

1 LATHAM & WATKINS LLP
Margaret M. Zwisler (*pro hac vice*)
2 *margaret.zwisler@lw.com*
Jennifer L. Giordano (*pro hac vice*)
3 *jennifer.giordano@lw.com*
555 Eleventh St. NW, Suite 1000
4 Washington, D.C. 20004-1304
Telephone: +1.202.637.2200
5 Facsimile: +1.202.637.2201

6 Alfred Pfeiffer (Bar No. 120965)
al.pfeiffer@lw.com
7 Andrew M. Gass (Bar No. 212731)
andrew.gass@lw.com
8 505 Montgomery Street, Suite 2000
San Francisco, California 94111-6538
9 Telephone: +1.415.391.0600
Facsimile: + 1.415.395.8095

10
11 Attorneys for RADIO MUSIC
LICENSE COMMITTEE, INC.
12

13
14 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
15

16 GLOBAL MUSIC RIGHTS, LLC,

17 Plaintiff,

18 v.

19 RADIO MUSIC LICENSE
20 COMMITTEE, INC. and DOES 1
through 3,000,

21 Defendants.
22

CASE NO. 2:16-cv-09051 TJH (ASx)

**DEFENDANT RADIO MUSIC
LICENSE COMMITTEE, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR JUDGMENT ON THE
PLEADINGS PURSUANT TO FED.
R. CIV. P. 12(C)**

The Honorable Terry J. Hatter, Jr.

Date: September 9, 2019

Time: Under Submission

Place: Courtroom #9B

23
24
25
26
27
28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	Page
INTRODUCTION	1
RELEVANT COMPLAINT ALLEGATIONS	2
A. RMLC Is An 80-Year Old Trade Association That Federal Courts Have Recognized Serves A Valuable Role In Determining “Reasonable” Fees For Music Licensing	2
B. RMLC Successfully Sued A Third PRO, SESAC, To Allow A Neutral Arbitrator To Decide Rates	4
C. RMLC Sued GMR In November 2016 To Allow A Neutral Third Party To Determine Reasonable Rates For A GMR License	5
D. The Complaint Does Not Allege That Any RMLC Member Refused To Buy A License From GMR At A Point In Time When It Actually Needed Such A License	8
ARGUMENT	9
I. THE COMPLAINT DOES NOT PLAUSIBLY ALLEGE THE EXISTENCE OF A CONSPIRACY AMONG 10,000 RADIO STATIONS TO BOYCOTT GMR	10
A. To Plausibly Allege An Agreement In Violation Of The Antitrust Laws, GMR Was Required To Allege More Than Mere Parallel Conduct By RMLC’s Members To Not Buy A License	10
B. GMR Has Not Plausibly Alleged Any Circumstantial “Plus Factors” From Which This Court Could Reasonably Conclude That Parallel Conduct By Some Of RMLC’s Members Was The Product Of An Antecedent Agreement Among All 10,000 Of Them	13
II. GMR’S SECTION 1 CLAIM ALSO FAILS BECAUSE GMR WAS REQUIRED TO ALLEGE THAT THE PURPORTED BOYCOTT HARMED COMPETITION IN THE ALLEGEDLY RELEVANT MARKET, BUT IT FAILED TO DO SO	16
A. The Group Boycott That GMR Alleges Cannot Be A <i>Per</i> <i>Se</i> Violation Of The Sherman Act As A Matter Of Law; The Court Must Assess The Claim Under The Rule Of Reason	17
B. GMR Has Not Pled A Viable Section 1 Claim Under The Rule Of Reason Because It Has Not Alleged Harm To Competition In The Supposedly Relevant Market	19

1 III. GMR FAILED TO PLAUSIBLY ALLEGE ANY
2 COGNIZABLE *ANTITRUST INJURY* FROM THE
3 SUPPOSED BOYCOTT 21
4
5 IV. GMR’S CALIFORNIA STATE LAW CLAIMS FAIL FOR
6 THE SAME REASONS THAT ITS FEDERAL SHERMAN
7 ACT CLAIM FAILS..... 24
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
CONCLUSION..... 24

TABLE OF AUTHORITIES

Page(s)

CASES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Adaptive Power Sols., LLC v. Hughes Missile Sys., Co.,
141 F.3d 947 (9th Cir. 1998).....*passim*

In re Application of the Cromwell Grp.,
1:10-cv-05210-DLC (S.D.N.Y. Jan. 30, 2012) 3

Arunachalam v. Apple, Inc.,
2018 WL 5023378 (N.D. Cal. Oct. 16, 2018)..... 22

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 9, 10

Atl. Richfield Co. v. USA Petroleum Co.,
495 U.S. 328 (1990) 20, 21, 22

Bay Area Surgical Mgmt. LLC v. Aetna Life Ins. Co.,
2016 WL 3880989 (N.D. Cal. July 18, 2016)..... 18

Bell Alt. Corp. v. Twombly,
550 U.S. 544 (2007)*passim*

Bourne Co. v. Hunter Country Club, Inc.,
990 F.2d 934 (7th Cir. 1993)..... 11

Brantley v. NBC Universal, Inc.,
675 F.3d 1192 (9th Cir. 2012)..... 20, 21, 22

Brown Shoe Co. v. United States,
370 U.S. 294 (1962) 20

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,
429 U.S. 477 (1977) 22

Cargill, Inc. v. Monfort of Colo., Inc.,
479 U.S. 104 (1986) 21

Cascades Comput. Innovation, LLC v. RPX Corp.,
719 Fed. App’x 553 (9th Cir. 2017)..... 22, 23, 24

1 *Cty. of Stanislaus v. Pac. Gas & Elec. Co.*,
 2 114 F.3d 858 (9th Cir. 1997)..... 11

3 *FTC v. Ind. Fed’n of Dentists*,
 4 476 U.S. 447 (1986) 17, 18

5 *Gordey v. Bank of Am., Nat’l Ass’n*,
 6 2015 WL 12811259 (C.D. Cal. Jan. 6, 2015)..... 9

7 *Kendall v. Visa U.S.A., Inc.*,
 8 518 F.3d 1042 (9th Cir. 2008)..... 10, 16

9 *In re Late Fee and Over-Limit Fee Litig.*,
 10 528 F. Supp. 2d 953 (N.D. Cal. 2007)..... 14

11 *Lenhoff Enters., Inc. v. United Talent Agency, Inc.*,
 12 729 F. App’x 528 (9th Cir. 2018)..... 13, 14

13 *McGlinchy v. Shell Chem. Co.*,
 14 845 F.2d 802 (9th Cir. 1988)..... 24

15 *In re Musical Instruments & Equip. Antitrust Litig.*,
 16 798 F.3d 1186 (9th Cir. 2015)..... 13, 14, 15, 16

17 *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*,
 18 472 U.S. 284 (1985) 17

19 *Omni Resource Dev. Corp. v. Conoco, Inc.*,
 20 739 F.2d 1412 (9th Cir. 1984)..... 11, 15

21 *Orchard Supply Hardware LLC v. Home Depot USA, Inc.*,
 22 939 F. Supp. 2d 1002 (N.D. Cal. 2013) 24

23 *Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*,
 24 508 U.S. 49 (1993) 11

25 *Radio Music License Comm., Inc. v. Global Music Rights, LLC*,
 26 No. 2:16-cv-06076-CDJ (E.D. Pa. Nov. 18, 2016) 7

27 *Radio Music License Comm., Inc. v. SESAC*,
 28 2013 WL 12114098 (E.D. Pa. Dec. 20, 2013) 4

Radio Music License Comm. v. SESAC,
 29 F. Supp. 3d 487 (E.D. Pa. 2014).....*passim*

1 *Sony Elecs., Inc. v. Soundview Techs., Inc.*,
 2 281 F. Supp. 2d 399 (D. Conn. 2003) 22
 3 *Tanaka v. Univ. of S. Cal.*,
 4 252 F.3d 1059 (9th Cir. 2001) 20
 5 *William O. Gilley Enters., Inc. v. Atl. Richfield Co.*,
 6 588 F.3d 659 (9th Cir. 2009) 9
 7 *Withers Broad. Co. of Ill., LLC v. Broad. Music, Inc.*,
 8 1:10-cv-04779-LLS (S.D.N.Y. Aug. 20, 2012) 3

9 **STATUTES**

10 15 U.S.C. § 1 *passim*
 11 17 U.S.C. § 504(c)(2) 16
 12 Cal. Bus. & Prof. Code § 16720 24
 13 Cal. Bus. & Prof. Code § 17200 24

14 **RULES**

15 Fed. R. Civ. P. 11 11
 16 Fed. R. Civ. P. 12(b)(6) 9
 17 Fed. R. Civ. P. 12(c) 9, 23, 24
 18 L.R. 7-3 11, 12, 24

19 **CONSTITUTIONAL PROVISIONS**

20 U.S. Const. amend. I 11, 15
 21
 22
 23
 24
 25
 26
 27
 28

INTRODUCTION

1
2 This is a purely retaliatory action, filed in response to an antitrust suit by the
3 defendant against the plaintiff here. But it is not a very good one. The theory
4 underlying Global Music Rights, LLC's ("GMR's") own, offensive complaint is not
5 merely implausible, it is preposterous.

6 GMR is a brand new "performing rights organization," founded in 2013. It
7 contends that the Radio Music License Committee—an 80-year old trade association
8 whose role in negotiating and administering copyright performance rights licenses
9 for radio stations has been not just approved by federal courts but *mandated* through
10 court orders—is, by its very nature, *per se* illegal under the antitrust laws, even
11 though no one has noticed until now. And that is just the beginning.

12 The Sherman Act violation that has harmed GMR in the here-and-now, as the
13 story goes, is that RMLC somehow managed to get all **10,000** of its radio station
14 members to agree *with each other* not to buy a license from GMR—even though
15 they could not or would not avoid playing songs that could be licensed only through
16 GMR. What the Court is presented with here is thus an alleged conspiracy, by an
17 entire industry, to knowingly and intentionally expose itself to copyright
18 infringement statutory damages of up to \$150,000 per song, for thousands of songs.
19 The sheer absurdity that 10,000 entities would agree with each other to do anything
20 (much less something that exposes each of them to potentially crippling liability)
21 should be enough, by itself, to end this case. But there is plenty more.

22 The sole basis that GMR has for contending that such an unprecedentedly
23 massive (if entirely self-defeating) conspiracy exists is that most (but certainly not
24 all) of those 10,000 stations did not buy a license from GMR before RMLC sued
25 GMR for antitrust violations for charging anticompetitively high prices. That's it.
26 GMR was perfectly happy to deal with RMLC until that time. But according to the
27 theory asserted here, the minute RMLC's member stations declined to give in to
28 GMR's extortionate pricing demands and to instead sue GMR, those stations not

1 only instantaneously violated the antitrust laws, but did so on a *per se* basis, meaning
 2 that they should never be allowed even to try to explain why they did what they did.
 3 Under GMR's theory, the only way that RMLC's members could have escaped
 4 antitrust liability would have been to pay GMR's ransom. Of course that is not the
 5 law.

6 As explained below, the complaint does not come close to alleging facts
 7 sufficient to assert that a cognizable conspiracy to boycott GMR ever existed. But
 8 even if it did, established antitrust precedents, including the binding law of this
 9 Circuit, hold that the particular conspiracy GMR has alleged here does not state a
 10 violation of Section 1 of the Sherman Act as a matter of law because the complaint
 11 does not allege that the supposed boycott harmed competition or caused any
 12 cognizable antitrust injury. The Court should enter judgment on the pleadings in
 13 favor of RMLC on all of GMR's claims. And, because amendment could not cure
 14 any of these fatal defects, the Court should do so with prejudice to put an end to this
 15 nonsense.

16 RELEVANT COMPLAINT ALLEGATIONS

17 Accepting, as we must on this motion, the allegations in GMR's complaint,
 18 here is the tale that GMR itself tells:

19 **A. RMLC Is An 80-Year Old Trade Association That Federal Courts 20 Have Recognized Serves A Valuable Role In Determining 21 "Reasonable" Fees For Music Licensing**

22 RMLC is a trade association whose members consist of approximately 10,000
 23 U.S. terrestrial radio stations (run by 3,000 separate radio groups).⁵ First Am.

24 ⁵ The complaint's allegations that these 10,000 different radio stations—that
 25 broadcast different programs and different types of music pursuant to different
 26 broadcast spectrum licenses from the Federal Communications Commission in
 27 different parts of the country—all compete with each other for anything (listeners,
 28 advertisers, or PRO licenses) is an absurd one that RMLC vigorously disputes. *See*
 FAC ¶¶ 50-55 (alleging that all 10,000 RMLC members are horizontal competitors).
 However, as set forth below, even if the Court were to accept such a ridiculous claim

1 Compl. (“FAC”) ¶ 44, ECF No. 23. Since 1935, RMLC’s mission has been to
2 “negotiate public-performance-right license fees with performance rights
3 organizations for the benefit of its members and the commercial radio industry.” *Id.*
4 ¶¶ 46, 58. For many “decades” RMLC has negotiated license fees and terms with
5 the two largest performing rights organizations (or PROs), ASCAP and BMI,
6 pursuant to the terms of antitrust consent decrees that have bound each of those
7 PROs for nearly 80 years. *Id.* ¶¶ 26-27, 46. The consent decrees exist because, by
8 aggregating together the right to license large numbers of separate copyrights,
9 ASCAP and BMI have immense “market power in setting license fees.” *Id.* ¶¶ 27,
10 28-29. The consent decrees were put in place, and have endured for these many
11 decades, despite the existence of RMLC and its role in negotiating license fees with
12 ASCAP and BMI. *Id.* ¶¶ 27-29, 47. This is because, without the decrees, RMLC
13 would be powerless to discipline the PROs’ pricing.

14 The ASCAP and BMI consent decrees are overseen and enforced by two
15 federal “rate courts” in the U.S. District Court for the Southern District of New York.
16 *Id.* ¶ 3. Over these many “decades,” if either PRO was unable to agree on licensing
17 terms with RMLC for the benefit of RMLC’s members, the dispute has been
18 presented to the rate court and the court has determined a reasonable rate, or the
19 parties have reached a settlement ratified by the court. *Id.* ¶ 3, 48. As a result, the
20 rates that RMLC has negotiated with ASCAP and BMI have been “ordered,
21 adjudged and decreed” by two separate federal courts to be lawful, “reasonable,”
22 and “non-discriminatory.” *See, e.g.,* Final Order ¶ 1, *Withers Broad. Co. of Ill., LLC*
23 *v. Broad. Music, Inc.*, 1:10-cv-04779-LLS (S.D.N.Y. Aug. 20, 2012), ECF No. 59
24 (“BMI Order”) (attached herein as Attachment A); Final Order ¶ 1, *In re Application*
25 *of the Cromwell Grp.*, 1:10-cv-05210-DLC (S.D.N.Y. Jan. 30, 2012), ECF No. 20
26 (“ASCAP Order”) (attached herein as Attachment B).

27 _____
28 for purposes of this motion, it should still dismiss GMR’s complaint for multiple
separate reasons.

1 The federal rate courts have not only permitted RMLC to litigate these rate-
2 setting matters on behalf of its thousands of members, and expressly ratified the
3 fairness of agreements between the RMLC and PROs, but also have found that
4 RMLC’s contributions to the PRO rate-setting process are so beneficial that the
5 courts have *ordered* radio stations (both RMLC members and non-members) to pay
6 RMLC fees to fund the costs of the rate court proceedings as well as “RMLC’s
7 ongoing representation of radio stations in regard to music licensing.”⁶

8 **B. RMLC Successfully Sued A Third PRO, SESAC, To Allow A**
9 **Neutral Arbitrator To Decide Rates**

10 In 2012, when a third PRO, SESAC, that is not subject to a consent decree,
11 sought to impose supracompetitive price increases on RMLC’s members, RMLC
12 sued SESAC in the U.S. District Court for the Eastern District of Pennsylvania for
13 an injunction that would require SESAC to resolve rate disputes through a process
14 similar to the rate courts. FAC ¶ 46 n.1 (citing RMLC’s Complaint in *Radio Music*
15 *License Comm., Inc. v. SESAC, Inc., et al.*, No. 2:12-cv-05807-CDJ (E.D. Pa. Oct.
16 11, 2012)), ECF No. 1.

17 After the federal court found that RMLC was likely to succeed on the merits
18 of its antitrust claim, SESAC decided to settle the case by agreeing, among other
19 things, that for the next 20 years, it will try to negotiate reasonable rates and terms
20 with RMLC and, if the parties cannot agree, a neutral arbitrator will determine the
21 rates for RMLC’s members. *Id.* ¶ 48; *see also Radio Music License Comm., Inc. v.*
22 *SESAC*, 2013 WL 12114098, at *13-20 (E.D. Pa. Dec. 20, 2013); *Radio Music*
23 *License Comm. v. SESAC*, 29 F. Supp. 3d 487, 502-03 (E.D. Pa. 2014) (denying
24 SESAC’s motion to dismiss RMLC’s Section 2 claim). Pursuant to the litigated

25
26 ⁶ BMI Order ¶ 5; ASCAP Order ¶ 5; *see also* FAC ¶ 50 (identifying stations
27 that are “required by court order to pay fees to support the RMLC’s operational
28 expenses”); *id.* ¶ 102 (alleging “court-mandated fee to fund the RMLC’s operations,
which radio stations pay regardless of whether or not they are members of the
RMLC”).

1 settlement agreement, RMLC and SESAC engaged in the first such arbitration in
2 early 2017 (FAC ¶¶ 48, 58) and the neutral arbitrator ultimately ruled that the rates
3 that SESAC had been demanding from radio stations were 60% too high. The
4 complaint does not allege that, prior to the results of this 2017 litigation-driven
5 arbitration, any RMLC member ever paid SESAC a rate that RMLC had
6 negotiated—because no station ever had.⁷

7 In each of the litigated resolutions with ASCAP, BMI, and SESAC, every
8 radio station has had the choice to decide for itself whether it wished to be bound by
9 the outcome of the rate-setting proceedings by the neutral decision maker, or to
10 proceed with its own separate negotiations with the PRO. *Id.* ¶¶ 57-58. Many
11 stations have chosen to be bound, and thousands of others have sometimes chosen
12 not to be bound despite RMLC supposedly urging them to do so. *Id.* (alleging that
13 only 7,300 stations decided to opt in to the SESAC arbitration conducted pursuant
14 to the litigation settlement); *id.* ¶ 99.

15 **C. RMLC Sued GMR In November 2016 To Allow A Neutral Third**
16 **Party To Determine Reasonable Rates For A GMR License**

17 GMR first emerged on the scene in 2013 as a brand new PRO with a very
18 specific business model. FAC ¶¶ 20, 37. It lured away certain artists from their
19 “existing performing rights organizations” (*i.e.*, ASCAP and BMI) where licenses
20 to their works had been available to RMLC members at rates that federal courts had
21 deemed reasonable. *Id.* ¶¶ 20, 42; BMI Order ¶ 1; ASCAP Order ¶ 1. “GMR set
22 out to pay th[ose] songwriters more money” than their prior PROs, by charging
23 music users, like RMLC’s members, “increased license fees” compared with what
24 ASCAP and BMI had charged for those same exact songs. FAC ¶¶ 20, 37.

25

26 ⁷ RMLC sent the October 28, 2015 letter that GMR calls a “smoking gun”
27 (FAC ¶ 111) to its members just a few months after the ink was dry on the litigation
28 settlement with SESAC. The letter addresses only that litigated settlement; it does
not mention anything about GMR, as the complaint makes clear.

1 GMR admits that it was the one that approached RMLC seeking to negotiate
2 license terms that would be made available to all of RMLC’s members, not the other
3 way around. *Id.* ¶ 61. GMR also admits that it made a proposal to RMLC “covering
4 all RMLC stations.” *Id.* ¶ 71. Notably, GMR did not elect to start its business by
5 directly approaching *any* (much less all) of RMLC’s 10,000 member-stations
6 individually; it chose to start with RMLC. *See id.* The reasons are obvious. GMR’s
7 entire business model supposedly is predicated on “running a lean, cost-efficient
8 operation” with “reduced overhead” and a little over a dozen employees.
9 FAC ¶¶ 36-37, 40. Negotiating individually with 10,000 radio stations or even 3,000
10 separate radio groups would destroy that business model. *See id.* ¶ 33 (alleging that
11 it is more efficient for radio stations to negotiate with a PRO than with each of their
12 many songwriters; and alleging that it would be “highly impractical” for copyright
13 owners to enter into licenses “with each of the thousands of radio stations”). GMR
14 alleges that it took over a year to negotiate individual contracts with just two radio
15 groups, iHeart and Townsquare. *Id.* ¶ 74.

16 The complaint also admits that RMLC asked GMR to agree to allow a neutral
17 arbitrator to decide the rates that radio stations should pay GMR, similar to the way
18 that radio stations deal with ASCAP, BMI, and SESAC. *Id.* ¶ 73. Obviously, if the
19 rates that GMR was demanding were justified and reasonable, then it should have
20 had no concern about making its case to an arbitrator. But GMR steadfastly refused
21 to entertain the idea of a neutral decision-maker. *Id.* While RMLC was having these
22 discussions with GMR, GMR was simultaneously negotiating directly with two of
23 RMLC’s Board Members and the first and third largest broadcasters in the U.S.—
24 iHeart and Townsquare—for direct license deals that each ultimately signed.
25 *Id.* ¶ 74. And other unidentified RMLC members were individually “inquir[ing]”
26 about a license from GMR. *Id.* ¶ 69.

27 GMR ultimately refused to allow a neutral third-party to determine rates.
28 Fearing its members’ potential exposure to infringement claims from GMR

1 beginning on January 1, 2017 (FAC ¶ 123), on November 18, 2016, RMLC filed an
2 antitrust complaint against GMR in the Eastern District of Pennsylvania seeking
3 various forms of equitable relief, including an injunction setting forth a process by
4 which a neutral party (akin to the ASCAP and BMI rate courts) could determine
5 reasonable rates. *Id.* ¶ 76.⁸

6 On that same day RMLC also filed an emergency motion for preliminary
7 injunction to stop GMR “from imminently and irreparably injuring U.S. commercial
8 radio stations on January 1, 2017” because that was the date that GMR had
9 “implicitly threatened to start suing radio stations for copyright infringement.”⁹ It is
10 that preliminary injunction motion that GMR is purporting to describe in paragraph
11 76 of the complaint. In that preliminary injunction motion, RMLC requested only
12 interim relief as the litigation played out in the form of (1) requiring GMR, during
13 the duration of the litigation, to offer radio stations a license to its repertory “at a
14 reasonable rate that is proportional to the annual rates that each station pays to
15 ASCAP and BMI” because federal courts had deemed those rates “reasonable” and
16 (2) prohibiting GMR from suing any station for copyright infringement “until such
17 station has had fair opportunity to consider, and has rejected, participation in such a
18 reasonable license.”¹⁰

19 To resolve RMLC’s preliminary injunction motion, GMR agreed to offer all
20 U.S. commercial radio stations a nine-month interim license beginning January 1,
21 2017 (which it has subsequently extended on several occasions), the existence and
22 terms of which both parties have agreed not to use against each other for any
23

24 ⁸ See *Radio Music License Comm., Inc. v. Global Music Rights, LLC*, No. 2:16-
25 cv-06076-CDJ (E.D. Pa. Nov. 18, 2016).

26 ⁹ Pl. Radio Music License Comm.’s Mem. of Law in Supp. of Mot. for a Prelim.
27 Inj. (“Preliminary Injunction Mot.”) at 1-2, *Radio Music License Committee, Inc. v.*
28 *Global Music Rights, LLC*, No. 2:16-cv-06076-CDJ (E.D. Pa. Nov. 18, 2016), ECF
No. 3.

¹⁰ *Id.* at 3-4.

1 purpose.

2 **D. The Complaint Does Not Allege That Any RMLC Member Refused**
3 **To Buy A License From GMR At A Point In Time When It Actually**
4 **Needed Such A License**

5 The complaint does not identify any radio station that ever refused to enter
6 into a direct license with GMR at all, much less because of that station’s connection
7 to RMLC. At best, the complaint alleges that some unidentified radio stations
8 owners, at some unspecified point in time “directed [GMR] to the RMLC.”
9 *Id.* ¶¶ 74, 123. Who? When? And directed to RMLC for what purpose? The
10 complaint does not say.

11 Details matter here because, on its face, the complaint does not allege that any
12 radio station ever failed to buy a license from GMR at a time when it actually needed
13 a license from GMR to avoid copyright infringement. Despite forming in 2013,
14 GMR does not allege that it actually had the right to license *any* copyrights at all
15 until January 1, 2015. FAC ¶ 74. And, even at that point, it only claims to have had
16 the rights to “certain works” from a small handful of artists who had chosen to leave
17 BMI and sign up with GMR. *Id.*; *see also id.* ¶ 122 (alleging the right to license
18 only “certain songs” as of January 1, 2015). The complaint does not identify those
19 particular songs or the songwriters. Indeed, the complaint does not identify any of
20 the works that GMR had the right to license to radio stations between its formation
21 in 2013 and December 31, 2016. It also does not allege that GMR ever identified
22 any such works to any RMLC member or ever accused any RMLC member of
23 infringing any such works. Instead, the complaint merely alleges that, at some
24 unidentified point in time, **BMI** (not GMR) posted on BMI’s website that, as of
25 January 1, 2015, certain works from five artists might no longer be covered by the
26 existing BMI license. FAC ¶¶ 74, 122-23. But the complaint does not allege that
27 any RMLC member (much less all 10,000 of them) ever saw or would have had any
28 reason to see this passive posting on BMI’s website. What would have caused any
of them to look at this particular page on BMI’s website at this particular time?

1 On the other hand, the complaint does acknowledge that, for at least the vast
2 majority of the works in GMR’s repertory, RMLC members had a good faith reason
3 to believe that GMR did not have the right to bring copyright infringement claims
4 against them until after December 31, 2016. FAC ¶¶ 122-23. That is because
5 GMR’s affiliates all came from ASCAP or BMI, and RMLC’s members understood
6 that they were protected from copyright infringement claims for those affiliates’
7 works until the radio stations’ existing “license[s]-in-effect” with ASCAP and BMI
8 expired on December 31, 2016. *Id.* Thus, prior to December 31, 2016, no radio
9 station needed (or believed that it needed) a license from GMR for the works covered
10 by its existing licenses-in-effect with ASCAP and BMI. And the complaint does not
11 identify any station who actually knew or believed that it needed a license from
12 GMR for *any other particular work* not covered by the licenses-in-effect that did not
13 buy a license from GMR. *See id.* ¶ 74.

14 **ARGUMENT**

15 A motion for judgement on the pleadings pursuant to Fed. R. Civ. P. 12(c)
16 should be granted after the pleadings have closed when, “taking all allegations in the
17 pleading as true, the moving party is entitled to judgment as a matter of law.”
18 *Gordey v. Bank of Am., Nat’l Ass’n*, 2015 WL 12811259, at *1 (C.D. Cal. Jan. 6,
19 2015). “Because a motion for judgment on the pleadings is functionally identical to
20 a motion to dismiss, the standard for a Rule 12(c) motion is the same as for a Rule
21 12(b)(6) motion.” *Id.*

22 “On a motion to dismiss in an antitrust case, a court must determine whether
23 an antitrust claim is ‘plausible’ in light of basic economic principles.” *William O.*
24 *Gilley Enters., Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 662 (9th Cir. 2009) (citing
25 *Bell Alt. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A claim is plausible “when
26 the plaintiff pleads factual content that allows the court to draw the reasonable
27 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*,
28 556 U.S. 662, 678 (2009). To that end, the complaint must do more than plead “facts

1 that are ‘merely consistent with’ a defendant’s liability,” *id.*, and must provide more
2 than “a formulaic recitation of the elements of a cause of action,” *Bell Alt. Corp. v.*
3 *Twombly*, 550 U.S. 544, 555 (2007). The party seeking relief must plead “enough
4 fact[s] to raise a reasonable expectation that discovery will reveal evidence” of the
5 specific harm alleged; if not, the complaint must be dismissed. *Id.* at 556. GMR has
6 not met these requirements here.

7 **I. THE COMPLAINT DOES NOT PLAUSIBLY ALLEGE THE**
8 **EXISTENCE OF A CONSPIRACY AMONG 10,000 RADIO**
9 **STATIONS TO BOYCOTT GMR**

10 **A. To Plausibly Allege An Agreement In Violation Of The Antitrust**
11 **Laws, GMR Was Required To Allege More Than Mere Parallel**
12 **Conduct By RMLC’s Members To Not Buy A License**

13 The threshold question for the Court to address is whether GMR has alleged
14 facts that plausibly suggest that all 10,000 of RMLC’s members actually agreed *with*
15 *each other* to do something that they intended would harm competition. If GMR
16 has not plausibly alleged this predicate element—an actual agreement among at least
17 3,000 separate entities—then all of its claims fail without any need for further
18 inquiry.

19 To state a claim under Section 1 of the Sherman Act, a claimant “must plead
20 not just ultimate facts (such as a conspiracy), but evidentiary facts that, if true, will
21 prove: (1) a contract, combination or conspiracy among two or more persons or
22 distinct business entities; (2) by which the persons or entities intended to harm or
23 restrain trade or commerce among the several States, or with foreign nations;
24 (3) which actually injures competition.” *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042,
25 1047-48 (9th Cir. 2008) (affirming dismissal of Section 1 claim on grounds that
26 plaintiffs “pleaded only ultimate facts, such as conspiracy, and legal conclusions”
27 and “failed to plead the necessary evidentiary facts to support those conclusions”);
28 *see also Twombly*, 550 U.S. at 556-57. “[A] conclusory allegation of agreement at
some unidentified point does not supply facts adequate” to allege the existence of a
conspiracy. *Twombly*, 550 U.S. at 557. Rather, at the pleading stage, a viable claim

1 requires factual “allegations plausibly suggesting (not merely consistent with)
2 agreement.” *Id.*

3 On its face, GMR’s complaint is no model of clarity as to what supposed
4 agreement GMR contends violates Section 1. Thus, RMLC posed that direct
5 question to GMR prior to filing this motion during the parties’ meet and confer
6 pursuant to Local Rule 7-3. Although the complaint makes a variety of (in RMLC’s
7 view, absurd) allegations about the legality of RMLC’s mere existence and of the
8 rates that RMLC has supposedly negotiated with other PROs, GMR confirmed that
9 none of those is the purported agreement that GMR alleges violates Section 1 and
10 injured it. It remains unclear whether the reason that GMR made this admission is
11 that RMLC previously sent GMR a Rule 11 letter threatening sanctions for pressing
12 any such arguments.¹¹

13 Instead GMR made clear during the LR 7-3 meet and confer, as it did in its
14 opposition to RMLC’s motion to dismiss for lack of subject matter jurisdiction (ECF

15
16 ¹¹ RMLC’s right to participate in the ASCAP and BMI rate-setting proceedings
17 in federal court established by the consent decrees, and RMLC’s role in the
18 litigation-settlement driven arbitration with SESAC—the only time RMLC has been
19 involved in determining the rates that radio stations paid SESAC—is, of course, fully
20 protected under the First Amendment and the *Noerr-Pennington* doctrine. *See, e.g.,*
21 *Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49
22 (1993) (right to participate in litigation is protected by the First Amendment and
23 immune from liability under the antitrust laws); *Omni Resource Dev. Corp. v.*
24 *Conoco, Inc.*, 739 F.2d 1412, 1413 (9th Cir. 1984) (“The fundamental right of
25 petition to the courts lies at the center of a system designed to invite the resolution
26 of private grievances and claims by an impartial tribunal.”). And any attempt to
27 attack, as anticompetitively low, the rates that the federal rate courts found
28 “reasonable” would run afoul of the filed rate doctrine and federal comity by asking
this Court to second-guess the rate courts’ conclusions. *See Bourne Co. v. Hunter*
Country Club, Inc., 990 F.2d 934, 937-38 (7th Cir. 1993) (“We also agree with the
district court that as a matter of comity the Amended Consent Decree should be
interpreted in the Southern District of New York.”); *see also Cty. of Stanislaus v.*
Pac. Gas & Elec. Co., 114 F.3d 858, 863, 866 (9th Cir. 1997) (concluding that filed
rate doctrine bars antitrust claims based on rates determined by federal agency to be
“just and reasonable”).

1 No. 35), that its antitrust claim is predicated on a supposed conspiracy among all
2 10,000 of RMLC’s member-stations—or at least those other than the thousand-plus
3 owned by iHeartMedia and Townsquare that actually took licenses—to boycott
4 GMR in the time before it filed its initial complaint on December 6, 2016.¹² So what
5 are the facts that GMR alleges from which this Court could conclude that it is
6 plausible that 10,000 radio stations all agreed with each other not to buy a license
7 from GMR? The answer is none.

8 The complaint does not allege that all 10,000 radio stations ever
9 communicated with each other about a boycott of GMR. Indeed, the only GMR-
10 related communication that the complaint alleges that every RMLC member
11 received expressly told all members that “*every broadcaster is free to determine*
12 *whether the best course for it is to negotiate a license with GMR directly.*”
13 FAC ¶ 68 (emphasis added). And, as noted, the complaint (to its credit) actively
14 alleges that two of the largest broadcasters in the country, comprising over 1,100
15 stations, did precisely that and other stations “inquired” about doing it, in direct
16 conflict with a supposed agreement to boycott. *Id.* ¶¶ 69, 71. The former point bears
17 further emphasis: the RMLC’s alleged conspiracy supposedly was an air-tight,
18 across-the-board plan by all radio stations to refuse to deal with GMR—except for
19 two of the three largest station owners in the country, who sit on RMLC’s Board and
20 actually entered license agreements. *See Lenhoff Enters., Inc. v. United Talent*
21 *Agency, Inc.*, 729 F. App’x 528, 531 (9th Cir. 2018) (rejecting Section 1 claim where

22
23 ¹² The sole claim that this Court found ripe for GMR to pursue was a claim for
24 “past injury due to [RMLC’s] member stations’ failure to negotiate for licenses”
25 prior to GMR filing its lawsuit on December 6, 2016. Order Regarding Def.’s Mot.
26 to Dismiss Pl.’s First Am. Compl. at 8-9 n.3 (ECF No. 40). By limiting GMR’s
27 claim to this “past injury,” the Court did not need to address the interim license that
28 has been available to RMLC’s member since January 1, 2017 as a result of RMLC’s
November 2016 lawsuit and preliminary injunction motion. *Id.* GMR, of course, is
precluded from using any station’s decision to take or not to take that license as
evidence of anything in this case.

1 complaint showed transactions “on several occasions in the relevant timeframe” that
2 were inconsistent with the conspiracy alleged).

3 Ultimately, the complaint bases the entire conspiracy theory on the bare fact
4 that most (but certainly not all) of RMLC’s members did not buy a license from
5 GMR prior to December 6, 2016. A conspiracy claim based on a group of similarly
6 situated defendants all behaving the same way around the same time in response to
7 similar market conditions is well studied in antitrust jurisprudence. This type of
8 behavior is known as “parallel conduct,” and pleading it does *not* state a violation of
9 Section 1.

10 “[M]ere allegations of parallel conduct—even consciously parallel conduct—
11 are insufficient to state a claim under § 1.” *In re Musical Instruments & Equip.*
12 *Antitrust Litig.*, 798 F.3d 1186, 1193 (9th Cir. 2015). In order to “distinguish[]
13 permissible parallel conduct from impermissible conspiracy,” courts must look for
14 certain “plus factors.” *Id.* at 1194. “Whereas parallel conduct is as consistent with
15 independent action as with conspiracy, plus factors are economic actions and
16 outcomes that are largely inconsistent with unilateral conduct but largely consistent
17 with explicitly coordinated action.” *Id.* (citing *Twombly*, 550 U.S. at 557 n.4). A
18 plaintiff must sufficiently plead enough of these additional facts to place the parallel
19 conduct “in a context that raises a suggestion of preceding agreement.” *Id.* (quoting
20 *Twombly*, 550 U.S. at 557). As discussed below, GMR has not done so.

21 **B. GMR Has Not Plausibly Alleged Any Circumstantial “Plus**
22 **Factors” From Which This Court Could Reasonably Conclude**
23 **That Parallel Conduct By Some Of RMLC’s Members Was The**
24 **Product Of An Antecedent Agreement Among All 10,000 Of Them**

24 These are the “plus factors” that GMR attempts to allege:

25 1. Opportunity to conspire. The complaint alleges that all 10,000 stations
26 are members of (and fund) the RMLC, that some of them serve on RMLC’s Board
27 of Directors and Executive Committee, and that some of them occasionally attend
28 the same industry meetings. FAC ¶¶ 63-65. However, it is well-settled that mere

1 participation in a trade association is not sufficient to establish an unlawful
2 agreement to violate the antitrust laws. *Lenhoff Enters., Inc.*, 729 F. App'x at 530
3 (declining to infer agreement from “facts [that] amount to nothing more than an
4 allegation that defendants participated in a lawful trade organization”); *In re Musical*
5 *Instruments*, 798 F.3d at 1196 (“But mere participation in trade organization
6 meetings where information is exchanged and strategies are advocated does not
7 suggest an illegal agreement.”); *In re Late Fee and Over-Limit Fee Litig.*, 528 F.
8 Supp. 2d 953, 963-64 (N.D. Cal. 2007) (concluding that “courts have consistently
9 refused to infer the existence of a conspiracy” from membership in industry-wide
10 trade associations) (citation omitted); *see also Twombly*, 550 U.S. at 567 n.12
11 (rejecting the argument that a conspiracy is shown “just because [a hypothetical
12 pinmaker] belonged to the same trade guild as one of his competitors when their pins
13 carried the same price tag”). Thus, it certainly cannot be sufficient to plausibly
14 allege an agreement specifically to boycott GMR, particularly when the complaint
15 *also* alleges that (i) two RMLC Board Members (one of whom sits on the Executive
16 Committee) actually bought licenses, (ii) other members “inquired” about doing so,
17 and (iii) RMLC told each member to make its own decision about GMR. FAC ¶¶
18 68-69.

19 2. Common motive to conspire. GMR alleges that all RMLC members
20 share the same common desire to want to keep their PRO licensing fees as low as
21 possible. Of course they do. Every business in America shares the common desire
22 to want to keep the costs of inputs necessary for its business as low as possible. That
23 type of common “motive” to increase profits “always exists” among all firms
24 everywhere; it “does not suggest an agreement” and is “insufficient to plead a
25 [Section] 1 violation.” *In re Musical Instruments*, 798 F.3d at 1193-94; *see also In*
26 *re Late Fee*, 528 F. Supp. 2d at 964 (same).

27 3. Actions against self-interest. GMR alleges that “[i]t makes no
28 economic sense, absent a horizontal conspiracy between and among the radio

1 stations and the RMLC, that these stations would not try to avoid potential copyright
2 infringement liability by at least seeking a direct license with GMR.” FAC ¶ 124.
3 Thus, according to GMR, when no stations allegedly reached out to GMR seeking a
4 license, “[t]he *only plausible explanation* for the collective failure of individual
5 radio stations to negotiate a license with GMR (or, alternatively to stop infringing
6 on GMR works) is that they are assured their competitors likewise will boycott
7 GMR.” *Id.* ¶ 126 (emphasis added). Really?

8 How about this explanation, which the complaint itself contemplates (and also
9 happens to be true): Most of RMLC’s members did not know, or did not believe,
10 that they needed a license from GMR prior to December 31, 2016 (when their
11 licenses-in-effect with ASCAP and BMI expired), and the ones that did either signed
12 licenses with GMR, “inquired” about doing so, and/or decided to await the outcome
13 of the antitrust lawsuit that RMLC had filed on their behalf which expressly sought
14 a preliminary injunction from a federal court to force GMR to offer them reasonable
15 licensing terms before December 31, 2016. FAC ¶¶ 69, 74, 76, 122-23. It is
16 unquestionably in the unilateral self-interest of every radio station not to overpay
17 GMR for a license and to instead seek relief from a court.¹³ The fact that a group of
18 defendants reacted the same way to “pressure and coercion” from a single entity is
19 not sufficient to plead that each was acting against its own unilateral self-interest.
20 *See In re Musical Instruments*, 798 F.3d at 1195.

21 Moreover GMR’s theory makes no sense. GMR claims that radio stations
22 would only risk the \$150,000 per work liability for copyright infringement (17
23 U.S.C. § 504(c)(2)) if “they are assured their competitors likewise will boycott
24

25 ¹³ The complaint makes clear that GMR’s antitrust claim is not based on
26 RMLC’s decision to sue GMR. FAC ¶ 76 n.4. That is because the decision of
27 RMLC and its members to sue GMR is protected by the First Amendment and cannot
28 be used to establish antitrust liability. *See Omni Resource Dev. Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1413 (9th Cir. 1984) (“The general rule is that petitions to induce lawful government action are immune from attack under the antitrust laws.”).

1 GMR.” FAC ¶ 126. But agreeing with other radio stations to boycott GMR would
2 not insulate any radio station from copyright infringement liability. Any station that
3 actually played a GMR work without a necessary license would be at risk of
4 infringement liability, regardless whether 10,000 other radio stations were also at
5 risk. Indeed, the suggestion that 10,000 radio stations were supposedly willfully
6 infringing GMR’s works makes it all the more *implausible* that they were acting
7 conspiratorially, rather than in accordance with their own unilateral self-interest not
8 to overpay GMR and to instead await the outcome of RMLC’s lawsuit and
9 preliminary injunction motion. Mutually assured destruction is hardly a rational
10 business decision.

11 **II. GMR’S SECTION 1 CLAIM ALSO FAILS BECAUSE GMR WAS**
12 **REQUIRED TO ALLEGE THAT THE PURPORTED BOYCOTT**
13 **HARMED COMPETITION IN THE ALLEGEDLY RELEVANT**
14 **MARKET, BUT IT FAILED TO DO SO**

15 Even if GMR had plausibly alleged that all 10,000 of RMLC’s members
16 conspired with each other to boycott GMR (which it has not), its claims still fail for
17 two other independent reasons. We address the first here, and the second in Section
18 III below.

19 Merely pleading an agreement among a group of companies is not sufficient,
20 by itself, to state a violation of Section 1 of the Sherman Act. *Kendall*, 518 F.3d at
21 1049. Section 1 only prohibits agreements that unreasonably restrain trade. *In re*
22 *Musical Instruments*, 798 F.3d at 1191. Some agreements are considered *per se*
23 unreasonable violations of Section 1 (*i.e.*, deemed unreasonable without regard to
24 any potential pro-competitive justifications) because they “always or almost always
25 tend to restrict competition and decrease output.” *Id.* Other agreements must be
26 judged under the so-called “rule of reason” where their potential harm to competition
27 must be weighed against their procompetitive benefits. *Id.*

28 GMR claims that the particular boycott conspiracy it alleges here either
“constitutes a *per se* violation of Section 1 of the Sherman Act” or, alternatively,

1 “constitutes an unreasonable restraint on trade” under the rule of reason.
2 FAC ¶¶ 139-140. The allegations in the complaint do not support either claim.

3 **A. The Group Boycott That GMR Alleges Cannot Be A *Per Se***
4 **Violation Of The Sherman Act As A Matter Of Law; The Court**
5 **Must Assess The Claim Under The Rule Of Reason**

6 Certain types of group boycotts are considered *per se* unreasonable violations
7 of Section 1, and other types of group boycotts must be judged under the rule of
8 reason. It is an all too common practice for plaintiffs to try to force their claims
9 “into the ‘boycott’ pigeonhole and invoke[e] the *per se* rule.” *FTC v. Ind. Fed’n of*
10 *Dentists*, 476 U.S. 447, 458 (1986). But the Supreme Court has cautioned that “care
11 is [] necessary in defining the category of concerted refusals to deal that mandate
12 *per se* condemnation” because “[t]here is more confusion about the scope and
13 operation of the *per se* rule against group boycotts than in reference to any other
14 aspect of the *per se* doctrine.” *Nw. Wholesale Stationers, Inc. v. Pac. Stationery &*
15 *Printing Co.*, 472 U.S. 284, 294 (1985). Fortunately, the Ninth Circuit has distilled
16 the Supreme Court’s teachings into a simple standard—which GMR patently fails
17 to satisfy. *See Adaptive Power Sols., LLC v. Hughes Missile Sys., Co.*, 141 F.3d 947,
18 949-50 (9th Cir. 1998). In *Adaptive Power Solutions*, the Ninth Circuit held that a
19 group boycott cannot be *per se* unreasonable unless it is designed to “disadvantage
20 a competitor” of the alleged conspirators. *Id.* at 950. Where the purported boycott
21 was not done with the intention of harming a competitor to the conspirators, the
22 boycott must be assessed under the rule of reason. *Id.*

23 In *Adaptive*, it was undisputed that two horizontal competitors—Raytheon
24 and Hughes—agreed with each other to boycott a supplier of a particular part that
25 they both otherwise competed to buy for the missiles that they both manufactured
26 and competed to sell to the Department of Defense. *Id.* at 949. It likewise was
27 undisputed that Raytheon and Hughes engaged in the concerted boycott because they
28 did not like that the supplier was trying to charge a price for the part that they thought

1 was too high, and that they not only intended for the boycott to put the supplier out
2 of business, but that it actually did so. *Id.* The Ninth Circuit held that these facts
3 did not state a *per se* violation of Section 1 because, although Raytheon and Hughes
4 were competitors, there were no other competitors for the particular part at issue and
5 therefore the boycott did not “disadvantage a competitor” to Raytheon or Hughes.
6 *Id.* at 950. The Court explained that the *per se* rule was reserved for boycotts “in
7 which firms with market power boycott suppliers *in order to discourage them from*
8 *doing business with a competitor.*” *Id.* (quoting *Ind. Fed’n of Dentists*, 476 U.S. at
9 458); *see also, e.g., Bay Area Surgical Mgmt. LLC v. Aetna Life Ins. Co.*, 2016 WL
10 3880989, at *12 (N.D. Cal. July 18, 2016) (“This Court follows the approach
11 articulated by the Supreme Court in *NYNEX* and *Nw. Wholesale* and Plaintiffs must
12 allege a horizontal agreement between companies to disadvantage direct competitors
13 in order to invoke the *per se* approach.”).

14 Here, GMR does not even allege a *horizontal* agreement among *competitors*
15 for copyright licenses;¹⁴ however, even if it did, it certainly does not allege that the
16 purported group boycott was designed to disadvantage any competitor of RMLC or
17 of RMLC’s members. The complaint does not even identify any potential
18 competitors of RMLC or its members, much less articulate how a boycott of GMR
19 was possibly intended to disadvantage such a competitor. Because GMR fails to
20 allege that the “boycott” at issue was designed to disadvantage a competitor of
21 RMLC or its members, under the binding law of this Circuit, GMR’s Section 1 claim
22 cannot be a *per se* violation of the antitrust laws. It must be judged under the rule of

23

24 ¹⁴ More precisely, the complaint does not allege any *facts* to support its
25 conclusory allegation that RMLC’s members are horizontal competitors for the
26 supposedly relevant product—a *copyright broadcast license*. For example, the
27 complaint does not allege any facts demonstrating that any radio station ever has
28 competed or ever would have any reason to compete with any other radio station to
buy a copyright license—a non-scarce good for which the marginal cost of
production is essentially zero—from a PRO.

1 reason.

2 The Court should not be fooled by GMR’s attempt to dress its group boycott
3 claim up as a horizontal “price fixing” claim. *E.g.*, FAC ¶ 136. First, the complaint
4 itself contradicts GMR’s fictional characterization of RMLC’s alleged proposal as
5 “sell to us at \$X price, or our stations will not buy from you.” GMR admits that
6 RMLC asked it to agree to have a neutral arbitrator determine rates. FAC ¶ 73. In
7 other words, the complaint itself pleads that RMLC was not insisting on any fixed
8 price at all, much less a supposedly artificially suppressed one. The complaint
9 contemplates that, if the arbitrator had agreed with GMR, it could have received the
10 rates that it was demanding in its own proposal to radio stations. *See* FAC ¶ 71
11 (alleging GMR made a proposal to all RMLC stations). Second, and in any event,
12 the Ninth Circuit has made clear that the type of group boycott claim alleged here is
13 not a price fixing claim as a matter of law. In *Adaptive*, it held that a claim that
14 buyers collectively “refuse[d] to deal with a high-priced supplier” “has nothing to
15 do with a price fixing conspiracy among competitors who agree among themselves
16 to fix their prices.” 141 F.3d at 950.

17 **B. GMR Has Not Pled A Viable Section 1 Claim Under The Rule Of**
18 **Reason Because It Has Not Alleged Harm To Competition In The**
19 **Supposedly Relevant Market**

20 To state a violation of Section 1 under the rule of reason, GMR was required,
21 at a minimum, to allege that the purported boycott *harmed competition* in the
22 particular market that it alleges is the relevant one, *i.e.*, “the market for licenses to
23 broadcast copyrighted music on terrestrial commercial radio stations in the United
24 States.” FAC ¶ 82.¹⁵ *See Adaptive*, 141 F.3d at 950-51 (“Proving injury to
25 competition in a rule of reason case requires a claimant to prove the relevant market

26 ¹⁵ Although RMLC is not challenging GMR’s purported relevant market in this
27 motion, RMLC does not concede that it is legally cognizable. If GMR’s complaint
28 somehow were to survive this motion, then RMLC will demonstrate that this alleged
market is deficient as a matter of law.

1 *and to show the effects of competition within that market.*”) (internal quotation and
2 citation omitted); *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198 (9th Cir.
3 2012) (to state a rule of reason violation, plaintiff must plead sufficient factual detail
4 to explain how the challenged practice harmed competition).

5 To allege the necessary harm to competition, GMR was required to allege
6 more than that the supposed boycott injured **GMR**. *Brantley*, 675 F.3d at 1198 (to
7 withstand a motion to dismiss, “plaintiffs must plead an injury to competition
8 beyond the impact on the plaintiffs themselves”). GMR was required to allege that
9 the purported boycott injured **competition** (*i.e.*, the competitive process) in “the
10 market for licenses to broadcast copyrighted music on terrestrial commercial radio
11 stations” (FAC ¶ 82), by, for example, alleging an actual reduction in the nature or
12 number of competitors in that purportedly relevant market. *Adaptive*, 141 F.3d at
13 951. This requirement exists because “[t]he antitrust laws were enacted for ‘the
14 protection of **competition**, not **competitors**.’” *Atl. Richfield Co. v. USA Petroleum*
15 *Co.*, 495 U.S. 328, 338 (1990) (“*ARCO*”) (quoting *Brown Shoe Co. v. United States*,
16 370 U.S. 294, 320 (1962)) (emphasis in original). “[The] failure to allege injury to
17 competition is a proper ground for dismissal by judgment on the pleadings.” *Tanaka*
18 *v. Univ. of S. Cal.*, 252 F.3d 1059, 1064 (9th Cir. 2001) (affirming dismissal of
19 antitrust claims with prejudice for failure, *inter alia*, to allege harm to competition
20 in a properly defined relevant market).

21 Here again, GMR fails to satisfy a requisite element of the claim it is asserting.
22 GMR certainly alleges that the boycott injured it, but it nowhere goes beyond that to
23 explain how the boycott harmed **competition** in the purportedly relevant market “for
24 licenses to broadcast copyrighted music on terrestrial commercial radio stations in
25 the United States.” FAC ¶ 82. GMR does not even allege who the competitors are
26 in this purported market other than itself, and certainly does not allege that the
27 boycott reduced the number of competitors or impeded any of the existing ones from
28 competing at all in that supposed market. The complaint merely alleges that GMR

1 did not sell as many licenses or make as much money as it would have liked to do.
2 That is not harm to competition as a matter of law.

3 *Adaptive* is instructive, once again. There the Ninth Circuit concluded that
4 the plaintiff had not established that the boycott harmed competition in the market
5 for the sale of the particular missile part—even though the boycott had put the
6 plaintiff out of business—because the boycott caused no more than a temporary
7 decline in the number of competitors selling the part. *Adaptive*, 141 F.3d at 952.
8 Before the boycott there were two competing suppliers, and less than a year after the
9 boycott there were also two competing suppliers. *Id.* Thus, although the boycott
10 may have harmed the plaintiff, it did not harm *competition* in the market for the sale
11 of the part. *Id.*; *Brantley*, 675 F.3d at 1202 (affirming dismissal of complaint where
12 “allegations show only that plaintiffs have been harmed as a result of the practices
13 at issue, not that those practices are anticompetitive”).

14 So too here. GMR is not even speaking the language of harm to competition,
15 much less articulating a theory by which stations collectively refusing to take
16 licenses affected the competitive process itself. On the facts as pleaded, no such
17 theory could possibly exist.

18 **III. GMR FAILED TO PLAUSIBLY ALLEGE ANY COGNIZABLE**
19 **ANTITRUST INJURY FROM THE SUPPOSED BOYCOTT**

20 The Court also should dismiss GMR’s claims for the independent reason that
21 GMR has not alleged any cognizable antitrust injury to it that flows from the alleged
22 boycott.

23 A separate, standalone element of every antitrust claim, including a Section 1
24 claim (whether judged by the rule of reason or *per se* rule), is that the plaintiff must
25 allege not only that it personally suffered an actual injury (or impact) from the
26 defendants’ conduct, but also that its particular injury qualifies as an *antitrust injury*.
27 *ARCO*, 495 U.S. at 334; *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110
28 n.5 (1986) (“A showing of antitrust injury is necessary . . . to establish standing under

1 § 4 . . .”). The requirement to plead an antitrust injury is “in addition to, rather than
2 in lieu of, injury to competition.” *Brantley*, 675 F.3d at 1200. Not just any old injury
3 qualifies as the requisite *antitrust injury*. *ARCO*, 495 U.S. at 334 (“A private
4 plaintiff may not recover damages under § 4 of the Clayton Act merely by showing
5 ‘injury causally linked to an illegal presence in the market.’”) (quoting *Brunswick*
6 *Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977). An *antitrust injury*
7 is a very specific type of injury; it must be “of the type the antitrust laws were
8 intended to prevent and that flows from that which makes defendants’ acts
9 unlawful.” *Id.* (quoting *Brunswick*, 429 U.S. at 489).

10 The failure to buy a license to intellectual property that you are not using
11 and/or not infringing does not cause cognizable antitrust injury as a matter of law.
12 *See, e.g., Arunachalam v. Apple, Inc.*, 2018 WL 5023378, at *3 (N.D. Cal. Oct. 16,
13 2018) (“Plaintiff in this case fails to allege a viable patent infringement claim.
14 Therefore, Plaintiff’s claim that Defendants’ failure to pay her license fees
15 constitutes an antitrust injury is without merit.”); *Sony Elecs., Inc. v. Soundview*
16 *Techs., Inc.*, 281 F. Supp. 2d 399, 402 (D. Conn. 2003) (absent evidence that
17 defendants “needed a license” to plaintiff’s patent, the defendants’ collective refusal
18 to license patent could not cause an *antitrust injury*). This is true even if a group of
19 competitors collectively agree with each other not to buy the license, as the Ninth
20 Circuit has held.

21 In *Cascades Computer Innovation, LLC v. RPX Corp.*, 719 Fed. App’x 553
22 (9th Cir. 2017), the Ninth Circuit affirmed the grant of a motion for judgment on the
23 pleadings in favor of a group of potential patent licensees that were accused of
24 conspiring not to buy a license to a particular set of patents. The Court of Appeals
25 held that, because the defendants were not actually infringing the patents, they did
26 not need to buy a license to the patents. As a result, the defendants’ collective refusal
27 to buy a license to the patents “was not a cognizable antitrust injury.” *Id.* at 555.

28 Here, GMR does not identify any specific RMLC member that it contends

1 actually *needed* to buy a license to the GMR repertory prior to December 31, 2016
2 that did not do so. *See* FAC ¶ 59 (alleging that iHeart and Townsquare purchased
3 licenses). Apart from iHeart and Townsquare (who actually purchased licenses), the
4 complaint does not identify any specific radio station that actually was playing, or
5 even wanted to play, any particular song that required a license from GMR prior to
6 December 31, 2016.

7 Instead, the complaint merely conclusorily asserts that “[a]s early as January
8 1, 2015, thousands of RMLC member stations were playing songs from the GMR
9 repertory for which the stations did not have a valid license.” FAC ¶ 123. Which
10 stations? And which songs? GMR does not say. Is this allegation referring to iHeart
11 and Townsquare, neither of whom, according to GMR, had a GMR license as of
12 January 1, 2015 but ultimately purchased one for their over 1,000 individual stations
13 before GMR filed its complaint (*see* FAC ¶ 74)? No one knows.

14 The lack of specificity is critical here because the complaint acknowledges
15 that, prior to January 1, 2017, RMLC members already had licenses to at least the
16 vast majority of the works in GMR’s repertory by virtue of their existing “license[s]-
17 in-effect” with ASCAP and BMI. FAC ¶ 123. Thus, those stations were protected
18 by their ASCAP and BMI licenses and could play those works through December
19 31, 2016 without risk of infringement.

20 The complaint does allege that the licenses-in-effect did not cover “certain”
21 stray songs that some of GMR’s artists supposedly wrote after January 1, 2015.
22 FAC ¶ 122. However, GMR does not identify any of those particular songs. It also
23 does not allege any factual basis to conclude that all 10,000 RMLC members actually
24 were playing those particular new songs, much less that they all needed a license to
25 those stray songs prior to January 1, 2017 to avoid infringement liability.
26 Conclusory infringement allegations like these are insufficient as a matter of law.
27 *See Cascades*, 719 Fed. App’x at 555 (on a Rule 12(c) motion, district court correctly
28 refused to credit “conclusory” infringement allegations that “contain no specific

1 facts or details”).

2 In the circumstances of this case, in order to allege a cognizable antitrust
3 injury from the purported license boycott, GMR would have to plausibly allege that,
4 prior to December 31, 2016, *each* of the 10,000 alleged conspirators *needed* to buy
5 a GMR license because each was not only playing but also infringing a specific
6 identified work that required a license from GMR. Because GMR has not done so,
7 any supposed group boycott by those alleged conspirators does not state “a
8 cognizable antitrust injury” as a matter of law. *Id.*

9 **IV. GMR’S CALIFORNIA STATE LAW CLAIMS FAIL FOR THE SAME**
10 **REASONS THAT ITS FEDERAL SHERMAN ACT CLAIM FAILS**

11 GMR also alleges state law claims under California’s antitrust law, the
12 Cartwright Act (FAC ¶¶ 147-62), and California’s unfair competition law (“UCL”)
13 (codified in Cal. Bus. & Prof. Code § 17200) (FAC ¶¶ 163-71). Both of these claims
14 are based on the same factual allegations as the federal Sherman Act claim, and both
15 fail for the same reasons that the federal claim fails. *See McGlinchy v. Shell Chem.*
16 *Co.*, 845 F.2d 802, 811 n.4 (9th Cir. 1988) (dismissal of Cartwright Act claim is
17 appropriate on the same grounds as Sherman Act claims); *Orchard Supply*
18 *Hardware LLC v. Home Depot USA, Inc.*, 939 F. Supp. 2d 1002, 1011 (N.D. Cal.
19 2013) (dismissing a UCL claim based on same allegations as deficient group boycott
20 claim). Indeed, during the parties’ LR 7-3 meet and confer, GMR acknowledged
21 that if its federal claim fails, then its state claims fail as well. *Cascades*, 719 Fed.
22 App’x at 555-56 (district court properly dismissed California state law claims that
23 plaintiff admitted “live[d] or die[d]” with federal Sherman Act claims) (quoting
24 *McGlinchy*, 845 F.2d at 811 n.4).

25 **CONCLUSION**

26 For all of the above reasons, the Court should enter judgment on the pleadings
27 in favor of RMLC and dismiss GMR’s complaint in its entirety. Moreover, because
28 no amendment could cure any of these fatal defects, the Court should do so with

1 prejudice.

2 Dated: July 11, 2019

Respectfully submitted,

3 /s/ Jennifer L. Giordano

4 Jennifer L. Giordano (*pro hac vice*)

5 Margaret M. Zwisler (*pro hac vice*)

6 William M. Friedman (*pro hac vice*)

7 David L. Johnson (*pro hac vice*)

LATHAM & WATKINS LLP

555 Eleventh Street, N.W., Suite 1000

Washington, D.C. 20004-1304

Telephone: (202) 637-2200

Facsimile: (202) 637-2201

Email: Margaret.Zwisler@lw.com

Email: Jennifer.Giordano@lw.com

Email: William.Friedman@lw.com

Email: David.Johnson@lw.com

13 Alfred C. Pfeiffer, Jr. (Bar No. 120965)

14 Andrew M. Gass (Bar No. 212731)

15 Brittany N. Lovejoy (Bar No. 286813)

LATHAM & WATKINS LLP

505 Montgomery Street, Suite 2000

San Francisco, CA 94111-6538

Telephone: (415) 391-0600

Facsimile: (415) 395-8095

Email: Al.Pfeiffer@lw.com

Email: Andrew.Gass@lw.com

Email: Brittany.Lovejoy@lw.com

21 Manuel A. Abascal (Bar No. 171301)

22 LATHAM & WATKINS LLP

355 South Grand Avenue, Suite 100

23 Los Angeles, CA 90071-1560

24 Telephone: (213) 485-1234

Facsimile: (213) 891-8763

Email: Manny.Abascal@lw.com

26

27

28