UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 15-4961-JFW (MRWx)** Date: October 16, 2015

Title: Top Rank, Inc. -*v*- Alan Haymon, et al.

PRESENT:
HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	None

PROCEEDINGS (IN CHAMBERS): **ORDER GRANTING IN PART THE HAYMON DEFENDANTS' MOTION TO DISMISS PURSUANT TO FRCP 12(b)(6) [filed 8/31/2015; Docket No. 60];**

ORDER GRANTING WADDELL DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) [filed 8/31/2015; Docket No. 61]

On August 31, 2015, Defendants Alan Haymon, Haymon Boxing LLC ("Haymon Boxing"), Haymon Sports LLC ("Haymon Sports"), Haymon Holdings LLC ("Haymon Holdings"), and Alan Haymon Development, Inc. ("Haymon Development") (collectively, the "Haymon Defendants") filed a Motion to Dismiss Pursuant to FRCP 12(b)(6) ("Motion to Dismiss") [Docket No. 60]. On September 18, 2015, Plaintiff Top Rank, Inc. ("Plaintiff" or "Top Rank") filed its Opposition [Docket No. 79]. On September 25, 2015, the Haymon Defendants filed a Reply [Docket No. 81].

On August 31, 2015, Defendants Waddell & Reed Financial, Inc. ("W&R Financial"), Waddell & Reed Investment Management Company ("WRIMCO"), Ivy Investment Management Company ("IICO"), and Media Group Holdings, LLC ("MGH") (collectively, the "Waddell Defendants") filed a Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Motion to Dismiss") [Docket No. 61]. On September 18, 2015, Top Rank filed its Opposition [Docket No. 78]. On September 25, 2015, the Waddell Defendants filed a Reply [Docket No. 80].

Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found these matters appropriate for submission on the papers without oral argument. The matters

were, therefore, removed from the Court's October 5, 2015 hearing calendar and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

In its First Amended Complaint filed on August 3, 2015, Top Rank alleges that the Haymon Defendants, "[w]ith the financial backing, complicity, strategic planning, and material assistance" of the Waddell Defendants, are seeking to monopolize and restrain trade in the markets for managing and promoting "Championship-Caliber Boxers" in the United States. First Amended Complaint ("FAC") at ¶¶ 1, 3, 137-155. Top Rank alleges that the Haymon Defendants' and Waddell Defendants' conduct violates the Sherman Act, the Muhammad Ali Boxing Reform Act, and other federal and state laws. FAC at ¶¶ 137-184.

A. The Parties

Plaintiff Top Rank is a boxing promoter licensed in the States of California and Nevada, among others. FAC at ¶ 9.

Defendant Alan Haymon, and the other Haymon Defendants, are allegedly engaged in the business of professional boxing management as well as the business of professional boxing promotion throughout the United States. FAC at ¶ 122. The Haymon Defendants have approximately 200 fighters in their management stable, including current and former world champions Adonis Stevenson, Danny Garcia, Adrien Broner, Anthony Dirrell, Peter Quillin, and Keith Thurman. FAC at ¶ 45.

The Waddell Defendants are asset management and investment advisory firms. Specifically, W&R Financial is a "publicly traded asset management and financial planning company." FAC at ¶ 15. WRIMCO and IICO, subsidiaries of W&R Financial, are a "national investment advisory business" and a "registered investment advisor for [W&R Financial's] 'Ivy Funds,'" respectively. FAC at ¶¶ 16-17. MGH, a Delaware series LLC, is alleged to be a subsidiary of W&R Financial and the vehicle through which the Waddell Defendants invested in the Haymon Defendants. FAC at ¶¶ 18, 57. MGH is allegedly a member of Haymon Holdings. FAC at ¶ 18. According to the First Amended Complaint, the Waddell Defendants are allegedly agents and alter egos of one another. FAC at ¶ 19.

B. The Haymon Defendants' Alleged Conduct

As discussed in greater detail below, Top Rank alleges that the Haymon Defendants have engaged in at least four types of anticompetitive and tortious behavior: (1) inducing professional boxers to enter unlawful "tie out" agreements, which prevent the boxers from "freely" or "independently" contracting with legitimate promoters (FAC at ¶¶ 63-66, 137-144); (2) illegally acting as a promoter and fraudulently operating in the promotion business through a network of "sham promoters;" (FAC at ¶¶ 72-82, 147); (3) blocking legitimate promoters' access to major venues through fraud, overbooking, and other unlawful means (FAC at ¶¶ 97-100, 147); and (4) utilizing predatory "payola" practices, i.e., preventing legitimate promoters from access to television broadcasters through exclusive dealing, overbooking, and other unlawful means (FAC at ¶¶ 83-96).

1. "Tie Out" Contracts and "Sham Promoters"

The Haymon Defendants allegedly require boxers to sign long-term, exclusive management agreements, which prevent boxers from entering into contracts with "legitimate" promoters without the Haymon Defendants' express consent. FAC at ¶¶ 63-66. Top Rank alleges that the Haymon Defendants, on one occasion, withheld their consent and refused to allow Roc Nation to promote a bout involving one of the Haymon Defendants' boxers. FAC at ¶ 80. In addition, Top Rank alleges that "in at least some instances," the Haymon Defendants employ the services of "sham promoters" that are controlled by the Haymon Defendants. FAC at ¶¶ 73, 82. Top Rank alleges that the use of these "tie out" contracts and "sham promoters" excludes legitimate promoters from accessing and promoting many of the industry's top boxers and allows the Haymon Defendants to act illegally as both manager and promoter in violation of the "firewall" provisions of the Muhammad Ali Boxing Reform Act. FAC at ¶¶ 65, 82.

2. Predatory "Payola" Practices

The Haymon Defendants have allegedly reversed the ordinary flow of money between television broadcasters and promoters by purchasing air time with over half a dozen leading broadcasters to air fights involving Haymon-contracted boxers under the "Premier Boxing Champions" ("PBC") brand. FAC at ¶¶ 6, 86, 87, 92. Top Rank alleges that the Haymon Defendants have obtained "exclusive commitments," from broadcasters, either tacit or express, and have locked up over 100 different dates, allegedly leaving no room, dates, or opportunities for other promoters or fighters. FAC at ¶¶ 6, 87, 94. Top Rank alleges that, between paying the broadcasters for air time and the expenses of promoting each televised match, the Haymon Defendants are operating significantly below cost in the short term so that they can expand their presence in the boxing promotion business, eliminate competition from promoters, build a monopoly, and ultimately charge supracompetitive prices. FAC at ¶¶ 6, 92, 93.

3. Venue Blocking

Top Rank alleges that the Haymon Defendants have used their dominant position in the management market to block legitimate promoters from obtaining favorable dates at top venues. FAC at ¶¶ 4, 97-100. Specifically, Top Rank alleges that two promoters, Golden Boy and Banner Promotions, recently attempted to stage a fight between Ruslan Provodnikov and Lucas Matthyse at the StubHub Center in Carson, California. FAC at ¶ 97. The fight was originally scheduled for March 28, 2015. FAC at ¶ 97. However, Top Rank alleges that the Haymon Defendants "locked up" the desired date for the Provodnikov-Matthyse fight at the StubHub Center (as well as other Southern California venues), ostensibly to host a fight between Jhonny Gonzalez and Garry Russell Jr. FAC at ¶¶ 97-98. Because the StubHub Center and other Southern California venues were booked, Golden Boy and Banner Promotions were forced to move the fight to another location. FAC at ¶ 98. As soon as the Provodnikov-Matthyse fight was relocated, the Haymon Defendants allegedly moved the Gonzalez-Russell fight to The Palms in Las Vegas. FAC at ¶ 98. Top Rank alleges that the Haymon Defendants' purpose in "locking up" the StubHub Center and alternative Southern California venues was to "lock out" the Provodnikov-Matthyse fight and prevent any possible cannibalization of tickets sales in the same local area for the Haymon Defendants' bout between Julio Cesar Chavez, Jr. and Andrzej Fonfara, which was scheduled to

take place at the StubHub Center just three weeks later, on April 18, 2015. FAC at ¶ 98.

C. The Waddell Defendants' Alleged Conduct

Top Rank alleges that Ryan Caldwell, a senior executive and portfolio manager of W&R Financial, WRIMCO, and IICO, had ambitions to "own live sports." FAC at ¶ 56. After discussions with Alan Haymon, he allegedly agreed that the Waddell Defendants would "commit funding, business expertise, and operational supervision" to the Haymon Defendants. FAC at ¶ 56 Pursuant to that agreement, the Waddell Defendants arranged for at least four investment funds, under the management of WRIMCO and IICO, to collectively purchase hundreds of millions of dollars of "Series H" stock in MGH. FAC at ¶ 57. MGH in turn invested these funds in Haymon Holdings on August 29, 2013 and October 31, 2013. FAC at ¶ 57.

On August 29, 2013, concurrent with its investment, MGH entered into an Amended and Restated Limited Liability Company Agreement with respect to Haymon Holdings (which is, in turn, the managing member of Haymon Sports). FAC at ¶ 58. The Agreement provided that MGH would become a "member" of Haymon Holdings, along with Haymon Development and at least one other member. FAC at ¶ 58. Pursuant to the Agreement, MGH is allegedly entitled to appoint two "Observers" to Haymon Holdings' Board of Directors, who receive all of the information provided to any Board member, and who, in the past, had the power to convene special meetings of the Board of Directors. FAC at ¶ 59. In addition, MGH allegedly possesses approval rights (or veto power) over Haymon Holdings' and its subsidiaries' "Major Decisions," including those related to material contracts, any material change in business, adoption of annual budgets and business plans, and any material action or material expenditure. FAC at ¶ 61.

In addition to the Waddell Defendants' alleged investment in Haymon Holdings, Top Rank alleges that Ryan Caldwell, and other representatives of the Waddell Defendants: (1) attended meetings and engaged in negotiations for the possible acquisition of Golden Boy Promotions, one of the industry's premier promoters (FAC at ¶¶ 67-71);[1] and (2) attended meetings and engaged in negotiations with broadcasters to reassure them that the Haymon Defendants had adequate funding for their new PBC boxing venture and alleged "payola" scheme (FAC at ¶¶ 91, 95).

The remainder of the allegations concerning the Waddell Defendants consist of impermissible group pleading, i.e., lumping the Waddell Defendants and the Haymon Defendants together, or are bare legal conclusions cleverly disguised as factual allegations.

D. Top Rank's Claims

In its First Amended Complaint filed on August 3, 2015, Top Rank alleges the following claims for relief against all defendants: (1) unlawful "tie out" in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1; (2) conspiracy in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1; (3) attempted monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2; (4) injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26; (5) violation of

[1]Due to Top Rank's reliance on group pleading, it is impossible to determine which entity that Top Rank claims attempted to acquire Golden Boy Promotions.

the California Unfair Practices Act, Cal. Bus. & Prof. Code §§ 17000 *et seq.*; (6) violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*; and (7) tortious interference with prospective economic advantage.

The Haymon Defendants and the Waddell Defendants move to dismiss all of the claims asserted against them for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

II. LEGAL STANDARD

A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. "A Rule 12(b)(6) dismissal is proper only where there is either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Summit Technology, Inc. v. High-Line Medical Instruments Co., Inc.*, 922 F. Supp. 299, 304 (C.D. Cal. 1996) (quoting *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988)). However, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations and alterations omitted). "[F]actual allegations must be enough to raise a right to relief above the speculative level." *Id.*

In deciding a motion to dismiss, a court must accept as true the allegations of the complaint and must construe those allegations in the light most favorable to the nonmoving party. *See, e.g., Wyler Summit Partnership v. Turner Broadcasting System, Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). "However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations." *Summit Technology*, 922 F. Supp. at 304 (citing *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) *cert. denied*, 454 U.S. 1031 (1981)).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990) (citations omitted). However, a court may consider material which is properly submitted as part of the complaint and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201 without converting the motion to dismiss into a motion for summary judgment. *See, e.g., id.*; *Branch v. Tunnel*, 14 F.3d 449, 454 (9th Cir. 1994).

Where a motion to dismiss is granted, a district court must decide whether to grant leave to amend. Generally, the Ninth Circuit has a liberal policy favoring amendments and, thus, leave to amend should be freely granted. *See, e.g., DeSoto v. Yellow Freight System, Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). However, a Court does not need to grant leave to amend in cases where the Court determines that permitting a plaintiff to amend would be an exercise in futility. *See, e.g., Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile.").

III. THE HAYMON DEFENDANTS' MOTION TO DISMISS

A. The Sherman Act Claims

Top Rank alleges three claims for violation of the Sherman Act - two claims for violation of Section 1, which governs unreasonable restraints of trade and tying,[2] and one claim for violation of Section 2, which governs attempted monopolization.[3] The Haymon Defendants move to dismiss Top Rank's three Sherman Act claims, arguing that they suffer from certain common pleading defects, including Top Rank's (1) failure to adequately plead antitrust injury; (2) failure to adequately define the relevant markets; (3) failure to adequately allege market power; and (4) impermissible reliance on group pleading.

In addition, the Haymon Defendants move to dismiss each Sherman Act claim on individual grounds. The Court addresses the common pleading requirements first, and then the pleading requirements for each individual claim.

1. Common pleading requirements

a. *Antitrust injury*

The Haymon Defendants move to dismiss Top Rank's antitrust claims on the grounds that Top Rank has failed to allege "antitrust injury." Specifically, the Haymon Defendants argue that Top Rank has failed to allege injury to itself or to competition.

A plaintiff may only pursue an antitrust action if it can show "antitrust injury," i.e., "'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (quoting *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). The four requirements for antitrust injury are: "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051, 1055 (9th Cir. 1999). "Injury of the type antitrust laws were intended to prevent" means harm to competition, not harm to individual competitors. *See Brunswick*, 429 U.S. at 488 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) ("The antitrust laws . . . were enacted for 'the protection of competition not competitors.'"). In order to plead harm to competition sufficiently to withstand a motion to dismiss, a claimant "may not merely recite the bare legal conclusion that competition has been restrained unreasonably." *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 507-08

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[2]Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Despite the literal language of the statute, Section 1 "outlaw[s] only unreasonable restraints." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

[3]Section 2 of the Sherman Act makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations ..." 15 U.S.C. § 2.

(9th Cir. 1989). "Rather, a claimant must, at a minimum, sketch the outline of [the injury to competition] with allegations of supporting factual detail." *Id.* at 508.

The Court concludes that Top Rank has not adequately alleged injury to itself, which is not only an element of antitrust injury, but also of Article III standing. As discussed, Top Rank alleges that the Haymon Defendants engage in unlawful conduct in the form of exclusionary "tie out" contracts, the use of "sham" promoters, predatory "payola practices," and venue blocking. However, as the Haymon Defendants point out, Top Rank has failed to allege how it has been injured by the alleged conduct. Indeed, it has not identified a single bout that it has attempted to promote but was precluded from promoting by the Haymon Defendants, a single venue from which it has been blocked, or a single network that has refused to broadcast a fight promoted by Top Rank. Top Rank correctly argues that competitors who are "frozen out" of a market by an antitrust violation have suffered antitrust injury and possess antitrust standing. However, Top Rank has failed to allege any facts demonstrating that it has actually been "frozen out" by any of the Haymon Defendants' conduct.

With respect to the alleged "tie out," for example, Top Rank only alleges that the Haymon Defendants, on one occasion, withheld their consent and refused to allow Roc Nation to promote a bout involving one of the Haymon Defendants' boxers. FAC at ¶ 80. With respect to venue blocking, Top Rank only alleges that the Haymon Defendants blocked Golden Boy and Banner Promotions from booking a venue for a single fight. FAC at ¶¶ 97-98. With respect to the alleged "payola practice," Top Rank merely alleges that the Haymon Defendants have booked "over 100 different show dates" on "over half a dozen major broadcasters" and that the Haymon Defendants obtained undefined "exclusivity commitments (tacit or express)". FAC at ¶ 94. These alleged actions may not have affected all promoters equally, may not have affected certain promoters at all, and in fact, may have even helped certain promoters. Without any additional factual allegations, the Court cannot determine whether Top Rank has alleged an injury-in-fact, let alone whether that injury flows from that which makes the conduct unlawful.

b. *Market definition*

The Haymon Defendants also move to dismiss Top Rank's Sherman Act claims on the grounds that Top Rank has not adequately defined the relevant markets.

"In order to state a valid claim under the Sherman Act, a plaintiff must allege that the defendant has market power within a 'relevant market.' That is, the plaintiff must allege both that a 'relevant market' exists and that the defendant has power within that market." *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1044 (9th Cir. 2008). Allegations concerning the relevant market and the defendant's market power are required under both Section 1 and Section 2 of the Sherman Act. *Id.* at 1044 n.3 ("The 'relevant market' and 'market power' requirements apply identically under the two different sections of the [Sherman] Act . . . .").

The relevant market definition must include both a product market and a geographic market. *Id.* at 1045 n.4. The product market "must encompass the product at issue as well as all economic substitutes for the product." *Id.* at 1045. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962).

As the Ninth Circuit has held, "there is no requirement that [the relevant market and defendant's market power] . . . be pled with specificity." *Newcal*, 413 F.3d at 1045. "An antitrust complaint therefore survives a Rule 12(b)(6) motion unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect. And since the validity of the 'relevant market' is typically a factual element rather than a legal element, alleged markets may survive scrutiny under Rule 12(b)(6) subject to factual testing by summary judgment or trial." *Id.* A complaint, however, may be dismissed under Rule 12(b)(6) if the complaint's "relevant market" definition is "facially unsustainable." *Id.*

In this case, Top Rank identifies two relevant markets: (1) the market for the management of Championship-Caliber Boxers[4] in the United States; and (2) the market for the promotion of Championship-Caliber Boxers in the United States. The Court cannot conclude that these market definitions are facially unsustainable, especially given that the Supreme Court upheld a market definition for the "promotion of championship boxing contests" in the United States (albeit over 50 years ago). *See Int'l Boxing Club of New York, v. United States*, 358 U.S. 242, 249-52 (1959); *United States v. Int'l Boxing Club of New York*, 150 F. Supp. 397, 418-21 (S.D.N.Y. 1957). Although these market definitions may prove to be unsustainable on a motion for summary judgment, the Court concludes that they survive scrutiny on a motion to dismiss under Rule 12(b)(6).

c. *Market power*

Although the Court concludes that Top Rank's definitions of the relevant markets survive the pleading stage, the Court concludes that Top Rank has failed to adequately allege market power or economic power within those markets.

Each of Top Rank's Sherman Act claims requires Top Rank to allege market power or economic power in the relevant market. *Newcal*, 513 F.3d at 1044 n.3 (9th Cir. 2008) ("The 'relevant market' and 'market power' requirements apply identically under the two different sections of the [Sherman] Act."). The relevant market for the tying claim is the alleged market for management of Championship-Caliber Boxers. *See Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 46 (2006) ("[I]n all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product."); FAC at ¶ 141 (alleging that the tying product is the management of Championship-Caliber Boxers). The relevant markets for the conspiracy claim are the alleged markets for the management and promotion of Championship-Caliber Boxers.[5] *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (equating analysis under "rule of reason" for alleged unreasonable restraints under Section 1 to "an inquiry into market

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[4]"Championship-Caliber Boxers" are defined as "professional boxers who, within the past three years, have demonstrated through such quantitative factors as purse size, television rights, viewership, ticket revenue, and other objective criteria that they belong to the 'cream' of the boxing business." FAC at ¶ 104 (quotations and citations omitted).

[5]Top Rank argues that it need not allege dominance in the promotion market for its conspiracy in restraint of trade claim, relying on cases concerning tying arrangements. However, Top Rank's conspiracy claim does not appear to limit itself to tying arrangements. *See* FAC at ¶ 147.

power and market structure designed to assess the combination's actual effect"); FAC at ¶ 147 (alleging an unreasonable restraint of trade in both the management and promotion markets). And, finally, the relevant market for the attempted monopolization claim is the alleged market for the promotion of Championship-Caliber Boxers. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) ("[D]emonstrating the dangerous probability of monopolization in an attempt case also requires inquiry into the relevant product and geographic market and the defendant's economic power in that market."); FAC at ¶ 152 (alleging attempted monopolization of the promotion market).

Market power is the ability "(1) to price substantially above the competitive level and (2) to persist in doing so for a significant period without erosion by new entry or expansion." Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 501. Market power may be demonstrated through either of two types of proof: (1) "direct evidence of the injurious exercise of market power," i.e., "evidence of restricted output and supracompetitive prices;" or (2) more commonly, "circumstantial evidence pertaining to the structure of the market." *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). "To demonstrate market power circumstantially, a plaintiff must: (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." *Id.* Although market power need not be pled with specificity, the allegations must be sufficiently detailed "to raise a right to relief above the speculative level." *Rick-Mik Enters., Inc. v. Equilon Enters. LLC*, 532 F.3d 963, 973 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 555).

In this case, the Court concludes that Top Rank has failed to adequately allege that the Haymon Defendants possess market power or economic power in either of the relevant markets. With respect to the management market, Top Rank's allegations of the Haymon Defendants' market power are completely disconnected from the relevant market definition. Top Rank defines the relevant market as the market for the management of "Championship-Caliber Boxers" in the United States. FAC at ¶ 104. Yet, Top Rank's allegations supposedly reflecting the Haymon Defendants' "dominant share" of that market are not limited to Championship-Caliber Boxers, but encompass *all* boxers. Specifically, Top Rank alleges that:

> Haymon's stable includes approximately 200 fighters, including numerous Championship-Caliber Boxers. No other boxing manager represents more than a handful of boxers. While Plaintiff does not have access to precise figures, Plaintiff alleges that Haymon's share of this relevant market is greater than 50%.

FAC at ¶ 119. As the Haymon Defendants point out, "Top Rank alleges no such facts or figures concerning *Championship-Caliber Boxers*: how many of them there are, how many promoters promote them, how many managers manage them, or how many of them the Haymon Defendants manage." Reply [Docket No. 81] at 5. Moreover, although Top Rank alleges that "Haymon's share of this relevant market is greater than 50%," the Court has no idea how Top Rank arrived at this figure, or whether it is limited to the management of Championship-Caliber Boxers. Top Rank's Opposition, rather than clarifying the issue, merely repeats the same confusing allegations, and, in fact, creates additional confusion. *See*, *e.g.,* Opposition [Docket No. 79] at p. 25 ("Top Rank did allege the approximate number of boxers Defendants manage, averred that their control exceeds 50% of the overall market, and is at least 15 times greater than any other manager."). Although the Court agrees with Top Rank that it does not have to allege an exact, percentage-based market

share, Top Rank must include enough facts to raise its right to relief above the speculative level. The Court concludes that Top Rank has failed to do so. *See Rick-Mik Enters., Inc.*, 532 F.3d at 972-73 (finding the allegations of market power inadequate where the allegations related to the retail gasoline market and not the relevant market for franchises).

Top Rank's allegations with respect to the Haymon Defendants' market power or economic power in the promotion market are even weaker, more speculative, and virtually non-existent. Indeed, although Top Rank contends that it has alleged the Haymon Defendants' economic power circumstantially, Top Rank utterly fails to allege any facts concerning the Haymon Defendants' market share in the promotion market, and instead relies on the same flawed allegations concerning the Haymon Defendants' power in the management market. *See* FAC at ¶¶ 119-121 (only alleging that the Haymon Defendants possess market power in the management market); Opposition [Docket No. 79] at p. 26 (relying on allegations related to Defendants' power in the management market).

Although Top Rank argues that it has also alleged direct evidence of the Haymon Defendants' market power, based on, for example, their ability to elicit "exclusionary" terms from broadcasters and to make "exclusionary demands" of venues, these conclusory allegations are insufficient. Although Top Rank may allege market power through "direct evidence of the injurious exercise of market power," i.e., "evidence of restricted output and supracompetitive prices," *see Rebel Oil,* 51 F.3d at 1434, Top Rank fails to allege any evidentiary facts plausibly suggesting restricted output or supracompetitive prices in the promotion market.

Accordingly, the Court concludes that Top Rank has failed to allege market power in either the management market or promotion market for Championship-Caliber Boxers.

d. *Group pleading*

The Haymon Defendants also move to dismiss Top Rank's antitrust claims on the grounds that Top Rank's allegations draw no meaningful distinctions between or among the nine defendants against whom they are collectively asserted.

The Court agrees that Top Rank has impermissibly relied on group pleading, *especially* by lumping the Waddell Defendants and the Haymon Defendants together. Accordingly, in its Second Amended Complaint, Top Rank shall allege the specific conduct engaged in by each of the remaining defendants.

2. Pleading Requirements for Individual Claims

a. *Tying in violation of Section 1 of the Sherman Act (Count I)*

In its first claim for relief, Top Rank alleges that the Haymon Defendants have violated Section 1 of the Sherman Act by entering into unlawful "tying" or "tie out" arrangements. Specifically, Top Rank alleges that the Haymon Defendants condition the provision of their management services on the boxers' agreement "to not contract with legitimate boxing promoters without [the Haymon Defendants'] consent." FAC at ¶ 139. The Haymon Defendants move to dismiss the tying claim on the grounds that the alleged "tie out" does not, on its face, constitute a

tie out.[6]

"A tying arrangement is a device used by a seller with market power in one product market to extend its market power to a distinct product market." *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 912 (9th Cir. 2008). "To accomplish this objective, the competitor agrees 'to sell one product (the tying product) but only on the condition that the buyer also purchase a different product (the tied product), or at least agrees that he will not purchase the tied product from any other supplier.'" *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1159 (9th Cir. 2003) (quoting *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 461 (1992)). "[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). "Tying arrangements are forbidden on the theory that, if the seller has market power over the tying product, the seller can leverage this market power through tying arrangements to exclude other sellers of the tied product." *Cascade*, 515 F.3d at 912.

A tying arrangement is a *per se* violation[7] of Section 1 of the Sherman Act if the plaintiff establishes that: "(1) the defendant tied together the sale of two distinct products or services; (2) the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product; and (3) the tying arrangement affects a 'not insubstantial volume of commerce' in the tied product market." *See Cascade*, 515 F.3d at 912*; Paladin Assocs.*, 328 F.3d at 1159 (citing *Eastman Kodak*, 504 U.S. at 461-62).

The Court concludes that Top Rank has failed to allege sufficient facts to support its per se tying claim. As previously discussed, Top Rank has failed to adequately allege that the Haymon Defendants possess market or economic power in the management market and has failed to allege injury to itself. Moreover, although Top Rank's allegations are carefully and creatively worded, Top Rank has failed to allege that the Haymon Defendants tied together the sale of two distinct services. Indeed, Top Rank merely alleges that the Haymon Defendants' management agreement provides that boxers cannot contract with promoters without the Haymon Defendants' consent. *See* FAC at ¶ 64 ("These purported management agreements – which Haymon often styles as 'advisor contracts' – not only lock up managerial rights, but also restrict boxers from entering into any other agreement, including those related to promotional rights, without Haymon's

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[6]The Haymon Defendants also move to dismiss the tying claim on the grounds that their alleged market power cannot be premised on a voluntary contractual relationship. *See, e.g., Rick-Mik Enters. Inc. v. Equilon Enters., LLC*, 532 F.3d 963, 973 (9th Cir. 2008) ("A tying claim generally requires that the defendant's economic power be derived from the market, not from a contractual relationship that the plaintiff has entered into voluntarily."). However, contrary to the Haymon Defendants' argument, Top Rank alleges that the Haymon Defendants' economic power is derived from the market, not from a voluntary contractual relationship.

[7]"*Per se* liability is reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'" *Texaco v. Dagher*, 547 U.S. 1, 5 (2006) (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).

express consent."); FAC at ¶ 139 ("Haymon's 'advisor' contracts with Championship-Caliber Boxers contain exclusionary provisions that condition his professional services on the boxers' agreement to not contract with legitimate boxing promoters without his consent. These agreements constitute unlawful 'tying' or 'tie out' arrangements."). Contrary to Top Rank's argument, this "consent" provision does not, on its face, tie two services together (management services and promotion services). *See Midwestern Waffles, Inc. v. Waffle House, Inc*., 734 F.2d 705, 712 (11th Cir. 1984) ("An approved source requirement is not, alone, illegal. Only if a franchisee is coerced into purchasing products from a company in which the franchisor has a financial interest does an illegal tie exist."); Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1753g ("And when there are many approved suppliers in which the defendant lacks a financial interest, the products should not be deemed tied together because buyers have not been denied a competitive market in the tied product.").

Top Rank correctly argues that illegal tying arrangements need not be express, and that "consent" clauses may practically function as unlawful tying arrangements. *See, e.g.,* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1753g ("To be sure, a tie-in would exist if the willingness to approve others is merely a charade."); *Tix-X-Press, Inc. v. Omni Promotions Co. of Ga.*, 815 F.2d 1407, 1416 (11th Cir 1987) ("Where a contract . . . provides that buyers shall use only the seller or a source 'approved' by the seller to purchase the tied product, the courts have looked to see if the approval clause was reasonable and permitted the buyer meaningful freedom of choice, or whether it is manipulated by the seller to force the buyer to purchase the tied product from the seller."). However, Top Rank's First Amended Complaint is devoid of any factual allegations demonstrating that the consent clause functioned, in practice, as a tying arrangement or "tie out," at least with respect to Top Rank. Indeed, Top Rank does not allege, for example, that it was generally understood that boxers in the Haymon Defendants' management stable were not allowed to contract with all or even certain legitimate promoters or that they were required to use one of the Haymon Defendants' alleged sham promoters.[8] Rather, all that Top Rank alleges is that "in at least some instances," the Haymon Defendants' boxers have used "sham promoters" who are in fact controlled by the Haymon Defendants, and, on *one* occasion, the Haymon Defendants withheld their consent and did not allow one of their boxers to fight in a bout promoted by Roc Nation. Without any additional factual allegations supporting the existence of a de facto tying arrangement, these allegations fail to state a plausible tying claim. *See* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1755c ("Absent an announced or reasonably understood tying condition,. . . two products have not been tied together."); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 722 (7th Cir. 1979) ("Given the contractual language, which at least provides for the possibility of purchasing processing from non-Fotomat sources, we are reluctant to find a tying arrangement without some evidence that Fotomat applied the contract language so restrictively as to constitute a de facto tying clause.").

[8]In its Opposition, Top Rank contends that it has alleged that the Haymon Defendants have "never consented" to allowing boxers in their management stable to sign with "legitimate" promoters, citing to paragraph 65 of the First Amended Complaint. *See* Opposition at p. 26. However, paragraph 65 does not so allege. If Top Rank can, in good faith, allege facts showing that the Haymon Defendants have never consented to allowing boxers in their management stable to sign with "legitimate promoters," Top Rank may be able to state a viable tying claim.

For the foregoing reasons, the Haymon Defendants' Motion to Dismiss Top Rank's claim for an unlawful "tie out" in violation of Section 1 of the Sherman Act (Count I) is **GRANTED.**

b. *Conspiracy in restraint of trade in violation of Section 1 of the Sherman Act (Count II)*

In its second claim for relief, Top Rank alleges that the Haymon Defendants entered into a contract, combination, or conspiracy (with the Waddell Defendants, Championship-Caliber Boxers, boxing venues, television broadcasters, advertisers, sponsors and/or "sham promoters") in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. FAC at ¶¶ 145-150. In addition to the grounds previously discussed, the Haymon Defendants move to dismiss this claim on the grounds that it lacks the requisite factual specificity.

"To state a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, claimants must plead not just ultimate facts (such as conspiracy), but evidentiary facts which, if true, will prove: (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." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008).

As discussed, Top Rank fails to state a claim for conspiracy in restraint of trade in violation of Section 1 of the Sherman Act because it fails to adequately allege that the Haymon Defendants possess market power in either the management market or promotion market and has failed to adequately allege injury to itself.[9] Accordingly, the Haymon Defendants' Motion to Dismiss Top Rank's claim for conspiracy in restraint of trade in violation of Section 1 of the Sherman Act (Count II) is **GRANTED**. However, with the exception of these defects, the Court concludes that, although Top Rank's First Amended Complaint is short on factual detail and clarity, Top Rank's allegations, for the most part,[10] sufficiently answer the basic questions of "who, did what, to whom (or with whom), where, and when?" *Kendall,* 518 F.3d at 1048.

c. *Attempted monopolization in violation of Section 2 of the Sherman Act (Count III)*

In its third claim for relief, Top Rank alleges that the Haymon Defendants "orchestrated a predatory and anticompetitive scheme to leverage Haymon's monopoly power in the market for management of Championship-Caliber Boxers, in an attempt to obtain a monopoly in the market for promotion of Championship-Caliber Boxers, in violation of Section 2 of the Sherman Act." FAC at ¶ 152.

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[9]In addition, although Top Rank alleges the existence of several other allegedly anticompetitive agreements, as discussed *infra*, the Court concludes that Top Rank has failed to adequately allege an agreement between the Waddell Defendants and the Haymon Defendants.

[10]Although Top Rank's allegations, for the most part, meet the applicable pleading standard, Top Rank's allegations with respect to, for example, the "exclusivity commitments" with unspecified broadcasters are vague and lack the requisite factual detail. *See* FAC at ¶ 94.

"A claim for attempted monopolization has three elements: 1) a specific intent to monopolize a relevant market; 2) predatory or anticompetitive conduct; and 3) a dangerous probability of success." *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir. 1991). In the Ninth Circuit, leveraging of a monopoly does not constitute an independent Section 2 claim. *Id.* at 546-49. However, "[i]f there is a dangerous probability that a monopoly will be created by leveraging conduct, then the conduct will be reached under the doctrine of attempted monopoly." *Id.* at 549.

"[D]emonstrating the dangerous probability of monopolization in an attempt case [ ] requires inquiry into the relevant product and geographic market and the defendant's economic power in that market." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993). In this case, Top Rank alleges attempted monopolization of the promotion market. Although a lower percentage of market share can support a claim for attempted monopolization than that required for actual monopolization, as the Court has already concluded, Top Rank fails to allege *any* facts regarding the Haymon Defendants' economic power in the promotion market and thus has not alleged any facts to demonstrate that the Haymon Defendants' economic power meets even this lower threshold. Accordingly the Court concludes that Top Rank has failed to state a claim for attempted monopolization. *See, e.g., ChriMar Sys., Inc v. Cisco Sys., Inc.*, 72 F. Supp. 3d 1012, 1019-20 (N.D. Cal. 2014) ("[A]lthough a lower percentage is required for an attempted monopoly claim, as opposed to an actual monopoly claim, HP must still allege sufficient market power."); *Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc.*, 2013 WL 5694452, at *15-16 (N.D. Cal. Oct. 18, 2013) (dismissing attempted monopolization claim for failure to adequately allege market power in the relevant market).

Accordingly, the Haymon Defendants' Motion to Dismiss Top Rank's claim for attempted monopolization in violation of Section 2 of the Sherman Act (Count III) is **GRANTED**.

B. Injunctive Relief Under Section 16 of the Clayton Act (Count IV)

Section 16 of the Clayton Act "does not furnish an independent cause of action." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051 (9th Cir. 2008). "Rather, it allows the court to fashion relief upon a showing of a separate violation of the antitrust laws." *Id.* Because Top Rank has failed to state a claim for relief under Section 1 or Section 2 of the Sherman Act, the Haymon Defendants' Motion to Dismiss Top Rank's claim for injunctive relief under Section 16 of the Clayton Act (Count IV) is **GRANTED**.

C. State Law Claims

The Haymon Defendants also move to dismiss Top Rank's claims for violation of the California Unfair Practices Act, Cal. Bus. & Prof. Code §§ 17000 *et seq*. (Count V), violation of the California Unfair Competition Law, Cal. Bus. & Prof Code §§ 17200 *et seq*. (Count VI), and tortious interference with prospective economic advantage (Count VII).

The Court declines to address the Haymon Defendants' arguments relating to Top Rank's state law claims for relief at this time. If Top Rank is able to cure the pleading defects with respect to its Sherman Act claims and states viable claims for relief under the Sherman Act (and Clayton Act), many of the pleading defects raised by the Haymon Defendants with respect to the state law

claims will also be cured. On the other hand, if Top Rank ultimately fails to allege a viable federal claim for relief under the Sherman Act (or Clayton Act), the Court will likely decline to exercise supplemental jurisdiction over Top Rank's state law claims for relief. Accordingly, the Court **DEFERS** ruling on the Haymon Defendants' Motion to Dismiss Top Rank's claims for violation of the California Unfair Practices Act, Cal. Bus. & Prof. Code §§ 17000 *et seq.* (Count V), violation of the California Unfair Competition Law, Cal. Bus. & Prof Code §§ 17200 *et seq*. (Count VI), and tortious interference with prospective economic advantage (Count VII).

IV. THE WADDELL DEFENDANTS' MOTION TO DISMISS

A. Claims for Violation of Section 1 of the Sherman Act (Counts I and II)

The Waddell Defendants move to dismiss Top Rank's claims for violation of Section 1 of the Sherman Act, in relevant part, on the grounds that: (1) there are no allegations which plausibly suggest that the Waddell Defendants entered into an "illegal agreement;" (2) the Waddell Defendants are incapable of conspiring with the Haymon Defendants; and (3) there is no recognized claim for "aiding and abetting" a Sherman Act violation.

1. The allegations regarding the Waddell Defendants do not plausibly suggest an illegal agreement.

As previously stated, "[t]o state a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, claimants must plead not just ultimate facts (such as conspiracy), but evidentiary facts which, if true, will prove: (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." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008).

Whether a restraint is analyzed under the rule of reason or a per se rule, a claim for violation of Section 1 of the Sherman Act,"requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). In other words, the pleaded facts must "raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 555-56. "[T]erms like 'conspiracy,' or even 'agreement,' are borderline: they might well be sufficient in conjunction with a more specific allegation -- for example, identifying a written agreement or even a basis for inferring a tacit agreement, . . . but a court is not required to accept such terms as a sufficient basis for a complaint." *Id.* at 557 (quoting DM *Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999)). Indeed, "[a] bare allegation of conspiracy is almost impossible to defend against, particularly where the defendants are large institutions with hundreds of employees entering into contracts and agreements daily." *Kendall*, 518 F.3d at 1047. Importantly, "[a]llegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws." *Id.* at 1049.

When the First Amended Complaint is stripped of conclusory statements, legal conclusions disguised as factual allegations, and group pleading allegations, the allegations regarding the Waddell Defendants can be summarized as follows: (1) the Waddell Defendants are investment advisors; (2) the Waddell Defendants made an investment in Haymon Holdings through MGH; (3) as a result of that investment and pursuant to the "Amended and Restated Limited Liability

Company Agreement," MGH allegedly possesses approval rights (or veto power) over Haymon Holdings' and its subsidiaries' "Major Decisions;" (4) Ryan Caldwell, and other representatives of the Waddell Defendants, attended meetings and engaged in negotiations for the possible acquisition of Golden Boy Promotions, which ultimately failed; and (5) Ryan Caldwell attended meetings and engaged in negotiations with broadcasters to reassure them that the Haymon Defendants had adequate funding for their new PBC boxing venture.

The Court concludes that these allegations do not plausibly suggest that the Waddell Defendants entered into a conspiracy or agreement to restrain trade. Indeed, the only agreements allegedly entered into by the Waddell Defendants (and supported by the facts alleged in the First Amended Complaint) are the alleged investment in Haymon Holdings and the corresponding Amended and Restated Limited Liability Company Agreement.[11] However, there is nothing about these agreements, standing alone, that suggest or hint of an agreement to restrain trade in the management or promotion markets, and these agreements are entirely consistent with rational, legal business behavior. "The antitrust laws are not offended by agreements as such, but only by those with an anticompetitive content." *49er Chevrolet, Inc. v. Gen. Motors Corp.*, 803 F.2d 1463, 1467 (9th Cir. 1986).

Top Rank has not alleged that the Waddell Defendants signed, or entered into, any of the other allegedly anticompetitive agreements described in the First Amended Complaint. Instead, Top Rank argues that it has adequately alleged that the Waddell Defendants entered into an "overarching" conspiracy or agreement to "eliminate competition in the markets for managing and promoting Championship-Caliber Boxers," and seeks to hold the Waddell Defendants liable for acts taken by the Haymon Defendants in furtherance of that alleged conspiracy. However, before the Waddell Defendants can be liable for acts taken by the Haymon Defendants in furtherance of the alleged conspiracy, Top Rank must allege sufficient facts, taken as true, to plausibly suggest that the Waddell Defendants were in fact members of the alleged conspiracy. As the Waddell Defendants point out in their Reply [Docket No. 80 at 3-4], Top Rank's "overarching" conspiracy theory relies almost exclusively on paragraph 56 of the First Amended Complaint, which states in its entirety:

> The Waddell & Reed Defendants' *involvement in the conspiracy* began when a senior executive and portfolio manager with WRF, WRIMCO, and IICO named Ryan Caldwell was presented with an opportunity to meet Al Haymon. An avid boxing fan with ambitions to "own live sports," Caldwell leapt at the chance. Haymon first spoke with Caldwell from an office in Burbank, California. In the course of this and later discussions, Caldwell agreed that the Waddell & Reed Defendants would commit funding, business expertise, and operational supervision to Haymon's *illegal scheme*

[11] Although it initially appeared to the Court that Top Rank was attempting to hold the Waddell Defendants vicariously or indirectly liable for the conduct of the Haymon Defendants (based on their investment in the Haymon Defendants and their approval power or veto power over the Haymon Defendants' major decisions), Top Rank adamantly disavows any attempt to impose "indirect or vicarious liability" on the Waddell Defendants based on a principal-agent relationship between the Waddell Defendants and the Haymon Defendants. See Opposition [Docket No. 78] at 7 n. 3.

> -- which was, in substantial part, directed at the State of California and at California businesses and consumers. From that time forward, the Waddell & Reed Defendants *actively participated in, and materially furthered, the plot to take over the boxing promotion business*.

FAC at ¶ 56 (emphasis added); Opposition [Docket No. 78] at 1, 6, 9, 10, 11, 12, 18, 24, 27 (relying on paragraph 56 of the First Amended Complaint). The allegations that the Waddell Defendants were involved in a "conspiracy", agreed to enter into an "illegal scheme," and "actively participated in, and materially furthered, the plot to take over the boxing promotion business" are conclusory statements coupled with legal conclusions that cannot support the existence of an agreement to restrain trade in violation of Section 1 of the Sherman Act.[12] *See Kendall*, 518 F.3d at 1048 ("Although appellants allege the Banks 'knowingly, intentionally and actively participated in an individual capacity in the alleged scheme' to fix the interchange fee or the merchant discount fee, this allegation is nothing more than a conclusory statement."). In fact, stripped of its conclusory statements, paragraph 56 merely alleges that Caldwell desired to "own live sports" and agreed that the Waddell Defendants would commit "funding, business expertise, and operational supervision" to the Haymon Defendants, which is consistent with and suggests rational, legal business behavior rather than an illegal conspiracy.

Top Rank also relies heavily on the Waddell Defendants' participation in meetings and negotiations regarding the failed acquisition of Golden Boy Promotions and their participation in meetings and negotiations with broadcasters regarding the Haymon Defendants' new PBC venture. However, this alleged conduct is also entirely consistent with the Waddell Defendants' ordinary business activities as asset management and investment advisory firms, and does not plausibly suggest that the Waddell Defendants entered into an "overarching conspiracy" to eliminate competition in the markets for the management and promotion of Championship-Caliber Boxers.

Accordingly, the Court concludes that Top Rank has failed to allege sufficient facts to suggest that the Waddell Defendants entered into an illegal agreement to restrain trade.

2. <u>The Waddell Defendants cannot conspire with the Haymon Defendants as a matter of law.</u>

Moreover, even if the Waddell Defendants "agreed" to participate in the Haymon Defendants' alleged anticompetitive scheme, the Court concludes that the Waddell Defendants are not legally capable of conspiring with the Haymon Defendants under Section 1 of the Sherman Act. Rather, the Court concludes that the conduct of the Haymon Defendants and the Waddell Defendants must be viewed as that of a single enterprise.

"The Sherman Act contains a 'basic distinction between concerted and independent action.'"

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[12]Top Rank's First Amended Complaint is littered with such conclusory statements and hyperbole regarding the Waddell Defendants. *See, e.g.,* FAC at ¶ 55 ("The Waddell & Reed Defendants have played an active, complicit, and indispensable role in bringing the anticompetitive scheme to fruition."); ¶ 57 ("The Waddell & Reed Defendants orchestrated an elaborate business arrangement to facilitate -- and to try to conceal -- their involvement in the conspiracy.").

Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 767 (1984) (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984)). "Sherman Act §1 reaches concerted action in unreasonable restraint of trade, while §2 covers unilateral action only when monopoly power is present or attempted." Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1402a. "Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2." *Copperweld*, 467 U.S. at 768.

Accordingly, in analyzing any Section 1 claim, the Court must first determine whether the alleged contract, combination, or conspiracy constitutes "concerted action." Athough the Waddell Defendants and the Haymon Defendants are legally distinct entities, that does not automatically result in the conclusion that there is concerted action for the purposes of Section 1 of the Sherman Act. As the Supreme Court explained:

> [S]ubstance, not form, should determine whether a[n] . . . entity is capable of conspiring under § 1. This inquiry is sometimes described as asking whether the alleged conspirators are a single entity. That is perhaps a misdescription, however, because the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved 'seem' like one firm or multiple firms in any metaphysical sense. The key is whether the alleged 'contract, combination . . ., or conspiracy' is concerted action – that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a 'contract, combination . . . or conspiracy' amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition.

Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 195 (2010) (internal quotations and citations omitted). Two Supreme Court cases – *Copperweld* and *American Needle* – demonstrate the application of these principles. In *Copperweld*, the Supreme Court held that a parent corporation and its wholly owned subsidiary were not legally capable of conspiring, reasoning:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. . . . With or without a formal 'agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.

Copperweld, 467 U.S. at 771. In contrast, in *American Needle*, the Supreme Court held that the licensing activities of National Football League Properties ("NFLP") - a corporate joint venture formed by thirty-two National Football League teams to manage their intellectual property - constituted "concerted activity." *Am. Needle*, 560 U.S. at 196-202. The Supreme Court partially relied on the fact that the teams compete in the market for intellectual property, and concluded that, "[a]lthough NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned." *Id.* at 198. Accordingly, "[t]hirty-two teams operating independently through

the vehicle of the NFLP are not like the components of a single firm that act to maximize the firm's profits. The teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's well-being." *Id.* at 201.

Applying these principles, the Court concludes that the Waddell Defendants' alleged "agreement" with the Haymon Defendants does not constitute "concerted action" for the purposes of Section 1. As pled by Top Rank, the Waddell Defendants and the Haymon Defendants share a complete unity of economic interest in the venture's success, and have no alleged separate interest, at least as it relates to the relevant management and promotion markets. Indeed, as investors, the Waddell Defendants are similar to the "components of single firm that act to maximize the firm's profits." [13] *Am. Needle*, 560 U.S. at 201. Moreover, the Waddell Defendants, as asset management and investment advisory firms, are not actual or potential competitors of the Haymon Defendants.[14] Accordingly, their alleged venture with the Haymon Defendants does not "deprive[ ] the marketplace of independent centers of decisionmaking,"or of a "diversity of entrepreneurial interests," and "thus of actual or potential competition." *Am. Needle*, 560 U.S. at 195.

Accordingly, the Court concludes that the Waddell Defendants cannot, as a matter of law, conspire with the Haymon Defendants.

3. The Waddell Defendants cannot be held liable as "aiders and abetters."

Top Rank contends that, even if the Waddell Defendants are not members of the conspiracy, they can be held liable as "aiders and abetters" of that conspiracy. However, the Court concludes that aiding and abetting is not an independent theory of civil liability under the Sherman Act. *See MCI Telecomms. Corp. v. Graphnet, Inc.*, 881 F. Supp. 126, 129 (D.N.J. 1995)

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[13]This unity of interest is further supported by Top Rank's allegations that Waddell Defendants and Haymon Defendants are, at least to some extent, under common control. *See, e.g.,* FAC at ¶ 15 (alleging that W&R Financial actively manages and controls Haymon Holdings, which is "exercised by its President and General Counsel who sit as MGH's 'Observer' representatives on the Haymon Holdings Board of Directors"); ¶ 16 (alleging that WRIMCO's senior officers actively manage and control Haymon Holdings); ¶ 18 (alleging that MGH is a member of Haymon Holdings and "exercises strategic and operational control" over Haymon Holdings' business activities).

[14]Top Rank argues that it has alleged that the Waddell Defendants are actual competitors in the relevant markets. However, those allegations are solely based on the Waddell Defendants' investment and alleged management and control over Haymon Holdings. *See* FAC at ¶ 15 ("[W&R Financial] participates in the managerial and promotional market in California through its active management and control over Haymon Holdings, exercised by its President and General Counsel who sit as MGH's 'Observer' representatives on the Haymon Holdings Board of Directors."); ¶ 16 ("WRIMCO also participates in the managerial and promotional market in California through its senior officers' active management and control over and direct financial interest in Haymon Holdings.").

("Because the Sherman Act is a statute providing for civil damages for violative conduct and fails to explicitly provide for aiding and abetting liability, none will be presumed unless there is sufficient evidence of congressional intent to the contrary."). Moreover, even if it is an independent theory of civil liability under the Sherman Act, for the same reasons that the Waddell Defendants are not capable of conspiring with the Haymon Defendants, the Court concludes that the Waddell Defendants are not capable of aiding and abetting the Haymon Defendants. *Cf id.* at 131 (noting that the "Graphnet's efforts to allege antitrust aiding and abetting against MCIT seem . . . to be primarily an attempt to circumvent the limitation on intraenterprise conspiracy claims" and dismissing the antitrust counterclaim).

For the foregoing reasons, the Waddell Defendants' Motion to Dismiss Top Rank's claims for unlawful 'tie out' in violation of Section 1 of the Sherman Act (Count I) and for conspiracy in restraint of trade in violation of Section 1 of the Sherman Act (Count II) is **GRANTED**.

B. Attempted Monopolization in Violation of Section 2 of the Sherman Act (Count III)

The Waddell Defendants move to dismiss Top Rank's claim for attempted monopolization in violation of Section 2 of the Sherman Act, on the grounds that the Waddell Defendants are not competitors in the relevant market.

The Court agrees. *See, e.g., name.space, Inc. v. Internet Corp. for Assigned Names and Numbers,* 795 F.3d 1124, 1131 (9th Cir. 2015) ("Because ICANN is not a competitor in any of the three markets, they cannot serve as the basis for a § 2 monopoly claim."); *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065, 1075 (11th Cir. 2004) ("There is no question that CC does not participate in the Spanish-language radio market. Thus, CC cannot attempt to monopolize that market.") (cited favorably by *name.space, Inc.*, 795 F.3d at 1131); *Transphase Sys., Inc. v. S. Cal. Edison Co.*, 839 F. Supp. 711, 717 (C.D. Cal. 1993) ("It is axiomatic in antitrust law that a defendant may not be found liable under the Sherman act for monopolizing or attempting or conspiring to monopolize a market unless that defendant is a competitor in the relevant market and his conduct creates a dangerous probability that he will gain a dominant share of the market.") .

Top Rank argues that it has sufficiently alleged that the Waddell Defendants are competitors in the relevant market. However, as stated in footnote 14, those allegations are solely based on the Waddell Defendants' investment and alleged management and control over Haymon Holdings via their veto or approval power over "Major Decisions." The Court concludes that these allegations are insufficient to find that the Waddell Defendants are competitors in the relevant markets. "[O]ne company's minority ownership interest in another company is not sufficient by itself to make the owner a competitor, for purposes of the antitrust laws, of the subsidiaries rivals. To be a competitor at the level of the subsidiary, the parent must have substantial control over the affairs and policies of the subsidiary." *Caribbean Broad. Sys., Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080, 1088 (D.C. Cir. 1998); *see also Spanish Broad. Sys. of Fla., Inc.*, 376 F.3d at 1075 ("Absent allegations of significant control over the policies of a subsidiary, a minority ownership share does not convert a parent corporation into a competitior."). In other words, Top Rank would have to allege a principal-agent relationship between the Waddell Defendants and the Haymon Defendants. *See Caribbean Broad. Sys., Ltd.,* 148 F.3d at 1088-89. However, Top Rank

disavows any reliance whatsoever on a a principal-agent relationship between the Waddell Defendants and the Haymon Defendants. *See* Opposition [Docket No. 78] at 7 n.3. Accordingly, because the Waddell Defendants are not competitors in the relevant market, Top Rank cannot state a claim for attempted monopolization in violation of Section 2 of the Sherman Act against the Waddell Defendants.

In addition, to the extent Top Rank seeks to assert a claim for "conspiring to attempt to monopolize" under Section 2 of the Sherman Act, no such claim exists. *See* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 809 ("An occasional complaint has alleged that the defendant conspired to attempt to monopolize. Courts have correctly held that §2 states no such offense.").

Accordingly, the Waddell Defendants' Motion to Dismiss Top Rank's claim for attempted monopolization in violation of Section 2 of the Sherman Act (Count III) is **GRANTED**.

C. Injunctive Relief Under Section 16 of the Clayton Act (Count IV)

Because Top Rank has failed to state a claim for relief under Section 1 or Section 2 of the Sherman Act, the Waddell Defendants' Motion to Dismiss Top Rank's claim for injunctive relief under Section 16 of the Clayton Act (Count IV) is **GRANTED.** *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051 (9th Cir. 2008).

D. State Law Claims

1. Violation of the California Unfair Practices Act as to the Waddell Defendants (Count V)

In its fifth claim for Relief, Top Rank alleges that the Waddell Defendants sold "boxing broadcast rights" at less than the cost thereof, and/or gave away that product to television broadcasters, as a "loss leader" in violation of the California Unfair Practices Act, Cal. Bus. & Prof. Code §§ 17043 and 17044. FAC at ¶¶ 161-168.

In order to be liable under Section 17043 or 17043, a defendant must have sold an article or product at less than cost of the article or product or given away that article or product. *See* Cal. Bus. & Prof. Code § 17043, ("It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition."); Cal. Bus. & Prof Code §§ 17044, 17030 (making it unlawful for any person engaged in business in California to sell or use any article or product as a "loss leader," i.e., any article or product sold at less than cost where the purpose is to induce, promote, or encourage the purchase of other merchandise, or where the effect is a tendency or capacity to mislead or deceive purchasers or prospective purchasers, or where the effect is to divert trade from or otherwise injure competitors). However, Top Rank fails to allege any facts demonstrating that the Waddell Defendants sold any article or product at less than cost, or gave away an article or product. Indeed, Top Rank's allegations solely relate to the Haymon Defendants, not the Waddell Defendants.

Accordingly, the Waddell Defendants' Motion to Dismiss Top Rank's claim for violation of the California Unfair Practices Act (Count V) is **GRANTED**.

2. Violation of California's Unfair Competition Law (Count VI)

In its sixth claim for relief, Top Rank alleges that the Waddell Defendants violated California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq*. The Waddell Defendants move to dismiss the UCL claim on the grounds that the alleged conduct underlying this claim does not relate to any business practices engaged in by the Waddell Defendants. The Court agrees.

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. "Each prong of the UCL is a separate and distinct theory of liability." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009). "As to the unlawful prong, the UCL incorporates other laws and treats violations of those laws as unlawful business practices independently actionable under state law." *See Clark v. Countrywide Home Loans, Inc.*, 732 F. Supp. 2d 1038, 1049 (E.D. Cal. 2010) (citing *Chabner v. United Omaha Life Ins. Co.*, 225 F.3d 1042, 1048 (9th Cir.2000)). An "unfair" business practice is one "that threatens an incipient violation of an antitrust law, or 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 otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. LA. Cellular Tel. Co.*, 20 Cal.4th 163, 187 (1999). In addition, a business practice is "unfair" when that practice "either offends an established public policy or is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *McDonald v. Coldwell Banker*, 543 F.3d 498, 506 (9th Cir. 2008) (quotations and citations omitted). Finally, a business practice is "fraudulent" if members of the public are likely to be deceived. *Prata v. Superior Court*, 91 Cal. App. 4th 1128, 1146 (2001). If the claim is grounded in fraud, the pleading of that claim must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). *See, e.g., Ward v. Wells Fargo Home Mortg., Inc.*, 2015 WL 1744235, at *9 (N.D. Cal. Apr. 13, 2015). Although Top Rank appears to allege in its First Amended Complaint that the Waddell Defendants violated all three prongs of the UCL, Top Rank solely relies on the "unlawful" prong in its Opposition.[15]

Top Rank's UCL claim based on the "unlawful" prong is premised on alleged violations of the following laws: (1) Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; (2) the Muhammad Ali Boxing Reform Act, 15 U.S.C. § 6301 *et seq*., which prohibits, in relevant part, a manager from having a direct or indirect financial interest in the promotion of a boxer; (3) California Code of Regulations, title 4, § 396, which prohibits, in relevant part, a promoter from acting directly or indirectly as a manager of a boxer; and (4) the California Unfair Practices Act, Cal. Bus. & Prof. Code §§ 17000 *et seq*. However, as previously discussed, the Court concludes that Top Rank has failed to state a claim against the Waddell Defendants for violation of Sections 1 or 2 of the Sherman Act or the California Unfair Practices Act. In addition, the Court concludes that Top Rank

[15]Top Rank does not address any of the state law claims in its Opposition to the Waddell Defendants' Motion to Dismiss, but merely incorporates its Opposition to the Haymon Defendants' Motion to Dismiss (even though the Waddell Defendants and Haymon Defendants primarily moved to dismiss on different grounds). *See* Opposition to Waddell Defendants' Motion to Dismiss [Docket No. 78] at 20. In its Opposition to the Haymon Defendants' Motion to Dismiss, Top Rank only argues that its UCL claim is sufficient based on the "unlawful" prong.

fails to allege that the Waddell Defendants violated the Muhammad Ali Boxing Reform Act, 15 U.S.C. § 6301 *et seq*. or California Code of Regulations § 396 because the Waddell Defendants have never acted as boxing managers or promoters. Accordingly, because Top Rank fails to allege that the Waddell Defendants committed a predicate violation of another law, Top Rank fails to state a UCL claim against the Waddell Defendants based on the "unlawful" prong. *See Dorado v. Shea Homes Ltd. Partnership*, 2011 WL 3875626, at *19 (E.D. Cal. Aug. 31, 2011) ("Where a plaintiff cannot state a claim under the 'borrowed' law, she cannot state a UCL claim either.").

Top Rank also fails to state a claim against the Waddell Defendants premised on the "unfair" or "fraudulent" prongs of the UCL. Indeed, Top Rank has failed to allege any "unfair" or "fraudulent" conduct specifically committed by the Waddell Defendants. Apparently recognizing its inability to plead a UCL claim against the Waddell Defendants based on the "unfair" or "fraudulent" prongs, Top Rank failed to oppose the Waddell Defendants' Motion to Dismiss the UCL claim based on these prongs.

Accordingly, the Waddell Defendants' Motion to Dismiss Top Rank's claim for violation of the UCL (Count VI) is **GRANTED**.

3. Tortious Interference with Prospective Economic Advantage (Count VII)

In its seventh claim for relief, Top Rank alleges a claim against the Waddell Defendants for tortious interference with prospective economic advantage.

In order to state a claim for tortious interference with prospective economic advantage, a plaintiff must plead the following elements: "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153 (2003) (quotations and citations omitted). In addition, a plaintiff must allege that the defendant's conduct was "wrongful by some legal measure other than the fact of interference itself." *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 393 (1995); *see also Korea Supply Co.*, 29 Cal. 4th at 1158 ("To establish a claim for interference with prospective economic advantage, . . . a plaintiff must plead that the defendant engaged in an independently wrongful act."). "[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Korea Supply Co.*, 29 Cal. 4th at 1159.

As the Court previously concluded, Top Rank has failed to allege any independently wrongful or unlawful conduct committed specifically by the Waddell Defendants. Accordingly, the Waddell Defendants' Motion to Dismiss Top Rank's claim for tortious interference with prospective economic advantage (Count VII) is **GRANTED**.

V. CONCLUSION

For the foregoing reasons, the Haymon Defendants' Motion to Dismiss is **GRANTED in part**. The Haymon Defendants' Motion to Dismiss Counts I, II, III, and IV is **GRANTED**. The

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Court will grant Top Rank an opportunity to amend these claims, and, thus, Counts I, II, III, and IV as to the Haymon Defendants are **DISMISSED with leave to amend.** Top Rank shall file its Second Amended Complaint on or before **October 30, 2015**. The Court **DEFERS** ruling on the Haymon Defendants' Motion to Dismiss Counts V, VI, and VII.

The Waddell Defendants' Motion to Dismiss is **GRANTED** in its entirety. Because the Court concludes that granting leave to amend as to the Waddell Defendants would be futile, the First Amended Complaint against the Waddell Defendants is **DISMISSED without leave to amend.** Although the Court recognizes that this Circuit has a liberal policy favoring amendments and that leave to amend should be freely granted, the Court is not required to grant leave to amend if the Court determines that permitting Top Rank to amend would be an exercise in futility. *See, e.g., Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile."). In this case, Top Rank has already had an opportunity to file an amended pleading and has failed to provide the Court with any facts or arguments in its Opposition that indicate leave to amend with respect to the Waddell Defendants would not be futile. Accordingly, the Court denies leave to amend as to the Waddell Defendants.

IT IS SO ORDERED.

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