No. 16-55739

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LENHOFF ENTERPRISES, INC.,

Plaintiff-Appellant,

v.

UNITED TALENT AGENCY, INC., INTERNATIONAL CREATIVE MANAGEMENT PARTNERS LLC,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

ANSWERING BRIEF OF APPELLEE INTERNATIONAL CREATIVE MANAGEMENT PARTNERS LLC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee International Creative Management Partners LLC ("ICM") discloses that it is a nongovernmental corporate party with two parent limited liability companies: EOTFR, LLC and Ice Partners LLC. No publicly held corporation owns ten percent or more of ICM's stock.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

The suit filed by Lenhoff Enterprises, Inc. ("Lenhoff") rests on its gripe that ICM and other large talent agencies are better able to attract and retain as clients the talent likely to create a successful television series. Lenhoff speculates that its shortcomings result from a conspiracy among the larger agencies. Yet that is a common refrain heard from competitors in every industry whenever larger rivals—which often possess superior knowledge, skill, experience, and resources—independently compete for customers by offering better services, lower prices, or other benefits. Those are the goals of a free-market economy, not indicia of collusion. And no antitrust claim can lie without facts from which a court plausibly might infer that a departure from lawful unilateral conduct has occurred *and* that the plaintiff suffered actual injury caused by any concerted action.

Indeed, Lenhoff reluctantly acknowledges in its Third Amended Complaint ("TAC") that studios, networks, and production companies seek out larger talent agencies precisely because they "are able to package together top acting, writing, producing and directing talent for a given project and have more influence and ability to develop new series for broadcast and cable networks" than are smaller agencies like Lenhoff. 2 ER 49, ¶ 14. In other words, the larger agencies offer a more desirable product—the sine qua non of a competitive market.

Lenhoff tells a good story on appeal, but that story fails to align with the allegations in the TAC—which never asserted a price-fixing conspiracy on packages, never mentioned a claimed conversation with William Morris Agency's former executive about package pricing, and never referenced the "statistics" on which Lenhoff now relies. Despite their absence below, Lenhoff attempts to bootstrap these unpleaded allegations into its appeal on the merits. The Court should reject that effort.

As to its pleaded allegations, Lenhoff never sufficiently explains how ICM and the other agencies supposedly acted in concert to impede Lenhoff's ability to attract and retain in-demand talent or compete for packages, or even provide a greater level of personal service so often lauded by smaller businesses. Stripped of its conclusory statements, the TAC confirms that each market participant acted independently and for its economic self-interest—as sound economic principles would predict and belying the existence of any antitrust conspiracy.

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction under 28 U.S.C. § 1291 to review whether the district court correctly dismissed Lenhoff's Third Amended Complaint for failure to state a claim.

This Court lacks jurisdiction to consider whether the district court abused its discretion in denying Lenhoff's motion for reconsideration—as well as to consider

the evidence disclosed for the first time in support of that motion—because Lenhoff did not file a notice of appeal challenging the order denying the motion to reconsider pursuant to Federal Rule of Civil Procedure 60. *See* Fed. R. App. P. 4(a)(4)(B)(ii) (requiring that a party "intending to challenge an order disposing of any motion [under Rule 60] must file a notice of appeal, or an amended notice of appeal").

STATEMENT OF ISSUES PRESENTED

1. Whether the District Court correctly dismissed Lenhoff's claim for violation of the Sherman Act because the Third Amended Complaint fails to allege facts sufficient to plausibly show either an antitrust conspiracy or antitrust injury.

2. Whether the District Court correctly dismissed Lenhoff's claims for violation of the California Unfair Competition Law ("UCL") and intentional interference with prospective economic advantage because they are premised on Lenhoff's deficient antitrust claim.

3. Whether the District Court correctly dismissed Lenhoff's claim for intentional interference with contract because Lenhoff failed to plead facts sufficient to plausibly show that the contract was for a specific duration.

4. Whether the District Court abused its discretion by denying Lenhoff's request to file a Fourth Amended Complaint because Lenhoff had multiple prior opportunities to state a claim and amendment would have been futile.

STATEMENT OF THE CASE

Lenhoff alleged in its Third Amended Complaint that ICM, United Talent Agency, LLC ("UTA"), and other large, non-party talent agencies engaged in a conspiracy to "restrain trade in the scripted television relevant market, including the scripted television packaging submarket" in violation of Section 1 of the Sherman Antitrust Act. 2 ER 49, ¶¶ 6, 73–81. Based on that allegation, Lenhoff also asserted that UTA and ICM violated the UCL and intentionally interfered with its business relationships with two clients who left Lenhoff for UTA and ICM. *Id.* ¶¶ 82–88, 101–06. Finally, Lenhoff alleged that UTA and ICM poached the same two clients as the basis for an intentional interference with contract claim. *Id.* ¶¶ 90–100.

The district court dismissed with prejudice all claims except intentional interference with contract as alleged against ICM; the court dismissed that claim without prejudice but declined to exercise supplemental jurisdiction over it, and therefore dismissed the case. 1 ER 65 at 21–22.

I. The Parties

Lenhoff is a "boutique" talent agency "consisting of two agents" that represents "writers, directors, producers and cinematographers" in the entertainment industry. 2 ER 49, ¶¶ 7–8. UTA is a "large talent agency, ranked behind only CAA [Creative Artists Agency] and WME [William Morris Endeavor

Entertainment, formed from the merger of William Morris Agency and Endeavor]," that "employs two hundred (200) agents," is "controlled by over thirty partners," and "services 3,000 plus clients." *Id.* ¶¶ 11, 13. ICM, which acquired Broder/Kurland/Webb/Uffner ("Broder") in the mid-2000s, is a "large talent agency" that "employs two hundred plus (200+) agents," is "controlled by forty (40) partners," and "services 4,500 plus clients." *Id.* ¶¶ 12–13.

II. Lenhoff Files Four Separate Complaints

A. Lenhoff Does Not Serve Its Original Complaint

In February 2015, Lenhoff filed its original Complaint. SER 209. Lenhoff never served the complaint, resulting in the district court entering an Order to Show Cause. *Id.* at 208.

B. Lenhoff's First Amended Complaint

1. Lenhoff's Allegations

Lenhoff filed its First Amended Complaint ("FAC") shortly after receipt of the show-cause order. *Id.* at 154. Lenhoff alleged six causes of action: (1) conspiracy to monopolize in violation of Section 2 of the Sherman Act, (2) violation of California's UCL, (3) intentional interference with prospective economic advantage, (4) intentional interference with contract, (5) declaratory relief, and (6) injunctive relief. *Id.* at 181–85, ¶¶ 117–48.

Talent agencies representing artists such as actors, writers, producers and directors ("talent") are customarily paid for their services by receiving

commissions equal to 10% of their clients' compensation. *Id.* at 159, ¶ 24. Alternatively, in lieu of these customary commissions from clients on particular television series, the agencies can earn "packaging fees" paid by the studios, networks, and production companies ("buyers") for bringing talent to the series. *Id.* Package fees typically consist of 3% of the license fees paid by the buyers on each episode in the series, another 3% of the license fees deferred out of net profits (if any), and 10% of the Modified Gross Receipts (if any). *Id.* When series are successful, the package fees can exceed the customary commissions the agencies would have collected from their individual clients. *Id.* As a result of packaging, the top-tiered talent are not paying hundreds of millions of dollars in commissions. *Id.*

Lenhoff alleged that through their membership in the Association of Talent Agencies ("ATA"), UTA and ICM conspired with Broder (later acquired by ICM), CAA, and William Morris Agency and Endeavor (later combined to form WME) to bring an end to the "financial interest" limitations imposed by Rule 16(g), the franchise (or collective bargaining) agreement between the ATA and the Screen Actors Guild ("SAG"). *Id.* at 163, 165–66, ¶¶ 40, 49–50. According to Lenhoff, Rule 16(g) forbade talent agencies from possessing any financial interest in buyers and vice versa. *Id.* at 164, ¶¶ 42, 43. Lenhoff alleged that representatives of each of these six largest packaging agencies served on the ATA's Strategic Planning

Committee and were "interested in changing the business model" of their agencies "from a 'service based' business to an 'asset based' receivables business which could be factored and leveraged." *Id.* at 165, ¶ 49. Lenhoff alleged that those agencies therefore "conspired and agreed . . . that it was in their best interests to proceed without Rule 16(g)." *Id.* at 165–66, ¶ 50 (emphasis omitted). Lenhoff alleged that these Committee members "shared a prophetic vision" that their agencies would see greater revenues if they were no longer restricted by Rule 16(g) and that the ATA therefore "opened up negotiations with SAG," demanding the right to invest in or be invested in by third parties. *Id.* at 164–65, ¶¶ 42, 49.

Lenhoff asserted that after Rule 16(g) expired, the ATA and SAG reached a "tentative agreement" that would allow for limited financial interests—allowing agencies to take up to 20% stakes in production and distribution companies and allowing advertising firms and independent (non-studio) producers to take up to 10% and 20% stakes, respectively, in the agencies. *Id.* at 164, ¶¶ 44, 46. But when that proposal "was submitted for approval to SAG's members," SAG's membership "rejected the negotiated agreement." *Id.* at 165, ¶ 47.

In other words, despite Lenhoff's contention that the agencies' intent "in bringing about the demise of Rule 16(g) . . . was to destroy competition and to build a monopoly of Uber Agencies," *Id.* at 166, ¶ 51, Lenhoff admitted that it was SAG's members (i.e., the talent whom Lenhoff contends have been victimized)

that rejected the tentative agreement that would have replaced the expired Rule 16(g).

Lenhoff further alleged that without Rule 16(g)'s restrictions, UTA, ICM, and two competitor agencies (WME and CAA) received significant increases in funding from outside investors, which permitted the agencies to "consolidate their power." *Id.* at 166, 168, 171–72, 178, ¶¶ 53, 60, 71, 98. Lenhoff alleged that the consolidation permitted larger agencies to accumulate talent and offer more packaging arrangements to talent and buyers than smaller agencies could offer. *Id.* at 175–76, ¶¶ 82–83.

Finally, without pleading any names or dates, Lenhoff alleged that UTA and ICM "poached" two of Lenhoff's clients by inducing those clients with the promise that UTA and ICM would include them in future, unspecified packaged series and saving them from paying the customary 10% commission on those series. *Id.* at 157–61, ¶¶ 11–28.

2. The District Court Dismisses in Part the First Amended Complaint

After UTA and ICM moved to dismiss, the court rejected Lenhoff's Sherman Act Section 2 cause of action because Lenhoff alleged that the conspirators intended "to build a monopoly of Uber Agencies"—that is, "share the monopoly power—an assertion that suggests Defendants' power is better construed as an oligopoly." *Id.* at 146, 166, ¶ 51. Because this Court does not recognize a

"shared monopoly" or "joint monopolization" antitrust theory, the district court dismissed the claim. *Id.* at 146–47.

The court dismissed Lenhoff's claim for intentional interference with prospective economic advantage because that claim requires proof "that the defendant's interference was wrongful by some measure beyond the fact of the interference itself." *Id.* at 151. Since Lenhoff relied exclusively on the alleged violation of the Sherman Act as the independent wrongful act, the claim for interference with prospective economic advantage fell with the Sherman Act claim. *Id.*

The court also dismissed Lenhoff's claim for intentional interference with contract—for which Lenhoff alleged that ICM poached "Client #2"—because Lenhoff failed to allege whether its contract with Client #2 was terminable at-will or for a specific duration. *Id.* at 150. The court explained that "where contracts are terminable at-will, the competitor's privilege applies." *Id.* If the competitor's privilege applies, "a plaintiff must also plead and prove that the defendant engaged in an independently wrongful act" that induced the party to leave the plaintiff. *Id.* Because the FAC did not allege facts sufficient to plausibly show that the contract was for a specific duration—and because Lenhoff had not sufficiently alleged an independently wrongful act—the court dismissed that claim. *Id.*

The court dismissed with prejudice Lenhoff's claim for declaratory relief because it was "duplicative." *Id.* at 152. The court also dismissed with prejudice Lenhoff's claim for injunctive relief because it is "not an independent cause of action." *Id.*

The court denied the motions to dismiss Lenhoff's UCL claim because it "did not address the merits of Plaintiff's § 2 claim, nor did it determine whether the conduct alleged constituted an unreasonable restraint of trade." *Id.* at 39.

C. Lenhoff's Second Amended Complaint

1. Lenhoff's Allegations

Lenhoff next filed its Second Amended Complaint ("SAC"). *Id.* at 54. Based on nearly the same "facts," Lenhoff replaced its Sherman Act Section 2 claim with a Section 1 claim, alleging a conspiracy to unreasonably restrain trade. *Id.* at 91–93, ¶¶ 117–21. Lenhoff's SAC again included UCL and interference with prospective economic advantage claims, this time based on the new Section 1 claim. *Id.* at 93, 97–98, ¶¶ 122–26, 134–41. Lenhoff also alleged a claim for interference with contract. *Id.* at 94–97, ¶¶ 127–33.

Lenhoff's Section 1 claim contended that ICM and other large talent agencies (1) "engaged in horizontal price-fixing," (2) agreed "that it was in their best interests to proceed without Rule 16(g)," (3) agreed to "engage[] and continue to engage in exclusive co-packaging contracts" and "have an agreement to not split

packaging fees" with smaller agencies, and (4) agreed to "coerce studio employers" to refuse granting packages to smaller talent agencies by threatening to withhold talent as a consequence of noncompliance. *Id.* at 78–79, 84, 86–87, ¶¶ 73, 84, 99.

To support its interference with contract claim and to avoid the competitor's privilege, Lenhoff alleged that its oral contracts with Clients #1 and #2 were not terminable at-will by operation of the "90 Day Clause" contained in "Rider D" to the collective bargaining agreement between the ATA and the Directors Guild of America ("DGA"). *Id.* at 56–57, ¶ 8. Lenhoff asserted that Rider D governed its oral agreements with these clients and made them for a specific duration. *Id.*

2. The District Court Dismisses the Second Amended Complaint

UTA and ICM moved to dismiss the SAC, and the court granted those motions in their entirety. *Id.* at 53. The court recognized that claims under Section 1 of the Sherman Act are evaluated under either per se analysis or the rule of reason. To support its claim of per se price fixing, Lenhoff asserted only that UTA, ICM, and the other large agencies "engaged in horizontal price-fixing." *Id.* at 78–79, 84, 90–91, ¶¶ 73, 84, 116. Because Lenhoff "provided no factual details other than this conclusory statement," the court rejected any claim of a per se violation. *Id.* at 41.

The court likewise rejected Lenhoff's Section 1 claim under the rule of reason as applied to the other three alleged conspiracies. Because the Supreme Court "insist[s] upon some specificity in pleading before allowing a potentially massive factual controversy to proceed," the court concluded that the "only alleged conspiracy of which Plaintiff provides names of participating individuals is the agreement to 'bring about the demise of Rule 16(g).'" *Id.* at 42–44. Yet "mere participation in trade-organization meetings [like the ATA] where information is exchanged and strategies are advocated does not suggest an illegal agreement." *Id.* at 45. The court confirmed that any decision to permit Rule 16(g) to expire was "in all agencies' best interest, and thus is as much evidence of a conspiracy as it is evidence that each individual agency acted for its own independent benefit." *Id.* And Lenhoff also admitted that SAG (not the ATA) rejected the proposal to reinstate provisions of Rule 16(g). *Id.*

The court similarly rejected Lenhoff's allegations about agreements to exclusively co-package contracts and coerce studios to boycott smaller agencies because Lenhoff did not "provide the names of any individuals who allegedly engaged in those agreements," did not "allege the specific time or place such agreements took place," and did not "plead a specific instance of a threat against a studio." *Id.* at 42, 45. Further, and critically, even though Lenhoff alleged that the large agencies had collectively "engaged and continue to engage in *exclusive* co-

packaging contracts" to the exclusion of smaller agencies, *id.* at 78–79, ¶ 73 (emphasis added), Lenhoff also "concede[d] in its SAC that Defendants do in fact participate in co-packaging agreements with [smaller agencies]," *id.* at 45. Specifically, Lenhoff alleged that "'16 out of 105' co-packaging agreements were split with the [smaller agencies]." *Id.* Thus, because Lenhoff's own allegations "contradict its claim," the court concluded that Lenhoff had "failed to sufficiently plead a conspiracy to unreasonably restrain trade." *Id.*

The court also concluded that Lenhoff failed to sufficiently plead injury to competition because Lenhoff failed to allege the requisite connection to the conspiracy. *Id.* at 46–47. Further, with respect to the allegation of a boycott by studios against the smaller agencies, the court concluded that Lenhoff did not allege whether there was unlawful coercion or whether, even accepting the allegations as true, the large agencies had "lawfully pressured" the studios to refrain from using the smaller agencies. *Id.* at 47. And the court rejected Lenhoff's reference to alleged "tying agreements" as support for the existence of antitrust injury because, like its other claims, Lenhoff "points to no specific tying agreement whereby Defendants required a studio, network, or producer to accept tied talent along with the coveted talent." *Id.* at 48.

The court further dismissed Lenhoff's claims for violation of California's UCL and intentional interference with prospective economic advantage because

those claims were premised on Lenhoff's deficient Sherman Act claim. *Id.* at 50, 53.

Finally, the court dismissed Lenhoff's intentional interference with contract claim, despite Lenhoff's attempted reliance on Rider D. *Id.* at 52. The court did not reach Lenhoff's assertion that Rider D could elevate the status of the contracts from at-will to term agreements (and therefore avoid the competitor's privilege). *Id.* The court explained that before Rider D could be relevant, Lenhoff had to sufficiently allege that two conditions were met: (1) within 90 days of termination, the client had received a bona fide offer of employment and (2) the compensation for that offer of employment had been the "pro rata equivalent of 3 weeks of services." *Id.* at 51. Because Lenhoff "state[d] no facts indicating whether payment of the employment met Rider D's requirements"—and therefore did not allege whether the contract was for a specific duration—the court again dismissed the claim. *Id.* at 52.

Despite three prior attempts to plead a sufficient complaint, the court granted leave to amend the complaint yet again. *Id.* at 53.

D. Lenhoff's Third Amended Complaint

1. Lenhoff's Allegations

Lenhoff alleged in its TAC the same four causes of action: (1) violation of Section 1 of the Sherman Act for (a) per se "horizontal price fixing,[1] (b) conspiracy to eliminate Rule 16(g), (c) conspiracy with other large agencies to exclude smaller agencies from co-packaging agreements, and (d) vertical conspiracy with buyers to boycott smaller agencies; (2) violation of the California UCL for the same acts; (3) intentional interference with prospective economic advantage for the same acts; and (4) intentional interference with contract for "poaching" two clients. 2 ER 49.

This time Lenhoff included a list of dates at which the ATA Strategic Planning Committee allegedly met at the ATA's offices, telephoned, or emailed—stating that representatives of those larger agencies therefore "had ample opportunity" to collude. *Id.* ¶ 23. Lenhoff also attached as new exhibits to the TAC two lists of purported packaged series from the 2014–15 season allegedly identifying the number of packages the larger agencies split with smaller agencies and among themselves. 2 ER 49-1. Neither the TAC or the new exhibits identify the source of this "data" or provide any indicia of accuracy. Finally, Lenhoff

[1] As explained below, the TAC omitted several earlier factual assertions and did not explicitly allege a price-fixing conspiracy, though the district court generously interpreted that claim.

included with its UCL claim a reference to the California Cartwright Act. 2 ER 49, ¶ 84.

2. Lenhoff Adds Additional Factual Allegations For the First Time in Its Oppositions to the Motions to Dismiss

After UTA and ICM moved to dismiss the TAC, Lenhoff filed oppositions in which it included two additional declarations—one by an economist purporting to provide statistics about the market share and co-packaging of the largest talent agencies in the television-package market and another by Lenhoff's principal, Charles Lenhoff, revealing that he was the source of the data upon which the expert relied and that he claims to have "compiled from a variety of sources." 2 ER 56-1 at 23–25.

The court noted that those declarations were not included in any of the filed complaints and, "[i]n ruling on a motion to dismiss, a court may not look beyond the pleadings except in limited circumstances, none of which apply here." 1 ER 65 at 6 n.2. But the court expressly considered the declarations in determining whether to grant leave to amend. *Id.* at 6–7 n.2.

3. The District Court Dismisses the Third Amended Complaint

The court again rejected Lenhoff's claims. The only allegation that could support a price-fixing conspiracy—a per se violation of the Sherman Act—remained Lenhoff's assertion that the large agencies engaged in "horizontal price fixing": "Plaintiff adds no factual details to support this conclusion. Accordingly,

the Court finds that Plaintiff again fails to sufficiently plead a per se Sherman Act violation." *Id.* at 8–9.

The court again rejected Lenhoff's Section 1 claim under the rule of reason. The court explained that "[l]ike its SAC, Plaintiff's TAC relies upon circumstantial evidence, not direct evidence, to plead the existence of a conspiracy" and "the only alleged conspiracy of which Plaintiff provides names of participating individuals is the alleged agreement 'to eliminate Rule 16(g)." *Id.* at 10. Repeating that "mere participation in trade-organization meetings . . . does not suggest an illegal agreement," the court concluded that "merely stating . . . that Defendants' agents served on the Strategic Planning Committee [on specific dates] and 'had ample opportunity' to plan to eliminate Rule 16(g) fails to sufficiently plead a conspiracy." *Id.* at 11. The court also explained that "the decision to permit Rule 16(g) to expire is as much evidence of a conspiracy as it is evidence that each individual agency acted for its own independent benefits" and that, in any event, it was "SAG, not the ATA, that rejected a new version of Rule 16(g)." *Id.*

As to the alleged conspiracy to co-package exclusively among large agencies, the court noted the discrepancy between two sets of conflicting data relied on by Lenhoff. Previously in the SAC, Lenhoff alleged that during the 2014–15 season, the large agencies co-packaged with smaller agencies 16 times while the TAC attached an exhibit claiming that it happened only 12 times. *Id.* at

12. The court noted that it need not accept the newly alleged, contradictory data as true, but that even if it did, Lenhoff's revised allegation fell short because it again confirmed that the large agencies co-packaged with smaller agencies at least a dozen times. *Id.*

The court also rejected Lenhoff's allegation that the large agencies coerced studios to boycott smaller agencies because Lenhoff, again, "fail[ed] to provide the names of any individuals who allegedly conspired to coerce studios . . . to boycott smaller agencies," failed to identify "a specific time or place such agreements took place," and failed "to plead a specific instance of a threat against a studio, network, or producer." *Id.* at 13. The court also concluded that Lenhoff failed to sufficiently plead antitrust injury because such injury requires a connection to the conspiracy that was deficiently pleaded. *Id.* at 13–15. As to the alleged vertical conspiracy to force the studios to boycott smaller agencies, the court concluded that Lenhoff failed to allege any facts showing that studios were unlawfully coerced rather than lawfully pressured. *Id.* at 14. The court therefore dismissed Lenhoff's Sherman Act claim and dismissed the UCL and intentional interference with prospective economic advantage claims because they were premised on the Sherman Act claim. *Id.* at 16.

As to Lenhoff's new assertion that it could maintain a cause of action for violation of the UCL because *either* the Sherman Act *or* the Cartwright Act could

serve as the predicate violation of law, the court rejected the assertion under this Court's precedent: "The analysis under California's antitrust law mirrors the analysis under federal law because the Cartwright Act . . . was modeled after the Sherman Act. Given our analyses and conclusions regarding the federal claims, the district court properly granted summary judgment on the state antitrust claims, as well." *Cty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001) (citation omitted); 1 ER 65 at 16 n.6.

Finally, the district court dismissed Lenhoff's remaining claim for intentional interference with contract for the alleged "poaching" of Client #2. In its SAC, Lenhoff "state[d] no facts indicating whether payment of the employment met Rider D's requirements." SER 52. In its TAC, Lenhoff again alleged "no *facts*" about the requisite payment. 1 ER 65 at 19. Instead, Lenhoff asserted only that Client #2 "received an amount equal to his last compensation at a pro rata rate equivalent to three (3) weeks of services." 2 ER 49, ¶¶ 93, 95. In other words, Lenhoff provided a "formulaic recitation of the elements" of the claim using "labels and conclusions" rather than alleging the specific "amount each client was compensated for their prior work" or the "amount each client received for their subsequent work." 1 ER 65 at 19.

Because Lenhoff had four opportunities (supported by two sets of lawyers before its current counsel) to sufficiently state a plausible claim for relief, and

because the court had twice dismissed Lenhoff's complaints with leave to amend, the court dismissed with prejudice all causes of action except intentional interference with contract against ICM. *Id.* at 21–22. The court dismissed that remaining claim without prejudice, permitting Lenhoff to amend if it could "sufficiently plead[] in good faith . . . that at the time the alleged interference took place, Client #2 was under an agreement for a specified term." *Id.* at 20. Nonetheless, because only a state-law claim remained, the court declined to exercise supplemental jurisdiction. *Id.* at 21.

III. The District Court Denies Lenhoff's Motion for Reconsideration, and Lenhoff Does Not File An Amended Notice of Appeal

Twelve days after the court dismissed the TAC, Lenhoff moved the court to reconsider its decision to deny leave to amend for a fourth time. 2 ER 66. Lenhoff asked that the court (1) issue "an order permitting Plaintiff the right to subpoena and depose Sam Haskell, who is the former worldwide head of [non-defendant] William Morris [Agency] TV packaging" or (2) permit Lenhoff to file a Fourth Amended Complaint. *Id.* at 2.

In its motion for reconsideration, Lenhoff alleged for the first time that six days after Lenhoff filed its TAC, Charles Lenhoff (Lenhoff's principal) "had a conversation with Sam Haskell." *Id.* at 3. During that conversation, Mr. Haskell allegedly told Mr. Lenhoff that split packaging began in the mid-1990s and that at the time William Morris Agency enjoyed the best packaging formula in the

industry, which was 5% of the gross revenues, while other large agencies received 2.5 of the gross or 3% of the adjusted gross. *Id.* at 4.

Although Mr. Haskell was allegedly "unwilling to tell Mr. Lenhoff in that conversation which studio/network executives were pushing to eliminate packaging fees," he supposedly informed Mr. Lenhoff that William Morris Agency decided to reduce its package formula "so that the major agencies would offer the same terms and packages could be split." *Id.* Mr. Lenhoff asserted that after this conversation, he and his counsel attempted to reach Mr. Haskell to obtain a sworn statement but Mr. Haskell never replied. *Id.* Lenhoff argued that because of the conversation with Mr. Haskell, the court should reconsider its order.[2] *Id.*

In the interim—*after* Lenhoff moved for reconsideration but *before* the court addressed the motion—Lenhoff filed a notice of appeal. 1 ER 68 at 2. Lenhoff asked that "the notice of appeal be held in abeyance until the motion [for reconsideration] is resolved." *Id.*

A month after Lenhoff filed its notice of appeal, the court denied Lenhoff's motion for reconsideration. 1 ER 72. The court was "unpersuaded" by Lenhoff's

[2] It is this untimely disclosed and unalleged 1990s decision by William Morris Agency to reduce its packaging fees to match those of other large agencies that gives rise to Lenhoff's contention, raised for the first time on appeal, that there is evidence that UTA, ICM, and the other large agencies conspired to fix the price of packaging fees (the so-called "3-3-10 Packaging Fee"). Br. 14–15.

argument that it had presented "new" evidence sufficient to support reconsideration: "[B]y [Lenhoff]'s own concession, it has been aware of the purportedly 'new' information . . . [for] almost three months before the Court issued its Order [dismissing the TAC]" and had nonetheless failed to disclose it. *Id.* at 5. Lenhoff had "ample time to include the information in its Oppositions" to the motions to dismiss (as it had included other unalleged facts and evidence in those same oppositions) but chose not to do so. *Id.* at 5–6. Accordingly, because the allegedly new facts "emerged before, not after," the court dismissed the TAC, the court concluded that "reconsideration is not warranted" and denied the motion. *Id.*

Lenhoff then failed to file an amended notice of appeal of the order denying its motion for reconsideration or the newly cited evidence contained therein.

STANDARD OF REVIEW

A district court's order granting a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo. *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1191 (9th Cir. 2015). The Court "can affirm a 12(b)(6) dismissal on any ground supported by the record, even if the district court did not rely on the ground." *United States v. Corinthian Colls.*, 655 F.3d 984, 992 (9th Cir. 2011) (internal quotation marks and citation omitted).

The district court's denial of a motion to amend a complaint is reviewed for an abuse of discretion. *AE ex rel. Hernandez v. Cty. of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012). The district court's denial of a motion for reconsideration is also reviewed for an abuse of discretion. *Benson v. JPMorgan Chase Bank, N.A.*, 673 F.3d 1207, 1211 (9th Cir. 2012).

SUMMARY OF ARGUMENT

This case presents a textbook example of allegations that fail to meet the plausibility-pleading standard outlined by the Supreme Court in *Bell Atlantic v. Twombly*, 550 U.S. 544, 554–56 (2007). Because antitrust discovery can be exorbitant and can facilitate abusive litigation, the Supreme Court demands that complaints—particularly antitrust complaints—plead facts sufficient to *plausibly* show that discovery would reveal an illegal agreement. *Id.* at 558. A plaintiff cannot sustain a cause of action by asserting allegations that merely present the possibility of anticompetitive behavior.

Here, despite four efforts to state a plausible claim for relief—and despite detailed guidance from the district court on two separate occasions about how Lenhoff could address the deficiencies of its complaints—Lenhoff continually failed to allege the requisite detail needed to sustain its claims.

Shifting from its original group-monopoly theory, Lenhoff attempted to salvage its lawsuit by alleging a conspiracy to restrain trade. But on the only

alleged agreement (to bring about the demise of Rule 16(g)) for which Lenhoff identifies the supposed participants, Lenhoff pleads nothing more than the identity of the alleged participants and the assertion that they had the opportunity to collude, not that they actually colluded. Its contention that the large agencies co-packaged with each other exclusively is contradicted by its own allegations. And it fails to identify a single instance in which a studio boycotted a small agency—let alone Lenhoff—because of an alleged vertical conspiracy.

Nor does UTA's and ICM's alleged signing of two unidentified Lenhoff clients create a claim. Soliciting customers from rivals, without more, is the sign of healthy competition, and under California law, the "most significant privilege" for attracting customers from competitors "is free competition." *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 389 (1995).

Perhaps now recognizing that the district court correctly dismissed its complaints, Lenhoff attempts on appeal to plead *an entirely new claim*: conspiracy to fix the price that talent agencies charge buyers for packaged television series. Br. 14–15 (the so-called "3-3-10 Packaging Fee"). In the district court, Lenhoff alleged in conclusory terms that the larger agencies used packages as an inducement to poach clients and agreed among themselves not to split package commissions with smaller agencies, but for the first time on appeal, Lenhoff wades into specific price-fixing allegations. Lenhoff relies substantially on that allegation

in its opening brief, yet *nowhere* in the TAC did it allege that UTA and ICM had conspired with other large talent agencies to fix the package fee formula. Indeed Lenhoff admits as much, conceding in a footnote that it "*did not plead* this 1990s' agreement to fix the packaged series price." *Id.* at 14 n.8 (emphasis added).

Lenhoff's sole support for this new claim arises from a self-serving declaration from one of Lenhoff's two owners belatedly provided to the district court in Lenhoff's motion for reconsideration. 1 ER 72 at 4. The declaration referred to an alleged conversation with Sam Haskell, formerly of William Morris Agency, that occurred *over six weeks before* Lenhoff filed its oppositions to the motions to dismiss and nearly *three months before* the court dismissed the TAC. *Id.* at 5. As ICM pointed out in its opposition, even if the alleged statements of Mr. Haskell were true, they would not support a conspiracy but rather that competition forced William Morris Agency to reduce its package prices. Regardless, the court summarily denied Lenhoff's motion because Lenhoff had "been aware of the purportedly 'new' information" and chose not to present it. 1 ER 72 at 5.

Lenhoff failed not only to plead that claim but also to file a notice of appeal challenging the district court's order declining to consider the evidence upon which that claim relied and denying Lenhoff's motion for reconsideration. Because Lenhoff did not file an amended notice of appeal after the court denied the motion

for reconsideration, this Court does not have jurisdiction to consider that evidence or that order.

Likewise, Lenhoff's appeal relies on statistical allegations from an "expert" about the market share garnered by the largest talent agencies in the television-package market. The purported expert's analysis is based exclusively on unsupported, conclusory "data" compiled and provided by Lenhoff's principal. Even assuming the data are accurate, the conclusions drawn by Lenhoff are easily refuted. But more importantly, those statistics *do not appear* in any of Lenhoff's prior four complaints. Lenhoff identified those statistics for the first time in its oppositions to the motions to dismiss the TAC. 2 ER 56-1. The district court correctly concluded that because those factual allegations were not in the TAC, it would consider them only to evaluate whether to grant leave to amend for a fourth time, which it denied. 1 ER 65 at 6 n.2.

Thus, despite Lenhoff's acknowledgement that it failed to plead an agreement to fix the price that talent agencies charge buyers for packaged television series, despite its failure to plead facts about that alleged conspiracy, despite its failure to file a notice of appeal challenging the order denying the motion for reconsideration, and despite its failure to plead the statistics about the market share from its purported expert, Lenhoff attempts to bootstrap all of those allegations into its appeal. The Court should reject that effort.

Lenhoff has failed at every turn to provide the specific facts that could plausibly state a claim for relief. The Court should affirm the district court's dismissal.

ARGUMENT

I. The Legal Standard

Section 1 of the Sherman Act condemns concerted action; it does not police unilateral conduct, even if that conduct mirrors the conduct of its competitors. *See, e.g.*, *name.space, Inc. v. Internet Corp. for Assigned Names & Nos.*, 795 F.3d 1124, 1129 (9th Cir. 2015). Consequently, a plaintiff must plead "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly*, 550 U.S. at 556. In assessing the allegations, 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 (2009).

Therefore, to survive a motion to dismiss, the allegations of a complaint must "plausibly suggest[]" wrongful conduct. *Twombly*, 550 U.S. at 557. "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility

of entitlement to relief." *Iqbal*, 556 U.S. at 678 (internal quotation marks and citation omitted).

To that end, Lenhoff misstates the applicable legal standard, suggesting that where the allegations in a complaint are in "equipoise," the complaint must survive a motion to dismiss. Br. 26, 30 (citing *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)). But as *Starr* itself makes clear, only where specific facts of a complaint give rise to two explanations "both of which are *plausible*," will a complaint survive a motion to dismiss. *Starr*, 652 F.3d at 1216 (emphasis added). Here, as the district court recognized, Lenhoff's allegations are far from the plausible.

The Supreme Court and this Court have repeatedly explained that alleged "[c]onduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." *name.space*, 795 F.3d at 1130 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597 n.21 (1986)); *see also In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) ("When faced with two *possible* explanations, only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are merely consistent with their favored explanation but are also consistent with the alternative explanation." (emphasis added) (internal quotation marks and citation omitted)).

Affirming the dismissal of a complaint alleging a Sherman Act conspiracy, this Court held that it "must consider obvious alternative explanations for a defendant's behavior when analyzing plausibility" and that an antitrust complaint must allege facts that "tend[] to exclude the possibility that the alleged conspirators were acting independently." *name.space*, 795 F.3d at 1130 (quoting *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996–97 (9th Cir. 2014), and *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)); *see also Musical Instruments*, 798 F.3d at 1194 (affirming dismissal of Sherman Act complaint because the allegations "could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy" (quoting *Kendall v. Visa USA, Inc.*, 518 F.3d 1042, 1049 (9th Cir. 2008))).

Thus, allegations of parallel conduct are not sufficient; "[p]laintiffs must plead 'something more'"—specifically, "plus factors," which are "economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action," such as "extreme action against self-interest [that] would be so perilous in the absence of advance agreement that no reasonable firm would make the challenged move without such an agreement." *Musical Instruments*, 798 F.3d at 1193–95. And "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*, 518 F.3d at 1047 (quoting *Twombly*, 550 U.S. at 565 n.10).[3]

II. The Court Lacks Jurisdiction to Review the District Court's Denial of Lenhoff's Motion for Reconsideration and the Evidence Submitted for the First Time with that Motion

As a threshold matter, this Court lacks jurisdiction to review whether the district court abused its discretion in denying Lenhoff's motion for reconsideration as well as the evidence submitted for the first time with that motion—the self-serving declaration from Charles Lenhoff identifying a purported conversation with Mr. Haskell and referring to William Morris Agency's alleged decision to reduce its packaging fees in the 1990s. 2 ER 66 at 4. Lenhoff relies on this declaration throughout its opening brief. Br. 2, 14, 32, 49. Yet Mr. Haskell's alleged statements did not appear in any of Lenhoff's complaints and was never provided to the district court or the defendants prior to the dismissal of the TAC. *See, e.g.*, *Corinthian Colls.*, 655 F.3d at 998–99 ("As a general rule, we 'may not

[3] Lenhoff's reliance on two out-of-circuit cases is likewise misplaced. Even putting aside that *Kendall* is the law of this circuit, the plaintiffs in *Starr v. Sony BMG Music Entertainment* supported their allegations with detailed facts showing behavior that "contravene[d] each defendant's self-interest." 592 F.3d 314, 327 (2d Cir. 2010). The plaintiffs in *In re Text Messaging Antitrust Litigation* likewise sufficiently alleged "parallel plus" behavior, including "historically unprecedented changes in pricing" made "at the very same time" and with "no . . . discernable reason." 630 F.3d 622, 628 (7th Cir. 2010). No similar allegations exist here.

consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion.'" (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001))).

Furthermore, Lenhoff filed a notice of appeal prior to the district court's evaluation of that evidence, but did not file an amended notice of appeal specifying that this appeal would challenge the order denying the motion to reconsider that relied upon the evidence.

The appellate rules are clear: if a party files a notice of appeal before the court disposes of specific post-judgement motions (including motions for reconsideration), the appealing party must file an amended notice of appeal if it seeks to challenge the order disposing of the post-judgment motion. Federal Rule of Appellate Procedure 4(a)(4)(B)(i) explains that "if a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered."[4] Rule 4(a)(4)(B)(ii) explains that if the party "intend[s] to challenge an order disposing of any motion listed in Rule 4(a)(4)(A)"

[4] Motions listed in Rule 4(a)(4)(A) include those to "alter or amend the judgment under Rule 59" as well as "for relief under Rule 60." Lenhoff's motion for reconsideration sought relief "pursuant to Federal Rule of Civil Procedure 60(b)." 2 ER 66 at 1; *see also* 2 ER 68 at 2.

the party "must file a notice of appeal, or an amended notice of appeal" within the time provided.

Lenhoff complied with Rule 4(a)(4)(B)(i) when it filed its notice of appeal after the court dismissed the TAC. But to challenge the order denying the motion for reconsideration and the evidence upon which it relies, Lenhoff was required under Rule 4(a)(4)(B)(ii) to file an amended notice of appeal.

Because Lenhoff did not file an amended notice of appeal, this Court lacks jurisdiction and should dismiss that portion of Lenhoff's appeal, including all arguments about Mr. Lenhoff's untimely disclosed declaration. *See, e.g.*, *Ouma v. Clackamas Cty.*, 663 F. App'x 544, 545 (9th Cir. 2016) ("We lack jurisdiction to consider the district court's order . . . denying Ouma's motions for reconsideration . . . because Ouma failed to file a separate or amended notice of appeal."); *Whitaker v. Garcetti*, 486 F.3d 572, 585 (9th Cir. 2007) (dismissing appeal on attorney fees because although plaintiff filed a notice of appeal before the district court addressed those fees, the plaintiff did not "'file a notice of appeal, or an amended notice of appeal' specifying its appeal of that decision").[5]

[5] Although Lenhoff's notice of appeal asked that it be "held in abeyance" until resolution of the motion to reconsider, that request merely mirrors the language of Rule 4(a)(4)(B)(i), which says that the notice of appeal "becomes effective" upon resolution of the postjudgment order. The notice of appeal does not, however, incorporate that postjudgment order. *See Whitaker*, 486 F.3d at 585.

Even if Lenhoff could overcome this jurisdictional hurdle, the Court should still decline to consider the declaration because it was untimely disclosed. As the district court concluded, the evidence was not "new." 1 ER 72 at 5. Lenhoff admitted that it had been aware of the alleged conversation for almost three months before the district court denied the TAC, yet Lenhoff failed to disclose it. *Id.* Lenhoff had "ample time to include the information in its Oppositions" to the motions to dismiss (as it had included other unalleged facts and evidence in those same oppositions) but chose not to do so. *Id.* at 5–6. Because the allegedly new evidence "emerged before, not after," dismissal of the TAC, this Court, like the district court, should decline to consider it. *See* Fed. R. Civ. P. 60(b)(2) (permitting relief from judgment if presented with "newly discovered evidence that, with reasonable diligence, could not have been [earlier] discovered"); C.D. Cal. Local R. 7-18 (permitting reconsideration because of "the emergence of new material facts or a change of law occurring after the time of such decision").

III. Lenhoff's Third Amended Complaint Fails to State a Claim for Violation of Section 1 of the Sherman Act

In order to state a claim for damages under Section 1 of the Sherman Act, a plaintiff must plead facts to support four elements: "(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures

competition . . . . [and] (4) that [the plaintiff was] harmed by the defendant's anticompetitive contract, combination, or conspiracy, and that this harm flowed from an 'anti-competitive aspect of the practice under scrutiny.'" *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1196–97 (9th Cir. 2012) (quoting *Kendall*, 518 F.3d at 1047 (internal citation omitted), and *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)).

Because Lenhoff failed to allege facts that could support the conspiracy and injury elements of a Section 1 violation, the district court correctly dismissed that claim.

A. Lenhoff Fails to Allege Facts Sufficient to Show that ICM Participated in the Formation and Operation of an Antitrust Conspiracy.

"[D]iscovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case." *Kendall*, 518 F.3d at 1047. Consequently, this Court requires that plaintiffs allege specific facts as to each defendant describing the circumstances of the alleged agreement. *Id.* at 1047–48. In other words, to pass muster under *Twombly*, conspiracy allegations must "answer the basic questions: who, did what, to whom (or with whom), where, and when?" *Id.* at 1048; *see also Musical Instruments*, 798 F.3d at 1194 n.6.

As this Court observed in *Kendall*, because "[a] bare allegation of a conspiracy is almost impossible to defend against, particularly where the defendants are large institutions with hundreds of employees entering into contracts and agreements," antitrust conspiracy allegations must be specific enough to "give a defendant seeking to respond to allegations of a conspiracy an idea of where to begin." 518 F.3d at 1047 (citing *Twombly*, 550 U.S. at 565 n.10). Lenhoff lumps together broad and conclusory statements about the "Defendants" rather than alleging facts to show the purported conduct of each individual actor as required to plead a claim under Section 1.

As the district court explained in each order dismissing Lenhoff's amended complaints, Lenhoff failed to plead any names, dates, times, or places where UTA, ICM, and other large agencies purportedly conspired to engage in "horizontal price fixing."[6] 1 ER 65 at 8–9. Lenhoff failed to plead any names, dates, times, or places where UTA, ICM, and other large agencies purportedly conspired "to co-package to the exclusion of [smaller agencies]." *Id.* at 10. And Lenhoff failed to

[6] Lenhoff's allegation of "price fixing" was so sparse that the TAC did not even explicitly allege that the large agencies conspired to fix prices. Instead, it said merely that the alleged conspiracy to exclude small agencies from co-packaging "*encourages* . . . horizontal price fixing." 2 ER 49, ¶ 13 (emphasis added). Similarly, Lenhoff relies in its opening brief on an interview in the *Hollywood Reporter* with representatives of the large agencies to show that they "work closely with each other," yet even Lenhoff can muster no more than the assertion that the article shows a "cozy relationship." Br. 15.

plead any names, dates, times, or places where UTA, ICM, and other large agencies purportedly conspired "to coerce studios, networks, and producers to boycott smaller agencies." *Id.* at 12. Failure to identify and allege those names, dates, times, and places is dispositive. *See, e.g.*, *Twombly*, 550 U.S. at 565 n.10 (affirming dismissal where complaint "mentioned no specific time, place, or person involved in the alleged conspiracies"); *Kendall*, 518 F.3d at 1047.

Even if Lenhoff's allegation about a horizontal conspiracy to "engage in exclusive co-packaging contracts" had identified sufficient names and places, it would still fail because Lenhoff's *own allegations* contradict its claim. Specifically, Lenhoff's SAC alleged that at least 16 co-packaging arrangements during the 2014–15 season involved both large and small agencies. SER 78–79, ¶ 73. Although Lenhoff attempted in the TAC to alter those statistics in its favor—asserting only 12 such co-packages—those allegations still admit that co-packages were not exclusive to the large agencies. *See* 1 ER 72 at 12.

Nor are there specific allegations that UTA, ICM, and others engaged in a conspiracy to "induc[e] a boycott of non-Uber agencies by talent and studios." 2 ER 49, ¶ 76. Lenhoff asserts only that the large agencies orchestrated the alleged boycott through the "use of veiled threats," without identifying any specific threats, talent, or studios. *Id.* ¶ 76.

But even a "veiled threat" is insufficient as a matter of law to demonstrate a conspiracy in restraint of trade. The mere fact that a market participant may be able to exert economic pressure on its customer or supplier in an attempt to convince it to take certain action is not sufficient, as a matter of law, to state a claim under Section 1. *Musical Instruments*, 798 F.3d at 1195 (holding that allegations that a dominant retailer "pressured" or "coerc[ed]" suppliers into adopting certain policies are insufficient because "decisions to heed similar demands made by a common, important customer do not suggest conspiracy or collusion"); *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1158 (9th Cir. 1988) (holding that "exposition, persuasion, argument, or pressure" are insufficient to establish coercion (citation omitted)).

Nor do Lenhoff's references to a guest column in the *Hollywood Reporter* written by prolific executive producer Gavin Polone and an article including quotes from writer Meredith Stiehm change the result. Br. 15, 22–24, 40. Mr. Polone and Ms. Stiehm merely express their biased opinion that agencies are overpaid for packages. 2 ER 49, ¶¶ 53, 77. Neither identifies a specific agency or studio. Mr. Polone does not even assert any unlawful conspiracy. To the contrary, while he contends that agents get "money for nothing," he explicitly withholds blame of the agencies for using packages: "I'm not writing this to bash the agencies. It isn't any more their fault than it would be mine if I were to put my house up for sale at five

times what it's worth and someone acceded to my demand." *Id.* ¶ 77. And Ms. Stiehm's reference to the word "collude" without identification of any of the required names, dates, times, or places of the conduct is similarly insufficient to state a plausible claim. *See Musical Instruments*, 798 F.3d at 1194 n.6; *Kendall*, 518 F.3d at 1048.

Thus, Lenhoff's claim that UTA, ICM, and other large agencies exert economic pressure on the buyers who employ talent for scripted televisions series to refuse to deal with other agencies is insufficient as a matter of law to plead a conspiracy in restraint of trade. *Monsanto Co.*, 465 U.S. at 761; *Musical Instruments*, 798 F.3d at 1195.

As to the alleged conspiracy to "bring[] about the demise of Rule 16(g)," the only factual allegations in the TAC purporting to demonstrate the formation of that conspiracy is Lenhoff's claim that the named individuals associated with those agencies took part in meetings, conference calls, and e-mail communications in furtherance of their service on the ATA's Strategic Planning Committee. 2 ER 49, ¶ 23. Lenhoff claims not that these individuals actually conspired to do anything during these meetings, calls, or emails but rather that they "had ample opportunity" to collude "to eliminate Rule 16(g)." *Id.*

But "mere participation in trade-organization meetings where information is exchanged and strategies are advocated does not suggest an illegal agreement."

Musical Instruments, 798 F.3d at 1196. And it is well-established that allegations of communications among competitors and the mere opportunity to reach an agreement is no evidence of a conspiracy. *See, e.g.*, *In re Citric Acid Litig.*, 191 F.3d 1090, 1103 (9th Cir. 1999) (noting that allegations of meetings and telephone conversations between competitors was insufficient "to infer participation in the conspiracy from the opportunity to do so").

Moreover, even if Lenhoff had pleaded facts sufficient to show that UTA, ICM, and others theoretically conspired to "bring about the demise of Rule 16(g)" during these meetings, calls, and emails, those factual allegations would still be insufficient because Lenhoff conceded that it was SAG—not the ATA—that actually brought about the demise of Rule 16(g). 2 ER 49, ¶ 33.

Accordingly Lenhoff has failed to allege facts sufficient to plausibly show that UTA and ICM participated in the formation and operation of an antirust conspiracy.

B. Lenhoff's New Allegations of a Price-Fixing Conspiracy Are Untimely and in Any Event Are Insufficient to State a Claim

This Court has repeatedly held that it "may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Corinthian Colls.*, 655 F.3d at 998 (quoting *Lee*, 250 F.3d at 688). Only where the extrinsic material is "attached to the [c]omplaint" as an exhibit, is subject to "judicial notice," or is necessary to the resolution of the case and authenticity is undisputed may a court consider in

evaluating a motion to dismiss material not pleaded in a complaint. *Id.* at 999. Because none of those exceptions applies (and Lenhoff does not argue that any applies), this Court may not consider extrinsic material in determining whether Lenhoff's complaint alleged facts sufficient to plausibly show that UTA and ICM formed and participated in a conspiracy.

On appeal, Lenhoff attempts to assert new price-fixing allegations purportedly showing that UTA, ICM, and other large agencies conspired to set the package formula that buyers pay talent agencies for packaged television series. Br. 14–15 (the so-called "3-3-10 Packaging Fee"). The information that purportedly supports that allegation arises exclusively from the declaration of Charles Lenhoff that this Court does not have jurisdiction to consider. *See*, *supra* Part II.

But even had Lenhoff appealed the denial of its motion for reconsideration to which the declaration was attached, it would be insufficient because nowhere in the TAC did it allege a conspiracy among large talent agencies to fix those prices. Lenhoff merely included the words "horizontal price fixing" in the TAC to assert that the alleged exclusive-packaging agreement created conditions that purportedly facilitate price fixing. 2 ER 49, ¶ 13 (alleging that the exclusion of small agencies from co-packaging "*encourages* . . . horizontal price fixing." (emphasis added)). Indeed Lenhoff admits that it "did not plead this 1990s' agreement to fix the packaged series price" at "3-3-10." Br. 14 n.8.

And even if Lenhoff had alleged the contents of the declaration in the TAC, these allegations would still fail to plausibly support a conspiracy. The declaration attributes to Mr. Haskell the statement that because talent agencies received pushback from undisclosed "studios/distributors" on packaging fees, William Morris Agency reduced its fees to meet competition so that it would have the same terms as other agencies. 2 ER 66 at 3–4. Although Lenhoff contends that certain agencies formed an "agreement" to split packages, the declaration supports only that Mr. Haskell stated that "he was involved in [an] effort" by various agencies to more easily split packages. *Id.* at 7. At best, the declaration amounts to a claim that William Morris Agency, a non-party, unilaterally chose to lower its prices. Indeed, the statements attributed to Mr. Haskell reveal that far from having the power to coerce studios to do anything, one of the large agencies was actually forced to *reduce* prices in order to satisfy the studios. *Id.* at 4.

Equally misplaced is Lenhoff's reliance on an untimely disclosed and flawed application of the so-called "Herfindahl-Hirschman Index" (a statistical measure applicable to mergers, not alleged conspiracies). 2 ER 56-1. Despite Lenhoff's acknowledgment that none of these allegations were included in its complaints, it nonetheless relies on them to support its argument that the district court erroneously dismissed its TAC. Br. 7 n.4, 10, 25, 34. Even if it were considered,

all the purported statistics show is that the industry is highly concentrated, which is lawful and insufficient to plead the conspiracy on which Lenhoff relies.

C. Lenhoff Fails to Allege That It Suffered Any Antitrust Injury

"It can't be said often enough that the antitrust laws protect competition, *not* competitors." *United States v. Syufy Enters.*, 903 F.2d 659, 668 (9th Cir. 1990). Thus, to sustain a private right of action for an alleged federal antitrust violation, a plaintiff must plead that it was "harmed by the defendant's anticompetitive contract, combination, or conspiracy, and that this harm flowed from an 'anti-competitive aspect of the practice under scrutiny.'" *Brantley*, 675 F.3d at 1197 (quoting *Atl. Richfield Co.*, 495 U.S. at 334). But "while 'conduct that eliminates rivals reduces competition,' 'reduction of competition does not invoke the Sherman Act until it harms consumer welfare.'" *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 848 (9th Cir. 1996) (quoting *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1443 (9th Cir. 1995)).

In other words, to state a claim, a private plaintiff must allege facts that plausibly demonstrate harm not to competitors but to consumers, meaning an increase in price or reduction in output. *See Rebel Oil*, 51 F.3d at 1433 ("If the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal *per se*.").

Lenhoff cannot demonstrate antitrust injury because the TAC does not allege facts sufficient to show that *Lenhoff* suffered harm as a result of any alleged anticompetitive conduct. Lenhoff does not specifically allege that it was excluded from receiving a specific package or co-package. Lenhoff does not identify any particular package or co-package that it desired but did not receive as a result of an alleged horizontal conspiracy to exclude small agencies or from the elimination of Rule 16(g). Nor does Lenhoff allege a particular package or co-package from which it was excluded as a result of an alleged boycott by the larger agencies and buyers of scripted television series.

The only specifically alleged injury in the TAC is the loss of clients from "poaching." But nowhere does Lenhoff allege that those clients left Lenhoff because UTA, ICM, or its alleged co-conspirators refused to split a particular package with Lenhoff or because buyers of talent refused to employ those clients due to some fear of, threat from, or loss of opportunity at the hands of the conspirators. To the contrary, Lenhoff alleges that these clients left because UTA and ICM offered them the possibility of *lower commissions*. 2 ER 49, ¶ 52. Thus, Lenhoff's complaint stems from more vigorous competition, not less.

Finally, although Lenhoff refers to loss of consumer choice and diversity in support of its claim, those alleged harms are not actionable antitrust injuries. As this Court has explained, even if an "agreement has the effect of reducing

consumers' choices or increasing prices," that "does not sufficiently allege an injury to competition" because each is "fully consistent with a free, competitive market." *Brantley*, 675 F.3d at 1202. In the absence of injury to competition, such concerns are simply not actionable.[7]

IV. Lenhoff's Third Amended Complaint Fails to State a Claim for Violation of California's Unfair Competition Law

California's Unfair Competition Law defines "unfair competition" to include, in relevant part, an "unlawful" business act or practice or an "unfair" business act or practice. Cal. Bus. & Prof. Code § 17200 et seq. The UCL thus prohibits acts that violate some other law or are "unfair" as California case law has defined that term. *Cel–Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). Lenhoff's UCL claim fails under either theory.

[7] The same is true of Lenhoff's reference to alleged "tying agreements." Br. 24. Lenhoff alleged in its TAC only that networks agreed to purchase certain television series if they also renewed other allegedly less popular series. 2 ER 49, ¶¶ 42, 78. But tying arrangements are not intrinsically unlawful. *Brantley*, 675 F.3d at 1199–1200 ("Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively—conduct that is entirely consistent with the Sherman Act." (quoting *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984))). Unlawful tying requires proof that the agreement will "harm existing competitors or create barriers to entry of new competitors in the market for the tied product," and Lenhoff alleges neither. *Id.* at 1199 (citation omitted). Nor does Lenhoff allege that the networks were forced "into giving up the purchase of substitutes for the tied product." *Id.* (citation omitted). Lenhoff did not plead any facts sufficient to plausibly show a claim for unlawful tying.

A. Lenhoff Fails To Allege Facts Sufficient To State a Claim under the UCL "Unlawful" Prong

The "unlawful" prong of the California UCL "borrows" violations from other laws, and causes of action under the "unlawful" prong must be predicated upon an independent violation of law. *Id.* at 180. Thus, to plead a claim under this prong, the plaintiff must allege facts sufficient to demonstrate a violation of an underlying law. *People v. McKale*, 25 Cal. 3d 626, 635 (1979).

Lenhoff rests its UCL claim on a predicate violation of the Sherman Act, and—in a new allegation in the TAC—suggests that the same conduct violated California's Cartwright Act. 2 ER 49, ¶¶ 82–88. Because Lenhoff failed to sufficiently plead an alleged violation of the Sherman Act, it cannot serve as the predicate of Lenhoff's UCL claim.

As to the Cartwright Act, the district court concluded that because "the analysis under California's antitrust law mirrors the analysis under federal law, Plaintiff's new allegation that Defendants violated the Cartwright Act does not alter the Court's conclusion." 1 ER 65 at 16 n.6 (quoting *Tuolumne*, 236 F.3d at 1160). On appeal, Lenhoff contends for the first time that the Cartwright Act is "broader in reach" than the Sherman Act and therefore cannot be evaluated through the Sherman Act's lens. Br. 11, 26, 43 (citing *Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal. 4th 1185, 1195 (2013)).

Yet in its oppositions to the motions to dismiss the TAC, *Lenhoff agreed that the Cartwright Act mirrored the Sherman Act*, stating that "[a]s ICM points out, California's Cartwright Act mirrors federal law under the Sherman Act." SER 9 n.8; *see also* SER 3 n.8 (same). Having agreed with UTA and ICM below, Lenhoff cannot now take a different position on appeal. *See, e.g.*, *Helfand v. Gerson*, 105 F.3d 530, 534 (9th Cir. 1997) (holding that judicial estoppel prevents litigants from "playing fast and loose with the courts" and "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position" (internal quotation marks and citations omitted); *see also White v. Martel*, 601 F.3d 882, 885 (9th Cir. 2010) ("Generally, arguments not raised before the district court are waived on appeal.").

Furthermore, *Aryeh*—the case on which Lenhoff now relies to assert that this Court's precedent is incorrect—is not a Section 1 case; it merely evaluated whether the statute of limitations for a UCL deceptive practices claim may be tolled under the discovery rule. 55 Cal. 4th at 1195. More importantly, this Court two years after *Aryeh* affirmed that the analyses of Section 1 and the Cartwright Act are "identical." *name.space*, 795 F.3d at 1131 n.5.

Regardless, Lenhoff's TAC does not sufficiently allege a plausible violation of the Cartwright Act even under Lenhoff's new interpretation. To plead a violation of the Cartwright Act, a plaintiff must allege facts sufficient to show "the

formation and operation of the conspiracy." *Marsh v. Anesthesia Servs. Med. Grp.*, 200 Cal. App. 4th 480, 493 (2011) (internal quotation marks and citation omitted). Moreover, like the Sherman Act, the pleading standard for conspiracy under the Cartwright Act requires a "high degree of particularity." *Freeman v. San Diego Ass'n of Realtors*, 77 Cal. App. 4th 171, 196 (1999). A mere recitation of elements is not enough—a plaintiff must make factual allegations of specific conduct. *Id.*

Thus, because Lenhoff failed to plead factual allegations sufficient to plausibly show a conspiracy among the large agencies, Lenhoff's allegations can no more support a violation of the Cartwright Act than they can support a violation of the Sherman Act. Accordingly, the district court correctly dismissed Lenhoff's UCL claim.[8]

[8] Lenhoff also alleges for the first time on appeal that California Business and Professions Code § 17043 serves as the predicate violation of law to support its UCL claim. Br. 46. Although the TAC makes passing references to antitrust buzzwords such as "predatory pricing," Lenhoff neither alleged that basis to support its UCL claim nor raised it in the district court, and this Court should not consider it. *See, e.g.*, *Martel*, 601 F.3d at 885. Regardless, Lenhoff has not alleged any facts, let alone those sufficient to plausibly show, that ICM priced below its costs with the purpose to injure competitors and that the resulting sales had the "tendency or capacity to injure" Lenhoff. *See, e.g.*, *Fisherman's Wharf Bay Cruise Corp. v. Superior Court*, 114 Cal. App. 4th 309, 327 (2003).

B. Lenhoff Fails To Allege Facts Sufficient To State a Claim under the UCL "Unfair" Prong

The California Supreme Court has construed "unfair" to mean conduct that "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech*, 20 Cal. 4th at 187.

As the district court recognized, although it is not necessary for a practice to violate a federal or state antitrust law to be "unfair" under the UCL, the conduct claimed under the UCL must contain factual allegations showing an unreasonable restraint on trade and harm to consumers. *City of San Jose v. Office of the Comm'r of Baseball*, 776 F.3d 686, 691–92 (9th Cir. 2015). Notably, "the determination that [a defendant's] conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' towards consumers." *Id.* (citation omitted). Indeed, "[t]o permit a separate inquiry into essentially the same question under the unfair competition law [as under the antitrust laws] would only invite conflict and uncertainty and could lead to the enjoining of procompetitive conduct." *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001).

As discussed above and in the district court's orders, Lenhoff's antitrust claim fails in its entirety and was properly dismissed. Beyond Lenhoff's failure to plead the necessary elements of conspiracy, Lenhoff's Section 1 claim fails more

fundamentally because it does not allege any unfairly anticompetitive conduct or harm to competition or consumers. And although claims under the UCL do not necessarily require proof of conspiracy, where a plaintiff bases a UCL claim entirely upon a purported conspiracy, the UCL claim rises and falls with the alleged conspiracy. *See Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 866–67 (2001). Here, Lenhoff's UCL claim incorporates its preceding allegations, does not allege any additional conduct, and therefore depends on its allegation of the existence of a purported conspiracy. 2 ER 49, ¶¶ 82–88.

Lenhoff cannot be permitted to reach via the UCL procompetitive conduct that is not unlawful under the antitrust laws. Because Lenhoff failed to adequately plead the asserted antitrust conspiracy, its UCL claim likewise fails.

V. Lenhoff's Third Amended Complaint Fails to State a Claim for Intentional Interference With Prospective Economic Advantage Because That Claim Is Premised on Lenhoff's Deficient Antitrust Claim

Lenhoff concedes on appeal that its cause of action for intentional interference with prospective economic advantage is predicated on its causes of action for violation of the Sherman Act and the UCL. Br. 4–5 ("Reversal by this Court of either ruling dismissing the Sherman 1 or UCL claim will require the reversal of dismissal of the intentional interference [with prospective economic advantage] claim.").

Because the district court correctly dismissed Lenhoff's claims for violation of the Sherman Act and the UCL, the court correctly dismissed Lenhoff's intentional interference with prospective economic advantage claim. 1 ER 65 at 20 ("Plaintiff fails to sufficiently plead a violation of the Sherman Act. Thus, Plaintiff again fails to sufficiently allege that Defendants' conduct was 'wrongful by some measure beyond the fact of the interference itself,'" as required [by California law]." (quoting *Della Penna*, 11 Cal. 4th at 393)).

VI. Lenhoff's Third Amended Complaint Fails to State a Claim for Intentional Interference With Contract Because Lenhoff Failed to Allege Facts Sufficient to Show that the Contract Was for a Specific Duration

To state a claim for intentional interference with contract, a plaintiff must sufficiently plead the following: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126 (1990).

Because interference often signals vigorous competition, not all acts of interference are actionable. To protect healthy competition, California has adopted the doctrine of the competitor's privilege: "Perhaps the most significant privilege or justification for interference with a prospective business advantage is free competition." *Della Penna*, 11 Cal. 4th at 389. Thus, where a plaintiff asserts a

claim for intentional interference with a contract terminable at-will, the competitor's privilege applies and the plaintiff "must also plead and prove that the defendant engaged in an independently wrongful act" that induced the party to terminate the contract. *Reeves v. Hanlon*, 33 Cal. 4th 1140, 1151–52 (2004) (citing Restatement (Second) of Torts § 768 (1979)).

Lenhoff contends that UTA and ICM "poached" Lenhoff's contracted clients by inducing those unidentified clients with the promise that UTA and ICM would be able to include them in packages paid by buyers saving the clients from paying the customary 10% commission on those packages. SER 159–61, ¶¶ 25–28; 2 ER 49 ¶¶ 52, 54, 90–100. Because Lenhoff made no factual allegation in its FAC of whether the oral agency agreements were for a specific duration or terminable at-will—and because Lenhoff had also failed to sufficiently plead an independently wrongful act inducing the breach—the court dismissed the claim. SER 150.

In its SAC, Lenhoff alleged that the oral agency agreements were not terminable at-will by operation of Rider D of the collective bargaining agreement between the ATA and the DGA (the "ATA/DGA Agreement"). *Id.* at 56–57, 94–96, ¶¶ 8, 128. The ATA/DGA Agreement promulgates a Code of Fair Practice that establishes, as a minimum, certain practices in the relationship between ATA agents and their DGA-member clients and, to that end, makes Rider D part of every agency agreement between them. *Id.* at 15, 27–34. For example, it is Rider

D that limits the term of agency agreements to a maximum of three years and the agency commission to 10%. *Id.* at 15–16, 27.[9]

Lenhoff alleged that its agency agreements with DGA-members Clients #1 and #2 were not terminable at-will by operation of Section 3 of Rider D titled "90 Day Clause." *Id.* at 56–57, 94–96, ¶¶ 8, 128. The district court interpreted the 90 Day Clause as requiring two conditions that must be met before a director is restricted from terminating the relationship with an agent. *Id.* at 52. The court concluded that the SAC satisfied the first condition that the clients obtained employment or a bona fide offer for employment within 90 days preceding their notices of termination, but Lenhoff failed to allege the second condition that the clients were "entitled to an amount equal to his last compensation at a pro rata equivalent of 3 weeks of services." *Id.*[10]

Instead of following the direction from the district court and alleging specific facts about the amount of compensation, Lenhoff merely added in its TAC

[9] Rider D also confirms the propriety of package commissions. Paragraph 5 of Rider D expressly recognizes packages and provides that the package agency may not charge its DGA client commissions on the same project, thereby preventing double commissions. SER 29–30.

[10] Because Lenhoff failed to allege the conditions of Rider D, the district court never reached UTA's and ICM's additional argument that, regardless of satisfying its conditions, Rider D cannot elevate the status of an oral agency agreement from at-will to term. SER 51.

that each client "received an amount equal to his last compensation at a pro rata rate equivalent to three (3) weeks of services." 2 ER 49, ¶¶ 93, 95. In other words, Lenhoff cited no facts about the amount of compensation those clients received for the prior work or for the subsequent work. Instead, Lenhoff formulaically recited the terms of the 90 Day Clause of Rider D as interpreted by the district court. That conclusory allegation is insufficient under the *Twombly* pleading standard, and the district court correctly dismissed the cause of action for failure to state a claim. 550 U.S. at 555 (rejecting allegations that are merely a "formulaic recitation of the elements of a cause of action").

But even had the TAC contained sufficient facts to satisfy both conditions addressed by the district court, Lenhoff would be unable to overcome the competitor's privilege because Rider D's 90 Day Clause does not have the power to transform an at-will oral agency agreement into an agreement for a specific term. As explained above, Rider D is implied into every agency agreement between an ATA talent agency and a DGA member and contains the minimum basic terms. While the ATA/DGA Agreement does not prohibit oral agency agreements, many of its protections contemplate written agency agreements for terms up to three years. As a result, Rider D gives each party the opportunity to terminate an agency agreement before the end of the term if it is not bearing fruit

or circumstances materially change provided other conditions are satisfied, including those in the 90 Day Clause. SER 28–29.

Here, Lenhoff invokes the 90 Day Clause not for its stated purpose of enabling a party to terminate a contract early but to block a DGA member's ability to terminate any agency agreement. Lenhoff relies on a fundamental misinterpretation of Section C of the 90 Day Clause; Section C is merely a "term" that defines when the 90 Day Clause's termination right can be invoked.

Moreover, under Lenhoff's misguided interpretation, the clause would prohibit a client under an oral agency agreement from *ever* terminating his or her agency relationship so long as the agency provided a bona fide offer for employment and the client received the equivalent of 3-week's pay every 90 days. The Court should reject such an absurd result. *See, e.g.*, *Segal v. Silberstein*, 156 Cal. App. 4th 627, 633 (2007) (prohibiting a contractual "interpretation which will make the instrument extraordinary, harsh, unjust, inequitable or which would result in absurdity." (citation omitted)).

Equally illogical is Lenhoff's effort to salvage its claim by alleging that its oral agreement with Client #2 had an initial term of two years followed by multiple one-year renewals. 2 ER 49, ¶ 95. Lenhoff added this new allegation after the district court's first dismissal in an attempt to avoid the competitor's privilege. Such an agreement not only defies common sense but also, even if taken as true,

fails to save Lenhoff's claim. Any oral agreement with an alleged initial term of at least two years would be unenforceable under the statute of frauds because it could not possibly be performed within a year. *See Rosenthal v. Fonda*, 862 F.2d 1398, 1400–01 (9th Cir. 1988).

Further, Lenhoff did not allege facts sufficient to plausibly show that UTA or ICM were aware of those contracts with Lenhoff. *See CRST Van Expedited, Inc. v. Werner Enters., Inc.*, 479 F.3d 1099, 1105 (9th Cir. 2007) (requiring facts showing "defendant's knowledge of this contract"). Lenhoff alleged that UTA and ICM "had knowledge of such contracts" because Lenhoff had notified the DGA (not UTA or ICM) of its representation of the clients and because "ICM had unabated access to [Lenhoff's] complete exclusive client list." 2 ER 49, ¶¶ 96–97.

But Lenhoff alleges no facts showing or explaining how its notices to a separate entity—the DGA—imparted knowledge on UTA or ICM. And nowhere in the TAC are there any facts describing how ICM had "unabated access" to Lenhoff's client list. Indeed, even if ICM had "access" to the client information, access to information is not the same as "knowledge" of information—no more so than the "opportunity" to collude is the same as actual collusion. *See Citric Acid*, 191 F.3d at 1096 (rejecting allegation that "opportunities to conspire" are the same as plausibly showing a conspiracy).

Accordingly, Lenhoff failed to state a claim for intentional interference with contract, and the district court correctly dismissed that cause of action.

VII. The District Court Did Not Abuse Its Discretion by Denying Lenhoff's Request to File a Fourth Amended Complaint Because Lenhoff Had Multiple Prior Opportunities to State a Claim and Amendment Would Have Been Futile

Lenhoff contends that the district court abused its discretion when it denied Lenhoff's request—made in its oppositions to the motions to dismiss Lenhoff's fourth complaint—to grant leave to amend so that Lenhoff could file a *fifth* complaint based on two previously undisclosed and unalleged declarations—one by an economist providing statistics about alleged disproportionate co-packaging among large agencies and one by Lenhoff's principal identifying the source of the underlying data. Br. 48–49.

Although Lenhoff asserts on appeal that the district court "refused [to grant leave to amend] without any indication it considered the newly identified facts," Br. 49, the district court considered those untimely disclosed declarations: "Accordingly, the Court considers these declarations in determining only whether to grant leave to amend," 1 ER 65 at 6 n.2.

When deciding whether to grant leave to amend, a court considers whether the plaintiff has had previous opportunities to amend. Discretion to deny leave to amend is "particularly broad where, as here, a plaintiff previously has been granted leave to amend." *Griggs v. Pace Am. Grp.*, Inc., 170 F.3d 877, 879 (9th Cir.

1999). Lenhoff had four separate opportunities to state a claim but failed to do so. And on two occasions, the district court provided a roadmap to cure the complaints' deficiencies, yet Lenhoff failed to do so—either because it ignored that feedback or realized it had no factual allegations supporting its antitrust theories. The district court soundly exercised its discretion by denying leave to amend for a fourth time. *See, e.g.*, *William O. Gilley Enters., Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 668 (9th Cir. 2009) (affirming dismissal of Sherman Act claim because although it "might be possible" to sufficiently state a claim, plaintiff has failed to do so despite having "thrice been given the opportunity to amend his complaint").

In any event, leave to amend to include the allegations in the declarations would have been futile because those declarations do not address the deficiencies in the prior complaints. *See Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 725–26 (9th Cir. 2000) ("A district court acts within its discretion to deny leave to amend when amendment would be futile, when it would cause undue prejudice to the defendant, or when it is sought in bad faith.").

Lenhoff contends that the declarations purportedly establish "that the percentage of co-packaged shows between [large agencies] is enormously out of proportion with the statistical likelihood of such co-packaging based on the number of agencies in the market." SER 4–5, 11. Setting aside that the declarations are

fundamentally flawed, based on unreliable and incomplete "data," and attribute causation without accounting for the myriad of lawful and competitive variables demanded by such analyses, the statistics still do not show that the co-packaging among large agencies is exclusive. That something is "out of proportion" does not make it exclusive. Nor could it, as Lenhoff admitted in its complaints that the large agencies participated in co-packaging with smaller agents. 2 ER 49, ¶ 45.

Accordingly, because amendment was futile, the district court properly denied Lenhoff's request to file a fourth amended complaint.

CONCLUSION

The judgment of the district court should be affirmed.

STATEMENT OF RELATED CASES

Defendant-Appellee International Creative Management Partners LLC is unaware of any related cases within the meaning of Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,707 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 and uses a 14-point font size and Times New Roman type style.

s/ *Kathleen M. O'Sullivan*
Kathleen M. O'Sullivan

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 20, 2017.

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s/ *Kathleen M. O'Sullivan*
Kathleen M. O'Sullivan