient violation of an antitrust law, or [2] violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or [3] otherwise significantly threatens or harms competition.

Cel-Tech Commc'ns, Inc., 20 Cal. 4th at 187. *First*, the radius clause does not "threaten[] an incipient violation of an antitrust law" because Plaintiff has failed to state a plausible antitrust claim. *Id.*; *see also Manwin Licensing Int'l S.A.R.L v. ICM Registry, LLC.*, No. CV 11-9514 PSG (JCGx), 2013 WL 12123772, at *8 (C.D. Cal. Feb. 26, 2013) ("Where a party's UCL allegations are based on alleged antitrust violations, the failure to allege an antitrust violation results in the failure to allege unfair competition."); *In re Apple iPod iTunes Antitrust Litig.*, 796 F. Supp. 2d 1137, 1147 (N.D. Cal. 2011) ("Under California law, if the same conduct is alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason, then the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' toward consumers.") (internal quotations omitted).

Second, Plaintiff's allegations do not, and cannot, show that the radius clause has resulted in effects that "are comparable to or the same as a violation of [antitrust] law." *LiveUniverse* 2007 WL 6865852, at *18 ((internal quotations omitted). Plaintiff's theory is that Coachella's radius clauses harm because of Coachella's market power over artists. But Plaintiff fails to allege any facts showing such market power, given the thousands of artists are available to promoters like Plaintiff. As such, Plaintiff cannot plausibly allege effects "comparablefvolunt" to a

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WL 3988171, at *5 (S.D. Cal. Oct. 12, 2010) (dismissing claim for unlawful competition because all causes of action which the claim "borrows" are dismissed).

violation of the antitrust laws. *See, e.g.*, *Oracle Am., Inc.* 938 F. Supp. at 908 (dismissing unfair competition claim when the plaintiff did not sufficiently allege market power in antitrust claim); *Sidibe*, 4 F. Supp. 3d at 1181 (same).

Third, for the same reasons, Plaintiff has not plausibly shown that the radius clause "otherwise significantly threaten[s] or harm[s] competition." *Cel-Tech Commc'ns, Inc.*, 20 Cal. 4th at 187. In support of its unfair competition claim, Plaintiff recites the same allegations made in support of its other claims, and therefore those allegations are insufficient to state an independent UCL claim. *See, e.g.*, SAC ¶¶ 363, 366; *see also LiveUniverse, Inc.*, 2007 WL 6865852, at *18; *Manwin Licensing Int'l S.A.R.L.*, 2013 WL 12123772, at *8 ("Because [plaintiff] fails to distinguish its allegations as to the UCL claim from the allegations as to the federal antitrust claims . . . the motion to dismiss the UCL claim is GRANTED . . .") (emphasis in original). Plaintiff's allegations of harm to its business are insufficient. *See Orchard Supply Hardware LLC*, 939 F. Supp. at 1010–11. Plaintiff's Seventh Claim for Relief should be dismissed.

CONCLUSION

For the foregoing reasons, AEG respectfully requests that the Court dismiss Plaintiff's Second Amended Complaint with prejudice.

DATED: November 15, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed **MOTION TO DISMISS SECOND AMENDED COMPLAINT BY DEFENDANTS ANSCHUTZ ENTERTAINMENT GROUP, INC.; THE ANSCHUTZ CORPORATION; GOLDENVOICE, LLC; AEG PRESENTS, LLC; and COACHELLA MUSIC FESTIVAL, LLC** with the Clerk of the Court using the CM/ECF system which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies the recipients of electronic notice.

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