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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

TOP RANK, INC.,

Plaintiff,

vs.

AL HAYMON, et al.,

Defendants.

CASE NO. CV 15-04961-JFW (MRWx)

**THE HAYMON DEFENDANTS' NOTICE
OF MOTION AND MOTION TO DISMISS
THE SECOND AMENDED COMPLAINT
PURSUANT TO FRCP 12(b)(6);
MEMORANDUM OF LAW IN SUPPORT
OF THEIR MOTION TO DISMISS
THE SECOND AMENDED COMPLAINT**

Judge: Hon. John F. Walter
Date: December 14, 2015
Time: 1:30 p.m.
Courtroom: 16 (Spring Street)

Second Am. Compl. Filed: October 30, 2015

**TO ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF
RECORD:**

PLEASE TAKE NOTICE that on December 14, 2015, at 1:30 p.m., or as soon thereafter as counsel may be heard in Courtroom 16 in the United States District Court for the Central District of California, located at 312 North Spring Street, Los Angeles, California 90012, the Honorable John F. Walter presiding, Defendants Alan Haymon, Haymon Boxing LLC, Haymon Sports LLC (“Haymon Sports”), Haymon Holdings LLC, and Alan Haymon Development, Inc. (collectively, the “Haymon Defendants”) will appear and move the Court for an Order dismissing the Second Amended Complaint (the “SAC”) in its entirety and with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state any claims for relief. The grounds for the motion are: The antitrust claims (Counts I-III) all should be dismissed because Top Rank has not been injured and therefore lacks antitrust standing, there has been no harm to competition, the SAC does not adequately plead that the Haymon Defendants have market power in either alleged market, and Top Rank impermissibly relies on group pleading; for separate and independent reasons, the SAC fails to state viable claims for attempted monopolization (Count I) and tying (Count II) under the Sherman Act, or injunctive relief (Count III) under the Clayton Act. For the reasons set forth in their Motion to Dismiss the First Amended Complaint, the Haymon Defendants continue to maintain that the SAC fails to state the elements of a claim under the California Unfair Practices Act (Count IV); fails to state a claim under the California Unfair Competition Law because Top Rank has not suffered “injury in fact” and has not alleged any unlawful or unfair action (Count V); and fails to state a claim for Tortious Interference with Prospective Economic Advantage (Count VI). The Haymon Defendants’ Motion is based upon this Notice, the attached Memorandum of Points and Authorities, the Declaration of Norman C. Simon (“Simon Decl.”) and the exhibits annexed thereto, all papers and pleadings on file herein, and on such

1 other oral and documentary evidence as the Court may receive at or before the
2 hearing on this Motion.

3 **PLEASE TAKE FURTHER NOTICE** that this Motion is made following
4 the conference of counsel pursuant to Local Rule 7-3, which took place on
5 November 5, 2015. (*See* Joint Pre-Filing Statement Filed on November 10, 2015.)

6 DATED: November 13, 2015
7

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10 and
11

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENTS¹

All of Top Rank's claims were and still are premised on the core assertion that it and other "legitimate promoters" have been frozen out of promoting fights in which Haymon-managed Championship Caliber boxers compete. As demonstrated below, Top Rank has not remedied any of the pleading defects the Court described in dismissing its Sherman Act claims. The SAC also confirms that this core assertion is false, undermining not just the tying claim but the existence of antitrust injury – without which Top Rank cannot plead *any* antitrust claims. By pursuing its Sherman Act claims nonetheless, Top Rank has not proceeded in good faith, thus boldly disregarding this Court's admonition.

The SAC contains many more words, but not facts to remedy the fatal flaws identified by the Court in its Order Dismissing the First Amended Complaint (the "Order"). The SAC's superficial appearance of added heft is attributable mainly to repetition. Far from adding any material of substance, instead, Top Rank has dropped one claim and numerous allegations – most notably:

- citations to almost all of the previously-cited news articles, because they revealed that the PBC series has helped, not hurt, competition (Simon Decl. Ex. A at pp. 3, 38, 42, 44, 73, 89);
- references to the legislative history of the Ali Act, because it reveals that the law's purpose is to protect boxers, and not promoters like Top Rank, which is turning that intent on its head through this action (*id.* at pp. 29-32);
- allegations of "venue blocking," "scalping," "fraud" and "overbooking," because Top Rank could not support them (*id.* at pp. 6, 15-16, 93-95, 171-72); and
- the Sherman Act conspiracy claim, which is no longer tenable given the Court's holding that the Waddell and Haymon Defendants cannot

¹ Top Rank's allegations are accepted as true solely for purposes of this dismissal motion; the Court is "not, however, required to accept as true allegations that contradict exhibits attached to the Complaint . . . or 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).

1 conspire between and among themselves as a matter of law (*id.* at pp.
2 158-59).

3 Two antitrust claims remain: tying (which was the focal point of the prior
4 complaint but is now, tellingly, demoted to Count II) and attempted monopolization
5 (now the lead claim). As we show below, Top Rank has not cured any of the
6 pleading defects in either claim.

7 First and foremost, the Court held that Top Rank lacked standing to assert any
8 antitrust claims because it did not allege injury to itself or to competition. In an
9 effort to plead around this problem, Top Rank resorts to even more “careful” and
10 “creative” wordplay than before. (Order at 11). Choosing its language very
11 deliberately, Top Rank now alleges that it and other “legitimate promoters” have
12 been prevented from “*entering promotional contracts*” with boxers managed by
13 Haymon. (*E.g.*, SAC ¶ 66). But as Top Rank well knows, the law does not require
14 a “promotional contract” for a promoter to promote a bout – and, in fact, coercive
15 long-term promoter contracts are prohibited by the Ali Act. With or without a
16 “promotional contract,” Top Rank can enter into bout agreements to promote or co-
17 promote bouts involving Haymon-managed boxers – including, as Top Rank now
18 acknowledges, the “immensely lucrative” fight in May of this year “between Manny
19 Pacquiao, who is promoted by Top Rank, and Floyd Mayweather, who is managed
20 by Haymon.” (SAC ¶ 89 & 50 n.9). Top Rank thus still “fail[s] to allege any facts
21 demonstrating that it has actually been ‘frozen out’ by any of the Haymon
22 Defendants’ conduct.” (Order at 7).

23 Nor does the SAC adequately allege harm to competition. Indeed, it
24 continues to expressly rely on, and thus incorporate by reference, numerous sources
25 that show how the PBC series is reinvigorating and growing boxing. These adopted
26 sources put the lie to Top Rank’s assertion – which is conclusory in any event – that
27 “[t]he notion that PBC is good for consumers, or good for the sport, is [] false.”
28 (SAC ¶ 121). Even if the Court were to ignore the sources on which Top Rank

1 relies, its assertions that Haymon's "scheme" will eventually "harm consumers" by
 2 requiring them to "pay more to see [PBC] bouts" (SAC ¶ 169) and extracting more
 3 fees from broadcasters "than they ever would in a competitive market" (SAC ¶ 171)
 4 are not only speculative and conclusory, but are now undermined by Top Rank's
 5 own allegations. Accepting as true Top Rank's new allegations of supposed
 6 "disappointing" and "plummeting ratings" and fan complaints about "low quality"
 7 PBC bouts, and its allegation that "Haymon has been forced to give away tickets to
 8 fights" (SAC ¶¶ 100, 121), Top Rank can no longer plausibly allege that
 9 broadcasters will pay anything, much less exorbitant fees, to continue to air the
 10 series, or that consumers will "pay more to see" PBC fights.

11 With respect to promoter competition, the Court already noted that the
 12 Haymon Defendants' alleged actions "may not have affected all promoters equally,
 13 may not have affected certain promoters at all, and in fact, *may have helped certain*
 14 *promoters.*" (Order at 7 (emphasis added)). And indeed the PBC series *has* created
 15 opportunities for many promoters. Top Rank's answer is to label all licensed
 16 promoters who promote Haymon-managed fighters as "frontmen" and "shams."
 17 (SAC ¶ 82). But Top Rank still fails to allege any facts to support these conclusory
 18 labels, and its own cited sources, as well as public records, undermine the allegation
 19 by showing that Top Rank itself has co-promoted with some of the very promoters it
 20 says are "shams."

21 Nor has Top Rank cured its market power problem. To try to address the
 22 disconnect that the Court identified (Order at 9), it now purports to offer facts and
 23 figures quantifying the Haymon Defendants' alleged share of the Championship-
 24 Caliber Boxer markets. (SAC ¶ 149). On the management side, although Top Rank
 25 claims to have derived its data from reliable sources, it has sliced and diced it in
 26 demonstrably indefensible ways to generate contrived percentages that it says
 27 (unsurprisingly) clear the threshold needed to support its claims. This undermines
 28 Top Rank's claim of market power. Indeed, the same sources on which Top Rank

1 relies to purportedly compute market power reveal that the Haymon Defendants
2 manage *none* of the top ten pound-for-pound ranked boxers in the world, a
3 published metric that Top Rank conveniently ignores. As for the promoter market,
4 the SAC's facts and figures are simply made up, and hinge entirely on Top Rank's
5 conclusory (and contradicted) assertion that every licensed promoter that works with
6 Haymon is illegitimate.

7 Like Top Rank's prior complaint, the SAC does not "allege the specific
8 conduct engaged in by each of the remaining defendants." (Order at 10). Instead,
9 Top Rank now contends that the Haymon entities are "mere instrumentalities" or
10 alter egos of Haymon himself. (SAC ¶ 26). But Top Rank has not alleged any of
11 the required elements of alter ego liability. The SAC thus suffers from the same
12 group pleading problem identified before.

13 Even if Top Rank had fixed all of these global pleading deficiencies, it still
14 has not alleged sustainable tying or attempted monopolization claims. The Court
15 dismissed the tying claim because the contractual "'consent' provision does not, on
16 its face, tie two services together (management services and promotional services)."
17 (Order at 12). Because of that, the Court warned Top Rank not to pursue this claim
18 unless it could "in good faith, allege facts showing that the Haymon Defendants
19 have never consented to allowing boxers in their management stable to sign with
20 'legitimate promoters.'" (*Id.* at n.8). Top Rank did not heed the Court's warning.
21 Instead, as explained above, it has engaged in a new semantic game. Moreover, Top
22 Rank's contrived market percentages unwittingly undermine its tying claim. If
23 Haymon-managed fighters were *never* promoted by "legitimate promoters," then
24 Haymon's share of the manager and promoter markets would be identical. Under
25 Top Rank's own analysis, it is not, debunking the claimed tie-out.

26 Finally, the Court dismissed the attempted monopolization claim because Top
27 Rank did not allege "*any* facts" concerning the Haymon Defendants' supposed share
28 of the promoter market. (Order at 14). Nor does the SAC. This claim rests entirely

1 on Top Rank's still-unsupported (and contradicted) assertion that all promoters who
 2 promote Haymon-managers fighters are "shams" and "frontmen." But the only
 3 sham is the SAC's purported quantification of Haymon's share of the promoter
 4 market, which is not derived from any source at all. It is simply made up.

5 **II. ALL OF THE ANTITRUST CLAIMS SHOULD BE DISMISSED**
 6 **ON ANY ONE OF THREE INDEPENDENT GROUNDS**

7 The Court held that Top Rank's prior complaint failed to allege *any* viable
 8 antitrust claims because it did not adequately plead antitrust injury or market power,
 9 and impermissibly relied on group pleading. The SAC fares no better.

10 **A. Top Rank Lacks Antitrust Standing**

11 Antitrust injury is a necessary element of both Sherman Act claims. The
 12 Court held that Top Rank previously failed to allege antitrust injury because: (i) it
 13 did not adequately allege "injury to itself," without which it lacks both antitrust and
 14 Article III standing; and (ii) even if it had, antitrust injury "means harm to
 15 competition, not harm to individual competitors," which also was not adequately
 16 alleged. (Order at 6-7). Top Rank now has added the following: "Because Top
 17 Rank's injuries directly flow from the competition-reducing aspect of Defendants'
 18 conduct, it has suffered antitrust injury and possesses antitrust standing." (SAC
 19 ¶ 173). This conclusory assertion does not suffice to overcome Top Rank's failure
 20 to plead *facts* in support of antitrust injury. Not only are those facts still missing,
 21 but the SAC actually confirms that the Haymon Defendants' alleged conduct has not
 22 hurt (and has, in fact, helped) competition, and has not hurt Top Rank itself. It is
 23 now even clearer than before that Top Rank lacks antitrust standing.

24 Starting with injury to Top Rank itself, the Court concluded that Top Rank
 25 previously "failed to allege any facts demonstrating that it has actually been 'frozen
 26 out' by any of the Haymon Defendants' conduct." (Order at 7). The SAC likewise
 27 fails to plead such facts; indeed, Top Rank remarkably no longer even so alleges.

28 Top Rank instead now alleges something quite different: that it "has been

1 precluded from entering promotional contracts with” the Championship-Caliber
 2 Boxers in Haymon’s “stable” (SAC ¶ 66), because “Haymon has prevented all of his
 3 Championship-Caliber Boxers from entering promotional contracts with Top Rank”
 4 and all “other legitimate promoters.” (SAC ¶ 16). This “no promotional contracts”
 5 mantra is repeated throughout the SAC. (*See, e.g.*, SAC ¶¶ 5-7, 16, 65-70, 93, 95,
 6 160, 175, 180, 191, 193-94, 198, 205, 208, 244). The SAC includes a new section,
 7 captioned “Specific Injuries to Top Rank Resulting from Haymon’s Contractual
 8 Exclusion, Constituting Actionable Antitrust Injuries,” in which Top Rank purports
 9 to identify specific boxers with whom it allegedly has “been precluded from
 10 entering promotional contracts.” (SAC ¶ 66). And Top Rank names specific people
 11 to whom Haymon supposedly said “that he will not allow any of his fighters to sign
 12 a promotional contract with a legitimate promoter.” (SAC ¶ 5).

13 Top Rank’s word choice is deliberate and misleading. “No promotional
 14 contracts” – even if true – does not equate with no opportunities to promote or co-
 15 promote bouts involving Haymon-managed boxers. Nor does the alleged absence of
 16 “promotional contracts” with Top Rank suggest that the Haymon Defendants have
 17 in any way violated the Ali Act. Indeed, it suggests just the opposite.

18 As we pointed out in our prior motion, the Ali Act was intended primarily to
 19 police coercive practices by boxing *promoters*. (Dkt. No. 60 at 28-29). Top Rank
 20 cannot change this reality merely by deleting its prior references to the legislative
 21 history of the Act, which evidences this purpose. (Simon Decl. Ex. A at 29-32). As
 22 Top Rank acknowledges, the Ali Act makes it unlawful for “a *promoter* to impose a
 23 ‘coercive provision . . . for a period greater than 12 months.’” (SAC ¶ 164 (citing
 24 15 U.S.C. § 6307b(a)(1)(A)(i))) (emphasis added). Top Rank also acknowledges
 25 that a manager (but not a promoter) owes a fiduciary duty to a boxer (SAC ¶ 36); “it
 26 is the *manager’s* job to represent the boxer in negotiating promotion contracts” (*id.*);
 27 “a manager should fiercely and exclusively advocate for the boxer’s interests with
 28 negotiating with sophisticated business entities” (*id.* ¶ 34); and a “manager is

1 supposed to be wholly devoted to his or her clients' best interests" (*id.* at ¶ 42).²

2 Consistent with the Ali Act, and to protect boxers, the Haymon Sports contracts
3 provide the manager with discretion over represented boxers' agreements with
4 promoters.

5 In the case of Top Rank, this is no idle concern. For example, Golden Boy
6 owner Oscar De La Hoya, who at one time was promoted by Top Rank, sued to void
7 his promotional contract on grounds of illegality. *de la Hoya v. Top Rank, Inc.*, No.
8 CV 00-9230-WMB, 2001 WL 34624886 (C.D. Cal. Feb. 6, 2001). This Court found
9 that the contract exceeded the statutory seven-year time limit for personal services
10 contracts. For this and other reasons, the promotional contract was found "void and
11 unenforceable." *Id.* at *12-14.³ And Top Rank presently is in litigation with boxer
12 Mikey Garcia in the District of Nevada, accused of "unlawfully attempt[ing] to
13 exploit, own and permanently control [his] boxing career." (Simon Decl. Ex. B at
14 ¶ 1).⁴ According to the Complaint, Top Rank requires its fighters to execute a
15 "Promotional Rights Agreement" that "improperly provides Top Rank the ability to
16 extend the agreement indefinitely, essentially rendering the contracting fighter an
17 indentured servant of Top Rank." (*Id.* at ¶ 2). So Haymon Sports has good cause to
18 be wary of Top Rank's "promotional contracts."

19 But that does not mean that Top Rank has been "frozen out" of promoting or
20 co-promoting bouts involving Haymon-managed boxers (Order at 7). As the SAC

21 ² Despite acknowledging the importance of vigilant management to protecting
22 a boxer's interests, Top Rank now concedes that it has repeatedly circumvented
23 Haymon by approaching trainers, other third parties, or the fighters themselves to try
24 to sign them to promotional contracts. (SAC ¶ 66). We note that Top Rank still
does not allege that it has ever approached, or been turned down by, Haymon Sports
to promote a bout involving a Haymon-manager fighter.

25 ³ While Top Rank asserts that "[u]nlike Haymon, Top Rank does not do
26 business on both sides of the 'firewall'" (SAC ¶ 93), the Court also held that Top
Rank was impermissibly acting as both promoter and manager. *de la Hoya*, No. CV
00-9230-WMB, 2001 WL 34624886 at *8.

27 ⁴ This Court properly may take judicial notice of this filing in another court.
28 *See, e.g., Holder v. Holder*, 305 F.3d 854, 866 (9th Cir. 2002).

1 explains, “promoters and ‘matchmakers’ arrange bouts on an individualized basis.”
 2 (SAC ¶ 128). Whether or not a “promotional contract” is executed, a promoter can
 3 promote fights in which a boxer competes by entering into a bout agreement for
 4 each fight – and the Haymon Sports advisory agreement expressly provides for that
 5 possibility. (*See infra* at 22). Hence the fatal flaw in Top Rank’s theory of antitrust
 6 liability. Confirming that flaw, Top Rank now concedes it *did* co-promote the
 7 “immensely lucrative” Mayweather/Pacquiao bout on May 2, 2015 (SAC ¶ 89 & 50
 8 n.9) – a fact it could no longer conceal after being confronted with the Haymon
 9 Defendants’ prior motion. That now outed fact proves that it has not been “frozen
 10 out” of promoting fights involving Haymon-managed boxers, and thus has sustained
 11 no antitrust injury.

12 Even if the SAC adequately pled harm to Top Rank (and it does not), that
 13 would not suffice to establish antitrust injury, because “[i]t is injury to the market or
 14 to competition in general, not merely injury to individuals or individual firms that is
 15 significant” under the Sherman Act. *McGlinchy v. Shell Chemical Co.*, 845 F.2d
 16 802, 812 (9th Cir. 1988). Contrary to what the SAC seems to suggest, the Sherman
 17 Act does not entitle Top Rank to promote *any* of the boxers that Haymon manages,
 18 and certainly does not entitle Top Rank to maintain its decades-long dominance of
 19 the sport. It merely entitles Top Rank to a competitive marketplace. If the market is
 20 competitive, then the Sherman Act is not violated, even if one competitor has lost
 21 business, or indeed been completely frozen out as Top Rank (falsely) claims it has
 22 been. Courts thus dismiss Sherman Act claims at the pleading stage when a plaintiff
 23 has pled injury to itself, but has not pled injury to competition. *See e.g., Brantley v.*
 24 *NBC Universal, Inc.*, 675 F.3d 1192, 1202 (9th Cir. 2012) (affirming dismissal of
 25 Sherman Act claims because the “allegations show only that plaintiffs have been
 26 harmed as a result of the practices at issue, not that those practices are
 27 anticompetitive.”); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 734
 28 (9th Cir. 1987) (affirming dismissal of SAC: “While appellant clearly pleads injury

1 to itself, its conclusion that competition has been harmed thereby does not follow.”).

2 Top Rank’s claims thus fail regardless of whether Top Rank itself has been
3 injured, because it does not and cannot allege injury to competition. In its original
4 and first amended pleadings, Top Rank cited and heavily relied on – and thereby
5 incorporated by reference – numerous articles in which HBO executives, boxers,
6 and others explained how the PBC series has helped, not hurt, competition in the
7 sport. (Dkt. No. 60 at 1-2, 9; Dkt. No. 60-1 at Exs. A-B). Those incorporated
8 allegations are, of course, irreconcilable with Top Rank’s claim that competition has
9 been harmed. So this time around, Top Rank omitted them, and added the
10 conclusory allegation, “The notion that PBC is good for consumers, or good for the
11 sport, is [] false.” (SAC ¶ 121).⁵

12 Not surprisingly, even though there is no rule against making contradictory
13 assertions in an amended complaint, “the court need not ignore the prior allegations
14 in determining the plausibility of the current pleadings.” *Fasugbe v. Willms*, No.
15 CIV. 2:10-2320 WBS KJN, 2011 WL 2119128, at *5 (E.D. Cal. May 26, 2011). In
16 *Bauer v. Tacey Goss*, No. C 12-00876 JSW, 2012 WL 2838834, at *3 (N.D. Cal.
17 July 10, 2012), for example, the amended complaint set forth a new theory that was
18 “precluded by Plaintiffs’ own allegations in their original complaint.” There, as
19 here, “Plaintiffs [sought] to avoid the implications of these factual allegations by
20

21 ⁵ While Top Rank omitted the citations, in many instances it retained the
22 quotation without referencing the source. (See, e.g., Simon Dec. Ex. A at ¶¶ 1, 51,
23 89). It is well established that “[a]t the motion to dismiss stage, the court may
24 properly treat a website quoted and cited in the complaint as incorporated by
25 reference.” *Eugster v. Wa. State Bar Ass’n*, No. C15-0375 JLR, 2015 WL 5175722,
26 at *1 n.3 (W.D. Wa. Sept. 3, 2015) (currently pending appeal) (citing *Daniels-Hall*
27 *v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010)). In that case, similar to
28 here, in the first complaint, the plaintiff had cited from a website; in an amended
pleading, he retained the quoted language but removed the citation. The court
reasoned, “[e]ven if the court were inclined to let this omission of citation dictate
what it can reference at this stage, any webpages from which [plaintiff] ‘directly
quoted’ can be treated as incorporated.” *Id.* Further, “[b]ecause the direct quote
from the [] Website remains in the amended complaint – citation or not – the court
deem[ed] the [] Website incorporated by reference in the amended complaint.” *Id.*
(citing *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)).

1 omitting them” from the amended pleading. *Id.* The Court held that, because the
 2 contradiction was unexplained, it “need not accept their amended allegations as
 3 true.” *Id.* Indeed – and as is equally true here – the Court said that the earlier
 4 allegations “hinder Plaintiffs’ ability to challenge the motion to dismiss, *which must*
 5 *have become clear to Plaintiffs when Defendants moved to dismiss Plaintiff’s*
 6 *original complaint.*” *Id.* (emphasis added).⁶

7 Even if Top Rank could so easily walk away from the articles it previously
 8 cited, that would not fix the problem. As it turns out, those articles were hardly
 9 outliers. In the SAC, Top Rank explicitly relies on and thus incorporates other
 10 articles, including one from the *Sports Business Journal* in which the president of
 11 HBO Sports, which broadcasts Top Rank-promoted events, stated: “We feel like
 12 other television networks getting into boxing and broadening awareness of the sport
 13 is all going to rebound to HBO’s benefit and is a good thing.” (Simon Decl. Ex. C)
 14 (cited in SAC ¶ 55 n.2). Top Rank also cites multiple other professional boxing
 15 sources that it plainly deems reliable – including the boxing sections of the HBO,
 16 ESPN and Sports Illustrated websites, as well as Boxingscene.com, Boxrec.com and
 17 other websites (SAC ¶ 145).⁷ While it invokes the websites as “sources” in support

18
 19 ⁶ See also *Rodriguez v. Sony Computer Entertainment America, LLC*, 801
 20 F.3d 1045, 1054 (9th Cir. 2015) (plaintiff’s “subsequent attempt” to salvage its
 21 claim by “artfully pleading” different facts “is unconvincing, especially considering
 22 that the more recent pleading completely contradicts the earlier pleading.”); *Mitchell*
 23 *v. Galev*, No. 1:14-cv-00317-LJO-SKO (PC), 2015 WL 3402982, at *2 (E.D. Cal.
 24 May 27, 2015) (dismissing pro se complaint without further leave to amend where
 25 the “Plaintiff omitted certain relevant allegations [and exhibits] from his amended
 complaint. . . . [G]iven the omissions, the Court will consider both pleadings in
 determining whether Plaintiff’s allegations support” his claims.); *Harbridge v.*
Schwarzenegger, No. CV 07-4486-GW(SH), 2011 WL 6960830, at *8 (C.D. Cal.
 Aug. 31, 2011) (“When Plaintiff’s current allegations are considered along with . . .
 his prior allegations, it is clear that he has omitted material, previously-alleged facts
 that undermine his retaliation claims.”).

26 ⁷ These new sources, like the previously-referenced articles, may be
 27 considered on this motion to dismiss. See *Ecological Rights Found. v. Pac. Gas &*
 28 *Elec. Co.*, 713 F.3d 502, 511 (9th Cir. 2013) (“Under the ‘incorporation by
 reference’ doctrine, ‘[e]ven if a document is not attached to a complaint, it may be
 incorporated by reference into a complaint if the plaintiff refers extensively to the
 document or the document forms the basis of the plaintiff’s claim.’”); *Kniesel v.*
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1 of its market power allegations (*id.*), as we show in Point IIB, they do not help Top
 2 Rank in that regard. But they do repeatedly confirm that the PBC series has been
 3 good for competition. For example:

- 4 • Top Rank's CEO, Bob Arum, has bragged that "since this PBC started, the
 5 programming on HBO is unbelievable, better than it ever was. . . . when
 6 you look at fighters who fight on HBO - compared to all the hundreds, the
 7 horde of hundreds on the PBC - there's no contest" (Simon Decl. Ex. K).
- 8 • A Showtime executive, discussing Haymon Sports' NBC deal, said:
 9 "Anything which has the potential to expand boxing's fan base and to
 10 bring in a wider range of fans is a good thing for the sport of boxing and is
 11 a good thing for every network that carries boxing." He went on to
 12 explain: "In order to really build true stars, you have to market those
 13 boxers not just to the 25 percent of television households that have
 14 premium television but to the entire hundred million homes that have
 15 television. That's the only way that you're going to build mainstream
 16 stars." (Simon Decl. Ex. L).

17 Even if the Court were to ignore all of this, the SAC still does not allege harm
 18 to competition in the promoter market. Top Rank claims that Haymon has not
 19 permitted the Championship-Caliber Boxers he manages "to enter into promotional
 20 contracts with" Top Rank, Golden Boy, Main Events, "or any other legitimate
 21 promoter." (*E.g.*, SAC ¶ 160). As explained above, this does not mean that these

22 *ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) ("The rationale of the 'incorporation by
 23 reference' doctrine applies with equal force to internet pages as it does to printed
 24 material. Just as a reader must absorb a printed statement in the context of the
 25 media in which it appears, a computer user necessarily views web pages in the
 26 context of the links through which the user accessed those pages."); *Tae Hee Lee v.*
 27 *Toyota Motor Sales, U.S.A. Inc.*, 992 F. Supp. 2d 962, 971 (C.D. Cal. 2014) (Walter,
 28 J.) ("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 also Minor v. FedEx Office & Print Servs., Inc.*, 78 F. Supp. 3d
 1021, 1027 (N.D. Cal. 2015) ("Proper subjects of judicial notice when ruling on a
 Rule 12 motion include . . . publicly accessible websites.").

1 promoters are foreclosed from promoting bouts involving Haymon-managed
2 fighters, and indeed, they are not.

3 Moreover, Top Rank's "legitimate promoter" mantra is hollow and devoid of
4 facts. According to Top Rank, any promoter that promotes Haymon-managed
5 boxers – notwithstanding being licensed and "formally execut[ing] contracts with
6 venues, sponsors, broadcasters, and other stake holders" (SAC ¶¶ 82, 86) – is a
7 "sham" or a "frontman" (*id.* ¶ 82), and thus, by definition, not "legitimate." But
8 Top Rank offers no facts to support this conclusory assertion and concedes, as it
9 must, that Haymon-managed boxers are promoted by licensed promoters. (SAC
10 ¶¶ 65, 82, 91).⁸ Including the allegedly "sham" but admittedly "licensed"
11 promoters, the SAC identifies by name eleven licensed promoters, not to mention
12 the unspecified number of "other legitimate promoters" referenced throughout the
13 SAC, thus confirming the existence of competition in this market. Although the
14 PBC series "may not have affected all promoters equally," it has – as the Court
15 recognized it could – "helped certain promoters." (Order at 7). Top Rank does not
16 (and cannot) show otherwise. And not only is the "sham promoter" allegation
17 conclusory, it also is frivolous. Publicly-available information confirms that some
18 of the very promoters that Top Rank labels as "shams" – including DiBella
19 Entertainment, Mayweather Promotions and Warriors Boxing (*see* SAC ¶ 82) –
20 have recently co-promoted events with Top Rank and Golden Boy. (Simon Decl.
21 Exs. D, E, and F).⁹

22 The SAC also confirms that competition is alive and well on the broadcast, or
23 "distribution" front. For example, it alleges that, but for Haymon's network deals,

24 ⁸ State records in their respective states of incorporation show that some these
25 alleged "sham" promoters have been in business for many years, and became
26 promoters long before the PBC series was launched or even conceived of. (Simon
Decl. Exs. G, H, and I).

27 ⁹ The Court may take judicial notice of these public records filed with the
28 Nevada Athletic Commission. *See e.g., Davis v. Sutley*, No. EDCV 07-1415-CBM
(RNB), 2008 WL 1817262, at *2 (C.D. Cal. Apr. 17, 2008).

1 “Top Rank would in fact have successfully negotiated agreements with many of
 2 these broadcasters” (SAC ¶ 123), and “Top Rank would in fact be able to secure
 3 airtime with some of these broadcasters” (*id.* at ¶ 175). But as the SAC shows, well
 4 before the PBC series launched, Top Rank spent two years (2013 and 2014) in
 5 “advanced discussions with” Fox, Spike TV and NBC, to try to strike its own
 6 network deals. (SAC ¶ 113). Top Rank did not succeed, but admittedly was not
 7 prevented from trying. Haymon Sports – which had the creative vision and risk
 8 tolerance to advance a promising new business model – prevailed. That is how
 9 competition is supposed to work. Top Rank cannot concoct plausible antitrust
 10 claims by blaming the Haymon Defendants for its own failure to secure a deal with
 11 these networks after two years of unimpeded negotiations.

12 Top Rank’s allegation that the Haymon Defendants have locked up “80
 13 percent” of all “English-language boxing programming” (SAC ¶¶ 16, 112) is
 14 extremely deceptive. Putting aside whether this figure is accurate (and it is unclear
 15 how Top Rank derived it), there is a reason Top Rank uses percentages instead of
 16 numbers: by greatly expanding the universe of networks that air boxing, the
 17 Haymon Defendants have made the pie much larger. As the total volume of boxing
 18 programming has expanded due to the advent of the PBC series, of course more
 19 bouts involving Haymon-managed boxers have been televised, and the Haymon
 20 Defendants’ percentage of all boxing programming has thus increased. But the
 21 absolute number of Top Rank television broadcast opportunities – its piece of pie –
 22 did not decrease; it has actually increased.

23 As explained in one of the articles cited in the SAC, Haymon’s vision for the
 24 PBC Series was to bring professional boxing to networks that air other professional
 25 sports but had, for decades, abandoned boxing. (Simon Decl. Ex. C) (cited in SAC
 26 ¶ 55 n. 2). The SAC’s cited sources also show that in the wake of the PBC launch,
 27 Top Rank – and other promoters – have struck broadcast deals of their own as
 28 interest in the sport has increased. For example, Top Rank recently announced a

1 major new television deal with Tru TV, and Golden Boy now has a broadcast deal
 2 with Estrella TV. (Simon Decl Exs. M and N).¹⁰ Moreover, Top Rank conveniently
 3 glosses over the fact that it has extensive boxing coverage on HBO and the advent
 4 of the PBC series has not changed that. All of this only confirms that Top Rank has
 5 not been “frozen out” of the television distribution market either and that the PBC
 6 series has helped, not hurt, competition in the sport.

7 Lastly and significantly, in our prior motion we showed that the future
 8 competitive harm that Top Rank fears is (at best) speculative because it depends
 9 upon the success of the PBC series, and courts routinely dismiss antitrust claims
 10 where the alleged harm to competition is speculative or hypothetical. (Dkt. No. 60
 11 at 9-10). The SAC not only fails to remedy this defect, it compounds it. Top Rank
 12 now denigrates the PBC series, alleging that ratings “continue to plummet and
 13 Haymon has been forced to give away tickets to fights” (SAC ¶ 100); that “[m]any
 14 boxing fans and commenters have often criticized PBC’s matches for their low
 15 quality and lack of variety,” and that it has been called “disappointing,” and that
 16 “[t]he ratings reflect this” (*id.* at ¶ 121). If these allegations are true, then it is hardly
 17 plausible that broadcasters will pay to keep these fights on the air, or that Haymon
 18 will be able to “recoup” his investment in the form of supra-competitive pricing, as
 19 Top Rank simultaneously alleges will occur. (*See, e.g.*, SAC ¶¶ 169-71). Top
 20 Rank’s new allegations only confirm that any supposed harm to competition is
 21 entirely speculative.

22
 23
 24 ¹⁰ Top Rank’s sources also show that another promoter, Roc Nation, recently
 25 struck a deal with Black Entertainment Television (“BET”) to air boxing events;
 26 (Simon Decl. Ex. O) and that yet another promoter, Roy Jones Jr. Boxing, struck a
 27 deal to air boxing bouts with Latino Alternative Television (Simon Decl. Ex. P).
 28 Top Rank’s exclusion of non-English-language programming in calculating this and
 other percentages in the SAC is disingenuous. Estrella TV, with which Golden Boy
 has a broadcast deal, is a Spanish language network. Top Rank’s cited sources show
 that it too broadcasts on a Spanish language network, UniMas. (Simon Decl. Ex.
 Q).

**B. The Complaint Does Not Adequately Plead
Market Power in Either Alleged Market**

Top Rank also must allege market power in the relevant markets to prevail on its antitrust claims. The relevant market for the tying claim is the alleged manager market; for the attempted monopolization claim, it is the alleged promoter market. (Order at 8). The Court held that the prior complaint did not adequately allege market power in either alleged market. As we show below, neither does the SAC.

The Court held that Top Rank had not alleged market power in the manager market because there was a disconnect between the allegations of market power, which pertained to the broader universe of professional boxers, and the relevant market definition, which is confined to the alleged sub-market for Championship-Caliber Boxers. (Order at 9). While the prior complaint alleged that Haymon manages “approximately 200 fighters” and his market share “is greater than 50%,” Top Rank provided no information concerning the sub-market of Championship-Caliber Boxers. (*Id.*). While Top Rank now purports to offer up percentages reflecting Haymon’s alleged market share, they are so obviously skewed and result-driven that they do not plausibly support Top-Rank’s claim of market power in the manager market.

Citing *International Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242 (1959), Top Rank alleges that “Championship-Caliber Boxers are those who 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.” (SAC at 2 n.1) (emphasis added). To be more precise, in the *International Boxing* case, those criteria were deemed relevant to defining the market for promoting “championship boxing *contests*,” not Championship-Caliber Boxers. See 358 U.S. at 249-50 (emphasis added). The former is a small and objective universe, consisting, as the District Court explained in that case, of all fights in which the reigning world champion in a given weight

1 class competes against a contender for the world title. *See United States v.*
 2 *International Boxing Club of New York, Inc.*, 150 F. Supp. 397, 403 (S.D.N.Y.
 3 1957).

4 In any event, even if those same criteria were relevant to quantifying the
 5 universe of Championship-Caliber Boxers – which was not the issue in that case –
 6 Top Rank selectively applies some, and ignores others, to arrive at a purported
 7 universe of “Championship-Caliber Boxers” that conveniently produces the market
 8 share percentages it wants. Specifically, Top Rank uses three metrics: (i) boxers
 9 ranked in the top ten by at least one of four specific sanctioning organizations; (ii)
 10 boxers “who have appeared on English-language television in the United States”;
 11 and (iii) boxers “who have earned at least \$100,000 in a single fight.” (SAC ¶ 147-
 12 49). Applying four different permutations of these three metrics, Top Rank
 13 magically concludes that Haymon’s share of the manager market ranges from 56%
 14 to 66%. (SAC ¶ 149). These results-driven “metrics” are riddled with biases,
 15 including:

- 16 • Top Rank never identifies the starting point of its analysis – namely, the
 17 universe of boxers to which these narrowing criteria were applied. Is the
 18 starting point all boxers in all, or some, weight classes? All ranked boxers
 19 in all, or some, weight classes? All top-ten ranked boxers in all, or some,
 20 weight classes? Its failure to allege the starting point of the analysis makes
 21 it suspect and unreliable in its entirety.
- 22 • Although Top Rank says it “compiled” its so-called “objective and
 23 quantifiable” data from numerous sources (SAC ¶ 145), there is no way to
 24 replicate or test its numbers because the boxers are never identified, nor
 25 does Top Rank tell us which data comes from which source.
- 26 • Top Rank inexplicably, and indefensibly, excludes from its universe of
 27 “Championship-Caliber Boxers” all boxers who appear on non-“English-
 28 language television.” This alone undermines the whole analysis, because,

as noted above (at 14 and n.10), Top Rank showcases its own boxers on UniMas, and Golden Boy has a broadcast deal with Estrella TV. Both are Spanish-language stations. In announcing Golden Boy's Estrella TV deal, owner Oscar De La Hoya explained that "Latinos comprise the largest fan base for our sport so we see this partnership with Estrella TV as a great opportunity to showcase our stable of fighters before an audience that is hungry to watch action-packed match-ups." (Simon Decl. Ex. N). Yet those fighters do not factor into Top Rank's analysis at all – most certainly because, unlike Haymon Sports, both Top Rank and Golden Boy have television deals on Spanish-language broadcast stations.

- Top Rank's choice of a \$100,000 purse size is completely arbitrary, and it does not explain why it chose that cutoff, as opposed to a higher or lower one. Absent any explanation, the obvious inference is that Top Rank used this number because it yielded the right result. Needless to say, changing this data point in either direction would drastically change both the total universe of Championship-Caliber Boxers, and the Haymon Defendants' share of that universe.
- Lastly, Top Rank's analysis fails to account for at least two of the criteria that the United States Supreme Court allegedly identified: "viewership" and "ticket revenue." Perhaps this is because Top Rank now alleges that the PBC's ratings are "plummeting" and that "Haymon has been forced to give away tickets to fights." (SAC ¶ 100). Whatever the reason, there is now a disconnect between the alleged list of criteria and the self-serving metrics that Top Rank chose to apply. (*Compare* SAC at 2 n.1 with SAC ¶ 149).

In short, Top Rank's facts and figures are an obvious exercise in data-dredging. That, alone, undermines the plausibility of its market power allegations.

But even beyond that, Top Rank's claim of market power is defeated by the very

1 sources on which it now relies (in SAC ¶ 145). For example, ESPN, Ring TV and
2 boxingscene.com each publishes a list of the top ten pound-for-pound boxers, which
3 amounts to thirty total slots comprising the best fighters in the world. These lists
4 (not surprisingly) are ignored by Top Rank because the Haymon Defendants
5 manage *none* of the boxers on these lists. (Simon Decl. Exs. R, S, and T). Indeed,
6 in one of the websites on which Top Rank relies, the president of HBO Sports –
7 which airs Top Rank-promoted bouts – said: “HBO Sports is well positioned for the
8 future, especially in the boxing arena, with nine of the top 10 pound-for-pound
9 fighters in the sport today.” (Simon Decl. Ex. U).

10 As for the promoter market, the Court held that Top Rank’s allegations were
11 “even weaker, more speculative, and virtually non-existent,” were totally devoid of
12 supporting facts, and relied entirely on the “flawed allegations concerning the
13 Haymon Defendants’ power in the management market.” (Order at 10). Top Rank
14 has done nothing to fix this problem. The promoter market share percentages in the
15 SAC (at ¶ 149) are a mirage. They do not even purport to be derived from any
16 actual source. Rather, they depend entirely on Top Rank’s conclusory assertions
17 that Haymon is the promoter for most of the fighters he manages and any licensed
18 promoter that promotes Haymon-managed boxers is an illegitimate sham.

19 Even if the Court were to accept Top Rank’s entirely conclusory allegation
20 that Haymon promotes Championship-Caliber fights, the SAC still does not
21 adequately allege market share in the promoter market because Top Rank has not
22 fixed its numerator/denominator problem. It never discloses how many promoters
23 promote Championship-Caliber Boxers. All it says is that the list “includes” Top
24 Rank, Golden Boy, Main Events, K2 and Roc Nation. (SAC ¶ 49). It refers
25 repeatedly to “other legitimate promoters,” but does not name or quantify them.
26 Top Rank thus still does not allege the most basic fact needed to determine
27 Haymon’s share of this alleged market – namely, the size of the promoter market
28

1 itself.¹¹

2 Lastly, to plead and prove market power, “entry barriers must be significant.”
 3 *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1439 (9th Cir. 1995).
 4 *See also Cyntegra, Inc. v. Idexx Labs. Inc.*, 520 F. Supp. 2d 1199, 1208 (C.D. Cal.
 5 2007) (to establish market power, plaintiff must show, among other things, “that
 6 there are significant barriers to entry.”). In our prior motion to dismiss, we showed
 7 that the prior complaint did not allege market power in either alleged market
 8 because it confirmed that the barriers to entry in both markets are in fact quite low.
 9 (See Dkt. No. 60 at 14-15). The Court did not reach this issue, perhaps because,
 10 regardless of entry barriers, Top Rank did not adequately allege market power.
 11 Should the Court choose to reach the issue this time, the lack of “significant” entry
 12 barriers provides added reason to find that Top Rank has not adequately alleged
 13 market power in either market.

14 Top Rank alleges no new facts that alter our prior analysis. The SAC
 15 continues to allege that entertainment executives, including Haymon himself, have
 16 crossed over into the boxing business. (SAC ¶¶ 1, 96). ESPN.com (on which Top
 17 Rank relies) reports that Roc Nation Sports, which Top Rank includes among its list
 18 of “legitimate” promoters (SAC ¶¶ 49, 96), entered the boxing business only last
 19 year. (Simon Decl. Ex. V). Despite its recent entry, Roc Nation already has
 20 promoted two elite boxers on the “pound-for-pound” lists. (Simon Decl. Exs. W
 21 and X). This point is further corroborated by another article that Top Rank
 22 selectively quotes, but notably does not cite, in which a senior HBO executive
 23 observed that there are “very few barriers to entry” in the professional boxing

24 ¹¹ Top Rank continues to allege that Haymon attempted to, but did not,
 25 acquire Golden Boy in 2013, and has expanded that section of its complaint. (See
 26 SAC ¶¶ 73-78). The purpose of these allegations remains unclear. The failed
 27 Golden Boy acquisition is irrelevant to the tying claim, which turns solely on the
 28 contracts between the Haymon Defendants and boxers. Nor does it show that the
 Haymon Defendants have market power, or a “dangerous probability” of obtaining a
 monopoly, in the alleged promoter market. Indeed, because the acquisition never
 happened, it supports the exact opposite conclusion.

1 business. (SAC ¶¶ 1 & 51; Simon Decl. Ex. J).

2 **C. Top Rank Impermissibly Relies on Group Pleading**

3 The Court also held that Top Rank “impermissibly relied on group pleading,”
 4 which is an added ground for dismissing the antitrust claims, and directed Top Rank
 5 to “allege the specific conduct engaged in by each of the remaining defendants.”
 6 (Order at 10). Unable to do that – most notably as to Haymon himself, who is not a
 7 party to the management/advisory contracts – Top Rank now contends that all of the
 8 Haymon entities “are each mere instrumentalities of Haymon himself.” (SAC ¶ 26).
 9 The SAC alleges that Haymon, “[a]cting on behalf of and through the
 10 instrumentality of Haymon Sports and Haymon Development,” has locked boxers
 11 into the alleged tie-out agreement (SAC ¶ 160); and that Haymon, “through the
 12 instrumentality of each Defendant,” has “attempted to monopolize” the promoter
 13 market (*id.* at ¶ 180). In other words, rather than alleging the specific conduct of
 14 each defendant, Top Rank now contends that all of the alleged conduct is
 15 attributable to Haymon because he and the entities are alter egos. But the SAC
 16 comes nowhere close to pleading the requisite elements of an alter ego claim.

17 Three of the four Haymon entities are Delaware limited liability companies.
 18 The fourth is incorporated in California. (SAC ¶ 26). “[C]ourts in both Delaware
 19 and California examine similar factors in determining whether an individual or
 20 corporation is the alter ego of another corporation.” *Trans-World Intern., Inc. v.*
 21 *Smith-Hemion Prods., Inc.*, 972 F. Supp. 1275, 1291 (C.D. Cal. 1997); *see also In re*
 22 *Hydroxycut Mktg.*, 810 F. Supp. 2d 1100, 1121-22 (S.D. Cal. 2011) (noting
 23 similarity in California and Delaware alter ego standards). To pierce the corporate
 24 veil, a party must show “(1) that the [two entities] operated as a single economic
 25 entity, and (2) that an overall element of injustice or unfairness is present.” *Trevino*
 26 *v. Merscorp, Inc.*, 583 F. Supp. 2d 521, 528 (D. Del. 2008) (citation omitted). With
 27 respect to the “single economic entity” factor, courts look at the following factors:
 28 “(1) undercapitalization; (2) failure to observe corporate formalities; (3)

1 nonpayment of dividends; (4) the insolvency of the debtor corporation at the time;
 2 (5) siphoning of the corporation's funds by the dominant stockholder; (6) absence of
 3 corporate records; and (7) the fact that the corporation is merely a facade for the
 4 operations of the dominant stockholder or stockholders." *Trevino*, 583 F. Supp. 2d
 5 at 528-29 (citing *United States v. Pisani*, 646 F.2d 83, 88 (3d Cir. 1981)). This
 6 Court, applying the same basic test, has said that "[c]onclusory allegations of 'alter
 7 ego' status are insufficient to state a claim. Rather, a plaintiff must allege specific
 8 facts supporting both of the necessary elements." *Gerritsen v. Warner Bros. Entm't*
 9 *Inc.*, No. CV 14-03305 MMM (CWx), 2015 WL 3958723, at *21 (C.D. Cal. June
 10 12, 2015) (citing *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523,
 11 526, 99 Cal. Rptr. 2d 824 (2000)).

12 All of the allegations in support of this alter ego theory appear in paragraph
 13 26 of the SAC. Not one of the required elements or factors is alleged. Under
 14 neither test can a court impose alter-ego liability on an individual defendant merely
 15 because he is "employed by" the entity, is the CEO and/or President of the entity,
 16 has "authority to act on behalf of and to bind" the entity, "routinely negotiated and
 17 signed contracts and other documents" on behalf of the entity, or even "has veto
 18 power" over "major decisions" by the entity, which is all that Top Rank has alleged.
 19 (SAC ¶ 26). If such facts sufficed, than alter-ego liability for employees and
 20 executives in corporate America would be virtually limitless.

21 Because Top Rank did not comply with the Court's directive, and because it
 22 comes nowhere close to alleging that the Haymon entities are "mere
 23 instrumentalities" of Haymon, the antitrust claims should be dismissed as to all of
 24 the Haymon Defendants – and certainly Haymon himself – for impermissibly
 25 relying on group pleading.¹²

26
 27 ¹² Because the SAC fails to state any Sherman Act claims, Count IV, seeking
 28 injunctive relief under Section 16 of the Clayton Act, must also be dismissed. *See*,
e.g., Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1051 (9th Cir. 2008) ("Section 16
 does not furnish an independent cause of action." It merely "allows the court to
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1 **III. EACH ANTITRUST CLAIM SHOULD BE DISMISSED**
 2 **ON ADDITIONAL, CLAIM-SPECIFIC GROUNDS**

3 **A. Top Rank Does Not State a Viable Tying Claim**

4 The Court held that, “although Top Rank’s allegations are carefully and
 5 creatively worded,” its prior complaint failed to allege a tying claim because the
 6 “‘consent’ provision does not, on its face, tie [the] two services together.” (Order at
 7 12). In addition to its failure to allege antitrust injury or market power, Top Rank
 8 thus failed to allege the most basic element of a tying claim – namely, the alleged
 9 tie-out. The Court warned Top Rank that it could not state a “viable” tying claim
 10 unless it could “in good faith, allege facts showing that the Haymon Defendants
 11 have *never* consented to allowing boxers in their management stable to sign with
 12 ‘legitimate promoters.’” (Order at 12 n. 8) (emphasis added). Regrettably, Top
 13 Rank did not heed the Court’s warning.

14 Whereas the FAC merely characterized the consent provision, the SAC now
 15 purports to quote it in full:

16 Promotional Agreements. If during the Term hereof,
 17 Fighter desires to enter into any promotional agreement *or*
 18 *bout agreement* to which Fighter is not then bound,
 19 selection of the promoter shall be at the sole discretion of
 the Advisor.

20 (See SAC ¶ 60) (emphasis added). Far from salvaging the tying claim, this serves
 21 only to explain why it must be dismissed. This time around, Top Rank even more
 22 “carefully and creatively” alleges that the boxers in Haymon’s stable are foreclosed
 23 “from entering into *promotional contracts*” with Top Rank and other “legitimate”
 24 promoters (e.g., SAC ¶¶ 16, 66, 67). But it does not – because it cannot – allege
 25 that they are precluded from signing “*bout agreements*” with Top Rank or with
 26 anyone else. Top Rank thus implicitly concedes that it *can* promote fights involving
 27
 28 fashion relief upon a showing of a separate violation of the antitrust laws.”).

1 Haymon-managed fighters by signing bout agreements for individual bouts. And it
 2 now explicitly alleges that it *did* co-promote the most profitable bout in the history
 3 of the sport – the “immensely lucrative” fight “between Manny Pacquiao, who is
 4 promoted by Top Rank, and Floyd Mayweather, who is managed by Haymon.”
 5 (SAC ¶ 89 & 50 n.9).¹³

6 Ironically, Top Rank’s market power analysis (if credited) further confirms
 7 the absence of the alleged tie. If the consent clause in fact precluded Haymon-
 8 managed fighters from being promoted by so-called “legitimate” promoters, then the
 9 share of both markets should be identical. But under Top Rank’s analysis, it is not
 10 (*see* SAC ¶ 149). Under each permutation of Top Rank’s metrics, Haymon’s
 11 purported share of the promoter market is less – ranging from four to seven
 12 percentage points lower – than his purported share of the manager market. This
 13 means that even accepting the SAC’s conclusory allegations of “sham promotion,”
 14 someone other than Haymon (or the alleged “sham” promoters) *does* promote fights
 15 involving boxers that Haymon manages. No matter how frequently or infrequently
 16 that has happened, the point is that Top Rank obviously could not allege that it
 17 “never” happens. By nevertheless continuing to allege that Haymon-managed
 18 boxers are not, and cannot be, promoted by anyone other than Haymon himself (*see*
 19 *e.g.*, SAC ¶¶ 18, 49, 65, 68, 190, 194), Top Rank has not proceeded in good faith.

20 Lastly, Top Rank now alleges a “rule of reason violation” as an alternative to
 21 its “per se” tying theory. (SAC ¶¶ 200-210). To plead a tying claim under the rule
 22 of reason, plaintiffs must allege the added element of injury to competition. *See*

23
 24 ¹³ Moreover, notwithstanding the Court’s “good faith” warning, Top Rank
 25 ignores facts that it knows directly undermine this claim. For example, Top Rank
 26 misleadingly alleges that in March 2015, Haymon prevented Top Rank from
 27 promoting a potential fight “between Tim Bradley, whom Top Rank promotes, and
 28 Haymon boxer Amir Khan,” (SAC ¶ 98). But as reported by boxingscene.com, on
 which Top Rank relies, Top Rank is *currently* in active negotiations with Khan to
 promote an upcoming fight against Pacquiao. Top Rank’s CEO, Bob Arum, has
 said that the fight can happen, and Khan has said he has the right to fight whomever
 he wants. (Simon Decl. Ex. Y).

1 *Brantley*, 675 F.3d at 1197. This alternative theory does not salvage Top Rank's
 2 tying claim. First, Top Rank still would have to allege a tie, which it has failed to
 3 do. Absent a tie, it makes no difference whether the per se rule or the rule of reason
 4 applies. Second, even if it could allege a tie, Top Rank has not alleged injury to
 5 competition in the tied (*i.e.* the promoter) market. (*See supra* at 11-14).

6 **B. Top Rank Does Not State an Attempted Monopolization Claim**

7 To state a claim for attempted monopolization, a plaintiff must allege "a
 8 dangerous probability of" success. *Rebel Oil*, 51 F.3d at 1433. To do so, it must, at
 9 minimum, plead that the defendant has market power in the market it is attempting
 10 to monopolize. *Id.* at 1432. The Court dismissed this claim because Top Rank
 11 failed "to allege *any* facts regarding the Haymon Defendant's economic power in
 12 the promotion market" – the market they are supposedly attempting to monopolize.
 13 (Order at 14) (emphasis in original). Top Rank has not fixed the problem.

14 As the SAC notes, "[t]he showing of market power" needed to support the
 15 "dangerous probability" element is "a lower quantum" than for an actual
 16 monopolization claim. (SAC ¶ 181). As if briefing the issue rather than pleading it,
 17 Top Rank even cites cases in which market shares ranging from 24 percent to 44
 18 percent were deemed sufficient. (*Id.*). But Top Rank still fails to allege facts
 19 showing that the Haymon Defendants have *any* share of the promoter market.
 20 Instead, Top Rank's claim of market power hinges on its conclusory allegations that
 21 all promoters that promote Haymon-managed boxers are "shams" and "frontmen"
 22 and Haymon is the real and the only promoter. As discussed above, Top Rank still
 23 does not allege "*any* facts" (*see* Order at 14) to support these labels and accusations.
 24 Revealing the utter implausibility of Top Rank's claim that there is a "dangerous
 25 probability of achieving a monopoly," the president of HBO Sports, in an article on
 26 which Top Rank relies, recently said: "The jury is still out on whether financially
 27 [the PBC series] is going to be a sustainable business model." (Simon Decl. Ex. C).

1 (cited in SAC ¶ 55 n.2).¹⁴

2 **IV. CONCLUSION**

3 For the foregoing reasons, the Haymon Defendants respectfully submit that
4 the SAC should be dismissed in its entirety, and this time, with prejudice.

5 DATED: November 13, 2015

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21
22 ¹⁴ The Court deferred ruling on the Haymon Defendants' motion to dismiss
23 the state law claims on the ground that "many of the pleading defects" we identified
24 would be cured "if Top Rank is able" to plead "viable claims for relief under the
25 Sherman Act," and if it could not, the Court "will likely decline to exercise
26 supplemental jurisdiction." (Order at 14-15). In the interest of efficiency, we
27 therefore do not address the state law claims in the SAC. In the event the Court
28 either declines to dismiss the antitrust claims, or dismisses them and retains
supplemental jurisdiction over the state law claims, we respectfully submit that the
state law claims (Counts IV-VI) are still inadequately pled and should be dismissed,
for the reasons set forth in our prior motion and here. In particular, the claim under
the California UCL (Count VI) must fail because "injury in fact" is a necessary
element of that claim (see Dkt. No. 60 at 26-27) and, as shown above, Top Rank
does not and cannot allege that it has been so injured.