LATHAM & WATKINS LLP
Daniel M. Wall (Bar No. 102580)
Timothy L. O'Mara (Bar No. 212731)
Sadik Huseny (Bar No. 224659)
Andrew M. Gass (Bar No. 259694)
505 Montgomery Street, Suite 2000
San Francisco, California 94111-6538
Telephone: +1.415.391.0600
Facsimile: +1.415.395.8095
Email: dan.wall@lw.com
Email: tim.o'mara@lw.com
Email: sadik.huseny@lw.com
Email: andrew.gass@lw.com

Attorneys for Defendant
Ticketmaster L.L.C.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STUBHUB, INC.,

Plaintiff,

v.

GOLDEN STATE WARRIORS, LLC AND TICKETMASTER L.L.C.,

Defendants.

CASE NO. 3:15-cv-01436-MMC

TICKETMASTER L.L.C.'S NOTICE OF MOTION AND MOTION TO DISMISS THE COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: July 31, 2015
Time: 9:00 A.M.
Place: Courtroom 7, 19th Floor
Action Filed: March 29, 2015

Assigned To:
The Honorable Maxine M. Chesney

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE, that on July 31, 2015, at 9:00 a.m., or as soon thereafter as the matter maybe heard, in the United States District Court, Northern District of California, Courtroom 7, 19th Floor, at 450 Golden Gate Ave., San Francisco, California 94102, before the Honorable Maxine M. Chesney, Defendant Ticketmaster L.L.C. will and hereby does move the Court for an order dismissing Plaintiff's Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

This motion is based on the Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the accompanying Request for Judicial Notice, all other papers submitted in support of the Motion, the record on file in this action, and such other written and oral argument as may be presented to the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Complaint filed by StubHub, Inc. ("StubHub") against Ticketmaster L.L.C. ("Ticketmaster") is legally defective because it (i) alleges antitrust "markets" that are tautological, self-contradictory, and thus implausible under the prevailing *Twombly* standard, and (ii) attacks as "anticompetitive" certain business conduct by Ticketmaster that on the facts alleged is not unlawful. Ticketmaster respectfully asks the Court to dismiss the action.

StubHub and Ticketmaster are both in the ticketing business. Ticketmaster, but not StubHub, contracts directly with leagues, teams, and venues to sell their tickets to consumers in the first instance, known as "primary" ticketing services in the industry's jargon. Both Ticketmaster *and* StubHub offer "secondary" ticketing services, *i.e.*, websites on which a person who has a ticket to an event can post it for resale, and on which others can look for and buy tickets. StubHub's Complaint alleges that Ticketmaster leverages its relationships with "primary" ticket-sellers (the leagues, teams, and venues) to achieve an unfair advantage over competing "secondary" ticket platforms like StubHub.

But StubHub faced a problem in constructing its theory of the case: Ticketmaster is not remotely dominant in any market for secondary ticketing services *in general*. *StubHub* is actually the dominant secondary ticket platform, and the most StubHub can allege about Ticketmaster is that it is "a substantial and growing provider of Secondary Ticket Exchange services." Compl. ¶ 37. That's a fatal shortcoming for a plaintiff asserting antitrust claims like tying, exclusive dealing, and monopolization, all of which depend on both market power and substantial "foreclosure" or "exclusion" from the relevant market. Equally problematic, StubHub's allegations are principally about conduct in relation to the resale of the tickets for *one basketball team*—the Golden State Warriors (a co-Defendant here). But Warriors tickets are a tiny fraction of the overall tickets available on StubHub, and so StubHub neither alleges nor could allege that losing some ability to resell Warriors tickets threatens StubHub overall.

To try to get around these problems, StubHub embraces a familiar tactic: it has accused the Warriors of dominating the "market" *for their own product*—Warriors tickets—and it has

accused the Warriors and Ticketmaster of excluding competition from a market for "Secondary Ticket Exchange services *for Warriors tickets*" alone. *See* Compl. ¶ 1 (emphasis added). In other words, both the Warriors' alleged market power and the adverse market effects exist solely within "markets" in which the only things bought or sold are Warriors tickets.

In reality, it is not that easy to build an antitrust case around just one front in an obviously broader competitive war.

As a general rule, U.S. antitrust law rejects "markets" that consist of a single-brand product. *See, e.g.*, *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 393 (1956) ("[The] power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly."); *Green Country Food Mkt. v. Bottling Grp.*, 371 F.3d 1275, 1282 (10th Cir. 2004) ("Even where brand loyalty is intense, courts reject the argument that a single branded product market constitutes a relevant market."). This Court has held the same. *Formula One Licensing, B.V. v. Purple Interactive Ltd. et al.*, 2001 WL 34792530, at *3 (N.D. Cal. Feb. 6, 2001) (Chesney, J.) (alleged product market for "sales of FIA Formula One Championship-related motor sport goods and services" improperly defined "in terms of one or more trademarks").

StubHub attempts to circumvent this rule by asserting that Warriors fans do not like to root for other teams. Compl. ¶ 59. No one disputes the loyalty of the Warriors' fans, but the specific point of these cases is that brand loyalty and consumer preferences are not proper grounds for defining an antitrust market. *Newcal Indus. v. Ikon Office Solution*, 513 F.3d 1083, 1045 (9th Cir. 2008) ("The consumers do not define the boundaries of the market; the products or producers do."); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) ("[S]trictly personal preference . . . is irrelevant to the antitrust inquiry[.]"). StubHub has thus failed to adequately allege that Warriors tickets are a market unto themselves.

StubHub's antitrust claims also fail because they assert harm to a "market" that reflects only a tiny sliver of the actual businesses at issue—*i.e.*, the tickets sold on ticket exchange services. Ticketmaster and StubHub do not compete just to be the platform that resells Warriors tickets; the Complaint acknowledges that they compete to be the platform on which consumers

and brokers resell tickets to all sorts of sporting events, concerts, and other forms of live entertainment. As a matter of law, foreclosure must be measured in relation to the market for all of the opportunities to provide ticket exchange services—not for secondary ticketing platform services for tickets to one basketball team's home games. If StubHub's approach to this case were legally viable, there would be different antitrust markets—and associated monopolists—for the "service" of selling each team's tickets, each artist's tickets, and each venue's tickets that appear on each ticket exchange platform. That is not how the law works.

Because all of StubHub's antitrust claims depend on bogus market definitions, the Court should dismiss the entire Complaint. *Apple, Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1195-1200 (N.D. Cal. 2008) (granting motion to dismiss antitrust claims due to faulty product market definition).[1]

Three additional claims by StubHub—regarding Ticketmaster's alleged "anticompetitive conduct"—independently warrant dismissal as well.

First, StubHub's primary allegation is that the Defendants have prohibited reselling Warriors tickets on secondary platforms other than Ticketmaster's. Yet the Complaint attempts to challenge that *resale restriction*, which is subject to a distinct set of legal principles, by calling it a "tying" arrangement. That fails as a matter of law. A tying claim requires *two* products—one "tied" to the other—not one product governed by (alleged) rules about how it can be redistributed. *See, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 21 (1984) ("[A] tying arrangement cannot exist unless two separate product markets have been linked.").

Second, StubHub asserts that Ticketmaster has unlawfully "denied competing Secondary Ticket Exchanges . . . the ability to technologically integrate with Ticketmaster's primary sales platform." Compl. ¶¶ 40, 55. But the antitrust laws narrowly limit the circumstances in which one competitor has a legal duty to allow another competitor to "technologically integrate" with its products, and StubHub has not remotely alleged the predicate facts necessary to impose such

[1] The only claims arising under federal law are the three Sherman Act claims; without those, the Court should not exercise supplemental jurisdiction over StubHub's state law claims. *See* 28 U.S.C. § 1367(c); *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997) (en banc) ("[S]tate law claims should be dismissed if federal claims are dismissed before trial[.]") (emphasis and quotation marks omitted).

a duty on Ticketmaster. *See, e.g., LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App'x 554, 556-57 (9th Cir. 2008).

Third, StubHub asserts that Ticketmaster has "engaged in a false and misleading advertising campaign" that deceptively questions the security and authenticity of resale platforms other than Ticketmaster's. Compl. ¶ 40. But there is a strong presumption that "false" advertising or even commercial disparagement does not harm competition, and harm to competition is required to support an antitrust claim. *See Am. Prof'l Testing Serv. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 108 F.3d 1147, 1151-52 (9th Cir. 1997). A plaintiff bears a daunting burden of proof for a false advertising-based Sherman Act claim, including *inter alia* the requirement to plead that the defendant made clearly false statements that are not "susceptible of neutralization" in the marketplace. *Id.* at 1152. StubHub's Complaint alleges no facts even suggestive of any falsity in the "campaign" at issue, contending only that the Warriors and Ticketmaster have marketed Ticketmaster's resale platform as the sole one that is "official" and "guaranteed" by the team, Compl. ¶¶ 53-54—which is undeniably *true*. Furthermore it is positively offensive to the interests antitrust law protects for StubHub to suggest that a marketplace debate about ticket authenticity is anticompetitive. StubHub admits that is has a marketplace counterargument to Defendants' allegedly false statements; under *American Professional Testing Service*, that is enough to defeat its claims. *Id*. at 1152 ("[T]he test refers to 'susceptible to neutralization' not 'successful in neutralization[.]'").

"The costs of modern federal antitrust litigation . . . counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (citation omitted). In view of the logical and legal flaws in StubHub's Complaint, this case falls well below that standard.

II. RELEVANT FACTS ALLEGED

A. Both StubHub And Ticketmaster Provide Ticket Services Across Sports, Leagues, Venues, And Events

StubHub operates the internet marketplace found at www.stubhub.com. It describes its

business as providing "Secondary Ticket Exchange services to resellers and purchasers of tickets available by resale." Compl. ¶ 15. According to the Complaint, those services include tickets for "sporting events, concerts and other forms of live entertainment." *Id.* Tickets to Golden State Warriors home games are just one of many products "[a]mong the types of tickets sold and purchased on StubHub's Secondary Ticket Exchange." *Id.* ¶ 17. All of those different types of tickets are bought and sold on one single StubHub "electronic exchange." *Id.* ¶ 16.

Defendant Ticketmaster also provides "Secondary Ticket Exchange services." *Id.* ¶ 20. Ticketmaster's online ticket resale service, like StubHub's, includes but is not limited to Warriors tickets. As the Complaint makes clear, Ticketmaster's platform also hosts resold tickets for games throughout the National Basketball Association ("NBA"), the National Football League, and the National Hockey League, along with concerts and other events. *Id.* For NBA games, Ticketmaster has a league-wide deal: it is the only official or "authorized" platform for ticket resale for all thirty teams. *Id.* According to the Complaint, Ticketmaster and the Warriors, uniquely, also have an additional agreement of some sort to preclude a subset of ticketholders from reselling their tickets on any other secondary exchange. *Id.* ¶ 41. That is false—and self-evidently so, in view of the thousands of Warriors tickets available on StubHub and other platforms every day of the year—but for the purpose of this motion, we treat it as if it were true.

Unlike StubHub, Ticketmaster has an additional business in which it works with teams, leagues, artists, and venues to sell their tickets to the public in the first instance—what the Complaint calls "Primary Ticket Platform services." *Id.* ¶¶ 19-20. By practical necessity, offering tickets directly from one of these initial sources requires interfacing between the venue and the public to ensure, *inter alia*, that no more than one of each seat gets sold for a given event. *Id.* ¶ 22 ("Primary Ticket Platforms are responsible for managing all aspects of the primary ticket sale and distribution process."). Ticketmaster's "primary" platform is the tool the Warriors use for this purpose—again pursuant to a league-wide deal with the NBA. *Id.* ¶¶ 20, 26.

B. The Defendants' Alleged Dominance Of Warriors-Specific "Markets"

The Complaint dedicates considerable attention to the allegation that "Ticketmaster has had long-standing dominance in Primary Ticket Platform markets" *in general—i.e.*, not just for

Warriors tickets. *See, e.g.*, *id.* ¶¶ 27, 69. But other than rhetorically, that alleged dominance does not matter to StubHub's theory of the case. Primary ticketing generally is neither the "tying market" for the tying claims, nor the restrained market for any of StubHub's claims.

With respect to the overall "*Secondary* Ticket Exchange business," StubHub does not contend that Ticketmaster has any dominance at all. *See id.* ¶ 37. To the contrary, *StubHub* "has been in the forefront of establishing" the very existence of organized "network distribution and support services for ticket resales," and remains the incumbent in this space. *Id.* ¶¶ 37, 29, 36. Ticketmaster has only recently become "a substantial and growing provider of Secondary Ticket Exchange services." *Id.* ¶ 37. So StubHub does not assert any claims based on that generalized "Secondary Ticket Exchange services" market, either.

Instead, StubHub has built its antitrust theory on "markets" for tickets for home games for one particular team in one particular league: the NBA's Golden State Warriors. For those forty-odd games per year, StubHub ostensibly alleges the existence of two markets.

- ***First***, a market for "[t]he sale of Warriors tickets through Primary Ticket Platforms." *Id.* ¶ 59. Because this necessarily means sales *by the Warriors*, StubHub claims "[t]he Warriors possess substantial market power over the sale of Warriors tickets sold through Primary Ticket Platforms." *See id.* ¶ 90.
- ***Second***, a market for "Secondary Ticket Exchange *services* for Warriors tickets." *Id.* ¶ 65 (emphasis added). This captures the StubHub and Ticketmaster resale platforms (as well as others)—but for resold Warriors tickets and nothing else. *Id.* ¶ 66.

Oddly, the Complaint also refers repeatedly to what appears to be a *third* Warriors-only market, not for resale *services* but for resold *tickets* themselves. Specifically, Stubhub several times invokes a market for "Warriors tickets sold through Secondary Ticket Exchange services." *See, e.g.*, *id.* ¶¶ 85, 107. In fact, the Complaint goes so far as to ascribe a share of that market to Ticketmaster and the Warriors, alleging that "Defendants' share of Warriors tickets sold through Secondary Ticket Exchanges" is "at a minimum, in excess of 50%." *Id.* ¶ 85. Except to obfuscate the distinction between *services* and *tickets*, however, it is not clear what role this "resold Warriors tickets" market plays in StubHub's legal theories.

By the same token, the Complaint also omits a number of allegations that might be expected in a case predicated on the existence of Warriors-only markets. Notably, it nowhere alleges that StubHub or Ticketmaster provides any resale service for Warriors tickets that differs from the resale service they provide for other tickets on their platforms, or that Ticketmaster's primary ticketing services for the Warriors differ from its primary ticketing services generally. In fact, the putative Warriors-only "markets" do not appear based on anything that could not be said for any remotely unique entertainment event.

C. Defendants' Allegedly Unlawful Conduct

The gravamen of the Complaint is that Ticketmaster and the Warriors have started contractually precluding people from reselling Warriors tickets on StubHub, in order to force them to use Ticketmaster's resale platform instead. *Id.* ¶¶ 40-51. This practice allegedly violates the federal antitrust laws in three ways: as an unlawful "tying" arrangement, an unlawful form of exclusive dealing, and an attempt or conspiracy to monopolize the "market" for "Secondary Ticket exchange services for Warriors tickets." *Id.* ¶¶ 87-110.

The Complaint also asserts that the Defendants have done two other things wrong. First, StubHub says, Defendants have "denied competing secondary exchanges, including StubHub, the ability to technologically integrate with Ticketmaster's primary sales platform unnecessarily raising their costs of providing a safe and secure resale exchange." *Id.* ¶ 40. The Complaint does not allege that there was a history of such integration, as is legally essential. *See infra* § III.B.2.a. But regardless, StubHub's argument seems to be that Ticketmaster's unique ability to have its secondary exchange interoperate with its primary exchange gives Ticketmaster some kind of unfair advantage in preventing fraud in the secondary market. StubHub essentially admits that integration promotes security, yet complains that "[w]ere the Warriors genuinely concerned with security and authenticity issues, they could and would take steps to allow other networks to integrate technologically with its primary ticket platform." *Id.* ¶ 57.

Second, StubHub says that Ticketmaster and the Warriors have engaged in a false and deceptive marketing campaign by suggesting to consumers that Ticketmaster's secondary exchange platform is safer and more secure than its competitors'. According to this allegation,

the Defendants have disseminated information "in an effort to mislead consumers into believing that Ticketmaster is the only safe or effective Secondary Ticket Exchange option they have, or the only one that can be trusted to provide a 'guaranteed' or 'official' Warriors ticket." *Id.* ¶ 54. StubHub admits that Ticketmaster actually *is* the Warriors' "official" secondary exchange partner. *Id.* ¶ 20. And StubHub does not contend that it is unable to answer Defendants' security claims in the marketplace. To the contrary, StubHub offers its own competing marketing message as "the truth" against which Defendants' advertising is allegedly "false." Specifically, the Complaint alleges that StubHub typically provides elaborate support for many of the customers that do in fact get defrauded on its website (for example by buying PDF tickets that a fraudulent reseller has sold to multiple purchasers), even going to the trouble to set up physical kiosks at some or all venues where defrauded ticket purchasers can go to try to "obtain alternative inventory" each time "they encounter a problem." *Id.* ¶ 56.

III. ARGUMENT

Ticketmaster's argument proceeds in two parts. *First*, we address the Warriors-only *market definitions* that are essential to all of StubHub's Sherman Act claims. In section A.1 below, we explain why the "*tying*" product market alleged in the Complaint's first cause of action—"the sale of Warriors tickets through Primary Ticket Platforms"—fails as a matter of law. In section A.2 below, we explain why the market allegedly *harmed* in each of the first three causes of action—the market for "Secondary Ticket Exchange services for Warriors tickets"—also fails as a matter of law. Because defining a viable market is an essential element of all of these antitrust claims (for tying, violation of Sherman Act Section 1, and violation of Sherman Act Section 2, respectively), the legal infirmities in StubHub's alleged market definitions mean that StubHub's Sherman Act claims for relief fail in their entirety. If the Court agrees, then it should dismiss the entire Complaint because there is no independent basis for subject matter jurisdiction over the remaining causes of action—each of which arises under state rather than federal law.[2] *See Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 433 (3d Cir.

[2] There is no "diversity" jurisdiction over Plaintiff's state law claims, because the Complaint alleges that all parties have their principal places of business in California—which means they are all "citizens" of the same state for subject matter jurisdiction purposes. *See* Compl. ¶¶ 18-20;

1997) (affirming dismissal of pendant state law claims under Rule 12(b)(1) where Sherman Act claims were properly dismissed under Rule 12(b)(6)); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial . . . the state claims should be dismissed as well."); *see also* 28 U.S.C. § 1367(c)(3) (district court authority to dismiss state law claims where federal claims fail as a matter of law).

Second, we address additional flaws in StubHub's Complaint that warrant dismissal even if the market definition problems do not. In section B.1 below, we explain why the tying cause of action fails for an independent reason: because it violates the doctrinal requirement that an unlawful "tie" include *two* products, rather than just one. In section B.2 below, we identify two forms of conduct alleged in the Complaint to constitute antitrust violations that are, in reality, perfectly lawful under the Sherman Act. We thus ask the Court to dismiss StubHub's antitrust claims to the extent they are predicated on these pro-competitive actions.

A. The Court Should Dismiss StubHub's Antitrust Claims Because They Depend On Market Definitions That Fail As A Matter Of Law

The key issues in antitrust cases subject to the Rule of Reason under Section 1 of the Sherman Act, or monopolization under Section 2, are assessed in relation to the legal construct of a "relevant market."[3] As a result, the "[f]ailure to identify a relevant market is a proper ground for dismissing a Sherman Act claim." *Tanaka*, 252 F.3d at 1063. The well-known *Twombly* pleading standard applies to market definitions alleged no less than the other elements

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28 U.S.C. § 1332(a) (granting federal courts subject matter jurisdiction over certain actions between "citizens of *different* states") (emphasis added); *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010) ("The federal diversity jurisdiction statute provides that a corporation shall be deemed a citizen of . . . *the State where it has its principal place of business*.") (emphasis in original).

[3] The Complaint alleges both *per se* and "rule of reason" violations of Section 1. *See* Compl. ¶ 101. Yet the only conduct recited as the basis for StubHub's Section 1 claim is a series of exclusive-dealing arrangements. *Id.* ¶ 98. As a matter of law, "an exclusive dealing arrangement does not constitute a per se violation of section 1." *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 996 (9th Cir. 2010) (quotation marks omitted). The only facially viable Section 1 claim thus requires a plausible market definition no less than the other antitrust causes of action in the Complaint. *See Gough v. Rossmoor Corp.*, 585 F.2d 381, 390 (9th Cir. 1978) ("[U]nder the rule of reason market definition is required to establish a § 1 violation[.]").

of an antitrust cause of action. *Psystar Corp.*, 586 F. Supp. 2d. at 1198.[4]

The fundamental flaw in StubHub's complaint is that in order to allege both market power and adverse competitive effects, it tries to recast its competition with Ticketmaster—competition that plainly occurs across many sporting events, concerts and other forms of live entertainment—as occurring in Warriors-only markets: to wit, "Warriors tickets sold through Secondary Ticket Exchange services," Compl. ¶ 106; and "Secondary Ticket Exchange services for Warriors tickets," *id.* ¶ 65. Likewise, to address the requirement for a tying claim of market power in the "tying" market, the Complaint claims that the Warriors have monopoly power in their own tickets. *Id.* ¶ 59. Single-brand markets such as these are highly disfavored in the law and state a claim only under unique circumstances not present here.

1. The "Tying" Market In StubHub's First Claim For Relief Fails As A Matter Of Law Because Warriors Tickets Are Not A Relevant Market

StubHub's first cause of action is a "tying" claim. Compl. ¶¶ 87-96. "A plaintiff must prove three elements to prevail on an illegal tying claim: (1) that there exist two distinct products or services in different markets whose sales are tied together; (2) that the seller possesses appreciable economic power in the tying product market sufficient to coerce acceptance of the tied product; and (3) that the tying arrangement affects a not insubstantial volume of commerce in the tied product market." *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1159 (9th Cir. 2003).[5]

"[I]n all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 45 (2006). "And to prove it, [the market] must first be properly alleged." *Rick-Mik Enters., Inc. v. Equilon Enters. LLC*, 532 F.3d 963, 972 (9th Cir. 2008) (affirming dismissal of tying claim for

[4] Under that standard, a plaintiff must allege "plausible grounds" for its complaint, rather than the mere "possibility" of relief, *i.e.*, "enough fact to raise a reasonable expectation that discovery will reveal evidence" of the specific harm alleged. *Twombly*, 550 U.S. at 556. "[A] court must determine whether an antitrust claim is 'plausible' in light of basic economic principles." *William O. Gilley Enters. v. Atl. Richfield Co.*, 588 F.3d 659, 662 (9th Cir. 2009).

[5] These are the elements of an allegedly *per se* unlawful tying claim. For a "rule of reason" tying claim, the plaintiff must also show *inter alia* that the challenged practice has an anticompetitive effect. *See Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 n.7, 1199 (9th Cir. 2012).

failure to assert a viable "tying" product market). A properly defined product market "must encompass the product at issue as well as all economic substitutes for the product." *Newcal*, 513 F.3d at 1045. As the U.S. Supreme Court has held, that means that a market is unlawfully narrow unless it includes all products that are "reasonably interchangeable" with each other. *E.I. du Pont*, 351 U.S. at 395.

Here, the Complaint defines the "tying" product market as "the sale of Warriors tickets sold through Primary Ticket Platforms." Compl. ¶ 90. In plain English, this means Warriors tickets sold in the first instance by the Warriors, since they are the only seller of Warriors tickets through a primary ticketing platform. StubHub is thus alleging a "single-brand market," *i.e.*, a "market" that consists of nothing but a single product when sold by the company that makes it. But as a matter of law, such "single-brand markets" are presumptively *not* viable:

> Relevant markets generally cannot be limited to a single manufacturer's products. As the Supreme Court recognized in *United States v. E.I. duPont de Nemours & Co.*, manufacturers ordinarily should not be deemed to have "monopolized" their own products. The Court explained that the "power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product."

American Bar Association Antitrust Section, Antitrust Law Developments (7th ed.) at 603-04; *see also Tanaka*, 252 F.3d at 1065 ("By attempting to restrict the relevant market to a single athletic program in Los Angeles based solely on her own preferences, [plaintiff] has failed to identify a relevant market."); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 479 (3d Cir. 1992) ("[P]laintiffs' basic theory is that the relevant tying product market consists only of new Chrysler cars manufactured for sale in the United States. If the market were so defined, of course Chrysler would have market power, being the sole seller. But such a narrow definition makes no sense in terms of real world economics, and as a matter of law we cannot adopt it."); *Spinelli v. Nat'l Football League*, 2015 WL 1433370, at *21 (S.D.N.Y. Mar. 27, 2015) ("[T]o define the market as that group of products over which a defendant exercises control would as an analytic matter read the market definition step out of the Sherman Act.");

Blizzard Ent. Inc. v. Ceiling Fan Software LLC, 941 F. Supp. 2d 1227, 1234 n.6 (C.D. Cal. 2013) ("[A] company does not violate the Sherman Act by virtue of the natural monopoly it holds over its own product.") (quotation marks omitted); *Williams v. Nat'l Football League*, 2014 WL 5514378, at *4 (W.D. Wash. Oct 31, 2014) (dismissing antitrust claims for faulty market definitions where "Plaintiff's threadbare allegations do not relate to competition between firms in a market, but to the exercise of a natural monopoly on sales of tickets to a single stadium").

StubHub attempts to get around this in two ways. First, the Complaint supports its alleged tying product market definition with the conclusory assertion that "there are no economic substitutes for Warriors tickets sold on a Primary Ticket Platform." *Id.* ¶ 62. The Court is not obliged to accept that blindly. *Twombly*, 550 U.S. at 555 ("[O]n a motion to dismiss, courts are not bound to accept as true a legal conclusion couched as a factual allegation.") (quotation marks omitted). The absence of economic substitutes for a product is the legal test for market definition. *See Newcal*, 513 F.3d at 1045. Saying that the operative legal test is satisfied is the very definition of an allegation that does not survive a motion to dismiss under *Twombly*.

Second, the Complaint tries to explain that the *reason* "there are no economic substitutes" for the product at issue is simply that consumers—Warriors fans—have strong allegiances to the team. As paragraph 59 asserts: "Warriors fans who root for the likes of particular Warriors players—such as Stephen Curry, David Lee, or Klay Thompson—do not deem other NBA team tickets, such as tickets for the Sacramento Kings, to be a substitute for Warriors tickets, as those fans primarily root for the success of the Warriors." But as a matter of law, "[e]ven where brand loyalty is intense, courts reject the argument that a single branded product constitutes a relevant market." *Green Country Food Mkt.*, 371 F.3d at 1282; *Blizzard Ent.*, 941 F. Supp. 2d at 1234 n.6 (same). In *Tanaka*, for example, the Ninth Circuit refused to accept the "conclusory assertion that the 'UCLA women's soccer program' is 'unique' and hence 'not interchangeable with any other program in Los Angeles,'" even though the plaintiff herself alleged it was. 252 F.3d at 1065. The legal rule that dictates these results is straightforward: "The consumers do not define the boundaries of the market; the products or producers do." *Newcal*, 513 F.3d at 1045 (citing *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 325 (1962)); *Tanaka*, 252 F.3d at

1063 (holding that "strictly personal preference . . . is irrelevant to the antitrust inquiry"). So to survive this Motion, StubHub needs to have alleged something more than just the truism that Warriors' fans prefer Warriors tickets; the Complaint must go further, alleging that Warriors tickets are *different* from other products. *See Colonial Med. Grp. Inc. v. Catholic Healthcare W.*, 2010 WL 2108123, at *3 (N.D. Cal. May 25, 2010), *aff'd*, 444 Fed. App'x 937 (9th Cir. 2011) (motion to dismiss granted where complaint improperly "defined the market by reference to a consumer").

It fails to. The key allegations are all just generic recitations of personal preference—so much so that if StubHub's market definition here were legally sound, then every single professional sports team, along with hundreds or thousands of artists and other entertainers, would be a monopolist, subject to perpetual regulation under the Sherman Act. There would be a "market" for "Secondary Ticket Exchange services for Warriors tickets," another one for Lakers tickets, another one for Bruce Springsteen tickets (in each geographic market in which he performs), another one for U2 tickets (again multiplied for each location on their tour), and so on. Consider, for example, how Bruce Springsteen could mimic StubHub's market definition theory:

Stub Hub Allegations (Complaint ¶ 59)	**Hypothetical Bruce Springsteen Allegations**
The sale of **Warriors** tickets through Primary Ticket Platforms is a relevant market in this case. There are no economic substitutes for **Warriors** tickets for **Warriors** fans, as these tickets provide entry into NBA games featuring the **Warriors** that are held at Oracle Arena. **Warriors'** fans who root for the likes of particular **Warriors** players – such as Stephen Curry, David Lee, or Klay Thompson – do not deem other NBA team tickets, such as tickets for the Sacramento Kings, to be a substitute for **Warriors** tickets, as those fans primarily root for the success of the **Warriors**. **Warriors** fans would pay (and have paid) a small, but significant, non-transitory increase in price for **Warriors** tickets.	The sale of **Springsteen** tickets through Primary Ticket Platforms is a relevant market in this case. There are no economic substitutes for **Springsteen** tickets for **Springsteen** fans, as these tickets provide entry into concerts featuring **Springsteen** that are held at Oracle Arena. **Springsteen** fans who follow particular E Street Band Members – such as Bruce Springsteen, Nils Lofgren, and Steven Van Zandt – do not deem other rock band tickets, such as tickets for Coldplay, to be a substitute for **Springsteen** tickets, as those fans primarily follow **Springsteen**. **Springsteen** fans would pay (and have paid) a small, but significant, non-transitory increase in price for **Springsteen** tickets.

The law does not allow single-brand markets to be alleged so easily—especially where the Complaint itself makes clear that the product at issue actually *does* have "economic substitutes." *See Tanaka*, 252 F.3d at 1064-65. In *Psystar*, for example, the counter-claiming defendant alleged that Apple owned a "monopoly in the Mac OS market," and unlawfully excluded a competitor from selling its own machines running Apple's operating system. 586 F. Supp. 2d at 1194. Like StubHub in this case, the counterclaimant in *Psystar* asserted that "a 'small but significant non-transitory increase in price' . . . would not result in a change in demand for" the product at issue—contending there was an antitrust market limited to the Mac OS, alone. *Id*. at 1198. But the court was not fooled. Other allegations in the same pleading made clear that Mac OS was just one of many relevant competing products. So considering "the pleading as a whole," *id*. at 1199, the court "conclude[d] that the counterclaim [did] not plausibly allege" a market limited to Mac OS, under *Twombly*, *id*. at 1200. *See also PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 418 (5th Cir. 2010) (affirming dismissal on market definition grounds and explaining, "[i]n rare circumstances, a single brand of a product . . . can constitute a relevant market for antitrust purposes. But that possibility is limited to situations in which consumers are 'locked in' to a specific brand by the nature of the product.") (citation omitted).

As in *Psystar*, StubHub's contention about the absence of "economic substitutes" for the tying product is belied by the rest of the Complaint. StubHub admits (as it must) that there *is* at least one "economic substitute" for Warriors tickets sold by the Warriors: Warriors tickets, to the very same games, resold by other people. *Cf. Ticketmaster LLC v. RMG Techs., Inc.*, 536 F. Supp. 2d 1191, 1197 (C.D. Cal. 2008) ("Why are retail and resale tickets not acceptable economic substitutes for each other? The Court is reasonably sure that . . . [a consumer] would not care whether her ticket was purchased through Ticketmaster in the 'retail' market or from a ticket broker in the 'resale' market . . . as long as she is able to attend the [event]."). On page one of the Complaint, StubHub avers: "If you are a Warriors fan and you want season tickets, you have one choice: buy them through Ticketmaster. . . . There is, however, a substantial and separate resale market for Warriors tickets[.]" *Id*. ¶¶ 2-3. StubHub thereafter clearly alleges that

resale tickets *compete* with remaining primary inventories. *See id.* ¶ 31 (alleging that among the "reasons why consumers might choose to purchase Warriors tickets by resale" is that "the purchaser might be able to find a better price . . . on the secondary exchange"); *see also* ¶ 69 ("[R]esale ticket purchases are often made because the primary tickets are . . . unavailable at the desired price[.]"). The Complaint thus acknowledges that "primary" and "secondary" tickets compete on price. This is the very definition of two products that are in *the same market*, rather than *different* markets: the price for one "often" leads customers to substitute away to the other.

StubHub's allegations are, at best, "internally contradictory," and thus implausible under *Twombly*. *See Psystar*, 586 F. Supp. 2d at 1200. Because the "tying" product market alleged—"the sale of Warriors tickets sold through Primary Ticket Platforms"—is improperly limited to a portion of a single brand and does not include all economic substitutes for the product at issue, it fails as a matter of law, and the Court should dismiss the Complaint's tying claim altogether. *See Rick-Mik*, 532 F.3d at 972; *Formula One*, 2001 WL 34792530, at *3 ("Product markets are not defined in terms of one trademark or another.") (quotation marks omitted).

2. The Market Allegedly Harmed In Each Of StubHub's First Three Claims For Relief Fails Because "Secondary Ticket Exchange Services" Include Many Products Other Than Warriors Tickets

More broadly, all of StubHub's antitrust claims fail because they assert *harm* to a contrived "market" gerrymandered to cover only a narrow slice of Ticketmaster's competition with StubHub. "Antitrust plaintiffs cannot, however, artificially define a market so as to cover only the practice complained of; this would be circular or at least result-oriented reasoning." *Redmond v. Mo. W. State Coll.*, 1988 WL 142119, at *2 (W.D. Mo. Nov. 2, 1988) (citing *Gen. Bus. Sys. v. N. Am. Philips Corp.*, 699 F.2d 965, 975 (9th Cir. 1983)); *Adidas Am., Inc. v. Nat'l Coll. Athletic Ass'n*, 64 F. Supp. 2d 1097, 1102 (D. Kan. 1999) (same, quoting *Redmond*). The failure to define a legally permissible market in which competition was allegedly injured is fatal to each of StubHub's Sherman Act claims: (1) its ***tying*** claim, *see Tanaka*, 252 F.3d at 1059; (2) its ***Section 1*** claim for "exclusive dealing," *see Gough*, 585 F.2d at 390 ("[U]nder the rule of reason market definition is required to establish a § 1 violation[.]"); and (3) its ***Section 2*** claim for conspiracy to monopolize the market, *see Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447,

456 (1993) ("In order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the relevant market[.]"). *See also Psystar*, 586 F. Supp. 2d at 1196 ("The relevant-market inquiry does not differ for the[se] three claims in any material respect.").

Ticket resale platforms are, as the Complaint repeatedly acknowledges, a national, multi-event business. StubHub's includes tickets for hundreds or thousands of events other than Warriors' home games, and so does Ticketmaster's. Everything about the Complaint other than a few conclusory assertions describing the market allegedly harmed reveals that competition between StubHub and Ticketmaster takes place at the level of their secondary exchange platforms *as a whole*. Ticketmaster has won "official" resale platform status for several major sports leagues, *see* Compl. ¶ 20; StubHub holds itself out as having done the same for baseball, *see* Request for Judicial Notice in Supp. of Mot. to Dismiss ("RJN") Ex. A at 1. StubHub even acknowledges that the real concern here is not about Warriors tickets, alone; it is about what will happen across a *broader* segment of "Secondary Ticket Exchange services" for *other* teams and leagues if the Warriors' alleged proscription against resale on StubHub gets replicated elsewhere. Compl. ¶ 86. In a 144-paragraph Complaint asserting six claims for relief, there is not a single intimation, let alone express assertion, that either StubHub or Ticketmaster's "Secondary Ticket Exchange service" *for the Warriors* differs in any respect at all from the "Secondary Ticket Exchange service" both companies offer *for all of the other events on their platforms*. *See supra* §§ II.A-B. In fact, StubHub's principal description of secondary exchanges is that "[t]hey perform a 'matchmaking' function between resellers and resale ticket buyers." *See* Compl. ¶ 32. That is about matching *all kinds of content* to *all kinds of fans*. It has nothing to do with the Warriors *per se*.

And yet the market alleged to have been harmed is limited to a subset of those "services" the parties provide when people use their platforms to buy and sell Warriors tickets, and nothing else. *See* Compl. ¶ 88 (tying claim asserting the foreclosure of competition "in Secondary Ticket Exchange services for Warriors tickets"); ¶ 102 (Sherman Act § 1 claim asserting diminution of competition in the identical "market"); ¶ 108 (Sherman Act § 2 claim asserting dangerous

likelihood of Defendants' monopolizing the identical "market"); ¶ 115 (Cartwright Act claim asserting conspiracy to monopolize the identical "market").[6] That is not a "plausible" market in which the Defendants can be deemed to have injured competition. *Cf. Twombly*, 550 U.S. at 557. To the contrary, it is specifically manipulated to be coterminous with the sliver of the real market in which StubHub claims to have been injured. But courts are wise to this gambit of tautologically defining a market to track one-for-one the harm allegedly incurred—and routinely reject it. *See, e.g.*, *Burns v. Cover Studios, Inc.*, 818 F. Supp. 888, 892 (W.D. Pa. 1993) ("The plaintiff's definition of the relevant market as coextensive with the parties to his competitor's contract is . . . patently invalid because it is tautological."); *Bridges v. MacLean-Stevens Studios*, Inc., 35 F. Supp. 2d 20, 29 (D. Me. 1998), *aff'd*, 201 F.3d 6 (1st Cir. 2000) (same holding and language); *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250, 257 (S.D.N.Y. 1995) ("tautological" market definitions "do not state a claim for Section 2 monopolization").

Again, the concern underlying the decisions is that this method of market definition leads to ubiquitous findings of "monopoly" and "foreclosed competition." Here, any Secondary Ticket Exchange service that actually struck a deal with an event presenter, and thus gained an outsized share of the tickets, would unlawfully "foreclose competition" in the "market" for resale services for that particular event. It would almost certainly mean that StubHub's own purported deal with Major League Baseball's "Advanced Media" unit, pursuant to which it claims to have the same "monopoly" over authorized online ticket resale for participating teams, would be illegal. *See* RJN Ex. A at 1. This cannot be right as a matter of law—and it isn't. Competition can be, and often is, for all (or a "monopoly" share) of an individual customer's business, or for a status like the "official" or "authorized" supplier that may lead to a single-customer "monopoly." In that setting, foreclosure is measured against all market opportunities, not each one. *See, e.g.*, *Omega*

[6] This characterization is, in reality, charitable to StubHub. Occasionally, the Complaint obfuscates whether the market allegedly harmed is one for the *service* of reselling Warriors tickets or for the distinct product constituting resold Warriors' tickets, themselves. *See, e.g.*, Compl. ¶ 107 ("To foreclose competition in the market for *Warriors tickets resold through Secondary Ticket Exchange services* . . ."). If what Plaintiff is saying is that the foreclosed "market" is one for resold Warriors *tickets* themselves, then the legal infirmity in the alleged market definition is even starker: for all the reasons discussed in section III.A.1 above, there are not separate "markets" for Warriors tickets to the very same games sold by different purveyors.

Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir. 1997) ("The relevant market for [measuring foreclosure] includes the full range of selling opportunities reasonably open to rivals, namely, all the product and geographic sales they may readily compete for, using easily convertible plants and marketing organizations."); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236 (1st Cir. 1983) (Breyer, J.) ("[V]irtually *every* contract to buy 'forecloses' or 'excludes' alternative sellers from *some* portion of the market, namely the portion consisting of what was bought."); *Nicsand, Inc. v. 3M Co.*, 507 F.3d 442, 456 (6th Cir. 2007) (en banc) ("When one exclusive dealer is replaced by another exclusive dealer, the victim of the competition does not state an antitrust injury.").

If StubHub wants to bring an antitrust claim against Ticketmaster over harm to a market involving secondary exchange services, it has to assert harm to the market as a whole, or explain how one slice of that market is meaningfully different from the rest. *Belfiore v. N.Y. Times Co.*, 826 F.2d 177, 180 (2d Cir. 1987) (market definition "implausible as a theoretical matter" where "Plaintiffs' narrow definition" amounts to "an awkward attempt to conform their theory to the facts they allege"). The Complaint does neither. As a result, the artificially limited market in which StubHub says competition has been injured is "facially unsustainable" and implausible, and so fails as a matter of law. *See Newcal*, 513 F.3d at 1045; *Twombly*, 550 U.S. at 556.

B. Market Definition Problems Aside, The Court Should Dismiss Other Portions Of The Complaint

If the Court allows this litigation to proceed notwithstanding these problems with the markets StubHub has alleged, the Court should nevertheless dismiss the following claims.

1. The "Tying" Cause Of Action Fails Because It Involves Only One Product

The first cause of action fails as a matter of law because it is a "tying" claim that involves only one product, rather than the required two.

A tying arrangement is a specific antitrust offense with a unique history and rules. It is a condition on the sale of a dominant product that requires the buyer to purchase something else—a separate product—it would prefer not to buy from the seller. *Brantley*, 675 F.3d at 1199.

Accordingly, "a tying arrangement cannot exist unless two separate product markets have been linked." *Jefferson Parish*, 466 U.S. at 21. The "common core of the adjudicated unlawful tying arrangements" is "the forced purchase of a *second distinct commodity* with the desired purchase of a dominant 'tying' product." *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 614 (1953) (emphasis added). Courts and commentators have urged the importance of limiting tying analysis to true "ties"—which are sometimes subject to "*per se*" treatment under the antitrust laws—warning of the potential for "plaintiffs to strain to make their agreements ties rather than exclusive deals" or other practices subject to a Rule of Reason analysis. Areeda & Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application §18.01b (2014).

Here, StubHub is trying to plead tying when in reality the alleged "tie" is not an obligation to buy an unwanted second product along with the product the consumer wants, but instead a restriction on the resale of the first product itself. The Complaint's allegation is that the Defendants "have agreed to unlawfully tie the use of Ticketmaster's Secondary Ticket Exchange [*i.e.*, the tied product] to the sale of Warriors tickets through Ticketmaster's Primary Ticket Platform [*i.e.*, the tying product]." Compl. ¶ 91. But that is not "the forced purchase of a second distinct commodity." *Times-Picayune*, 345 U.S. at 614. That is a restraint allegedly imposed by the seller of a good (Warriors tickets) over the ways the buyer can resell the very same good. *See Venzie Corp. v. U.S. Mineral Prods. Co.*, 521 F.2d 1309, 1316-18 (3d Cir. 1975) ("The critical deficiency in plaintiffs' efforts to prove an illegal tie-in [based on an alleged unwritten resale restriction] is that they have failed to establish a factual pattern that falls within the definition of arrangements which the Supreme Court has declared illegal *per se*.").

There is, in fact, a body of antitrust law that addresses the legality of resale restrictions—but it is not the law of "tying." Courts have long considered a seller's contractual limitation on a buyer's right to freely resell a product as a "vertical restraint" (*i.e.*, an agreement between entities at different market levels), evaluated under the Rule of Reason (*i.e.*, a balancing of any proven anti-competitive effects of the arrangement against its procompetitive effects). *See, e.g.*, *Clairol, Inc. v. Boston Disc. Ctr. of Berkley, Inc.*, 608 F.2d 1114, 1123 (6th Cir. 1979) (analyzing manufacturer's prohibition on resale of hair product as vertical restraint under the Rule of

Reason); *JBL Enters., Inc. v. Jhirmack Enters., Inc.*, 509 F. Supp. 357, 380 (N.D. Cal. 1981), *aff'd*, 698 F.2d 1011 (9th Cir. 1983) (Rule of Reason applied to manufacturer's restrictions against resale of beauty products); *Coca-Cola Co. v. Omni Pac. Co., Inc.*, 2000 WL 33194867, at *6 (N.D. Cal. Sept. 27, 2000) (assessing the legality of territorial distribution restrictions as vertical restraints under the Rule of Reason). In all but the rarest cases, agreements that limit the way a particular product can be resold are perfectly permissible; as one opinion from this District explains, "there is no authority to support the understanding that a reduction of intrabrand competition [caused by a resale restriction] is sufficient to constitute an unreasonable restraint on trade." *Coca-Cola*, 2000 WL 33194867, at * 6.

The facts alleged in the Complaint simply do not constitute a "tying" arrangement, so the Court should independently dismiss the first cause of action in its entirety on this ground.

2. The Complaint Alleges Harm From Conduct That Cannot Give Rise To Antitrust Claims

The Court should also dismiss two additional claims that fail as a matter of law because they assert liability for conduct that is not an antitrust violation. "To establish a section 1 violation under the Sherman Act, a plaintiff must demonstrate three elements: (1) an agreement, conspiracy, or combination among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition[.] . . . To establish a section 2 violation . . . a plaintiff must demonstrate four elements: (1) specific intent to control prices or destroy competition; (2) predatory or anti-competitive conduct; (3) a dangerous probability of success; and (4) causal antitrust injury." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir. 1988). StubHub's claims concerning "technological integration" with Defendants' primary ticketing platform, and Defendants' allegedly "false advertising" campaign, do not allege conduct that unreasonably restrains competition (under Section 1) or that is anti-competitive (under Section 2).[7]

[7] Under Rule 12(b)(6), courts should dismiss any antitrust claim to the extent that it asserts a violation from conduct that cannot as a matter of law yield liability. *See USA Petroleum Co. v. Atl. Richfield, Co.*, 577 F. Supp. 1296, 1308 (C.D. Cal. 1983) (selectively dismissing legally infirm bases for antitrust claims); *Tate v. Pac. Gas & Elec. Co.*, 230 F. Supp. 2d 1072, 1079-83 (N.D. Cal. 2012) (same); *Santa Cruz Med. Clinic v. Dominican Santa Cruz Hosp.*, 1995 WL

a. Ticketmaster Has No Duty To Let StubHub Integrate With Its Primary Ticketing System

The most audacious claim in StubHub's Complaint is its argument that "Defendants" refused to permit it to integrate StubHub into Ticketmaster's primary ticketing system. Since the Supreme Court's decision in *Verizon Comm., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407, 411 (2004), it has been crystal clear that "[a]s a general rule, businesses are free to choose the parties with whom they will deal," and have "no duty to aid competitors." The sole exception to this doctrine is strictly "limited," and reflects the "outer boundary" of antitrust liability. *Id.* at 409. It addresses the unjustified *termination* of *existing* collaborations between competitors. Specifically, for a party's refusal to deal with its competitor to violate the Sherman Act, the defendant must have "unilateral[ly] terminat[ed] . . . a voluntary (*and thus presumably profitable*) course of dealing." *Id.* at 409 (emphasis in original); *see also MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132 (9th Cir. 2004). Failure to plead facts establishing the predicate (1) *voluntary* and (2) *profitable* pre-existing relationship identified in *Trinko* is thus fatal to any refusal-to-deal claim. *See, e.g.*, *LiveUniverse*, 304 F. App'x at 557 (affirming dismissal of refusal-to-deal claim where Plaintiffs "failed to allege either a voluntary arrangement . . . or that any such arrangement was profitable").

Technology integration cases fall within the rule of *Trinko* and its progeny. *See Trinko*, 540 U.S. at 409-410 (refusal to allow competing "local exchange carriers" to use certain elements of Verizon's technological infrastructure); *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1076-77 (10th Cir. 2013) (refusal to share certain "application programming interfaces" that would facilitate interoperability with Microsoft's operating system); *LiveUniverse*, 304 F. App'x at 557 (refusal to allow links to plaintiff's website on MySpace's social media platform).

Here, the Complaint asserts that Ticketmaster has violated the antitrust laws (or "reinforced" other violations of antitrust, whatever that means) by refusing to allow its competitor, StubHub, to integrate into Ticketmaster's primary sales platform. *See supra* § II.C;

150089, at *2 (N.D. Cal. 1995) ("Although a complaint might include multiple claims for relief, a motion to dismiss may be directed against a single 'claim,'. . . effectively striking portions of a complaint where there is no viable theory or facts supporting recovery under that theory.").

Compl. ¶¶ 40, 57, 92 (first cause of action), 98 (second cause of action), 107 (third cause of action). In substance, that is plainly a refusal-to-deal claim, subject to the particular requirements courts have imposed for the assertion of liability against a defendant who prefers not to open up its technological infrastructure to a competitor. *See Trinko*, 540 U.S. at 407.

But StubHub alleges none of the predicate facts necessary to make out a viable refusal-to-deal claim. Specifically, StubHub never contends that the parties had any prior course of dealing in which Ticketmaster allowed StubHub to integrate into Ticketmaster's primary sales platform. *Cf. Trinko*, 540 U.S. at 409. Nor does the Complaint allege a prior course of dealing that was *profitable* for Ticketmaster, or that Ticketmaster unilaterally *terminated* that prior course of dealing. *Cf. id.* In fact, far from saying that Ticketmaster has reversed course, StubHub alleges that Ticketmaster will not permit integration in the first instance. *See* Compl. ¶¶ 40, 57, 92, 107, 114. As a matter of law, that makes this claim a non-starter. *See LiveUniverse*, 304 F. App'x at 557. U.S. courts cannot order that "new systems . . . be designed and implemented" to establish a competitor collaboration that did not previously exist. *Trinko*, 540 U.S. at 410 ("Verizon's alleged insufficient assistance in the provision of services to rivals is not a recognized antitrust claim[.]"); *Novell*, 731 F.3d at 1074-75 (holding that "unadulterated unilateral conduct—situations in which no course of dealing ever existed—won't trigger antitrust scrutiny," on the ground that this black-letter rule of law "keeps courts . . . out of the business of *initiating* collusion" between competitors) (emphasis added); *MetroNet*, 383 F.3d at 1131 ("'[E]nforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited.'") (quoting *Trinko*, 540 U.S. at 408).

StubHub's refusal-to-integrate claims should be dismissed without leave to amend.

b. The Complaint's Allegations About Defendants' "Deceptive Advertising" Campaign Fail As A Matter Of Law

Claims of false advertising are generally not the stuff of antitrust litigation. Competitors are expected to say negative things about one another's products; it is part and parcel of competition itself. So in antitrust there is an especially strong policy echoing Justice Brandeis'

teaching that the remedy for allegedly offensive speech is "more speech." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Accordingly, the Ninth Circuit in *American Professional Testing* established a presumption that statements by one competitor about another competitor—even defamatory or false statements—cause only *de minimis* injury to competition and are, therefore, insufficient to state a claim under Section 2 of the Sherman Act. *See Am. Prof'l Testing*, 108 F.3d at 1151 ("While the disparagement of a rival . . . may be unethical and even impair the opportunities of a rival, its harmful effects on competitors are ordinarily not significant enough to warrant recognition under § 2 of the Sherman Act."). Indeed, the Ninth Circuit "insist[s] on a 'preliminary showing of significant and more-than-temporary harmful effects on *competition* (and not merely upon a competitor or customer)' before these practices can rise to the level of exclusionary conduct." *Id*. (citing 3 P. Areeda & D. Turner, Antitrust Law ¶ 737b at 278 (1978)) (emphasis in original).

To overcome this presumption of *de minimis* effect, a plaintiff asserting an antitrust claim based on deceptive statements must demonstrate that the representations were: (1) clearly false; (2) clearly material; (3) clearly likely to induce reasonable reliance; (4) made to buyers without knowledge of the subject matter; (5) continued for prolonged periods; and (6) not readily susceptible to neutralization or other offset by rivals. *See id.* at 1152. The Ninth Circuit requires plaintiffs to prove "*all* six elements to overcome [the] *de minimis* presumption. Otherwise, [plaintiff] fails to prove its claim." *Id.* (emphasis in original).

StubHub has made no effort to plead its claim consistent with *American Professional Testing*. In a Complaint full of conclusory allegations, there are none about the six *American Professional Testing* factors. But two points stand out.

First, even though to give rise to antitrust liability, an allegedly deceptive advertisement must include statements that are, *inter alia*, "clearly false," *Am. Prof'l Testing*, 108 F.3d at 1152, the Complaint alleges no facts about Defendants' advertising campaign that are even arguably untruthful. *See Duty Free Ams. v. Estée Lauder Cos., Inc.*, 2014 WL 1329359, at *11 (S.D. Fla. Mar. 31, 2014) (dismissing § 2 claim based on misleading information because the "[defendant's] challenged representations are truthful"). To the contrary, its main gripe is that

the parties have marketed Ticketmaster's secondary exchange as the source of "the only 100% guaranteed official resale tickets." Compl. ¶ 53. But that is plainly accurate: Ticketmaster *is* in fact the Warriors' only official resale partner, which the Complaint admits, *id.* ¶ 20, and thus as a logical matter Ticketmaster is the only source of "100% guaranteed *official* resale tickets."

The Complaint also includes one line alleging that "the Warriors issued a 'fraud alert' for the 2013-14 season 'warning fans about the potential dangers of purchasing single-game tickets for the 2013-14 season from a non-verified third party.'" *Id.* ¶ 54. But the Complaint elsewhere makes clear that there *are* potential dangers from buying resold tickets via non-verified third parties.[8] Specifically, it admits that StubHub goes to great lengths to deal with the very real problem of fraud on its website, including granting customers their "money back" when they show up at an event and can't get in because the ticket was invalid. Compl. ¶ 56. So the fraud alert—which is not even alleged to be about StubHub in particular—is not "clearly false" as required. *Am. Prof'l Testing*, 108 F.3d at 1152.

The remainder of the Complaint's discussion of Defendants' "deception" consists of a series of conclusory assertions that they have said misleading things. *See, e.g.*, Compl. ¶ 54 (asserting that Defendants "mislead consumers"), ¶ 107 (asserting that Defendants "deceptively market and promote Ticketmaster"). These, too, do not satisfy *Twombly*. 550 U.S. at 557.

Second, not only has StubHub failed to plead that any false statements are "not readily susceptible to neutralization or other offset by rivals," *Am. Prof'l Testing*, 108 F.3d at 1152, they have pled *that they are*. StubHub lays out its security-related marketing message in the Complaint, arguing:

> StubHub, in fact, utilizes substantial and reliable mechanisms to protect purchasers on its site. It is a moderated marketplace that ensures that resellers who have previously engaged in deception are blocked from using the StubHub site. StubHub also provides kiosks at or near the venues where ticket purchasers can obtain alternative inventory if they encounter a problem. Moreover, through its robust Fan Protect Guarantee, StubHub ensures that all

[8] StubHub's allegations concerning the fraud alert are also curious given its own, very similar messaging. *See* http://www.stubhub.com/guarantee/#ad-scam-overlay ("Unfortunately, not all ticket listings on the web are genuine. . . . Beware of fake ticket listings, emails, and sites.").

> buyers receive the ticket they purchased or their money back. As a result of StubHub's consumer friendly practices, incidences of fraud on StubHub's [sic] are extremely minimal and consumers suffer the consequences of a fraud sale in only the rarest of cases.

Compl. ¶ 56. This argument is in fact evident on StubHub's website 24 hours a day. *See* www.stubhub.com/guarantee/; www.stubhub.com/fanprotect-guarantee-legal/#buyers.

StubHub has no right to try to use antitrust law to constrain a marketplace debate over which secondary ticketing site—StubHub or Ticketmaster—is the safest and most secure place to buy tickets. It has a security "story" to counter Ticketmaster's. And while we can certainly understand that "kiosks at or near the venues where ticket purchasers can obtain alternative inventory if they encounter a problem" may not be a very good story, the relevant legal "test refers to 'susceptible to neutralization' not 'successful in neutralization.'" *Am. Prof'l Testing*, 108 F.3d at 1152. StubHub thus fails to overcome the presumption of *de minimis* competitive effects, or the rule that quality claims must be adjudicated in the marketplace rather than the courtroom. *See In re Apple iPod Antitrust Litig.*, 796 F. Supp. 2d 1137, 1145-46 (N.D. Cal. 2011).

IV. CONCLUSION

StubHub's Complaint is legally infirm and does not justify the tremendous expense of antitrust discovery. For the foregoing reasons, Ticketmaster respectfully asks the Court to dismiss the action.

Dated: May 22, 2015

LATHAM & WATKINS LLP

By /s/ Daniel M. Wall
Daniel M. Wall
Attorneys for Defendant Ticketmaster L.L.C.

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