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12
13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA
15

16 LENHOFF ENTERPRISES, INC., a
California corporation dba LENHOFF
17 & LENHOFF,

18 Plaintiff,

19 v.

20 UNITED TALENT AGENCY, INC., a
California corporation;
21 INTERNATIONAL CREATIVE
MANAGEMENT PARTNERS LLC, a
22 Delaware limited liability company;
and DOES 1 through 5, inclusive,

23 Defendants.
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27
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Case No. 2:15-CV-01086-BRO (FFMx)

**DEFENDANT INTERNATIONAL
CREATIVE MANAGEMENT
PARTNERS LLC'S NOTICE OF
MOTION TO DISMISS FIRST
AMENDED COMPLAINT AND
MEMORANDUM OF POINTS AND
AUTHORITIES;**

[[Fed. R. Civ. P. 12\(b\)\(6\)](#)]

Date: September 21, 2015
Time: 1:30 p.m.
Place: Courtroom 14
Judge: Hon. Beverly Reid
O'Connell

NOTICE

1
2 TO THE COURT, ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF
3 RECORD:

4 PLEASE TAKE NOTICE THAT on September 21, 2015, at 1:30 p.m., or as
5 soon thereafter as the matter may be heard, in Courtroom 14 of the United States
6 District Courthouse, 312 North Spring Street, Los Angeles, California, before the
7 Honorable Beverly Reid O’Connell, Defendant International Creative Management
8 Partners LLC will, and hereby does, move this Court for an order dismissing the
9 First Amended Complaint (“FAC”). [Dkt. No. 8](#). This Motion is made pursuant to
10 [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#) on the grounds that the FAC
11 fails to allege facts sufficient to state any claim upon which relief can be granted.

12 This Motion is based upon this Notice, the accompanying Memorandum of
13 Points and Authorities, the [Proposed] Order Granting Defendant International
14 Creative Management Partners LLC’s Motion To Dismiss First Amended
15 Complaint, any reply memorandum, the filings in this action, and such other
16 matters as may be presented at or before the hearing.

17 This Motion is made following the conference of counsel pursuant to [L.R. 7-](#)
18 [3](#), which took place on August 3, 2015.

19
20 DATED: August 10, 2015

PERKINS COIE LLP

21
22 By: /s/ Michael Garfinkel
Michael B. Garfinkel

23 Attorneys for Defendants
24 INTERNATIONAL CREATIVE
25 MANAGEMENT PARTNERS LLC
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Under the guise of an antitrust lawsuit, Plaintiff Lenhoff Enterprises, Inc. dba
4 Lenhoff and Lenhoff (“Plaintiff”) is attempting to use the court system to complain
5 about the freedom of television industry artists— directors, writers, and actors—to
6 exercise their individual rights to choose the talent agencies that will represent
7 them; express frustration in its inability to prevent clients from choosing to leave its
8 agency for other agencies; and articulate its own social policy observations about
9 the television industry that Plaintiff speculates are somehow connected to its
10 criticisms about competition. Notably, there is no allegation that competition has
11 been reduced or that consumers have been harmed, and as a result, this lawsuit does
12 not implicate antitrust, and likewise fails to state a cause of action for tortious
13 interference, unfair competition, or any other legally cognizable claim. Indeed,
14 Plaintiff’s chief complaint is that it has been disadvantaged in its ability to attract,
15 win, and retain clients because other agencies, in effect, offer more opportunities
16 and charge lower commissions. However, that is a common refrain heard from
17 competitors in every industry whenever rival firms compete for customers by
18 offering lower prices or other benefits, and, in fact, is the very nature and goal of
19 fair competition and a free market economy.

20 Specifically, Plaintiff complains that it failed to retain two clients—Client #1
21 hired Defendant United Talent Agency, Inc. (“UTA”) and Client #2 engaged
22 International Creative Management Partners LLC (“ICM Partners”). Plaintiff
23 implicitly concedes, by not alleging otherwise, that each client was free to
24 discharge Plaintiff at any time (that is, the clients were not under a term agreement
25 and could terminate Plaintiff’s representation at will). Plaintiff contends that UTA
26 and ICM Partners used the lure of “packaging” to induce the clients to leave.
27 Packaging allows a talent agency to receive compensation (called “a package fee”)
28 on a television series directly from the producer of the series in lieu of the standard

1 ten percent (10%) agency commission from its artist-clients. Plaintiff
2 acknowledges packaging has long been approved by the guilds representing the
3 artists' interests (such as the Directors Guild of America), but complains that the
4 two clients left for larger agencies because they have more packages and therefore
5 more opportunities to get employment for their clients on package series, while
6 saving the clients commissions.

7 Plaintiff's claim for conspiracy to monopolize under Section 2 of the
8 Sherman Act fails because Plaintiff cannot plead antitrust injury. Rather than
9 alleging any harm to consumers, as required for a private plaintiff to state a claim,
10 Plaintiff concedes that artists are paying lower commissions. Plaintiff is
11 complaining about harm to competitors, not harm to competition. In any event, the
12 amended complaint does not allege facts sufficient to show the formation and
13 operation of any antitrust conspiracy, and Plaintiff affirmatively alleges that UTA,
14 ICM Partners, and two other agencies planned to share market power, rather than
15 vest monopoly power in a single agency, which is a necessary element of the cause
16 of action that Plaintiff purports to assert under Section 2. Thus, the Court must
17 dismiss Plaintiff's federal antitrust claim.

18 Plaintiff's state law claims fare no better. The amended complaint fails to
19 state a claim for violation of the California Unfair Competition Law ("UCL")
20 because Plaintiff fails to allege any unlawful act by ICM Partners, and since the
21 Plaintiff and ICM Partners are competitors, Plaintiff cannot state a claim under the
22 unfairness prong of the UCL because its antitrust and conspiracy allegations fail to
23 state a claim as a matter of law. Similarly, the competitor's privilege bars
24 Plaintiff's alleged claim for tortious interference with prospective economic
25 advantage because the amended complaint fails to allege any wrongful act apart
26 from the alleged interference itself. And, since Plaintiff fails to plead facts to show
27 that ICM Partners breached an existing contract, or that it had knowledge of the
28

1 alleged contract between Plaintiff and Client #2, its claim for tortious interference
2 fails as a matter of law, in addition to being barred by the competitor's privilege.

3 Finally, Plaintiff's request for a declaration that packaging violates the
4 California Talent Agencies Act (TAA) is misguided. The TAA regulates talent
5 agencies and is enforced and interpreted by the California Labor Commissioner.
6 *Styne v. Stevens*, 26 Cal. 4th 42, 53; 109 Cal. Rptr. 2d 14 (2001). As Plaintiff
7 concedes, since at least 1959, the Labor Commissioner has consistently concluded
8 that packaging falls outside the TAA and, therefore, cannot be in violation of the
9 TAA.

10 For all of these reasons, the Court should grant ICM Partners' motion, and
11 since Plaintiff has already amended its complaint, and any further amendment
12 would be futile, the Court should dismiss this action with prejudice.

13 **FACTUAL BACKGROUND AND PLAINTIFF'S ALLEGATIONS**

14 Formed in 1975,¹ ICM Partners is one of the world's most well-respected
15 talent and literary agencies, representing clients in motion picture, television,
16 books, music, live performance, branded entertainment, and new media, and
17 employing hundreds of talent agents in locations worldwide. Despite ICM
18 Partners' reputation and status, competition among talent agencies remains
19 vigorous in all fields, with many hundreds of agencies competing for the same
20 clients, and no one agency achieving any dominance over other agencies. *See, e.g.*,
21 Dkt No. 8 ("FAC") ¶ 41 (alleging that there are 611 competing agencies); *id.* Exs.
22 A-H (indicating large number of existing agencies and that no one agency is
23 dominant).

24 Plaintiff is a talent agency established in 1997 that consists of two agents.
25 FAC ¶¶ 6, 8. On February 13, 2015, Plaintiff filed suit in this Court against ICM
26

27 ¹ ICM Partners, *About Us*, <http://www.icmpartners.com/> (last visited Aug.
28 10, 2015). ICM Partners' predecessor entity was formed in 1975 through the
merger of Creative Management Associates and International Famous Agency.

1 Partners, along with one of its competitors, UTA (collectively, “Defendants”),
2 alleging claims under Section 2 of the Sherman Act, California’s Unfair
3 Competition Law, Intentional Interference with Contract, Intentional Interference
4 with Prospective Economic Advantage, Declaratory Relief, and Injunctive Relief.
5 *See generally* Dkt. No. 3. Plaintiff never served that initial complaint but instead
6 filed an amended complaint alleging identical causes of action. *See* FAC ¶¶ 117-
7 48.

8 **“Poaching” Allegations**

9 In the FAC, Plaintiff identified two of its clients as “Client #1” and “Client
10 #2,” with whom Plaintiff allegedly had “exclusive” contracts. *Id.* ¶¶ 8, 26, 128.
11 Plaintiff claims, without any factual support, that ICM Partners “had knowledge of”
12 these contracts because it “had unabated access to Plaintiff’s complete exclusive
13 client list” at some undisclosed point in time. FAC ¶ 129. Further, although
14 Plaintiff claims to have had an “exclusive” contract with Client #2, Plaintiff fails to
15 allege any of the specific circumstances of this “exclusive contract,” such as
16 whether it was written or oral, whether it was a term contract or at-will, or any other
17 meaningful terms of the contract.

18 Sometime in June 2014, Plaintiff alleges that Client #2 “terminat[ed] his
19 exclusive contract with Plaintiff” FAC ¶¶ 26. Although Plaintiff suggests that
20 Client #2 breached the contract by terminating, Plaintiff does not allege how this
21 was so. *See* FAC ¶ 131 (“Defendants actually induced the breach of its clients”).
22 Client #2 departed, Plaintiff claims, because ICM Partners offered the client lower
23 commissions and work. FAC ¶¶ 26-27, 91, 130-32, 137, 139 (alleging that ICM
24 Partners “poached” Client #2 with “the promise of packaging on other projects and,
25 therefore, the nonpayment of commissions by the client” and by “[advising] Client
26 #2 that, if he terminated Plaintiff, he would be hired by [a particular] Employer”).
27 As a result, Plaintiff alleges claims for intentional interference with contract and
28 with prospective economic advantage against ICM Partners. *Id.* ¶¶ 127-41.

1 ***“Conspiracy” Allegations***

2 Like many talent agencies (including Plaintiff), ICM Partners is a member of
3 the Association of Talent Agents (“ATA”), a non-profit trade association for talent
4 agents. *Id.* ¶ 41. Plaintiff alleges that, among other things, ATA has historically
5 negotiated on behalf of its members with artists guilds, such as the Screen Actors’
6 Guild (“SAG”) to execute franchise agreements governing the relationships
7 between ATA and SAG members, including former Rule 16(g). *Id.* ¶ 40 (“Rule
8 16(g) was the franchise agreement between SAG and the Association of Talent
9 Agents (‘ATA’) until 2002”). According to Plaintiff, among other terms, the
10 franchise agreement contained internal regulations, such as a rule requiring agents
11 “to be independent,” which regulation meant that agents could not “possess any
12 financial interest in a production or distribution company or vice versa.” *Id.* ¶ 43.

13 Plaintiff alleges that “[o]n or about October 20, 2000, the SAG/ATA
14 [franchise] agreement [‘Rule 16(g)’] expired.” *Id.* ¶ 44 (second alteration added).
15 For approximately a year and a half thereafter, “a contractual 15-month period
16 ensued,” while SAG and ATA engaged in arm’s length negotiations to execute a
17 new franchise agreement, including “attempting to negotiate the issue of ‘financial
18 interest.’” *Id.* ¶ 45. While the negotiations initially appeared to be successful, with
19 the parties forming a “tentative agreement” in February 2002, negotiations
20 terminated shortly thereafter when, “[o]n April 20, 2002, this tentative agreement
21 was submitted for approval to SAG’s members and [was] rejected.” *Id.* ¶ 47.

22 Despite the facts that Rule 16(g) terminated under its own terms, and that it
23 was SAG, *and not* ATA, that rejected the tentative agreement, Plaintiff alleges that
24 ICM Partners, UTA, and two of their fiercest competitors: William Morris
25 Endeavor Entertainment (“WME”), and Creative Artists Agency (“CAA”)
26 (collectively with Defendants, the “Agencies”) “conspired and agreed, amongst
27 themselves, that it was in their best interests to proceed without Rule 16(g)” and
28 that “in bringing about the demise of Rule 16(g), the intent of Defendants UTA,

1 ICM, as with the other Agencies, was to destroy competition and to build a
2 monopoly of [Agencies].” *Id.* ¶¶ 50-51. Notably, however, although Plaintiff
3 claims—on information and belief—that the Agencies “exercise effective control
4 over the ATA Board of Directors” and that “ATA’s Strategic Planning
5 Committee . . . consisted of representatives from [the Agencies],” the FAC does not
6 specify how the Agencies could or did “bring about the demise of Rule 16(g),” even
7 from their alleged positions of power within ATA. *FAC* ¶¶ 41, 49-51.

8 Nevertheless, Plaintiff alleges that as a result of “the choreographed ‘planned
9 implosion’ of Rule 16(g),” the Agencies, together, “control[] 79% of the 2014/2015
10 scripted series staffing market,” “91% of the 2014/2015 scripted series term deal
11 market,” and “93% of the scripted series market.” *Id.* ¶¶ 71-73; *but see id.* ¶ 84
12 (“Agencies . . . control 96% of the market”); *id.* ¶ 98 (“Agencies possess monopoly
13 power in the scripted series marketplace, as demonstrated by their 76% market
14 share of scripted series staffing, a 91% market share of term deals at the studios and
15 networks, and a 93% market share of scripted series packaging . . .”).
16 Individually, Plaintiff alleges, ICM Partners has only 10% or less of the alleged
17 relevant market; UTA has 23% or less; WME has 34% or less; and, CAA has 33%
18 or less. *FAC* Exs. C, F, H.

19 Elsewhere in the FAC, Plaintiff alleges that the Agencies “engage in
20 ‘predatory pricing.’” *FAC* ¶ 83 (emphasis original). In other words, according to
21 the FAC, “the smaller Agencies, who charge ten percent (10%), are undercut by the
22 largest Agencies, including UTA and ICM [Partners], who can offer to charge the
23 prospective television client zero.” *Id.* Setting buzz words aside, however,
24 nowhere in the FAC does Plaintiff support its predatory pricing allegation with any
25 facts demonstrating that the Agencies price below cost. To the contrary, Plaintiff
26 affirmatively alleges that the Agencies’ package arrangements are profitable for the
27 Agencies, which means, by definition, there is no allegation of below-cost pricing.
28 *See e.g.*, *FAC* ¶¶ 24, 28.

APPLICABLE STANDARD OF REVIEW

To survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss, a plaintiff’s factual allegations “must be enough to raise a right to relief above the speculative level” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555; 127 S. Ct. 1955, 1965; 167 L. Ed. 2d 929 (2007). The allegations must “plausibly suggest[,]” and not merely be consistent with, claimed wrongful conduct. *Id.* at 557. While specific factual allegations are assumed to be true, courts are “not bound to accept as true a legal conclusion couched as a factual allegation,” and “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678; 129 S. Ct. 1937, 1949-50; 173 L. Ed. 2d 868 (2009). It is improper to assume that a plaintiff “can prove facts that it has not alleged.” *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526; 103 S. Ct. 897, 902; 74 L.Ed.2d 723 (1983).

In the antitrust context, both the Supreme Court and the Ninth Circuit have made clear that a general allegation of conspiracy is insufficient. Instead, “to allege an agreement between antitrust co-conspirators, the complaint must allege facts such as a ‘specific time, place, or person involved in the alleged conspiracies’ to give a defendant seeking to respond to allegations of a conspiracy an idea of where to begin.” *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 565 n.10).

Finally, a complaint may be dismissed without leave to amend “if amendment would be futile.” *Carrico v. City of San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011).

ARGUMENT

I. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR CONSPIRACY TO MONOPOLIZE IN VIOLATION OF SECTION 2 OF THE SHERMAN ACT

Plaintiff’s claim for conspiracy to monopolize in violation of Section 2 suffers from three separate fatal defects. The complaint does not allege that

1 Plaintiff suffered any antitrust injury; its theory that defendants attempted to
2 establish a “shared monopoly” with other companies is not legally cognizable; and
3 it fails to allege facts sufficient to support the inference of a conspiracy. Any one of
4 those defects is an independent basis for dismissing Plaintiff’s claim.

5 **A. Plaintiff Fails To Allege That It Suffered Any Antitrust Injury**

6 “It can’t be said often enough that the antitrust laws protect competition, *not*
7 competitors.” *United States v. Syufy Enters.*, 903 F.2d 659, 668 (9th Cir. 1990)
8 (emphasis original). To sustain a private right of action for an alleged antitrust
9 violation, a private plaintiff must plead and prove that it has suffered an “antitrust
10 injury.” *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1200 (9th Cir. 2012).
11 Antitrust injury is “injury of the type the antitrust laws were intended to prevent and
12 that flows from that which makes the defendant’s acts unlawful.” *Atl. Richfield Co.*
13 *v. USA Petroleum Co.*, 495 U.S. 328, 334; 110 S. Ct. 1884; 109 L.Ed.2d 333 (1990)
14 (*ARCO*). The Supreme Court has described this requirement for a private plaintiff
15 to state an antitrust claim as “ensur[ing] that a plaintiff can recover only if the loss
16 stems from a competition-reducing aspect or effect of the defendant’s behavior.”
17 *Id.* at 343 (emphasis original). But “while ‘conduct that eliminates rivals reduces
18 competition,’ ‘reduction of competition does not invoke the Sherman Act until it
19 harms consumer welfare.’” *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 848
20 (9th Cir. 1996) (quoting *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th
21 Cir. 1995)). In other words, to state a claim, a private plaintiff must allege facts
22 that plausibly demonstrate harm not to competitors but to consumers, meaning an
23 increase in price or reduction in output. *Sterling Merch., Inc. v. Nestle, S.A.*, 656
24 F.3d 112, 121 (1st Cir. 2011); *Reudy v. Clear Channel Outdoors, Inc.*, 693 F. Supp.
25 2d 1091, 1128 (N.D. Cal. 2010); *see also Rebel Oil*, 51 F.3d at 1433. In this regard,
26 “a decrease in profits from a reduction in a competitor’s prices, so long as the prices
27 are not predatory, is not an antitrust injury.” *Pool Water Prods. v. Olin Corp.*, 258
28 F.3d 1024, 1035 (9th Cir. 2001); *cf. ARCO*, 495 U.S. at 340 (“Low prices benefit

1 consumers . . . and so long as they are above predatory levels, they do not threaten
2 competition. Hence, they cannot give rise to antitrust injury.”).

3 Here, Plaintiff’s sole alleged injury is that ICM Partners’ “poached” a single
4 client from Plaintiff. FAC ¶¶ 26-27, 91. ICM Partners allegedly did so, not by
5 engaging in any anticompetitive behavior, but rather by offering this client lower
6 commissions—in fact, no commissions. *Id.* This is perhaps a classic example of
7 conduct that benefits consumers (in this case the artist-clients) and enhances
8 competition, not harms it. Indeed, the ability to offer lower commissions is a mark
9 of more vigorous competition, not less. *See, e.g., Pool Water Prods., 258 F.3d at*
10 *1035; see also ARCO, 495 U.S. at 340.* Plaintiff alleges that the conduct it
11 challenges has resulted in a “lack of diversity and creativity” in television
12 programming, *see, e.g., FAC ¶ 30*, but does not claim (nor could it) that
13 competition among the Agencies has been lessened as a result. Thus, Plaintiff’s
14 alleged injury is not “of the type the antitrust laws were intended to prevent.”
15 *ARCO, 495 U.S. at 334.* Plaintiff therefore lacks the necessary antitrust injury to
16 challenge Defendant’s alleged conduct, and its Sherman Act claim fails as a matter
17 of law.²

18
19
20 ² Although Plaintiff peppers its complaint with antitrust buzz words, such as
21 “predatory pricing,” (*see FAC ¶¶ 73, 83-84, 104*), it fails to allege any facts to
22 sustain a predatory pricing claim. Nowhere in the FAC does Plaintiff allege that
23 Defendants priced below cost or had a dangerous probability of recouping their
24 losses by charging supracompetitive prices after the fact. *See, e.g., Rebel Oil, 51*
25 *F.3d at 1433-34* (describing two “stages” of predatory pricing, including a “price
26 war” stage in which defendant “prices below its marginal cost hoping to eliminate
27 rivals,” followed by a “recoupment” stage in which defendant “can collect the fruits
28 of the predatory scheme by charging supracompetitive prices”). Indeed, the FAC
affirmatively alleges that packaging fees are profitable, and therefore, Plaintiff
cannot plausibly allege that Defendants are pricing below their costs. *E.g., FAC ¶¶*
24, 28. Similarly, it is implausible to suggest that recoupment would be possible in
an industry with vigorous competition, no dominant firm, and insufficient economic
barriers to prevent entry by new agencies or expansion of output by existing ones.
See, e.g., FAC ¶ 41 (alleging that there are 611 competing agencies); *id.* Exs. A-H
(indicating large number of existing agencies and that no agency is dominant in the
market).

1 **B. Plaintiff’s “Shared Monopoly” Theory Is Not Cognizable And**
2 **Must Be Dismissed**

3 A claim for Section 2 conspiracy to monopolize also requires Plaintiff to
4 plead that Defendants sought to confer monopoly power on a *single* firm. Courts
5 have rejected the “shared monopoly” or “joint monopolization” theory, under which
6 a group of firms that, together, allegedly possess monopoly power (in other words,
7 an oligopoly) can be found liable for joint monopolization. *See, e.g., RxUSA*
8 *Wholesale, Inc. v. Alcon Labs.*, 391 F. App’x 59, 61 (2d Cir. 2010) (affirming
9 dismissal of Section 2 claims); *Reudy*, 693 F. Supp. 2d at 1127 (dismissing Section
10 2 claims alleging that two companies shared monopoly because “Section 2 of the
11 Sherman Act does not punish behavior aimed at creating or maintaining
12 oligopolies”); *Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co.*, 926 F.
13 *Supp. 2d* 36, 45-46 (D.D.C. 2013) (dismissing Section 2 claims and agreeing with
14 “vast majority of other courts” in concluding that a “shared monopoly” cannot
15 support a Section 2 claim); *Standfacts Credit Servs., Inc. v. Experian Info. Sols.,*
16 *Inc.*, 405 F. Supp. 2d 1141, 1152 (C.D. Cal. 2005) (dismissing Section 2 claims); *cf.*
17 *Rebel Oil*, 51 F.3d at 1442-43 (“To pose a threat of monopolization, one firm *alone*
18 must have the power to control market output and exclude competition. An
19 oligopolist lacks this unilateral power. By definition, oligopolists are
20 interdependent. An oligopolist can increase market price, but only if the others go
21 along.”) (emphasis original) (citation omitted); *Harkin Amusement Enters., Inc. v.*
22 *Gen. Cinema Corp.*, 850 F.2d 477, 490 (9th Cir. 1988) (noting that no court had
23 held such a claim actionable under Section 2 and that courts had rejected such a
24 theory). Thus, a “shared monopoly” is not actionable.

25 Even where an antitrust plaintiff alleges that firms conspired to monopolize,
26 moreover, it must still allege that they conspired to confer monopoly power on a
27 *single* firm. *See, e.g., RxUSA Wholesale*, 391 F. App’x at 61; *United Food &*
28 *Commercial Workers Local 1776 & Participating Emp’rs Health & Welfare Fund*

1 *v. Teikoku Pharma USA, Inc.*, 74 F. Supp. 3d 1052, 2014 WL 6465235, at *18
2 (N.D. Cal. 2014) (*Teikoku*) (dismissing conspiracy to monopolize claims);
3 *Standfacts Credit Servs.*, 405 F. Supp. 2d at 1152; *Sun Dun, Inc. v. Coca-Cola Co.*,
4 740 F. Supp. 381, 391-92 (D. Md. 1990) (dismissing conspiracy to monopolize
5 claims). It is thus insufficient for a plaintiff to allege that multiple defendants
6 conspired to create an oligopoly, or to share monopoly power amongst themselves.

7 Here, Plaintiff not only fails to allege facts sufficient to show that Defendants
8 conspired at all, but also fails to allege that Defendants purportedly agreed to confer
9 monopoly power on a single Agency. Indeed, the FAC pleads facts directly to the
10 contrary—that Defendants intended to build an oligopoly of multiple agencies, not
11 to vest monopoly power in one agency. See FAC ¶ 51 (“[T]he intent of Defendants
12 [and their co-conspirators] was to destroy competition and to build a monopoly of
13 Uber Agencies.”) (emphasis added). Further, Plaintiff’s own pleading reveals that
14 no single Agency has a market share even close to monopoly power in actuality.
15 See FAC Exs. C, F, H.

16 “Monopoly power” requires a market share of greater than 50%, among other
17 factors. See, e.g., *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195,
18 1206 (9th Cir. 1997) (“Courts generally require a 65% market share to establish a
19 *prima facie* case of market power.”); *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d
20 101, 109 (2d Cir. 2002) (64% market share insufficient to show monopoly power
21 absent additional evidence of power to exclude competition or control prices).

22 Here, accepting the allegations of the FAC as true, and accepting the
23 proposed relevant market as properly-defined for purposes of this Motion only,
24 Plaintiff admits, and affirmatively alleges, that neither Defendant (nor any of the
25 alleged co-conspirators) has a market share in excess of 50%. Indeed, according to
26 the Exhibits to the FAC, ICM Partners has 10% or less of the alleged relevant
27 market; UTA has 23% or less; WME has 34% or less; and, CAA has 33% or less.

28

1 See FAC Exs. C, F, H. Therefore, the FAC fails to state an claim for violation of
2 Section 2 as a matter of law.

3 **C. Plaintiff Fails To Allege Facts Sufficient To Plead An Antitrust**
4 **Conspiracy**

5 “To prove a conspiracy to monopolize in violation of § 2, [Plaintiff] must
6 show four elements: (1) the existence of a combination or conspiracy to
7 monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent
8 to monopolize; and (4) causal antitrust injury.” *Paladin Assocs., Inc. v. Montana*
9 *Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003). Because Plaintiff has failed to
10 allege facts sufficient to demonstrate a single one of the elements of conspiracy to
11 monopolize, its Section 2 claim must be dismissed.³

12 **1. The FAC contains no factual allegations describing the**
13 **formation and operation of an alleged conspiracy to**
14 **monopolize.**

15 Both the Supreme Court and the Ninth Circuit have held that mere
16 “descriptions of parallel conduct” are not sufficient to state a claim for an antitrust
17 conspiracy. *Twombly*, 550 U.S. at 546. Rather, “an independent allegation of
18 actual agreement” is required, *id.*, and plaintiffs pleading conspiracy theories “must
19 allege facts such as a ‘specific time, place, or person involved in the alleged
20 conspiracies’ to give a defendant seeking to respond to allegations of a conspiracy
21 an idea of where to begin.” *Kendall*, 518 F.3d at 1047 (quoting *Twombly*, 550 U.S.
22 at 564 n.10). Conclusory terms like “conspiracy” and “agreement” do not suffice.
23 *Id.* at 1047.

24 ³ In addition to failing to meet the first three elements, Plaintiff’s FAC fails
25 for the independent reason that it lacks any allegations demonstrating a plausible
26 causal link between its alleged injury (the loss of two clients) and the conduct it
27 challenges. Although Plaintiff claims it suffered injury-in-fact when Client #2
28 departed for ICM Partners, (e.g. FAC ¶ 26), Plaintiff fails to allege any facts or
even a plausible theory for how the alleged conspiracy—that Defendants
“conspired and agreed, amongst themselves, that it was in their best interests to
proceed without Rule 16(g),” (FAC ¶¶ 50-51)—supposedly caused the purported
injury. In other words, there is no fact or even conclusory allegation explaining
how the “demise of Rule 16(g),” FAC 51, caused Client #2 to leave Plaintiff.

1 In other words, the complaint must “answer the basic questions: who did
2 what to whom (or with whom), where, and when?” *Id.* at 1048; *see also Oxbow*
3 *Carbon & Minerals*, 926 F. Supp. 2d at 47 (dismissing conspiracy to monopolize
4 claim for lack of specificity, among other reasons, because “the Complaint lack[ed]
5 factual allegations about how the alleged agreement came about, the basic terms of
6 the agreement itself, or how the defendants used the agreement to monopolize the
7 [relevant] market” and because Plaintiff failed to allege whether or how Defendants
8 “conspired to allocate an entire market to [one of Defendants]”); *Credit Bureau*
9 *Servs., Inc. v. Experian Info. Sols., Inc.*, 2013 WL 3337676, at *8 (C.D. Cal. June
10 28, 2013) (dismissing conspiracy to monopolize claim where the complaint only
11 “generally refer[red] to an unidentified ‘agreement,’” and that “merely name[d]”
12 individuals within the Defendant corporation without “alleg[ing] any specific
13 communications”); *Int’l Norcent Tech. v. Koninklijke Philips Elecs. N.V.*, 2007 WL
14 4976364, at *10 (C.D. Cal. Oct. 29, 2007) (“[Plaintiff] has not alleged any facts
15 supporting its claim It has not alleged when the purported agreement was
16 made. Nor has it stated who made the decision, how it was made or what the
17 parameters of the agreement were.”).

18 Conspicuously absent from Plaintiff’s FAC are the most basic facts
19 describing the circumstances of the alleged conspiracy, how each member was
20 allegedly involved, when the alleged agreement was made, what the alleged
21 agreement was, or what steps any Defendant took to carry it out. To the extent
22 Plaintiff pleads any facts at all to support a conspiracy, its allegations rest on bare,
23 conclusory statements—based on “information and belief”—that Defendants and
24 their alleged co-conspirators belong to a trade association (to which Plaintiff also
25 belongs), that they “conspired and agreed, amongst themselves, that it was in their
26 best interests to proceed without Rule 16(g),” and that they “inten[ded] . . . to
27 destroy competition and to build a monopoly.” FAC ¶¶ 50-51. But even if those
28 allegations were true, they are insufficient to state a cause of action for conspiracy

1 to monopolize in violation of Section 2 because they do not describe, beyond their
2 conclusory use of the “magic” words “conspire” and “agree,” the formation of any
3 conspiracy or each Defendant’s individual participation. *See Int’l Norcent Tech.*,
4 [2007 WL 4976364](#), at *10 (referring to insufficiency of “magic words” like
5 “conspiracy”).

6 As *Twombly*, *Kendall*, and their progeny demand, conspiracy claims require
7 more. Plaintiff must plead specific facts demonstrating the who, what, where,
8 when, how, and why of the conspiracy. Plaintiff has not done so here because,
9 beyond its use of “magic” words, Plaintiff’s sole allegation aimed at the formation
10 of any conspiracy or agreement between Defendants and their alleged co-
11 conspirators is the claim that they each belonged to ATA. But mere membership in
12 a trade association is not enough to infer a conspiracy. *AD/SAT, Div. of Skylight,*
13 *Inc. v. Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999) (rejecting “walking
14 conspiracy” theory pertaining to trade association activity and instead requiring
15 antitrust plaintiffs to plead specific facts to show that each Defendant individually
16 participated in an alleged conspiracy); *see also Nova Designs, Inc. v. Scuba*
17 *Retailers Ass’n*, 202 F.3d 1088, 1092 (9th Cir. 2000) (same). A lone allegation that
18 members of a trade association “agreed” that a particular term of a franchise
19 agreement was “not in their best interests,” or even that they each, independently,
20 “inten[ded] . . . to destroy competition and to build a monopoly” is insufficient to
21 plead facts sufficient to show that a conspiracy existed or how each defendant
22 participated in its alleged formation and operation, let alone enough to negate
23 “merely parallel conduct.” *Twombly*, 550 U.S. at 556-57.⁴

24
25
26 ⁴ Although Plaintiff may argue that the FAC names certain individuals within
27 the Defendant organizations, the FAC still fails to allege any specific
28 communications between them, when they agreed to anything, what the parameters
of the agreement were, or any other fact necessary to inform Defendants of what the
alleged conspiracy entailed. *See, e.g., Credit Bureau Servs.*, [2013 WL 3337676](#), at
*8; *Int’l Norcent Tech.*, [2007 WL 4976364](#), at *10.

1 What’s more, the FAC fails to allege even *parallel* conduct. Reading
2 Plaintiff’s FAC, charitably, to allege that Defendants “agreed” to “bring[] about the
3 demise of Rule 16(g),” (FAC ¶¶ 50-51), Plaintiff still fails to plead what it was that
4 Defendants agreed to do, or what similar actions they supposedly took, to effect this
5 alleged conspiracy. Indeed, the FAC alleges facts to the contrary, that Defendants
6 had no role whatsoever in the “demise” of Rule 16(g): Rule 16(g) expired not
7 because of any act on Defendants’ part, but under its own terms. FAC ¶44.
8 Thereafter, it was the SAG membership—not *Defendants or ATA*—that rejected the
9 tentative agreement between SAG and ATA to reinstate Rule 16(g). FAC ¶¶ 46-47.
10 Neither ATA nor Defendants had any control over or participation in SAG’s vote to
11 reject the tentative agreement, and Plaintiff does not claim otherwise. So even if
12 Defendants did, in some manner, “agree” to “bring about the demise of Rule
13 16(g),” as Plaintiff asks this Court to infer, Plaintiff still has not plausibly alleged a
14 single fact demonstrating how Defendants could have effectively done so. *See*
15 *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, -- F.3d --,
16 2015 WL 4591897, at *3-4 (9th Cir. July 31, 2015) (upholding finding of no
17 conspiracy where alleged there were no direct allegations of agreement but
18 participants were members of the same board and allegedly had a “vested interest”
19 in the rulemaking at issue).

20 Because the FAC fails to meet the heightened pleading standard demanded
21 by *Twombly, Kendall*, and their progeny to plead an antitrust conspiracy, Plaintiff’s
22 Sherman Act Section 2 claim must be dismissed.

23 **2. The FAC contains no factual allegations describing any**
24 **overt acts in furtherance of any alleged conspiracy.**

25 Performance of an overt act in furtherance of the conspiracy is an essential
26 element of a Section 2 conspiracy to monopolize claim. *Am. Tobacco Co. v. United*
27 *States*, 328 U.S. 781, 809; 66 S. Ct. 1125; 90 L. Ed. 1575 (1946). Although the
28 overt act need not be unlawful itself, it must be an affirmative act done to “give

1 effect to the conspiracy.” *Id.* Here, as indicated above, the FAC does not allege
 2 any facts describing an act “in furtherance of” or done to “give effect” to the
 3 alleged conspiracy. To the contrary, the FAC admits that Rule 16(g) expired not
 4 because of any act on Defendants’ part, but under its own terms. FAC ¶44. The
 5 failure to plead facts sufficient to show that Defendants participated in the
 6 formation and operation of an antitrust conspiracy, alone, requires the Court to
 7 dismiss Plaintiff’s antitrust claim.

8 **3. The FAC contains no factual allegations sufficient to show**
 9 **that ICM Partners specifically intended to monopolize an**
 10 **antitrust relevant market.**

11 Along with conspiracy and an overt act, Plaintiff must plead specific intent to
 12 monopolize. *Paladin Assocs.*, 328 F.3d at 1158. “The necessary intent to
 13 monopolize . . . is something more than an attempt to compete vigorously.”
 14 *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459; 113 S. Ct. 884; 122
 15 L.Ed.2d 247 (1993). Rather, specific intent to monopolize means an intent to
 16 “achieve an illegal monopoly.” *Howard Hess Dental Labs Inc. v. Dentsply Int’l,*
 17 *Inc.*, 602 F.3d 237, 257 (3d Cir. 2010). Although specific intent may be inferred
 18 from unlawful conduct, a plaintiff must still allege facts supporting the inference.
 19 *See id.* at 257-58.

20 Here, Plaintiff merely concludes, without any factual support, that
 21 Defendants “inten[ded] . . . to destroy competition and to build a monopoly.” FAC
 22 ¶ 51. Not only does Plaintiff fail to allege any facts to buttress this conclusion, but
 23 Plaintiff likewise fails to allege any unlawful conduct from which to infer specific
 24 intent. And any conduct that Plaintiff may claim to have alleged is certainly not
 25 unlawful or even anticompetitive, as discussed above. Thus, in the absence of any
 26 factual allegations underlying Plaintiff’s single, conclusory statement of intent, the
 27 pleadings are insufficient on their face. *Howard Hess Dental Labs.*, 602 F.3d at
 28 258 (“At bottom, the Plaintiffs’ allegations of specific intent rest not on facts but on
 conclusory statements strung together with antitrust jargon. It is an axiom of

1 antitrust law, however, that merely saying so does not make it so for pleading-
2 sufficiency purposes.”).

3 Even more fundamentally, however, Plaintiff’s allegations fail to plead
4 specific intent for the independent reason that Plaintiff does not allege that
5 Defendants conspired to confer monopoly power on a *single* Agency. Courts in this
6 Circuit have held that “specific intent” within the meaning of a conspiracy to
7 monopolize claim means that Plaintiff must allege that Defendant conspired to
8 confer monopoly power on a single firm. *Teikoku*, 2014 WL 6465235, at *18;
9 *Standfacts Credit Servs.*, 405 F. Supp. 2d at 1152. As discussed above, Plaintiff
10 fails even to attempt to allege that the Agencies conspired to confer monopoly
11 power on only one of them, and the FAC pleads facts to the contrary. *See* FAC ¶
12 51 (intent “to build a monopoly of Uber Agencies.”) (emphasis added). This is fatal
13 to Plaintiff’s Section 2 claim.

14 Because Plaintiff has failed to plead specific intent, antitrust injury, an
15 alleged conspiracy to confer monopoly power on a single Agency, or any of the
16 remaining elements of a claim for conspiracy to monopolize in violation of Section
17 2, Plaintiff’s Sherman Act claim fails as a matter of law and should be dismissed
18 with prejudice without affording Plaintiff yet another futile opportunity to amend.⁵

19 **II. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR**
20 **UNFAIR COMPETITION IN VIOLATION OF SECTION 17200**

21 California’s Unfair Competition Law (UCL) defines “unfair competition” to
22 include, in relevant part, an “unlawful” business act or practice or an “unfair”
23 business act or practice. *Bus. & Prof. Code § 17200 et seq.* The UCL thus
24 prohibits acts that violate some other law or are “unfair” as California case law has

25 _____
26 ⁵ Even if permitted to amend its pleading again, Plaintiff cannot allege a
27 plausible set of facts supporting the theory that four competitors—whom the FAC
28 demonstrates are engaged in intense competition with one another, *see* FAC Exs.
A-I—would conspire amongst themselves to cede monopoly power to only one of
them. *Carrico*, 656 F.3d at 1008 (dismissal with prejudice appropriate where
amendment futile).

1 defined that term. *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal.4th
 2 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999). Because all of Plaintiff's
 3 underlying claims fail, and because Plaintiff has failed to allege any anticompetitive
 4 conduct, Plaintiff cannot satisfy either component of the UCL, and its UCL claim
 5 must also be dismissed.

6 **A. Plaintiff Fails To Allege Facts Sufficient To Plead A UCL**
 7 **“Unlawful” Claim**

8 The “unlawful” prong of the UCL “borrows” violations from other laws, and
 9 causes of action under the “unlawful” prong must be predicated upon an
 10 independent violation of law. *Cel-Tech Commc'ns*, 20 Cal. 4th at 180. Thus, to
 11 plead a claim under this prong, the plaintiff must allege facts sufficient to
 12 demonstrate a violation of an underlying law. *People v. McKale*, 25 Cal. 3d 626,
 13 635, 159 Cal. Rptr. 811, 602 P.2d 731 (1979). Because all of Plaintiff's underlying
 14 claims for interference and antitrust violations fail, its UCL “unlawful” prong claim
 15 must also be dismissed.

16 **B. Plaintiff Fails To Allege Facts Sufficient To Plead A UCL “Unfair”**
 17 **Claim**

18 When a plaintiff asserts a claim under the UCL's “unfair” prong against one
 19 of its competitors, the California Supreme Court has held that the term “unfair”
 20 means conduct which “threatens an incipient violation of an antitrust law, or
 21 violates the policy or spirit of one of those laws because its effects are comparable
 22 to or the same as a violation of the law, or otherwise significantly threatens or
 23 harms competition.” *Cel-Tech Commc'ns*, 20 Cal. 4th at 187.

24 Although it is not necessary in all circumstances for an allegedly “unfair”
 25 practice under the UCL also to violate a federal or state antitrust law, in order to
 26 state a claim under the “unfair” prong of the UCL, the complaint must contain
 27 factual allegations to show that the challenged conduct unreasonably restrains trade
 28 and harms consumers. *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375, 113

1 Cal. Rptr. 2d 175 (2001). And “the determination that [a defendant’s] conduct is
 2 not an unreasonable restraint of trade necessarily implies that the conduct is not
 3 ‘unfair’ towards consumers.” *Id.*; accord *RLH Indus., Inc. v. SBC Commc’ns, Inc.*,
 4 133 Cal. App. 4th 1277, 1286; 35 Cal. Rptr. 3d 469 (2005) (summary judgment on
 5 Cartwright Act claim precluded UCL claim under the “unfair” prong); *see also*
 6 *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App’x. 554, 557 (9th Cir. 2008) (unfair
 7 competition claim failed because antitrust claims had failed); *ChriMar Sys., Inc. v.*
 8 *Cisco Sys., Inc.*, 72 F. Supp. 3d 1012, 1020 (N.D. Cal. 2014) (rejecting UCL unfair
 9 prong claim where plaintiff’s Section 2 claims had failed, and noting that “[c]ourts
 10 have held that where the alleged conduct does not violate the antitrust laws, a claim
 11 based on unfair conduct under the UCL cannot survive”); *DocMagic, Inc. v. Ellie*
 12 *Mae, Inc.*, 745 F. Supp. 2d 1119, 1147 (N.D. Cal. 2010) (same). Indeed, “[t]o
 13 permit a separate inquiry into essentially the same question under the unfair
 14 competition law [as under the antitrust laws] would only invite conflict and
 15 uncertainty and could lead to the enjoining of procompetitive conduct.” *Chavez*, 93
 16 Cal. App. 4th at 375 (affirming trial court’s dismissal of UCL claims for failure to
 17 state a claim).

18 As discussed above, Plaintiff’s antitrust claim fails in its entirety and must be
 19 dismissed. Beyond Plaintiff’s failure to plead the necessary elements for
 20 conspiracy,⁶ Plaintiff’s Section 2 claim fails more fundamentally because it fails to
 21 allege any anticompetitive conduct or harm to competition or consumers. To the
 22 contrary, the only conduct that Plaintiff alleges on ICM Partners’ part—namely that
 23 a lone client left Plaintiff and paid lower commissions at ICM Partners, (FAC ¶¶
 24 26-27, 91)—is procompetitive, not anticompetitive. Thus, Plaintiff cannot be

25 _____
 26 ⁶ Here, Plaintiff’s UCL claim incorporates its preceding allegations, does not
 27 allege any additional conduct, and therefore depends on its allegation of the
 28 existence of a purported conspiracy. FAC, ¶¶ 122, 122-126. This is, in and of
 itself, grounds for dismissal. *See Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 875;
 107 Cal. Rptr. 2d 841 (2001) (failure to plead conspiracy precludes a UCL claim
 based upon conspiracy).

1 permitted to reach via the UCL procompetitive conduct that is not unlawful under
2 the antitrust laws.

3 As such, because all of Plaintiff's underlying claims fail, and because
4 Plaintiff has failed to allege any anticompetitive conduct, Plaintiff's UCL claim
5 must be dismissed in its entirety.

6 **III. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR**
7 **INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE**

8 "The elements of interference with prospective economic advantage resemble
9 those of intentional interference with contract. They are: (1) an economic
10 relationship between the plaintiff and some third party, with the probability of
11 future economic benefit to the plaintiff; (2) the defendant's knowledge of the
12 relationship; (3) intentional acts on the part of the defendant designed to disrupt the
13 relationship; (4) actual disruption of the relationship; and (5) economic harm to the
14 plaintiff proximately caused by the acts of the defendant." *CRST Van Expedited,*
15 *Inc. v. Werner Enters., Inc.*, 479 F.3d 1099, 1107-08 (9th Cir. 2007) (internal
16 quotation marks and citation omitted).

17 But because interference often signals vigorous competition, not all acts of
18 interference are actionable in California. To protect healthy competition, California
19 has adopted the doctrine of competitor's privilege, and in light of that privilege, a
20 plaintiff seeking to establish a claim of interference with prospective economic
21 advantage must plead wrongful conduct—that is, "an act that is wrongful
22 independent of the interference itself." *Id.* at 1108; *Della Penna v. Toyota Motor*
23 *Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 389; 45 Cal. Rptr. 2d 436 (1995). Under
24 California law, "an act is independently wrongful if it is unlawful, that is, if it is
25 proscribed by some constitutional, statutory, regulatory, common law, or other
26 determinable legal standard." *CRST Van Expedited*, 470 F.3d at 1109 (citation
27 omitted).

28

1 Here, as discussed throughout this Motion, Plaintiff has failed to demonstrate
2 that ICM Partners engaged in any independently wrongful conduct because all of
3 Plaintiff's underlying claims fail. Plaintiff's intentional interference with
4 prospective economic advantage claim must likewise be dismissed.

5 **IV. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR**
6 **INTENTIONAL INTERFERENCE WITH CONTRACT**

7 "The tort of intentional interference with contract requires allegations of the
8 following elements: (1) a valid contract between plaintiff and a third party; (2)
9 defendant's knowledge of this contract; (3) defendant's intentional acts designed to
10 induce a breach or disruption of the contractual relationship; (4) actual breach or
11 disruption of the contractual relationship; and (5) resulting damage." *CRST Van*
12 *Expedited*, 479 F.3d at 1105 (internal quotation marks and citation omitted).

13 Here, because Plaintiff has failed to plead facts demonstrating breach of a
14 valid contract, ICM Partners' knowledge of the alleged contract, or interference by
15 means other than those protected by the competitor's privilege, Plaintiff's
16 intentional interference with contract claim must be dismissed.

17 **A. Plaintiff Fails To Allege Facts Sufficient To Plead Breach Of An**
18 **Existing Contract**

19 In order to plead a viable interference with contract claim, Plaintiff must
20 plead facts sufficient to show the existence of a valid contract and the breach of that
21 contract. *CRST Van Expedited*, 479 F.3d at 1105.

22 Plaintiff's FAC fails at the most basic level to plead any meaningful terms of
23 the alleged contract between it and Client #2, or to plead that Client #2 actually
24 breached the contract when he "terminat[ed]" his relationship with Plaintiff. *FAC* ¶
25 26. In fact, the only mention of "breach" in the entire FAC occurs in the
26 conclusory allegations that "Defendants committed intentional acts designed to
27 induce the breach of [the exclusive] contract," and that "Defendants actually
28 induced the breach of [Plaintiff's] clients" *Id.* ¶¶ 130-31. Nowhere does

1 Plaintiff state what terms of the alleged contract were breached or how. In the
2 absence of facts supporting these conclusory statements, the amended complaint is
3 insufficient on its face to plead interference with contract, and the claim must be
4 dismissed for this reason alone.

5 **B. Plaintiff Fails To Allege Facts Sufficient To Plead ICM Partners’**
6 **Knowledge**

7 Plaintiff also must plead “defendant’s knowledge of th[e] contract” for the
8 interference with contract claim to survive. *CRST Van Expedited*, 479 F.3d at 1105.
9 Here, Plaintiff’s allegations fail because the FAC lacks any factual support for
10 Plaintiff’s single, conclusory assertion that ICM Partners knew of the alleged
11 contract because it “had unabated access to Plaintiff’s complete exclusive client
12 list” at some unstated point in time. FAC ¶ 129. Nowhere in the FAC are there any
13 facts detailing how this was so, and the inference that ICM Partners had access to
14 Plaintiff’s client list is particularly unjustified given that Plaintiff claims that it was
15 required to take action to send its client list to co-defendant UTA on a “monthly
16 basis” from April to November 2014 in order to give UTA “notice of Plaintiff’s
17 clients.” *Id.* ¶ 19. There is no similar allegation that Plaintiff provided its client list
18 to ICM Partners, and no other factual support for how ICM Partners could have
19 known of any relationship between Plaintiff and Client #2.

20 But even if the Court were willing to infer that ICM Partners knew of a
21 relationship between Plaintiff and Client #2, this would not mean that ICM Partners
22 knew of a binding contract between the two, let alone that Client #2 would breach
23 that contract by leaving. The FAC fails to plead any facts supporting this
24 unwarranted inference, and it is improper to assume Plaintiff “can prove facts that it
25 has not alleged.” *Assoc. Gen. Contractors of Cal*, 459 U.S. at 526.

1 **C. Plaintiff Fails To Allege Wrongful Conduct Sufficient To Defeat**
 2 **the Competitor's Privilege**

3 As discussed above, California has adopted the doctrine of competitor's
 4 privilege as a bar to interference claims. *See Della Penna*, 11 Cal. 4th at 389
 5 (discussing competitor's privilege and holding that a plaintiff must plead wrongful
 6 conduct to state an interference claim). Although the competitor's privilege does
 7 not apply to all interference with contract claims, the privilege does apply to
 8 interference with contracts that are *terminable at will*. California courts have held
 9 that "[o]ne who intentionally causes a third person . . . not to continue an existing
 10 contract terminable at will does not interfere improperly with the other's relation if:
 11 (a) the relation concerns a matter involved in the competition between the actor and
 12 the other and (b) the actor does not employ wrongful means and (c) his action does
 13 not create or continue an unlawful restraint of trade and (d) his purpose is at least in
 14 part to advance his interest in competing with the other." *S.F. Design Ctr. Assocs.*
 15 *v. Portman Cos.*, 41 Cal. App. 4th 29, 40; 50 Cal. Rptr. 2d 716 (1995).⁷ Thus, to
 16 defeat the privilege, Plaintiff must show that ICM Partners' alleged conduct in
 17 interfering with an at-will contract was independently actionable. *Id.* at 42-43.

18 Plaintiff's failure to plead even the most basic terms of the alleged contract,
 19 specifically, that the contract contained a term and was not at-will, means that the
 20 claim fails for the independent reason that Plaintiff has not pleaded the necessary
 21 wrongful conduct to circumvent the competitor's privilege. As discussed above,
 22 Plaintiff has failed to demonstrate that ICM Partners engaged in any independently
 23 wrongful conduct because all of Plaintiff's underlying claims fail.

24
 25
 26 ⁷ As discussed above, the FAC fails to state an actionable antitrust claim and
 27 therefore cannot be said to state a claim for an unlawful restraint of trade.
 28 Moreover, Plaintiff affirmatively alleges that ICM Partners' alleged conduct was
 done for the purposes of competing with Plaintiff, among others. *See, e.g., FAC ¶¶*
 28, 81, 93.

1 Thus, because Plaintiff has failed to plead any facts demonstrating breach of
 2 a valid contract—let alone interference by means other than those protected by the
 3 competitor’s privilege—and has failed to plead sufficient facts to demonstrate ICM
 4 Partners’ knowledge of the alleged contract, Plaintiff’s intentional interference with
 5 contract claim must be dismissed.

6 **V. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR**
 7 **DECLARATORY RELIEF**

8 Declaratory relief is a form of relief and not a cause of action. *Del Monte*
 9 *Int’l GmbH v. Del Monte Corp.*, 995 F. Supp. 2d 1107, 1124 (C.D. Cal. 2014);
 10 *Tirabassi v. Chase Home Fin., LLC*, 2015 WL 1402016, at *10 (C.D. Cal. Mar. 24,
 11 2015); *Hollins v. Recontrust, N.A.*, 2011 WL 1743291, at *2 (C.D. Cal. May 6,
 12 2011). “The object of [declaratory relief] is to afford a new form of relief where
 13 needed and not to furnish a litigant with a second cause of action for determination
 14 of identical issues.” *Lai v. Quality Loan Serv. Corp.*, 2010 WL 3419179, at *3
 15 (C.D. Cal. Aug. 26, 2010) (citation omitted). As a result, this Court routinely
 16 dismisses claims where plaintiffs attempt to state an independent cause of action for
 17 declaratory relief but the claim “merely replicate[s]” other causes of action. *See*,
 18 *e.g.*, *Del Monte Int’l GmbH*, 995 F. Supp. 2d at 1124; *Tirabassi*, 2015 WL
 19 1402016, at *10-11; *Hollins*, 2011 WL 1743291, at *2; *Lai*, 2010 WL 3419179, at
 20 *3. Here, all but possibly one of the claims for which Plaintiff seeks declaratory
 21 relief are entirely duplicative of its other claims. *See* FAC ¶ 143 (realleging prior
 22 claims and seeking a “declaration” that Defendants “committed violations” of
 23 statutes underlying Plaintiff’s other claims).

24 The only arguably non-duplicative relief Plaintiff seeks is a declaration that
 25 the longstanding, and widely accepted practice of packaging violates the California
 26 Talent Agencies Act (TAA), Labor Code section 1700, et seq. FAC ¶¶ 33, 58, 143.
 27 Talent agencies doing business in California are licensed and regulated under the
 28 TAA, and the California Labor Commissioner is charged with its enforcement and

1 interpretation, which authority is entitled to great weight. *Styne*, 26 Cal. 4th at 53.
 2 As Plaintiff concedes, the Labor Commissioner has determined that package
 3 agreements fall outside of the TAA.⁸ See FAC ¶¶ 34-35.

4 **VI. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR**
 5 **INJUNCTIVE RELIEF**

6 Injunctive relief is a form of relief and not an independent cause of action.
 7 *Fradis v. Savebig.com*, 2011 WL 7637785, at *7 (C.D. Cal. Dec. 2, 2011); *Hollins*,
 8 2011 WL 1743291, at *5; *Lai*, 2010 WL 3419179, at *1 n.3. This is true without
 9 regard to whether the claim duplicates other causes of action. See *id.* As a result,
 10 this Court also routinely dismisses claims where plaintiffs attempt to state an
 11 independent cause of action for injunctive relief. See, e.g., *Fradis*, 2011 WL
 12 7637785, at *7; *Hollins*, 2011 WL 1743291, at *2; *Lai*, 2010 WL 3419179, at *1
 13 n.3. Because Plaintiff's independent cause of action for injunctive relief is not
 14 cognizable at law, the Court should dismiss it with prejudice.

15 **CONCLUSION**

16 For the foregoing reasons, ICM Partners requests that the Court dismiss the
 17 entire FAC with prejudice.

18 DATED: August 10, 2015

PERKINS COIE LLP

19
 20 By: /s/ Michael Garfinkel
 Michael B. Garfinkel

21 Attorneys for Defendants
 22 INTERNATIONAL CREATIVE
 MANAGEMENT PARTNERS LLC

23 [LEGAL126858015.12](#)

24 ⁸ Plaintiff's requested declaration is further flawed in that it is based upon a
 25 misreading of two sections of the TAA. [Section 1700.39](#) provides "[n]o talent
 26 Agency shall divide fees with an employer, an agent or other employee of an
 27 employer." See FAC ¶¶ 33, 143(b). This provision clearly relates to the splitting of
 28 commissions paid by the artist with the employer, which is not what happens with a
 package. [Section 1700.40\(b\)](#) is also inapplicable as it expressly limits a talent
 agency from referring an artist to a person, firm, or corporation in which the talent
 agency has a direct or indirect interest for other services to be rendered to the artist,
 such as photographers and dramatic coaches. See FAC ¶ 58.