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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 FIRST 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") on Monday, May 7, 2018 and Tuesday, June 12, 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 First Amended Complaint ("FAC") (Dkt. #17) in its entirety.

MOTION

AEG, by and through its undersigned counsel, hereby moves the Court to dismiss the FAC under Fed. R. Civ. P. 12(b)(6) on the grounds that (1) Plaintiff lacks antitrust standing; (2) Plaintiff has failed to plausibly allege essential elements of an antitrust claim, including the definition of the relevant market and anticompetitive effects; (3) Plaintiff lacks standing to challenge the enforceability of the radius clause in AEG's artist agreements; (4) Plaintiff has failed to plausibly allege a claim for interference with contract or economic relations; and (5) 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

Mere days before the Coachella Valley Music and Arts Festival ("Coachella"), Plaintiff filed suit against AEG, alleging various claims under state and federal law. The thrust of Plaintiff's complaint is that it was unable to book three artists for its own music festival, which is scheduled at the same time as Coachella, because those artists were subject to a "radius clause" in their agreements with AEG for Coachella. Plaintiff alleges that the radius clause "restricts the ability of artists to perform or advertise other performances besides Coachella." FAC ¶ 5. According to Plaintiff, this radius clause (1) violates Section 1 of the Sherman Act, Oregon's antitrust statute, and California's Cartwright Act; (2) is an invalid restraint of trade under

California and Oregon law; (3) amounts to tortious interference with Plaintiff's contracts or economic relations under California and Oregon law; and (4) violates California's Unfair Competition Law ("UCL"). Though Plaintiff has purported to state various claims under various laws, the threadbare allegations in the FAC are insufficient to state a single claim for relief.

First, Plaintiff fails to state an antitrust claim under state or federal law because the factual allegations in the FAC are insufficient to satisfy the essential elements of an antitrust claim. As a threshold matter, Plaintiff fails to plead antitrust standing, which is separate and distinct from Article III standing. To plead antitrust standing, Plaintiff must allege facts showing harm to some market *as a whole*. The allegations in the FAC fall woefully short of this standard. Plaintiff alleges harm to its individual business interests, but not to any properly defined antitrust market. The antitrust laws are designed to protect *competition*, not *competitors*, and thus these allegations are insufficient to establish antitrust standing as a matter of law. Plaintiff's factual allegations are also insufficient to plead a relevant market or anticompetitive effects, which are both required elements of an antitrust claim. Plaintiff makes naked assertions about what the relevant market is and how the radius clause has allegedly harmed competition. Conclusory allegations, such as these, are not entitled to a presumption of truth and are insufficient to plead a plausible antitrust claim.

Second, Plaintiff fails to state a claim for unlawful restraint of trade under California and Oregon law because, as a threshold matter, Plaintiff lacks standing. It is well-established that to challenge the validity of a contract, a plaintiff must be a party or third-party beneficiary to that contract. There are no facts alleged in the FAC showing, or even suggesting, that Plaintiff has any privity to the alleged artist agreements. Plaintiff's claim under Oregon law further fails because the factual allegations in the FAC *confirm* that the radius clause is enforceable. That is, that the radius clause is limited in time and scope, was made in response to consideration, and most importantly, is *reasonable*. Plaintiffs' true gripe with the radius clause is that it prevents Plaintiff from free-riding on the popularity of Coachella and the investment AEG has made in

developing its artist lineup and ensuring those artists play at Coachella. Indeed, Plaintiff admitted in the initial Complaint that its concern with the radius clause is that it would have to "pay more money to bring artists in who are not already scheduled to be on the West Coast during Plaintiff's festival." *See* Compl. ¶ 55. It is more than reasonable for AEG to take steps to prevent this type of free-riding from taking place.

Third, Plaintiff fails to state a claim for intentional interference with contract or economic relations because the factual allegations in the FAC are insufficient to establish multiple essential elements. Among other things, there are no facts showing that AEG had knowledge of Plaintiff's alleged contract with Tank and the Bangas, or its purported relationships with two other artists, *before* it entered into its own artist agreements. To the contrary, the allegations in the FAC suggest that AEG had contracted with at least two of these artists to perform at Coachella before Plaintiff ever initiated negotiations. It is implausible that AEG intentionally interfered with Plaintiff's contract or economic relations when there are no facts establishing that AEG knew about the relationships in the first place. Similarly, there are insufficient facts to show that AEG's conduct was independently wrongful.

Finally, Plaintiff's claim for unfair competition under California law fails because Plaintiff has failed to allege conduct that is unlawful or unfair. Insofar as Plaintiff fails to plausibly allege any of its other legal claims, Plaintiff has failed to show that the radius clause is unlawful. To show that the radius clause is unfair, Plaintiff must allege facts showing that the radius clause threatens a violation of the antitrust laws, violates the spirit or policy of the antitrust laws, or significantly threatens harm to competition. Because Plaintiff fails to allege an antitrust claim in the first place, and does not allege any anticompetitive effects flowing from the radius clause, Plaintiff cannot plausibly allege that the radius clause is unfair under the UCL and its claim must be dismissed.

For all of these reasons, and those set forth herein, AEG respectfully requests that the Court dismiss the FAC in its entirety.

STATEMENT OF FACTS

Coachella is a multi-day, outdoor music festival that features artists in multiple music genres, including rock, indie, hip-hop, and electronic dance music. FAC ¶¶ 2, 36. Founded in 1999, Coachella takes place annually in April at the Empire Polo Club in Indio, California.[1] *Id.* ¶¶ 2, 34, 35, 36. The festival takes place on multiple stages and over two consecutive three-day weekends. *Id.* ¶¶ 2, 36. This year, Coachella took place from April 13-15 and April 20-22, 2018. *Id.* ¶ 36.

In 2017, roughly 250,000 people attended Coachella, making it one of the largest music festivals in the world. *Id.* ¶ 2, 4. Like other festivals, "the participation of prominent artists is key" to Coachella's success. *See id.* ¶ 37. Each year, AEG contracts with rising and established artists to perform at Coachella. *Id.* Because of its popularity, Coachella is a "sought after performance opportunity for many rising artists." *Id.* ¶ 4, 37.

In 2010, more than a decade after the first Coachella music festival, Plaintiff Soul'd Out Productions ("Plaintiff") founded the Soul'd Out Music Festival in Portland, Oregon. *Id.* ¶ 31-32. The Soul'd Out Music Festival takes place across several indoor venues and features soul, jazz, and hip-hop artists. *Id.* ¶ 14, 32, 39. This year, the Soul'd Out Music Festival took place at the same time as Coachella from April 18-22, 2018. *See id.* ¶ 36, 56; *see also* http://www.souldoutfestival.com/.

In April 2018, before either festival began, Plaintiff brought suit against AEG, alleging that AEG violated state and federal law by including a radius clause in its artist agreements that "restricts artists' performances both geographically and temporally" outside of Coachella.

[11] The only year Coachella did not take place was in 2000. FAC ¶ 34.

Compl. (Dkt. #1) ¶ 33. After Plaintiff filed its initial Complaint, AEG reached out Plaintiff's counsel to discuss ways to resolve the parties' dispute without proceeding to litigation. At Plaintiff's request, and in connection with those discussions, AEG provided Plaintiff with the current language of the radius clause used in its artist agreements for Coachella. In providing this information, AEG's counsel made clear that it was for purposes of settlement only, stating in bold print at the top of its email: "**Fed. R. Evid. 408 Communication**." *See* Exhibit 1 to FAC.

Barely two weeks after providing this information, Plaintiff filed the FAC. Without any forewarning to AEG, Plaintiff amended its initial Complaint to refer to AEG's confidential settlement communication, *see* FAC ¶ 7, and attached the communication as Exhibit 1 to the FAC. Plaintiff reprinted verbatim the text of the radius clause in the body of the FAC, and added new allegations that are based entirely on the information provided by AEG as part of its Rule 408 communication. *See id.* ¶¶ 6-13, 43, 51, 55, 83-85, 98-100. Plaintiff included this information in the FAC without conferring with AEG about whether such action was proper or if the radius clause was confidential.

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 Barbra, Ventura or San Diego Counties from December 15, 2017 until May 1, 2018." *Id.* ¶ 6. Outside of these seven counties, an artist may play any non-festival concert at any time. *Id.* The radius clause also includes certain limitations on when an artist may "advertise, publicize, or leak" a performance, festival, or tour date. *Id.* For example, an artist may not announce a tour date in California, Arizona, Washington and Oregon "until January 10, 2018 or when [Coachella] is announced, whichever is sooner." *Id.*

In the FAC, Plaintiff alleges that three artists declined to play the Soul'd Out Music Festival as a result of AEG's radius clause: (1) Tank and the Bangas, (2) SZA, and (3) Daniel Caesar. FAC ¶¶ 61, 66, 73. By Plaintiff's own account, only one of these artists—Tank and the Bangas—ever agreed to play the Soul'd Out Music Festival in the first place. *See id.* ¶ 56; *compare id.* ¶¶ 66, 73. At least two of these artists—SZA and Daniel Caesar—had agreed to play Coachella before they were approached by Plaintiff. *See id.* ¶¶ 66, 73. Nonetheless, Plaintiff alleges that "[a]s a result of Coachella's unlawful, anticompetitive, and monopolistic practices," namely, the radius clause, "Plaintiff was unable to secure these artists for performance at its festival." *Id.* ¶ 74.

For the reasons set forth below, AEG respectfully requests that the Court dismiss the FAC in full because Plaintiff's factual allegations are insufficient to state a claim for relief under state or federal law.

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.* 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 quotation marks omitted). Accordingly, a complaint, such as this one, that merely states "labels and conclusions," or tenders "naked assertion[s]," without "further factual enhancement" is insufficient. *Twombly*, 550 U.S. at 555, 557; *see also Iqbal*, 556 U.S. at 678 (a plaintiff must do more than allege "an unadorned, the-defendant-unlawfully-harmed-me accusation.") (citation omitted).

ARGUMENT

I. THE COURT SHOULD STRIKE REFERENCES TO CONFIDENTIAL SETTLEMENT DISCUSSIONS UNDER RULE 12(f).

Rule 12(f) of the Federal Rules of Civil Procedure authorizes courts to strike "redundant, immaterial, impertinent or scandalous" material from a complaint. Fed. R. Civ. P. 12(f). In applying this rule, "courts have routinely granted motions to strike allegations in pleadings that fall within the scope of Rule 408." *U.S. v. Centracare Health Syst., Inc.*, No. Civ. 99-106 (JRTRLE), 2002 WL 1285089, at *2 (D. Minn. June 5, 2002) (granting motion to strike paragraphs in complaint that refer to settlement negotiations); *see also Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 40 (S.D.N.Y. 1992) (same); *Braman v. Woodfield Gardens Assocs. Realcorp Investors I*, 715 F. Supp. 226, 230 (N.D. Ill. 1989) (same); *Agnew v. Aydin Corp.*, No. 88-3436, 1988 WL 92872, at *4 (E.D. Pa. Sept. 6, 1988) (same); *see also Jones v. Metro. Life Ins. Co.*, No. C-08-03971-JW (DMR), 2010 WL 4055928, at *14 (N.D. Cal. Oct. 15, 2010) (striking paragraph in case management document "that discloses confidential settlement negotiations").

Under Rule 408 of the Federal Rules of Evidence, evidence of "conduct or a statement made during compromise negotiations about the claim" to "either prove or disprove the validity

or amount of a disputed claim" is not admissible. Fed. R. Evid. 408(a), 408(a)(2). The purpose of this rule is to encourage settlement through full and frank discussions. *See Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JLR, 2012 WL 5476846, at *2 (W.D. Wa. Nov. 12, 2012).

In attaching AEG's Rule 408 communication to the FAC, and reciting the content of that communication verbatim in the FAC, Plaintiff has violated the letter and spirt of Fed. R. Evid. 408. Plaintiff's disregard for this rule is reason to strike Exhibit 1 to the FAC and Paragraphs 6-13, 43, 51, 55, 83-85, 98-100. AEG's counsel made clear in providing the text of the radius clause to Plaintiff's counsel that it was for settlement purposes only. Rather than confer with AEG about the propriety of including this information in an amended complaint, or whether the text of the radius clause is confidential, Plaintiff made the unilateral decision to include this information in a public filing as the basis for its claims against AEG. This is improper and reflects bad faith. None of this information should be considered in assessing whether Plaintiff has stated a plausible claim for relief.

II. PLAINTIFF FAILS TO STATE AN ANTITRUST CLAIM (COUNTS I, II, IV).

In any case, Plaintiff has failed to plausibly allege an antitrust claim. Plaintiff alleges that AEG violated Section 1 of the Sherman Act (Count I), Oregon's antitrust statute (Count II), and California's Cartwright Act (Count IV) by using a radius clause in its artist agreements for Coachella.[2] FAC ¶¶ 79-92, 94-107, 115-118. To state a claim under these statutes, Plaintiff

[2] While the FAC states in passing that AEG sought to "create an illegal monopoly," FAC ¶ 1, Plaintiff has not pled a claim for monopolization. Plaintiff does not bring a claim under 15 U.S.C. § 2 or Or. Rev. Stat. § 646.730, the statutes that create a cause of action for monopolization under federal and Oregon law. A claim for monopolization does not exist under California's Cartwright Act. *Asahi Kasei Pharma Corp. v. CoTherix, Inc.*, 204 Cal. App. 4th 1, 8 (Cal. Ct. App. 2012) ("The Cartwright Act bans combinations, but single firm monopolization is not cognizable under the Cartwright Act.") (citing *State of California ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147, 1163 (Cal. 1988)).

must allege sufficient facts to show:

> (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition.

Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197 (9th Cir. 2012) (citation omitted); *see also Name.Space, Inc. v. Internet Corp. for Assigned Names and Numbers*, 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-Employers Health & Welfare Trust 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 "must also plead (4) that they were harmed by the defendant's anti-competitive contract, combination, or conspiracy, and that this harm flowed from an 'anti-competitive aspect of the practice under scrutiny.'" *Brantley*, 675 F.3d at 1197 (citation omitted); *see also Marsh v. Anesthesia Servs. Med. Grp., Inc.* 200 Cal. App. 4th 480, 495 (2011); *Or. Laborers-Employers Health & Welfare Trust Fund*, 17 F. Supp. 2d at 1176-77. "This fourth element is generally referred to as 'antitrust injury' or 'antitrust standing.'" *Brantley,* 675 F.3d at 1197. Plaintiff fails to plausibly state these elements.

A. Plaintiff Lacks Antitrust Standing.

Plaintiff's antitrust claims fail at the threshold because the allegations in the FAC are insufficient to show antitrust standing. To establish antitrust standing, Plaintiff must allege facts sufficient to show that it suffered "antitrust injury." *Cargill, Inc. v. Monfort of Colorado, 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 defendant's acts unlawful." *Brunswick Corp. v. Pueblo*

Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).[3] To plead antitrust injury, Plaintiff "must allege both [1] that defendant's behavior is anticompetitive and [2] that plaintiff has been injured by an anti-competitive aspect of the practice under scrutiny." *Brantley*, 675 F.3d at 1200 (internal quotations omitted). To satisfy the first requirement, Plaintiff must allege "injury to the market or to competition in general, not merely injury to individuals or individual firms." *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 815 (9th Cir. 1988) (citations omitted). Stated differently, Plaintiff must "show injury to competition in the market *as a whole*." *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989) (emphasis added); *see also Atl. Richfield Co v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990) (The antitrust injury requirement "ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior.") (emphasis in original).

As this Court has explained, "antitrust injury manifests as higher prices, lower output, or decreased quality in the products within a defined market." *Expedite, Inc. v. Plus, Bags, Cars & Serv., LLC*, No. 11-329-AC, 2011 WL 6399460, at *3 (D. Or. Oct. 21, 2011) (dismissing antitrust claim because allegations were insufficient to show antitrust injury) (citation omitted). Here, Plaintiff alleges three markets: (1) a market for music concert promotion on the West Coast, (2) a market for music festivals in the United States, and (3) a market for music festivals on the West Coast. FAC ¶¶ 79-81. The facts alleged in the FAC are insufficient to show higher prices, lower output, decreased quality, or any other type of harm to competition in any of these alleged markets *as a whole*.

In Paragraph 87 of the Complaint, Plaintiff purports to identify all of the ways in which

[3] This requirement flows from the purpose of the antitrust laws, which is the "protection of *competition*, not *competitors*." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis added); *see also Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 734 (9th Cir. 1987) ("Indispensable to any section 1 claim is an allegation that *competition* has been injured rather than merely competitors.") (emphasis in original).

the radius clause has purportedly had, or is likely to have, anticompetitive effects in the alleged markets. *Id.* ¶ 87. In the market for music festivals, Plaintiff claims that the radius clause has "limit[ed] entry or expansion of competitors or potential competitors to the Coachella Festival." *Id*. This allegation is conclusory and belied by other allegations in the FAC, including Plaintiff's own experience. According to Plaintiff, the radius clause has been in existence for several years, *see* FAC ¶ 42, and yet, Plaintiff was able to start its own festival in 2010 and has been hosting it every year since.[4] There are no facts alleged in the FAC showing that it or any other festival has been unable to enter the market or expand as a result of the radius clause. Nor are there any facts showing any reduction in quality across music festivals.

In the market for music concert promotions, Plaintiff alleges that the radius clause has restricted "price and cost of competition among live concert promoters." *Id.* ¶ 87. But there are no facts alleged in the FAC relating to the pricing or costs facing concert promoters. Plaintiff further alleges that the radius clause has reduced the ability of promoters "to offer concerts to fans" and deprived them "of the opportunity to compete by bringing artists to venues within the temporal and geographic scope of the Radius Clause." *Id*. Aside from the three artists that declined to play the Soul'd Out Festival, there are no facts alleged in the FAC showing that

[4] Notably, Plaintiff goes out of its way to suggest that it does *not* compete with Coachella. *See* FAC ¶¶ 14, 32, 35, 39. Plaintiff cannot have it both ways. 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." *Surf City Steel. Inc. v. Int'l Longshore & Warehouse Union*, 123 F. Supp. 3d 1219, 1230 (C.D. Cal. 2015) (quotation omitted); *see also Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 989 (9th Cir. 2000) (same). If Plaintiff does not compete with Coachella, then it is not a participant in the relevant markets and lacks antitrust injury on this basis as well. *See American Ad Mgmt., Inc. v. General Telephone Co. of Calif.*, 190 F.3d 1051, 1057 (9th Cir. 1999) ("Antitrust injury requires the plaintiff to have suffered its injury in the market where competition is being restrained. Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury."); *see also R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 151 (9th Cir. 1989) (affirming dismissal of claims where plaintiff was not a participant in the relevant market).

promoters have struggled to book artists. More importantly, there are no allegations showing that promoters cannot compete because of the radius clause. Quite the opposite, under the terms of the radius clause, an artist is free to play a non-festival concert at *any time* and in *any state*, except for in a handful of counties located around Coachella for five months. *See* FAC ¶ 6. It is implausible that the radius clause has prevented promoters from offering concerts to fans when artists remain free to perform essentially anywhere. [5]

Without any facts to show harm to competition, Plaintiff focuses on harm to itself. For example, Plaintiff alleges that its "business activities have been substantially inhibited" by the radius clause because "numerous artists have declined to perform at the Soul'd Out Music Festival." *Id*. ¶ 16. Plaintiff complains that it has suffered "financial damages" in the form of lost "profits" because it "was unable to secure these artists for performance at its festival." *Id.* ¶¶ 58, 65, 74. Plaintiff also claims that it is has suffered "reputational harm" because it had to "change the lineup on its festival calendar." *Id.* ¶ 75. While these allegations may show harm to Plaintiff's own business interests, they do not show harm to any market as a whole. Courts routinely dismiss antitrust claims where, as here, the only alleged injury is to a plaintiff's own interests. *See Ireland M.D. v. Bend Neurological Assoc. LLC*, No. 6:16-cv-02054-JR, 2018 WL 1515096, at *4 (D. Or. Feb. 7, 2018) (dismissing antitrust claim because "the SAC's well-pleaded factual allegations are exclusively directed at the harm suffered personally by plaintiff"); *Expedite, Inc.*, 2011 WL 6399460, at *3 (dismissing antitrust claim because "the focus of [plaintiff's] Complaint is on its own injuries" with "only passing reference to injury to other

[5] Plaintiff also alleges purported harm to consumers, such as "[d]epriving consumers of the opportunity to hear musical artists of their choice in a live venue because of the cost of attendance and travel." FAC ¶ 87. There are no facts alleged in the FAC showing that the cost of attendance or travel has increased as a result of the radius clause, or that any consumer has been prevented from attending a concert due to increased cost. Moreover, Plaintiff cannot show antitrust injury to itself based on conclusively alleged harm to consumers.

baggage delivery vendors."); *Heisen v. Pac. Coast Bldg. Prods., Inc.*, No. 92-16661, 1994 WL 250036, at *2 (9th Cir. June 9, 1994) (affirming dismissal of Section 1 claim because plaintiff "alleges that defendants' actions have injured his own business interests," rather than "reduction of competition in the [relevant] markets."); *see also Les Shockley Racing, Inc.*, 884 F.2d at 508 (affirming dismissal of antitrust claim because "[a]lthough proof of plaintiffs' allegations would establish harm to their business interests, such proof would not, standing alone, show injury to competition in the market as a whole.").

Perhaps recognizing these defects, Plaintiff refers to a "study performed in 2012" that purportedly found that "radius clauses in music festival agreements are used as an anticompetitive practice."[6] FAC ¶ 44. However, this study has nothing to do with the markets alleged in this case. According to Plaintiff, the study found that radius clauses have "a negative effect on the local music *venues* in the affected cities . . ." *Id.* (emphasis added). The study did not reach any conclusions about the effect of radius clauses on music concert promotion or music festivals. Moreover, the study apparently found that radius clauses merely have the *potential* for anticompetitive effects on local music venues, not that they actually had. *Id.* ("It found that radius clauses have the *possible* effect of diminishing the ability of smaller firms affected by the contracts to attract enough popular bands to fill their schedule, *perhaps* leading to shut down.") (emphasis added)

According to Plaintiff, the study also purportedly found that radius clauses "drive up demand by forcing consumers to buy tickets to Coachella if they want to enjoy their favorite

[6] Notably, the FAC does not identify the source of the study, calling into question its credibility. It is also unclear whether the radius clause analyzed in the study is the same as that alleged here, as the study was published six years ago. *See* FAC ¶ 44.

band in the near future." *Id.* ¶ 45. The study posited that "[d]ue to the typically brief nature of a concert tour, competing venues will likely have trouble booking those acts again in the same year." *Id.* But these conclusions stand at odds with Plaintiff's own allegations. Plaintiff alleges that "Coachella sold 100% of its tickets . . . *even before announcing its line-up of performers*," suggesting that concertgoers purchase tickets to Coachella without regard to who is playing. *Id.* ¶ 47 (emphasis added); *see also id.* ¶¶ 38, 71. Moreover, the terms of the radius clause do not prevent artists from playing different venues in different locations in the same year. *See id.* ¶ 6. Under the radius clause, artists are free to play non-festival concerts nearly anywhere in the U.S., leaving ample opportunities for venues to book those artists and for consumers to see their favorite artists in different venues. *Id.*

In short, Plaintiff has failed to allege anticompetitive effects in any market as a whole. As such, Plaintiff cannot show antitrust injury, and Counts I, II, and IV must be dismissed.

B. Plaintiff Fails to Properly Define a Relevant Antitrust Market.

To state an antitrust claim under state or federal law, Plaintiff must allege "injury to competition in *the relevant market*." *All Shippers, Inc. v. S. Pac. Transp. Co.*, 858 F. 2d 567, 570 (9th Cir. 1988) (emphasis added); *see also Marsh*, 200 Cal. App. 4th at494-95 (Cartwright Act requires plaintiff to "adequately plead the existence of the relevant market"). A relevant market is comprised of two parts: a relevant geographic market and a relevant product market. *Brown Shoe*, 370 U.S. at 324. Plaintiff fails to plausibly allege either component.

1. Plaintiff's Alleged Product Market is Facially Unsustainable.

A properly defined relevant product market is comprised of those products that are "'reasonably interchangeable by consumers for the *same purposes*.'" *Golden Gate Pharm. Servs., Inc. v. Pfizer, Inc.*, 433 Fed. App'x. 598, 598 (9th Cir. 2011) (quoting *United States v. E.I.*

du Pont de Nemours & Co., 351 U.S. 377, 395 (1956)) (emphasis in original). Stated differently, the relevant product market "includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001); *see also Brown Shoe*, 370 U.S. at 325 (same).

Under Rule 12(b)(6), "'a complaint may be dismissed . . if the complaint's 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 Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008)); *see also Tanaka*, 252 F.3d at 1063 ("Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim.") (citation omitted). An alleged product market is "facially unsustainable" 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)).

Here, Plaintiff states in conclusory fashion that the alleged product markets are the "market for music concert promotion" and "the market for music festivals." FAC ¶¶ 79-81, 94-96. Plaintiff fails to plead any facts relating to reasonable interchangeability of use or cross elasticity of demand. It is not even clear from the FAC which types of concerts qualify as "festivals," or which firms are involved in "music concert promotion." *See Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1105 (9th Cir. 1999) (allegations insufficient where plaintiff failed to allege "that there are no other goods or services that are reasonably

interchangeable").

In *Golden Gate Pharmacy Services, Inc.*, the Ninth Circuit affirmed dismissal of an antitrust claim where the alleged product market was similarly unsupported. 433 Fed. Appx. at 599. There, plaintiff alleged that the relevant product market was the "the pharmaceutical industry." *Id.* The court found the alleged product market "facially unsustainable and appropriate for dismissal," because while "market definition need not be pled with specificity, the SAC fails to state any facts indicating that all pharmaceutical products are interchangeable for the same purpose." *Id.* So too here, there are zero facts indicating that all "music concert promotion" firms or "music festivals" are interchangeable for the same purpose. *Id.* Plaintiff has failed to allege a plausible relevant product market.

2. Plaintiff Fails to Allege a Plausible Geographic Market.

Plaintiff similarly fails to plead a relevant geographic market. For antitrust purposes, the relevant geographic market is the "area of effective competition." *Tanaka*, 252 F.3d at 1063 (quoting *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1446 (9th Cir. 1988). That 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) (quotation omitted).

Plaintiff alleges two geographic markets: (1) a "West Coast" market, comprised of "California, Oregon, Washington, Arizona, and Nevada," for music concert promotion and music festivals and (2) a "United States" market for music festivals. FAC ¶¶ 79-81, 94-96. Plaintiff fails to plead a single fact in support of either market. *See Natkin v. Am. Osteopathic Ass'n*, No. 3:16-cv-01494-SB, 2018 WL 452165, at *9 (D. Or. Jan. 17, 2018) (plaintiff failed to state antitrust claim because Complaint alleged no facts in support of relevant geographic market); *Garnica v. HomeTeam Pest Def., Inc.*, No. 14-cv-05243-VC, 2015 WL 3766514, at *2-3 (N.D.

Cal. June 16, 2015) (allegations that were "vague and conclusory" were insufficient to allege relevant geographic market) (citation omitted). There are no allegations relating to where a purchaser "can practicably turn" for music concert promotion or music festival services. Nor is it clear who the relevant purchaser is for purposes of this analysis. Plaintiff does not explain whether it is defining the relevant markets from the perspective of the concert goer, venue, promoter, or artist. *See Sidibe v. Sutter Health*, 4 F. Supp. 3d 1160, 1175 (N.D. Cal. 2013) (dismissing antitrust claim because the complaint provides no details about whether customers "can practicably turn" to defendant for services).

Plaintiff's failure to plead a relevant product market or relevant geographic market is reason alone to dismiss Plaintiff's antitrust claims. Counts I, II, and IV should be dismissed.

C. Plaintiff Fails to Allege Anticompetitive Effects.

The purpose of the antitrust laws is to regulate conduct that has anticompetitive effects, and Plaintiff has alleged none. Anticompetitive effects can be shown in two ways: (1) "by showing actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods and services," or (2) "by showing the defendant has market power—the ability to raise prices above those that would prevail in a competitive market." *Deborah Heart & Lung Ctr. v. Virtua Health, Inc.*, 833 F.3d 399, 403 (3d Cir. 2016) (internal quotations omitted). The FAC alleges neither.

1. Plaintiff Fails to Allege Actual Anticompetitive Effects.

As discussed, *supra* § II.A, Plaintiff fails to allege any facts showing increased prices, reduced output, reduced quality, or any other type of competitive harm in the alleged markets. At most, Plaintiff provides conclusory examples of purported anticompetitive effects. *See, e.g.*, FAC ¶ 87. As the Ninth Circuit has made clear: "The pleader may not evade this requirement by merely alleging a bare legal conclusion; if the facts do not at least outline or adumbrate a

violation of the Sherman Act, the plaintiffs will get nowhere merely by dressing them up in the language of antitrust." *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (1987) (internal quotations omitted).

Courts routinely dismiss antitrust claims where the complaint contains insufficient factual allegations to show anticompetitive effects in a relevant market. For example, in *Prime Healthcare Services, Inc. v. Service Employees Int'l Union*, the Ninth Circuit affirmed dismissal of a Section 1 claim where the complaint contained no more than "conclusory allegations." 642 Fed. App'x. 665, 666 (9th Cir. 2016). As the court explained, the plaintiff "never alleges that any competitors have exited the market or reduced their production because of the Defendants' actions. Nor does it allege that the Defendants' actions actually caused health care consumers to face higher prices or a reduction in quality of care, quantity of services, or overall choice of providers." *Id.* at 666-67.

Similarly, in *Korea Kumbo Petrochemical Co. v. Flexsys America LP*, the court affirmed dismissal of an antitrust claim because plaintiff did not allege "higher prices or the lack of access to a superior product." 370 Fed. App'x. 875, 877 (9th Cir. 2010). Nor did plaintiff allege that "it lacks market strength" relative to defendant or "that a substantial portion of the [relevant] market was foreclosed" by defendant's alleged conduct. *Id.*; *see also All. Shippers, Inc. v. S. Pac. Transp. Co.*, 858 F.2d at 570 ("[Plaintiff's] failure to allege injury to competition is a proper ground for dismissal by judgment on the pleadings.") (internal quotations omitted).

Similarly, Plaintiff fails to allege any facts in support of its conclusory assertions of anticompetitive effects.

2. Plaintiff Fails to Allege Market Power.

Plaintiff also fails to properly plead market power. The FAC merely states that AEG has "market power" in the markets for music concert promotion and music festivals, without reference to any facts. FAC ¶¶ 79-81, 94-96. "Market power is the ability to raise prices above

those that would be charged in a competitive market." *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109 n.38 (1984) (collecting cases). To allege market power, "Plaintiff must plead allegations regarding barriers to entry and the lack of ability by competitors to increase their share of the market." *Witt Co. v. RISO, Inc.*, 948 F. Supp. 2d 1227, 1244 (D. Or. 2013).

The FAC does not contain any facts relating to AEG's ability to raise prices, or the ability of its competitors to increase their share in the alleged markets. As for barriers to entry, the closest Plaintiff comes to alleging any facts in this regard is the assertion that AEG uses "market power over artists" "to deprive the promoter market, venue market, and ticket company markets of their necessary product input, i.e., the artists." *Id.* ¶ 49. As an initial matter, Plaintiff's assertion that AEG has "market power over artists" is conclusory. According to Plaintiff, this power is "reflected by the fact that all or substantially all artists are required to acquiesce to and become bound by the Radius Clause." *Id.* But this allegation is premised on "information and belief," not on facts. *See id.* ¶¶ 17, 48, 83-85, 98-100. Moreover, there are no facts alleged in the FAC showing that AEG's purported "market power over artists" has prevented concert promoters or festivals owners from entering the market or that they have been impeded from gaining market share.

The only other allegation in the FAC related in any way to market power is the assertion that AEG has "dominance in greater Los Angeles." FAC ¶ 77. This allegation is also conclusory and does not show that AEG has market power on the West Coast or in the United States more generally. Nor is it clear that this allegation pertains to the markets for music concert promotion or music festivals.

This Court's decision in *Witt Company v. RISO, Inc.* underscores the insufficiency of these allegations. 948 F. Supp. 2d at 1244. There, plaintiff alleged that defendant "possesses

65% of the market, exerts sufficient power in the digital duplicator market to coerce its dealers to refrain from selling competitors' supplies, and charges supra-competitive prices for its suppliers." *Id.* This is more than Plaintiff has alleged here, and still, the court found that market power had not been pled because "there are insufficient allegations establishing barriers to entry and that defendant's conduct precludes competitors from increasing their output." *Id.*

D. Plaintiff Fails to Allege a Conspiracy Among Festival Promoters.

Plaintiff claims that AEG "negotiated restrictions on the scope of its Radius Clause with other, competing festival promoters" in a "horizontal restraint of trade." FAC ¶¶ 90, 105; *see also id.* ¶¶ 12, 50. But simply stating that a "horizontal restraint of trade" exists does not make it so. *See Twombly*, 550 U.S. at 557 ("[A] conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.").

Stating a conspiracy under Section 1 of the Sherman Act "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 556. Plaintiff must allege sufficient facts to show 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); *see also Twomby*, 550 U.S. at 557 (without "further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory"). "Unilateral conduct by a single firm, even if it appears to restrain trade unreasonably, is not unlawful under section 1 of the Sherman Act." *Witt Co.*, 948 F. Supp. 2d at 1238 (quotations omitted).

According to Plaintiff, an agreement can be inferred from a single subsection in the radius clause. *See* FAC ¶ 51. Plaintiff alleges that "in subsection (c), Coachella has created exceptions for three competing festivals: SXSW in Austin, Texas, Ultra in Miami, and Jazz Fest in New Orleans." *Id.* This is a remarkable leap in logic. Based purely on AEG's decision to exempt three festivals from its radius clause, Plaintiff contends that an antitrust conspiracy exists

among at least four festival promoters.

To say this allegation is baseless is an understatement. Plaintiff alleges that festival promoters negotiate radius clauses to "avoid conflicts," FAC ¶ 50, but there are zero facts alleged in the FAC showing that any other festival has negotiated a similar exception, or that AEG has ever communicated with another festival about its radius clause. Even more telling, Plaintiff alleges that AEG conspired with Jazz Fest, a festival that is "*co-produced by AEG*." *Id.* ¶ 54 (emphasis added). It is well-established that a firm cannot conspire with itself. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 770 (1984).

To be sure, there are no allegations in the FAC, conclusory or otherwise, showing that AEG's decision to exempt certain festivals was anything other than an independent business decision by AEG. *William O. Gilley Enters., Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 669 (9th Cir. 2009) (affirming dismissal of complaint because allegations did not show that defendant's conduct was "part of any agreement or conspiracy, rather than independent efforts to maximize profits") (citation omitted). Because there are no facts in the FAC plausibly showing a "meeting of minds in an unlawful arrangement," Plaintiff's conspiracy claim among festival promoters must be dismissed.[7]

E. Plaintiff Fails to Allege a Tying Claim.

Plaintiff's allegation that AEG engaged in "unlawful tying" is similarly deficient. *See* FAC ¶¶ 91,106. Plaintiff describes AEG's purportedly unlawful tying arrangement as follows:

> Specifically, upon information and belief, Defendants allow exceptions to the Radius Clause where artists seek to perform at other venues owned, operated, controlled, or in concert with Defendants, or in which Defendants earn a portion of the profits from such events, but enforce the Radius Clause selectively against festivals or themed events that have no association with Defendants.

[7] Importantly, this claim would fail in any case because Plaintiff lacks antitrust standing and has failed to allege a relevant antitrust market or anticompetitive effects. Plaintiff's failure to allege a conspiracy is an independent reason to dismiss the claim.

Id. ¶ 48; *see also id.* ¶¶ 91, 106. This is not a tying arrangement. "[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 Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984) (emphasis added). A plaintiff must show "that the defendant went beyond persuasion and coerced or forced its customer to buy the tied product in order to obtain the tying product." *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1159 (9th Cir. 2003). "[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.*, 2007 WL 1747162, *2 (E.D. Wa. June 15, 2007) ("Where the buyer is expressly and realistically free to buy elsewhere, the absence of a tie is readily demonstrated.").

Here, it is not even clear what the tying and tied products are.[8] Plaintiff has not alleged a scenario in which customers were required to "buy product B when buying product A." *It's My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676, 689-91 (4th Cir. 2016). Indeed, the FAC does not allege that AEG forced *any* buyer to purchase *anything*. *See Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.,* 836 F.3d 1171, 1179 (9th Cir. 2016) ("The problem with [plaintiff]'s claim is that there is no tie . . . ."). Plaintiff's tying claim under Section 1 of the Sherman Act should be dismissed.

III. PLAINTIFF'S RESTRAINT OF TRADE CLAIMS FAIL UNDER CALIFORNIA AND OREGON LAW (COUNT III, IX).

Plaintiff claims that the radius clause is an unlawful restraint of trade under § 16600 of California's Business & Professional Code (Count III) and Oregon common law (Count IX). Put

[8] For this reason, Plaintiff's tying claim also fails because Plaintiff has failed to adequately 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."). Plaintiff's allegations suggest that the tie is related to artist services, *see* FAC ¶ 49, but there is no antitrust market alleged in the FAC relating to artists.

simply, Plaintiff alleges that the radius clause is an invalid non-compete provision. *See* FAC ¶¶ 108-113, 149-153. Both claims must be dismissed because Plaintiff is not a party to the alleged artist agreements, and therefore lacks standing to challenge the validity of the radius clause. Count IX further fails under Oregon common law because Plaintiff's factual allegations are insufficient to show that the radius clause is unreasonably broad and has caused injury to the public, which are required elements in any challenge to a non-compete provision. *See Nike, Inc. v. McCarthy*, 379 F.3d 576, 584 (9th Cir. 2004) (citing *Eldridge v. Johnston*, 245 P.2d 239, 250 (Or. 1952)).

A. Plaintiff Lacks Standing to Challenge the Validity of the Radius Clause.

In Oregon and California, it is well-established that a plaintiff who is not a party or third-party beneficiary to a contract generally lacks standing to challenge its validity. *See Berclain Am. Latina v. Baan Co.*, 74 Cal. App. 4th 401, 405 (1999) ("In asserting a claim based upon contract, this generally requires the party to be a signatory to the contract, or to be an intended third party beneficiary.") (citation omitted); *Tadros v. Wilmington Trust*, No. 3:17-cv-01623-AA, 2018 WL 1924464, at *5 (D. Or. April 23, 2018) ("In order to enforce a contract, an individual must be a party or an intended third party beneficiary to the contract.") (citing *Parker v. Jeffery*, 37 P. 712, 712 (Or. 1894)).

In applying this principle to non-compete agreements, "[c]ourts routinely hold that a plaintiff that has hired (or wishes to hire) the employee of a competitor does not have standing to sue that company to seek nullification of a non-compete agreement between the competitor and its employees." *Bowhead Info. Tech. Servs., LLC v. Catapult Tech., Ltd.*, 377 F. Supp. 2d 166, 172 (D.D.C. 2005) (plaintiff lacked standing to challenge non-compete agreement to which it was not a party); *see also Molinari v. Consol Energy Inc.*, No. 12cv1085, 2012 WL 5932979, at

*8 (W.D. Pa. Nov. 27, 2012) ("Other District Courts not within this Circuit have likewise found that a non-party to a restrictive employment covenant does not have standing to bring a declaratory judgment action.") (collecting cases); *Sun Commodities, Inc. v. C.H. Robinson Worldwide, Inc.*, No. 11-62738-CIV, 2012 WL 602616, at *2-3 (S.D. Fla. Feb. 23, 2012) (same); *Eaton Vance Mgmt. v. ForstmannLeff Assocs., LLC*, No. 06 Civ. 1510 (WHP), 2006 WL 2331009, at *6 (S.D.N.Y. Aug. 11, 2006) (plaintiff lacked standing because it was not a party to the non-compete agreement); *Defiance Hosp., Inc. v. Fauster-Cameron, Inc.*, 344 F. Supp. 2d 1097, 1118 (N.D. Ohio 2004) (same); *Premier Pyrotechnics, Inc. v. Zambelli Fireworks Mfg. Co.*, No. 05-3112-CV-SFJG, 2005 WL 1307682, at *1 (W.D. Mo. May 31, 2005) (same).

California courts have likewise dismissed claims brought under Cal. Bus. & Prof. Code § 16600 where the plaintiff was not a party to the alleged agreement. *See, e.g.*, *Golden State Orthopaedics, Inc. v. Howmedica Osteonics Corp.*, No. 14-cv-3073-PJH, 2016 WL 4698931, at *3 (N.D. Cal. Sept. 8, 2016).[9] Moreover, "California cases clearly establish that contractual prohibitions against current employees' competing with their employers do not violate section 16600." *Shaklee U.S. Inc. v. Giddens*, No. 90-15498, 934 F.2d 324, at *3 (9th Cir. 1991) (unpublished). For example, courts have found exclusivity provisions in personal services contracts, such as artist agreements, valid under Cal. Civ. Code § 3243 where the contract is for a "unique and irreplaceable employee." *See Steinberg Moorad & Dunn, Inc. v. Dunn*, 136 Fed. Appx. 6, 10 (9th Cir. 2005) (Cal. Civ. Code § 3243 "allows a court to enjoin competition by

[9] While Plaintiff is only seeking declaratory judgment under Cal. Bus. & Prof. Code § 16600, that does not change the outcome. As this Court explained in *Evans v. Sirius Computer Solutions, Inc.*, "[g]enerally, a party does not have standing to request declaratory judgment regarding the enforceability of a contract to which it is neither a party nor a third-party beneficiary." No. 3:12-CV-46-AA, 2012 WL 1557294, at *2 (D. Or. May 1, 2012) (citing 28 U.S.C. § 2201) (dismissing claim for declaratory relief).

unique and irreplaceable employees during the fixed term of the contract, even if they no longer work for the employer."); *see also MCA Records, Inc. v. Newton-John*, 90 Cal. App. 3d 18, 23 (1979). Thus, in addition to lacking standing, the radius clause does not violate section 16600 because it simply prevents artists from simultaneously providing services to the Soul'd Out Festival and competing with Coachella.

Here, there are no facts alleged in the Complaint showing that Plaintiff was a party or third-party beneficiary to AEG's artist agreements. As such, Plaintiff lacks standing to challenge the radius clause and Counts II and VIII of the Complaint must be dismissed.

B. Plaintiff's Factual Allegations Are Insufficient to State a Claim Under Oregon Common Law.

Plaintiff's claim also fails under Oregon common law because the radius clause is narrowly drawn to protect AEG's interests and Plaintiff does not allege any injury to the public. In Oregon, a restrictive covenant, such as a radius clause, is enforceable when three conditions are met: (1) the covenant "must be partial or restricted in its operation in respect either to time or place"; (2) the covenant "must be made on some good consideration"; and (3) the covenant "must be reasonable, that is, it should afford only a fair protection to the interests of the party in whose favor it is made, and must not be so large in its operation as to interfere with the interests of the public." *Nike, Inc.*, 379 F.3d at 584 (citing *Eldridge*, 245 P.2d at 250); *N. Pac. Lumber Co. v. Moore*, 551 P.2d 431, 434 (Or. 1976). "Reasonableness is a question of law for the court. . . ." *Actuant Corp. v. Huffman*, No. CV-04-998-HU, 2005 WL 396610, at *9 (D. Or. Feb. 18, 2005) (citation omitted). The relevant inquiry is whether there has been harm to the public, and not the harm to a single company. *Volt Servs. Grp. v. Adecco Emp't Servs., Inc.*, 35 P.3d 329, 335 (Or. App. 2001) ("Defendant's focus on inconvenience to a *client company* misses the

mark: The well-being of a single business does not necessarily coincide with the best interest of the public as a whole.") (emphasis in original).

In *Eldridge*, the Oregon Supreme Court identified two primary public policy concerns with restraints of trade: (1) "injury to the public by being deprived of the restricted party's industry"; and (2) "injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and his family." *Eldridge*, 245 P.2d at 250. The court held that restrictive covenants that are limited in time and place, and are "founded on a valid consideration and a reasonable ground of benefit to the other party" are enforceable. *Id.* at 251. Here, there is no question that the radius clause is "limited in time and place" and made on good consideration. *See* FAC ¶ 6 (outlining scope of radius clause); *see also id.* ¶ 4 ("Coachella is a sought after performance opportunity for many rising artists.").

While Plaintiff asserts that the clause is "unreasonable," this allegation is conclusory, and undercut by Plaintiff's own allegations, which show that the clause affords fair protection to AEG's interests. The entire purpose of the radius clause is to protect AEG from competitors unfairly free-riding on its creative choices in selecting its artist lineup and its investment in ensuring those artists will come to the West Coast to play at the Coachella festival. As more festivals proliferate, maintaining a unique festival lineup is crucial for Coachella to remain competitive. And, as Plaintiff alleged, promoters incur substantial costs to compensate artists from all over the world for their travel and other expenses to perform at festivals. *See* Compl. ¶ 55. Plaintiff's initial Complaint conceded the reasonableness of the radius clause by explaining that the radius clause prevented Plaintiff from free riding on AEG's investment, requiring Plaintiff to "pay more money to bring artists in who are not already scheduled to be on the West Coast during Plaintiff's festival." *Id.* Because the Soul'd Out Festival overlaps with Coachella,

Plaintiffs are uniquely situated to profit off of AEG's investment in Coachella by saving the costs AEG expended to bring artists to the West Coast. As the allegations in the Complaint show, the radius clause is tailored to protect these interests. It is restricted to performances at festivals or themed events—not all concerts—for less than five months surrounding the time of Coachella. FAC ¶ 6. The clause only restricts non-festival or themed performances in the counties immediately surrounding Coachella. *Id.*

The two public policy concerns identified in *Eldridge* are not present here. First, Plaintiff does not allege any facts showing that the radius clause prevents Coachella artists from pursuing their occupations or making a living as musicians. The agreement only prevents the artists from performing in six counties and for less than five months, or performing at festivals—a very particular type of performance—for less than five months. Artists are free to perform live at all other types of concerts or events, to write, record, and sell music, and even to perform at other festivals for more than eight months out of the year. Second, Plaintiff does not allege that the public is being deprived of the restricted party's industry. As noted, the restraint is sufficiently limited that artists are free to create music and perform through various avenues, including throughout the limitation period. The allegation that Plaintiff is not able to book a few particular artists, but must substitute other artists, does not injure the public and does not override AEG's interests in preventing free-riding. As the court noted in *Volt*, harm to a single company, to the extent the Complaint even alleges harm, does not necessarily coincide with harm to the public.

As such, Counts III and IX should be dismissed because Plaintiff lacks standing to challenge the validity of the radius clause and, in any case, the factual allegations in the Complaint are insufficient to show that the clause is an unlawful restraint of trade under Oregon common law.

IV. PLAINTIFF FAILS TO STATE A CLAIM FOR INTENTIONAL INTERFERENCE WITH CONTRACT OR ECONOMIC RELATIONS (COUNT VI, VII, VIII).

Plaintiff's claims for intentional interference with contractual 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; (2) that AEG intended to interfere with these alleged relationships; or (3) that the radius clause was independently wrongful.[10] Each of these claims must be dismissed.

[10] Though separate claims, the elements for these causes of action substantially overlap. To state a claim for intentional interference with prospective economic advantage under California law (Count V), plaintiff must plausibly allege: (1) "an economic relationship between the plaintiff and another, containing a probable future economic benefit or advantage to the 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)). Additionally, "the interference must have been "wrongful 'by some measure beyond the fact of the interference itself.'" *Della Penna*, 902 P.2d at 751 (internal citation omitted). To state a claim for intentional interference with contractual relations under California law (Count VI), 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, 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) 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. Natural Gas Co. v. Chase Gardens, Inc.*, 328 Or. 487, 497 (1999) (citations omitted). Like California law, the Oregon Supreme Court has held that "[d]eliberate interference alone does not give rise to tort liability;" the interference must be "wrongful by some measure beyond the fact of the interference itself," such as "a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession." *Id.* at 498 (citing *In Top Serv. Body Shop v. Allstate Ins. Co.*, 283 Or. 201, 209-10 (1978). Further, "[t]he burden of proof rests with a plaintiff to show that a defendant intentionally interfered with the plaintiff's economic relationship and that the defendant had no privilege to do so." *Id.* at 498-99 (citing *N. Pac. Lumber Co.*, 275 Or. at 369).

A. Plaintiff's Factual Allegations Are Insufficient to Show that AEG had Knowledge of a Contract or Relationship.

To state a claim for intentional interference under California and Oregon common law, Plaintiff must allege sufficient facts to show that AEG had knowledge of the purported economic 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). It is impossible, based on the allegations as pled, that AEG had knowledge of any contract or economic relationship because there is not a single fact alleged in the FAC showing that Plaintiff began negotiations with the artists at issue *before* AEG.

Importantly, Plaintiff alleges only one contract that could even conceivably allow Plaintiff to state a claim for intentional interference with contractual relations under California law. Plaintiff alleges that it had an agreement with Tank and the Bangas to perform at the Soul'd Out Music Festival.[11] FAC ¶ 56. However, Plaintiff does not allege that AEG had any knowledge of this agreement, 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

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[11] While Plaintiff alleges that it "negotiated a performance" with SZA, the Complaint makes clear that SZA never agreed to perform at the Soul'd Out Festival. Compl. ¶ 66 ("On November 14, 2017, a booking agent declined Plaintiff's offer to SZA to perform.")

Bangas for Coachella. *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 plaintiff did not allege that the 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) (emphasis in original).

Similarly, Plaintiff's claims for intentional interference with prospective economic advantage or economic relationship fail because Plaintiff does not, and cannot, allege that AEG had knowledge of any economic or business relationship between Plaintiff and any other artist. Indeed, Plaintiff alleges that Daniel Caesar and SZA, the artists who turned down offers to perform at the Soul'd Out Music Festival, did so because they already had *existing* agreements to perform at Coachella. *See* FAC ¶¶ 66, 73. *See, e.g.*, *Mark D. Dolin v. Facebook, Inc.*, No. C 18-0950, 2018 WL 2047766, at *4 (N.D. Cal. May 2, 2018) (dismissing tortious interference with prospective economic advantage claim in part because allegation that defendant must have known about plaintiff's economic relationship with defendant's platform users 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 Counts VI, VII, and VIII should be dismissed.

B. Plaintiff's Factual Allegations Are Insufficient to Show that AEG Intentionally Interfered with a Contract or Relationship.

Unsurprisingly, to state a claim for intentional interference under California or Oregon law, Plaintiff must allege sufficient facts to show that AEG *intentionally* interfered with a

contract or economic relationship. There are no facts alleged in the FAC showing that AEG acted with such intent. *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.

As an initial matter, because Plaintiff does not allege that AEG had knowledge of any contracts or relationships with artists, it cannot allege that AEG intentionally interfered with those specific contracts or relationships. Further, there are no facts alleged in the FAC showing that AEG drafted its artist agreements with the purpose of interfering with the Soul'd Out Music Festival. The FAC, in fact, affirmatively alleges that "Defendants require all or substantially all artists to execute an agreement containing the Radius Clause." FAC ¶ 40. If all artists are bound by the clause, as Plaintiff alleges, then it follows that these clauses were not specifically negotiated with Tank and the Bangas, SZA, or Daniel Caesar. Nor does it follow that these agreements were negotiated with the intention of interfering with any specific relationship these artists had with Plaintiff. At most, Plaintiff's allegations show efforts by AEG, and the artists themselves, to comply with the terms of pre-existing agreements.

C. Plaintiff's Factual Allegations Are Insufficient to Show that AEG's Conduct was Independently Wrongful.

To state a claim for intentional interference, both California and Oregon law require the plaintiff to show that defendant's conduct is wrongful by some measure independent of the alleged interference itself. *See Nw. Natural Gas*, 328 Or. at 498; *Della Penna*, 902 P.2d at 751. Here, the allegations in the FAC are insufficient to satisfy this standard. Indeed, where, as here, the plaintiff has failed to plausibly allege that the conduct at issue violates the law, courts have dismissed 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 tortious interference with business relationships 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 Oregon, Inc.*, 15 F. Supp. 3d 1075, 1108-10 (D. Or. 2014) (dismissing claim for tortious interference with a contract in part because plaintiff did not sufficiently allege that the defendant acted with an "improper purpose or improper means").

For all the reasons discussed herein, Plaintiff has failed to show that the radius clause violates the antitrust laws or is an unlawful restraint of trade. *See supra* §§ II, III. On the contrary, the radius clause is designed to promote the competitiveness of Coachella by protecting AEG's creative choices in selecting its artist lineup and by preventing competing festivals from free-riding off of AEG's investment in the artists scheduled to perform at Coachella. Accordingly, Plaintiff has failed to state a claim for intentional interference and Counts V, VI, and VII should be dismissed.

For all these reasons, Plaintiff has not plausibly alleged intentional interference with prospective economic advantage or contractual relations under California law or intentional interference with economic relations under Oregon law. These claims must be dismissed.

V. PLAINTIFF FAILS TO STATE A CLAIM FOR UNFAIR COMPETITION (COUNT V).

Plaintiff alleges that AEG engaged in "unlawful and "unfair" practices and is therefore liable under California's Unfair Competition Law ("UCL") (Count V). FAC ¶¶ 123, 125. Plaintiff's claim fails because its allegations are insufficient to show an act or practice that is unlawful, unfair, or fraudulent—the three potential sources of liability for unfair competition

under Cal. Bus. & Prof. Code § 17200.[12] *See, e.g. Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1554 (2007) (citation omitted); *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 179-80 (1999).

Specifically, Plaintiff alleges that AEG violated by the UCL by "(a) entering into agreements containing the Radius Clause, which is unlawful; (b) making artists think they are bound by an enforceable and lawful radius clause when they are not; and (c) implementing schemes to deny artists access to fair employment and lawful competitors the ability to compete." FAC ¶ 116. To the extent Plaintiff's unfair competition claim is predicated on AEG's conduct being "unlawful," Plaintiff's unfair competition claim rises or falls with the rest of its claims *See Davis v. HSBC Bank Nevada, 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 Comms. Inc. v. L.A. Cellular Tel. Co.*, 973 P. 2d 527, 539–40 (Cal. 1999)). To allege conduct that is "unfair," on the other hand, Plaintiff must allege sufficient facts to show:

> [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. The FAC is devoid of any factual allegations that could plausibly satisfy any of these tests.

First, it is implausible that the radius clause "threatens an incipient violation of an antitrust law," when Plaintiff has failed to state a plausible antitrust claim in the first place. The conduct Plaintiff alleges to be "unfair" is the very same conduct Plaintiff alleges to be unlawful in Counts I, II, and IV of the FAC. *Manwin Licensing Int'l S.A.R.L v. ICM Registry, LLC.*, No.

[12] Plaintiff does not allege that AEG engaged in conduct that is fraudulent for purposes of the UCL. *See* FAC ¶ 123 ("Due to Defendants' unlawful and unfair business practices . . ."); ¶ 125 ("Defendants' unlawful and unfair practices include . . ."); ¶ 126 ("Defendants' acts set forth above constitute unfair and unlawful business practices within the meaning and scope of Cal. Bus. & Prof. Code § 17200, *et seq*.").

CV 11-9514 PSG, 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 v. MySpace, Inc.*, No. CV 06-6994 AHM, 2007 WL 6865852, at *18 (C.D. Cal. June 4, 2007). To do so, Plaintiff must allege facts showing that the radius clause has had an anticompetitive effect. *Id*. As explained, *supra* §§ II.A, II.C, the FAC does not allege any facts showing that competition has been harmed by the radius clause. As such, Plaintiff cannot satisfy the second test for stating an "unfair" competition claim. *LiveUniverse, Inc.*, 2007 WL 6865852, at *18 (rejecting unfair competition claim where "the Court has already found that LiveUniverse failed to allege that MySpace's conduct caused an anticompetitive effect.").

Third, and for the same reasons, Plaintiff has not plausibly shown that the radius clause "otherwise significantly threaten[s] or harm[s] competition." *Id.* In support of its unfair competition claim, Plaintiff recites the same conclusory allegations regarding harm to competition that are made in connection with its other claims. *See, e.g.*, FAC ¶¶ 124, 127; *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). While Plaintiff also alleges that AEG's conduct has "caused artists to forbear at times exercising their right to work," FAC ¶ 127, this does not show harm to competition. *See Orchard Supply Hardware LLC v. Home Depot USA, Inc.*, 939 F.

Supp. 2d 1002, 1010–11 (N.D. Cal. 2013) ("Within the properly defined relevant market, Plaintiff must show 'an injury to competition, rather than just an injury to plaintiff's business.'") (citing *Sicor, Ltd. v. Cetus Corp.*, 51 F.3d 848, 854 (9th Cir.1995)); *MH Pillars Ltd. v. Realini*, No. 15-cv-1383-PJH, 2017 WL 916414, at *11 (N.D. Cal. Mar. 8, 2017) (slip op.) ("Plaintiffs have alleged no injury to consumers, and no harm to competition, and thus, the complaint fails to state a claim for 'unfair' business acts and practices."). Nor does Plaintiff have standing to bring claims for injuries it did not sustain. *See Hall v. Time Inc.*, 158 Cal. App. 4th 847, 855 (2008), as modified (Jan. 28, 2008) (granting motion to dismiss claim for violation of UCL because plaintiff failed to allege that it suffered an injury in fact that was caused by the alleged unfair competition). Count V should be dismissed.

CONCLUSION

For the foregoing reasons, AEG respectfully requests that the Court strike Exhibit 1 to the First Amended Complaint and ¶¶ 6-13, 43, 51, 55, 83-85, 98-100 and dismiss Plaintiff's First Amended Complaint in its entirety.

DATED: June 15, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed **MOTION TO DISMISS FIRST 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.

DATED: June 15, 2018.

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