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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

IN RE PANDORA MEDIA, LLC  
COPYRIGHT LITIGATION

Case No. 2:22-cv-00809-MCS-MAR

**ORDER RE: MOTION TO DISMISS  
(ECF NO. 49)**

Counterclaim Defendant Word Collections, Inc. moved to dismiss Counterclaimant Pandora Media, LLC’s counterclaim. (Mot., ECF No. 49.) Counterclaim Defendants Brave Lion, Inc., Nick Di Paolo, Mary Reese Hicks, Main Sequence, LTD, Robin Williams Trust, Ron White, Inc., and Yellow Rose Productions, Inc. (hereinafter “Comedians”) joined the motion. (Joinder, ECF No. 50.) Pandora opposed the motion, (Opp’n, ECF No. 54), and Counterclaim Defendants replied, (Reply, ECF No. 60; Reply Joinder, ECF No. 59). The Court heard argument on the motion on August 29, 2022. (Mins., ECF No. 63.)

**I. BACKGROUND**

This litigation involves several comedians bringing claims for copyright infringement against Pandora. The Comedians claim that while Pandora has paid

1 royalties for the copyrights on their recorded performances, Pandora has failed to pay  
2 royalties for the copyrights on their underlying written works (i.e., their jokes).<sup>1</sup> (*See*  
3 *generally* 2d Am. Consol. Compl., ECF No. 70.) Pandora brought an antitrust  
4 counterclaim against the Comedians and Word Collections, the Comedians’ licensing  
5 agent. (Countercl., ECF No. 34.)

6 As described in the counterclaim, Pandora and other streaming services “have  
7 enabled their listeners and subscribers to listen to recordings of comedians’  
8 performances” for years. (*Id.* ¶ 2.) Pandora assumes arguendo that the copyrights the  
9 Comedians hold in their performances and underlying written works are valid. (*Id.* ¶ 6.)  
10 Comedy only accounts for about one percent of all streams on Pandora’s services, “and  
11 only a handful of comedians account for any significant number of streams across  
12 Pandora’s services.” (*Id.* ¶ 31.) Pandora’s competitors in the area of comedy streaming  
13 include YouTube, Spotify, Netflix, and HBO. (*Id.* ¶ 33.) Pandora “can provide a viable  
14 comedy product with a relatively modest number of comedy recordings.” (*Id.* ¶ 34.) Put  
15 differently, Pandora alleges it only needs a “critical mass” of comedy recordings to have  
16 a viable comedy streaming service. (*Id.* ¶ 44(b).) If Pandora cannot secure rights to a  
17 critical mass of comedy recordings or can no longer license rights to a critical mass of  
18 comedy recordings at reasonable rates, Pandora would be unable to offer a viable  
19 comedy streaming product. (*Id.* ¶ 39.)

20 Comparatively, the comedy market is small, with fewer copyright owners than  
21 the thousands in the music industry. (*Id.* ¶ 44(a).) In light of this smaller size, Pandora  
22 alleges that separate licensing is efficient and that blanket licensing for comedy  
23 recordings lacks any procompetitive justification. (*Id.* ¶¶ 46–48.) Word Collections  
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25 <sup>1</sup> Similar to recorded music, a performance of a comedic routine and the underlying  
26 routine itself are two distinct works under the Copyright Act. *See, e.g.*, U.S. Copyright  
27 Off., *Circular 56A: Copyright Registration of Musical Compositions and Sound*  
28 *Recordings*, United States Copyright Office (rev. Mar. 2021),  
<https://www.copyright.gov/circs/circ56a.pdf>.

1 allegedly engages in blanket licensing. Word Collections represents over 1,300 literary  
2 works. (*Id.* ¶ 50.) Word Collections requires exclusive affiliation agreements from  
3 authors so that Word Collections can set a single price for all the assets in its portfolio.  
4 (*Id.* ¶ 51.)

5 Pandora alleges that these exclusive affiliation agreements amount to a  
6 conspiracy, whereby Word Collections and the Comedians have agreed not to license  
7 “independently outside of the cartel.” (*Id.* ¶ 54.) Word Collections represents many  
8 different comedians, (*id.* ¶¶ 57–59), making the Word Collections portfolio  
9 “dangerously close” to a must-have if a service wants to offer comedy streaming. (*Id.*  
10 ¶ 60). Pandora alleges that this demonstrates Word Collections’ monopoly power and  
11 permits Word Collections to make itself the go-to entity for comedy performances. (*Id.*  
12 ¶¶ 60–65.)

13 Pandora further alleges that Word Collections is requiring the licensing of  
14 additional undesirable works<sup>2</sup> as part of its portfolio, resulting in a higher licensing fee.  
15 (*Id.* ¶ 66.) Pandora alleges there is no valid purpose to this product grouping. (*Id.* ¶¶ 67–  
16 69.)

17 Pandora defines its relevant product market as “the U.S. market for the rights to  
18 comedy routines embodied in comedy recordings.” (*Id.* ¶ 71.) Pandora only includes  
19 written comedic works “that have been recorded and for which the recording is available  
20 to Pandora for streaming.” (*Id.* ¶ 72.) “[O]ther types of written works, even ones  
21 embodied in recorded performances of some kind, are not a substitute for the rights to  
22 comedy routines embodied in comedy recordings” “[b]ecause consumer demand for  
23 streaming of comedy recordings is specific to recorded comedy.” (*Id.* ¶ 73.) Customers  
24 would not readily shift to other kinds of streamed content, like music or non-comedic  
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27 <sup>2</sup> While Pandora is unclear on this point, the Court surmises that “undesirable” refers to  
28 bad comedians or bad jokes. (E.g., What’s the difference between a Federal Judge and  
God? God doesn’t think he’s a Federal Judge.)

1 spoken word, if Pandora stopped offering comedy or increased prices on its comedic  
2 offerings. (*Id.* ¶¶ 74–75.)

3 Pandora alleges that Word Collections’ licensing scheme has already throttled  
4 competition and will lead to either higher prices or a reduction in supply. (*Id.* ¶¶ 79–  
5 82.) Pandora claims it has suffered harm by being forced to either pay supracompetitive  
6 royalties or stop offering comedic recordings. (*Id.* ¶ 83.) Pandora also claims it has  
7 suffered harm from the costs of defending against copyright lawsuits as part of the  
8 Comedians’ litigation campaign. (*Id.*)

9 Pandora brings four claims under the Sherman Act: (i) a claim that Counterclaim  
10 Defendants conspired to fix prices, (*id.* ¶¶ 84–90); (ii) a claim that Counterclaim  
11 Defendants improperly tied the Comedians’ works to Word Collections’ entire literary  
12 portfolio, (*id.* ¶¶ 91–95); (iii) a claim that Counterclaim Defendants obtained or created  
13 a dangerous probability of monopoly power, (*id.* ¶¶ 96–101); and (iv) a claim that  
14 Counterclaim Defendants conspired to monopolize the relevant market, (*id.* ¶¶ 102–08).  
15 Pandora requests several forms of relief, including injunctive relief, an order declaring  
16 the copyrights licensed by Word Collections unenforceable, damages, and attorneys’  
17 fees. Relevant here, Pandora requests an injunction “prohibiting Counterdefendants and  
18 all other members of the Word Collections cartel from instituting, or threatening to  
19 institute, copyright infringement actions directed against the use by Pandora of  
20 copyrighted works licensed by Word Collections until such time as the effects of the  
21 anticompetitive conduct described herein have dissipated.” (*Id.*, Prayer for Relief.)

## 22 **II. LEGAL STANDARDS**

### 23 **A. Rule 12(b)(1)**

24 Federal Rule of Civil Procedure 12(b)(1) authorizes a party to seek dismissal of  
25 an action for lack of subject-matter jurisdiction. “Because standing and ripeness pertain  
26 to federal courts’ subject matter jurisdiction, they are properly raised in a Rule 12(b)(1)  
27 motion to dismiss.” *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122  
28 (9th Cir. 2010). In the context of a 12(b)(1) motion, the plaintiff bears the burden of

1 establishing Article III standing to assert the claims. *Id.*

2 Rule 12(b)(1) jurisdictional challenges can be either facial or factual. *Safe Air for*  
3 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). When a motion to dismiss  
4 attacks subject-matter jurisdiction on the face of the complaint, as is the case here, the  
5 court assumes the factual allegations in the complaint are true and draws all reasonable  
6 inferences in the plaintiff’s favor. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009).  
7 Moreover, the standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544  
8 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), apply with equal force to Article III  
9 standing when it is being challenged on the face of the complaint. *See Terenkian v.*  
10 *Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012) (applying *Iqbal*). Thus, in terms  
11 of Article III standing, the complaint must allege “sufficient factual matter, accepted as  
12 true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678  
13 (quoting *Twombly*, 550 U.S. at 570).

14 **B. Rule 12(b)(6)**

15 Federal Rule of Civil Procedure 12(b)(6) allows an attack on the pleadings for a  
16 “failure to state a claim upon which relief can be granted.” “To survive a motion to  
17 dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a  
18 claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*,  
19 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual  
20 content that allows the court to draw the reasonable inference that the defendant is liable  
21 for the misconduct alleged.” *Iqbal*, 556 U.S. at 678.

22 The determination of whether a complaint satisfies the plausibility standard is a  
23 “context-specific task that requires the reviewing court to draw on its judicial  
24 experience and common sense.” *Id.* at 679. Generally, a court must accept the factual  
25 allegations in the pleadings as true and view them in the light most favorable to the  
26 plaintiff. *Park v. Thompson*, 851 F.3d 910, 918 (9th Cir. 2017); *Lee v. City of Los*  
27 *Angeles*, 250 F.3d 668, 679 (9th Cir. 2001). But a court is “not bound to accept as true  
28 a legal conclusion couched as a factual allegation.” *Iqbal*, 556 U.S. at 678 (quoting

1 *Twombly*, 550 U.S. at 555).

2 As a general rule, leave to amend a dismissed complaint should be freely granted  
3 unless it is clear the complaint could not be saved by any amendment. Fed. R. Civ. P.  
4 15(a); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir.  
5 2008).

### 6 **III. DISCUSSION**

7 Section 1 of the Sherman Act states that “[e]very contract, combination in the  
8 form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the  
9 several States, or with foreign nations, is declared to be illegal.” 15 U.S.C. § 1. Section  
10 2 of the Sherman Act states that “[e]very person who shall monopolize, or attempt to  
11 monopolize, or combine or conspire with any other person or persons, to monopolize  
12 any part of the trade or commerce among the several States, or with foreign nations”  
13 violates the law. 15 U.S.C. § 2. Private parties may sue for violations of this law under  
14 the Clayton Act. 15 U.S.C. § 15(a).

15 Word Collections moves to dismiss Pandora’s Sherman Act counterclaims on a  
16 number of grounds and requests judicial notice of several documents submitted with its  
17 motion. The Court will first address the request for judicial notice, and then the Court  
18 will address the arguments for dismissal.

#### 19 **A. Requests for Judicial Notice**

20 Word Collections asks the Court to consider five documents outside the four  
21 corners of Pandora’s pleading: excerpts of Pandora’s fiscal year (“FY”) 2011 Annual  
22 Report (Form 10-K), excerpts of Pandora’s FY 2016 Annual Report (Form 10-K), a  
23 March 11, 2021 email containing several attachments, Spoken Giants’ website  
24 homepage, and a transcript of testimony before the Copyright Royalty Board. (RJN,  
25 ECF No. 49-1.) Pandora does not object to the Court’s consideration of the Form 10-  
26 Ks and to one attachment to the March 11, 2021 email, a proposed license between  
27 Pandora and Word Collections, but objects to the request to judicially notice all of the  
28 other exhibits. (RJN Opp’n, ECF No. 55.) Word Collections replied in support of its

1 request. (RJN Reply, ECF No. 61.) The Court grants the request to consider the Form  
2 10-Ks and the proposed license due to the lack of opposition.

3 “[A] court may judicially notice a fact that is not subject to reasonable dispute  
4 because it: (1) is generally known within the trial court’s territorial jurisdiction; or  
5 (2) can be accurately and readily determined from sources whose accuracy cannot  
6 reasonably be questioned.” Fed. R. Evid. 201(b). A court also may consider documents  
7 incorporated by reference in a pleading without converting a Rule 12(b)(6) motion into  
8 a motion for summary judgment. *United States v. Ritchie*, 342 F.3d 903, 907–08 (9th  
9 Cir. 2003). “A court may consider evidence on which the [pleading] ‘necessarily relies’  
10 if: (1) the [pleading] refers to the document; (2) the document is central to the [pleading  
11 party’s] claim; and (3) no party questions the authenticity of the copy attached to the  
12 12(b)(6) motion.” *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). “The  
13 incorporation by reference doctrine applies only when a document is central to a  
14 [pleading party’s] claim and no party questions its authenticity.” *Gerritsen v. Warner*  
15 *Bros. Entm’t Inc.*, 112 F. Supp. 3d 1011, 1024 (C.D. Cal. 2015) (collecting cases). A  
16 document “may be incorporated by reference . . . if the [pleading party] refers  
17 extensively to the document or the document forms the basis of the [pleading party’s]  
18 claim.” *Ritchie*, 342 F.3d at 908. Applying the incorporation by reference doctrine is  
19 inappropriate where a pleading refers to but does not extensively reference a document,  
20 and where a document is not integral to a claim. *See id.* (“[M]ere mention of the  
21 existence of a document is insufficient to incorporate the contents of a document by  
22 reference[.]” (citing 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and*  
23 *Procedure* § 1327 (2d ed. 1990))).

24 Word Collections first requests that the Court consider incorporated by reference  
25 an email containing as attachments a notice of potential copyright infringement, a short  
26 memorandum addressing the basis for a claim of copyright infringement, documented  
27 proof of past copyright infringement, and a proposed licensing agreement for Word  
28 Collections’ literary works. (RJN 4; RJN Ex. C, ECF No. 49-5.) Word Collections



1 argues that considering these documents at the Rule 12(b)(6) stage is appropriate  
2 because Pandora’s counterclaim references them. (RJN 4 (citing Countercl. ¶¶ 47, 63,  
3 82); RJN Reply 3 (citing Countercl. ¶ 26).) Paragraphs 47 and 63 reference the license  
4 attached to the email, paragraph 26 references “communications with Pandora  
5 employees” to establish personal jurisdiction in this district, and paragraph 82  
6 references Word Collections’ communication with Pandora regarding the proposed  
7 license. As Pandora concedes, the references to the proposed license are sufficient to  
8 incorporate the license by reference. The cited paragraphs, however, do not establish  
9 the propriety of incorporation by reference of the email and the other attachments.  
10 Accordingly, the Court denies the request to deem these materials incorporated by  
11 reference.

12 Word Collections also asks the Court to judicially notice the homepage of Spoken  
13 Giants, a “global rights administration company for the owners and creators of Spoken  
14 Word copyrights.” (RJN Ex. D, ECF No. 49-6; *see* RJN 5.) The Court rejects this  
15 request because “private corporate websites, particularly when describing their own  
16 businesses, generally are not the sorts of sources whose accuracy cannot reasonably be  
17 questioned.” *Spy Optic, Inc. v. Alibaba.com, Inc.*, 163 F. Supp. 3d 755, 763 (C.D. Cal.  
18 2015) (quoting *Victaulic Co. Tieman*, 499 F.3d 227, 237 (3d Cir. 2007)).

19 Finally, Word Collections asks the Court to judicially notice the testimony of  
20 Pandora employee Michael Herring before the Copyright Royalty Board. (RJN 5.) “As  
21 a general rule, a court may not take judicial notice of proceedings or records in another  
22 cause so as to supply, without formal introduction of evidence, facts essential to support  
23 a contention in a cause then before it.” *M/V Am. Queen v. San Diego Marine Constr.*  
24 *Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983). Thus, while the Court may take judicial  
25 notice of the existence of Herring’s testimony, *see Diaz v. Carlson*, 5 F. Supp. 2d 809,  
26 814 n.4 (C.D. Cal. 1997) (taking judicial notice of the transcript of administrative  
27 hearing testimony), the Court does not “accept as true the facts found or alleged” in  
28 Herring’s statements, *GemCap Lending, LLC v. Quarles & Brady, LLP*, 269 F. Supp.



1 3d 1007, 1019 (C.D. Cal. 2017) (internal quotation marks omitted), *aff'd*, 787 F. App'x  
2 369 (9th Cir. 2019).

3 **B. Article III Standing**

4 Word Collections argues Pandora has no Article III standing to pursue its  
5 counterclaim because Pandora's allegations of supracompetitive prices and litigation  
6 costs are not cognizable harms. (Mot. 8–13.)

7 To demonstrate Article III standing, a party must demonstrate it has “(1) suffered  
8 an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant,  
9 and (3) that it is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v.*  
10 *Robins*, 578 U.S. 330, 338 (2016). To meet the injury-in-fact requirement, the alleged  
11 injury must be “concrete and particularized” as well as “actual or imminent, not  
12 conjectural or hypothetical.” *Friends of Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*,  
13 528 U.S. 167, 180 (2000). In an antitrust case, Article III injury-in-fact is “an injury  
14 which bears causal connection to the alleged antitrust violation.” *Gerlinger v.*  
15 *Amazon.com Inc.*, 526 F.3d 1253, 1255 (9th Cir. 2008) (quoting *Amarel v. Connell*, 102  
16 F.3d 1494, 1507 (9th Cir 1996)).

17 Word Collections argues that its alleged supracompetitive prices do not confer  
18 standing on Pandora because Pandora has not entered into a license and because  
19 Pandora cannot make the necessary allegations of future harm. Neither argument has  
20 merit. Here, Pandora alleges that before the existence of Word Collections, Pandora  
21 paid comedians for an implied license to use all necessary copyrights to stream the  
22 comedians' works.<sup>3</sup> When Word Collections came on the scene, it began seeking  
23 supracompetitive royalties at a rate of 25 percent of the rates defined by 37 C.F.R.  
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25 <sup>3</sup> In certain instances, “in order to permit the full enjoyment of a right expressly,  
26 granted[,] there is a necessary implication that certain collateral rights have also been  
27 granted.” 3 *Nimmer on Copyright* § 10.10[C] (2022). The Court does not address at this  
28 stage whether the Comedians impliedly granted Pandora all rights necessary to fully  
perform their works.

1 §§ 380.10 and 382. (RJN Ex. C, at 11.)<sup>4</sup> This rate suffices to allege a supracompetitive  
2 price because it exceeds the status quo rate from when comedians individually licensed  
3 their works and because Pandora provides plausible allegations that, but for Word  
4 Collections’ conduct, this rate would not be demanded on the market. The demand of a  
5 large licensing fee confers standing in an antitrust case. *See Intellectual Ventures I LLC*  
6 *v. Capital One Fin. Corp.*, 99 F. Supp. 3d 610, 629 (D. Md. 2015).

7 Pandora also properly alleges a likelihood of future injury necessary to confer  
8 standing. To determine whether a plaintiff properly alleges a future injury such that the  
9 injury is “certainly impending,” *In re Zappos.com, Inc., Customer Data Sec. Breach*  
10 *Litig.*, 888 F.3d 1020, 1025 (9th Cir. 2017) (quoting *Clapper v. Amnesty Int’l USA*, 568  
11 U.S. 398, 410 (2013)), a plaintiff must demonstrate that the theory of future injury is  
12 supported by a chain of inferences that is not speculative. *Id.* at 1026. Here, accepting  
13 the facts in the counterclaim as true, Pandora has alleged past conduct that involves  
14 Word Collections’ formation and that involves Word Collections amassing works of a  
15 group of comedians under its portfolio. The single inferential step is that there is a  
16 danger Word Collections will amass a portfolio of comedians that requires Pandora  
17 either to accept supracompetitive royalty rates or to stop offering its comedy services.  
18 Pandora alleges sufficient information in the counterclaim to render this harm as  
19 certainly impending (at least under the standard articulated in *Iqbal*). Pandora thus  
20 properly alleges standing for the injury caused by supracompetitive royalties in this  
21 case. Word Collections cites *McCrary v. Fidelity National Title Insurance* to the  
22 contrary. *McCrary*, however, involved plaintiffs who failed to allege future plans to  
23 purchase title insurance and alleged that title insurance rates were remarkably stable  
24 over several years. 682 F.3d 229, 243–44 (3d Cir. 2012). Here, there is nothing  
25 speculative about Word Collections’ alleged plan. It has amassed a formidable portfolio  
26 of comedians and it has sought supracompetitive licenses. The only remaining question  
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28 <sup>4</sup> The Court uses the pagination automatically generated by CM/ECF for Exhibit C.

1 is whether it has the monopoly power necessary to make this request one Pandora  
2 cannot ignore. This, however, which is a merits inquiry inappropriate for standing  
3 analysis. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787,  
4 800 (2015) (“[O]ne must not ‘confus[e] weakness on the merits with the absence of  
5 Article III standing.’” (second alteration in original) (quoting *Davis v. United States*,  
6 564 U.S. 229, 249 n.10 (2011))).

7 Word Collections also argues that litigation costs cannot confer standing. Word  
8 Collections cites two cases for this proposition. *FTC v. Apex Cap. Grp., LLC*, No. CV  
9 18-9753 (JFX) (JPRx), 2022 WL 1060486, at \*3 (C.D. Cal. Mar. 10, 2022), *appeal*  
10 *filed*, No. 22-55342 (filed 9th Cir. Apr. 5, 2022; *San Diego Unified Port Dist. v.*  
11 *Monsanto Co.*, 309 F. Supp. 3d 854, 866 (S.D. Cal. 2018). These cases, however, rely  
12 on a line of authority stating that a plaintiff cannot bring a lawsuit and rely on litigation  
13 costs it can recover as its *sole* injury supporting standing. *See, e.g., Steel Co. v. Citizens*  
14 *for Better Env’t*, 523 U.S. 83, 107–08 (1998); *La Asociacion De Trabajadores De Lake*  
15 *Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). Pandora alleges a  
16 distinct harm—the costs of defending the Comedians’ copyright claims. To the extent  
17 *Apex Capital* and *San Diego Unified Port District* hold that a plaintiff cannot claim as  
18 harm the costs of defending other suits as part of an anticompetitive scheme, the Court  
19 respectfully disagrees with that conclusion as an unwarranted extension of the doctrine.

20 The Court denies Word Collections’ motion to dismiss the claims for want of  
21 Article III standing.

### 22 **C. Antitrust Standing**

23 Word Collections argues Pandora fails to demonstrate antitrust standing through  
24 its allegations of supracompetitive prices and through its allegations of incurred  
25 litigation costs. (Mot. 9–13.)

26 To allege antitrust injury, a plaintiff must allege (1) unlawful conduct,  
27 (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct  
28 unlawful, and (4) that is of the type the antitrust laws were intended to prevent.

1 *PLS.com, LLC v. Nat’l Assoc. of Realtors*, 32 F.4th 824, 833 (9th Cir. 2022).

2 Word Collections first argues that Pandora does not have antitrust standing to sue  
3 because it did not accept the terms of a supposedly anticompetitive license. Word  
4 Collections relies on *Edwards Vacuum, LLC v. Hoffman Instrumentation Supply, Inc.*,  
5 which states that “it is difficult to see how an unaccepted offer could ever satisfy the  
6 causal antitrust injury requirement needed in a private antitrust claim seeking money  
7 damages because an unaccepted offer would not be the ‘cause’ of any material result in  
8 the marketplace.” 556 F. Supp. 3d 1156, 1170 n.8 (D. Or. 2021). But *Edwards Vacuum*  
9 was limited to its facts and cited a Fifth Circuit precedent stating that an unaccepted  
10 offer to fix prices could confer antitrust injury on several grounds. *Id.* at 1171–72  
11 (distinguishing *United States v. Am. Airlines, Inc.*, 743 F.2d 1114, 1118–19 (5th Cir.  
12 1984)). While the *Edwards Vacuum* court did not identify a fact pattern establishing  
13 injury from an unaccepted offer, Pandora alleges sufficient facts here to demonstrate  
14 such an injury. Pandora alleges that it is faced with the choice of acquiescing to a  
15 supracompetitive license or canceling its comedy offerings. The counterclaim  
16 adequately alleges that the direct cause of this choice is Word Collections’ offer.  
17 Whether Word Collections’ conduct is unlawful is another question, but Pandora does  
18 not need to accept Word Collections’ offer to demonstrate antitrust injury.

19 Word Collections also argues that Pandora’s alleged antitrust injury is too  
20 speculative. For this proposition, Word Collections argues the Ninth Circuit case *City*  
21 *of Oakland v. Oakland Raiders* forecloses Pandora’s claim. While Word Collections is  
22 correct that nonpurchasers priced out of a market face an especially high bar to  
23 demonstrate antitrust standing, *City of Oakland v. Oakland Raiders*, 20 F.4th 441, 460  
24 (9th Cir. 2021), the Ninth Circuit declined to “adopt a bright-line rule precluding  
25 nonpurchasers who have been priced out of the market from establishing antitrust  
26 standing,” *id.* at 459 n.11. The Ninth Circuit panel predicated its result in *City of*  
27 *Oakland* on the fact that “[t]he City ha[d] not alleged—and there is no way of  
28 knowing—what would have occurred in a more competitive marketplace.” *Id.* at 459.

1 The panel found there were “too many speculative links in the chain of causation  
2 between Defendants’ alleged restrictions on output and the City’s alleged injuries.” *Id.*  
3 at 460. The Ninth Circuit required a “reasonable level of certainty  
4 before . . . confer[ring] antitrust standing on such consumers.” *Id.*

5 Unlike in *City of Oakland*, Pandora alleges links in the chain of causation that are  
6 not speculative. Pandora alleges the status quo before Word Collections’ existence—  
7 individual comedians licensing with streaming platforms like Pandora on an individual  
8 basis. Pandora’s counterclaim alleges Word Collections’ formation and aggregation of  
9 comedians’ works is the cause of Pandora either paying supracompetitive royalties or  
10 ceasing offering streamed comedy performances. These allegations also describe a  
11 scenario different than that in *Intel Corp. v. Fortress Investment Group*, a case upon  
12 which Word Collections relies. In *Intel*, the plaintiff’s allegations of supracompetitive  
13 licensing did not suffice because the plaintiff did not offer any context to explain  
14 whether the rates pleaded were supracompetitive. 511 F. Supp. 3d 1006, 1027 (N.D.  
15 Cal. 2021), *appeal filed*, No. 21-16817 (filed 9th Cir. Oct. 28, 2021). Here, Pandora  
16 provides the necessary context to state the supracompetitive royalties caused by Word  
17 Collections (the new 25 percent royalties) and alleges facts demonstrating this royalty  
18 is supracompetitive. Pandora thus properly alleges antitrust standing for the injuries  
19 resulting from Word Collections’ alleged supracompetitive royalties.

20 Word Collections also argues Pandora’s litigation defense costs are not  
21 cognizable as harm under antitrust laws. “[A]bsent an actual antitrust violation[,] the  
22 litigation costs themselves are not antitrust injury.” *Am. Med. Ass’n v. United*  
23 *Healthcare Corp.*, No. 00 Civ. 2800 (LMM), 2007 WL 683974, at \*5 (S.D.N.Y. Mar.  
24 5, 2007). Thus, where a claim relies only on alleged attorney’s fees without any initial  
25 antitrust injury, a plaintiff has no antitrust standing. *Chip-Mender, Inc. v. Sherwin-*  
26 *Williams Co.*, No. C 05-3465 PJH, 2006 WL 13058, at \*5–6 (N.D. Cal. Jan. 3, 2006).  
27 Litigation costs that flow from anticompetitive conduct, however, are cognizable as an  
28 antitrust wrong. *See Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 997 (9th Cir. 1979)

1 (holding attorneys’ fees are cognizable as damage when they result from a scheme of  
2 bad-faith patent prosecution). Here, Pandora claims as harm the litigation fees resulting  
3 from unlawfully pooled copyrights. These fees are cognizable harm.

4 The Court denies Word Collections’ motion to dismiss the claims for want of  
5 antitrust standing.

6 **D. Noerr-Pennington Immunity**

7 Word Collections argues the *Noerr-Pennington* doctrine immunizes its conduct  
8 from antitrust liability. (Mot. 13–15.) A claim may be dismissed on the pleadings if the  
9 allegations in the complaint demonstrate *Noerr-Pennington* protections apply to the  
10 defendant’s conduct. *See Gamble v. Kaiser Found. Health Plan, Inc.*, 348 F. Supp. 3d  
11 1003, 1026 n.14 (N.D. Cal. 2018) (citing *Boone v. Redevelopment Agency of City of*  
12 *San Jose*, 841 F.2d 886, 894 (9th Cir. 1988), and *Empress LLC v. City & County of San*  
13 *Francisco*, 419 F.3d 1052, 1057 (9th Cir. 2005)); *Entrepreneur Media, Inc. v. Dermer*,  
14 No. SACV 18-1562 JVS (KESx), 2019 U.S. Dist. LEXIS 164858, at \*9 (C.D. Cal. July  
15 22, 2019) (collecting cases). The Court assumes for the purpose of evaluating this  
16 argument only that Pandora’s antitrust claims are otherwise well-pleaded.

17 The *Noerr-Pennington* doctrine recognizes that litigants have rights under the  
18 First Amendment to use courts to advance their interests. This doctrine, among other  
19 things, provides immunity from antitrust suit for “a concerted effort to influence public  
20 officials regardless of intent or purpose.” *United Mine Workers of Am. v. Pennington*,  
21 381 U.S. 657, 670 (1965). The Supreme Court later extended *Noerr-Pennington* to  
22 situations where “groups use courts to advocate their causes and points of view  
23 respecting resolution of their business and economic interests vis-à-vis their  
24 competitors.” *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 525 (2002) (cleaned up). The  
25 Supreme Court carved out an exception from this immunity for sham petitioning. For a  
26 lawsuit to be a sham petition, it must meet two criteria: “first, it must be objectively  
27 baseless in the sense that no reasonable litigation could realistically expect success on  
28 the merits; second, the litigant’s subjective motivation must conceal an attempt to



1 interfere directly with the business relationships of a competitor through the use of the  
2 governmental process—as opposed to the outcome of that process—as an  
3 anticompetitive weapon.” *Id.* at 526 (cleaned up).

4 Courts have recognized, however, that *Noerr-Pennington* immunity does not  
5 immunize otherwise anticompetitive conduct associated with a lawsuit. The Ninth  
6 Circuit has held “that when there is a conspiracy prohibited by the antitrust laws, and  
7 the otherwise legal litigation is nothing but an act in furtherance of that conspiracy,  
8 general antitrust principles apply, notwithstanding the existence of *Noerr* immunity.”  
9 *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1263  
10 (9th Cir. 1982). Thus, even when litigation itself is immunized, a litigant cannot avail  
11 itself of *Noerr-Pennington* immunity when the litigation is used to enforce an unlawful  
12 scheme. *Abbott Lab ’ys v. Teva Pharms. USA, Inc.*, 432 F. Supp. 2d 408, 429 (D. Del.  
13 2006); *Intel Corp. v. Fortress Inv. Grp. LLC*, No. 19-cv-07651-EMC, 2020 WL  
14 6390499, at \*15–16 (N.D. Cal. July 15, 2020), *appeal filed*, No. 21-16817 (filed 9th  
15 Cir. Oct. 28, 2021). Even litigation-based damages are not immunized if the damages  
16 stem from litigation used to enforce anticompetitive conduct. *Amphastar Pharms. Inc.*  
17 *v. Momenta Pharms., Inc.*, 850 F.3d 52, 57 (1st Cir. 2017) (collecting cases from sister  
18 circuits). In the copyright context, the Second Circuit recognized that “[a]lthough  
19 coordinated efforts to enforce copyrights against a common infringer may be  
20 permissible, copyright holders may not agree to limit their individual freedom of action  
21 in licensing future rights to such an infringer before, during, or after the lawsuit.”  
22 *Primetime 24 Joint Venture v. Nat’l Broad. Co., Inc.*, 219 F.3d 92, 102–03 (2d Cir.  
23 2000). A litigant seeking to enjoin a party from asserting unlawful market power  
24 through litigation must, however, show evidence of more than the attorneys’ fees and  
25 costs incurred defending against intellectual property infringement litigation. *Apple,*  
26 *Inc. v. Motorola Mobility, Inc.*, 886 F. Supp. 3d 1061, 1076–77 (W.D. Wisc. 2021).

27 Reluctant to see this exception vitiate the interests the *Noerr-Pennington* doctrine  
28 protects, the Ninth Circuit has held that the immunity protects conduct that is incidental



1 to the prosecution of a lawsuit. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 934 (9th Cir.  
2 2006). Accordingly, a decision to accept or reject an offer of settlement is conduct  
3 incidental to the prosecution of a suit and is not a separate and distinct activity which  
4 might form the basis for antitrust liability. *Id.* at 935. This immunity extends to private  
5 demand letters made before litigation. *Id.* at 936–37. These demands are not “absolutely  
6 protected from liability,” however. *Id.* at 938. Instead, any such demands must be  
7 “sufficiently related to petitioning activity.” *Id.* at 935.

8 Pandora alleges that Word Collections’ and the Comedians’ litigation conduct is  
9 used to assert unlawful market power (assuming those claims are properly pleaded).  
10 Pandora alleges that Word Collections and the Comedians instituted the copyright suits  
11 as a way to force Pandora to pay a supracompetitive license. If Word Collections and  
12 the Comedians violated the antitrust laws, their litigation to enforce the unlawful  
13 scheme is not protected by the *Noerr-Pennington* doctrine. *Clipper Express*, 690 F.2d  
14 at 1263. Word Collections argues that the fact that the licensing and royalty demand  
15 was made during a settlement offer immunizes the conduct under *Sosa*. As a preliminary  
16 matter, the email containing the alleged prelitigation settlement demand is not judicially  
17 noticeable or incorporated into the counterclaim by reference, so the Court may not  
18 consider it at the motion to dismiss stage. *See* Fed. R. Civ. P. 12(d). Even if the Court  
19 did consider this email, however, Pandora plausibly demonstrates that the licensing  
20 demand is not “sufficiently related to petitioning activity” to warrant immunity from  
21 antitrust liability. *Sosa*, 437 F.3d at 935. The counterclaim raises a plausible inference  
22 that Word Collections did not make the licensing demand as part of a prelitigation  
23 settlement demand but instead as an independent action to effectuate its allegedly  
24 unlawful scheme. *Noerr-Pennington* immunity is thus inappropriate to apply at this  
25 stage of the case, both to the claims and the request for injunctive relief.

#### 26 **E. Failure to Seek Individual Licenses**

27 Word Collections argues that Pandora cannot maintain claims related to  
28 copyright pooling when it failed to seek an individual license from the comedians in the

1 first instance. (Mot. 15–16.)

2 “[T]he opportunity to acquire a pool of rights does not restrain trade if an  
3 alternative opportunity to acquire individual rights is realistically available.” *Buffalo*  
4 *Broad. Co., Inc. v. Am. Soc’y of Composers, Authors & Publishers*, 744 F.2d 917, 925  
5 (2d Cir. 1984); *accord Nero AG v. MPEG LA, LLC*, No. 10-cv-3672-MRP-RZ, 2010  
6 WL 4366448, at \*6 (C.D. Cal. Sept. 14, 2010) (collecting cases). An antitrust plaintiff  
7 has the burden of pleading the nonavailability of options to acquire individual licensing.  
8 *Nero AG*, 2010 WL 4366448, at \*6. Multiple courts have held this burden cannot be  
9 met where a plaintiff never makes an inquiry or attempt to negotiate an individual  
10 license. *E.g., id.* at \*6–7; *Sumitomo Mitsubishi Silicon Corp. v. MEMC Elec. Materials,*  
11 *Inc.*, Nos. C 05-2133 SBA, C 01-4925, 2007 WL 2318903, at \*15 (N.D. Cal. Aug. 13,  
12 2007). A plaintiff need not allege any attempt to individually license, however, if the  
13 plaintiff demonstrates availability of individual licenses is illusory. *Samsung Elecs. Co.,*  
14 *Ltd. v. Panasonic Corp.*, No. C 10-03098 JSW, 2015 WL 10890655, at \*6 (N.D. Cal.  
15 Sep. 30, 2015).

16 Pandora adequately alleges that the availability of any individual licenses is  
17 illusory. Word Collections has described itself as the only entity where services like  
18 Pandora could receive a license to use literary works in its portfolio. (Countercl. ¶ 62.)  
19 Pandora plausibly alleges that Word Collections requires a blanket license at the 25  
20 percent rate to broadcast any of Word Collections’ literary works. The proposed license  
21 Word Collections sent to Pandora contains language consistent with these allegations.  
22 (*See* RJN Ex. C.)

23 The Court, however, declines Pandora’s invitation to require that licenses be  
24 offered from individual owners that retain unimpaired independence to set competitive  
25 prices for individual licenses in order for availability to be nonillusory. (Opp’n 13 n.8.)  
26 Pandora relies on the Second Circuit case *Columbia Broadcasting System, Inc. v.*  
27 *American Society of Composers, Authors & Publishers*, 620 F.2d 930, 936–37 (2d Cir.  
28 1980), for this point, but *Columbia Broadcasting* does not go that far. The Second

1 Circuit simply held that “the issue is whether competition among copyright owners is  
2 realistically feasible.” *Id.* at 937. Antitrust law does not mandate competition in any  
3 specific corporate form. *Cf. Am. Needle v. Nat’l Football League*, 560 U.S. 183, 191  
4 (2010) (“[W]e have eschewed . . . formalistic distinctions in favor of a functional  
5 consideration of how the parties involved in the alleged anticompetitive conduct  
6 actually operate.”). It is enough that Pandora has plausibly alleged Word Collections  
7 requires a blanket license for access to its literary works.

8 The Court denies Word Collections’ motion to dismiss Pandora’s claims for  
9 failure to seek individual licenses.

#### 10 **F. Monopolization Claims**

11 Word Collections argues Pandora fails to properly allege market power in a  
12 relevant market that causes antitrust injury by Word Collections’ allegedly unlawful  
13 activity. (Mot. 17–21.)

14 To state a claim for monopolization, a party must plead (1) the possession of  
15 monopoly power, (2) the willful acquisition or maintenance of such power, and  
16 (3) causal antitrust injury. *In re Nat’l Football League’s Sunday Ticket Antitrust Litig.*,  
17 933 F.3d 1136, 1159 (9th Cir. 2019). To state a claim for attempted monopolization, a  
18 party must plead that (1) the defendant has engaged in predatory or anticompetitive  
19 conduct (2) with a specific intent to monopolize and (3) with a dangerous probability  
20 of achieving that monopoly power. *Coalition for ICANN Transparency, Inc. v.*  
21 *VeriSign, Inc.*, 611 F.3d 495, 506 (9th Cir. 2010). To state a claim for conspiracy to  
22 monopolize, a party must plead (1) the existence of a combination or conspiracy to  
23 monopolize, (2) an overt act in furtherance of the conspiracy, (3) the specific intent to  
24 monopolize, and (4) causal antitrust injury. *In re Nat’l Football League*, 933 F.3d at  
25 1159.

26 A party can demonstrate market power or monopoly power directly or  
27 circumstantially. A party demonstrates direct market power by identifying restricted  
28 output or supracompetitive prices. *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d

1 1421, 1434 (9th Cir. 1995); *see also* *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 460–  
2 61 (1986) (“Since the purpose of the inquiries into market definition and market power  
3 is to determine whether an arrangement has the potential for genuine adverse effects on  
4 competition, proof of actual detrimental effects, such as a reduction of output, can  
5 obviate the need for an inquiry into market power, which is but a surrogate for  
6 detrimental effects.” (internal quotation marks omitted)); *accord* *Ohio v. Am. Express*  
7 *Co.*, 138 S. Ct. 2274, 2284 (2018) (“Direct evidence of anticompetitive effects  
8 [includes] reduced output, increased prices, or decreased quality in the relevant  
9 market . . .”). A party demonstrates market power circumstantially by defining a  
10 relevant market, showing that the opponent owns a dominant share of the market, and  
11 showing that there are significant barriers to entry and that existing competitors lack the  
12 capacity to increase output in the short run. *Rebel Oil Co.*, 51 F.3d at 1434. A properly  
13 defined market encompasses a product as well as its economic substitutes. *Hicks v. PGA*  
14 *Tour, Inc.*, 897 F.3d 1109, 1120 (9th Cir. 2018). Economic substitutes are those goods  
15 that “have a ‘reasonable interchangeability of use’ or sufficient ‘cross-elasticity of  
16 demand’ with the relevant product.” *Id.* (quoting *Newcal Indus., Inc. v. IKON Off. Sol.,*  
17 *Inc.*, 513 F.3d 1038, 1045 (9th Cir. 2008)).

18 The monopolization claims suffer from defective allegations of monopoly power.  
19 Pandora does not adequately allege direct or circumstantial market power. Pandora  
20 argues Word Collections possesses market power because Word Collections presented  
21 a license with supracompetitive royalties and forced Pandora to either accept the license  
22 or stop offering certain comedy performances. (Opp’n 17–20.) Pandora ultimately  
23 decided to stop offering the performances. (Answer to 2d Am. Consol. Compl. ¶ 168,  
24 ECF No. 71.)<sup>5</sup> The counterclaim, however, does not provide support for direct market

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25  
26 <sup>5</sup> The Court accepts Pandora’s judicial admission of this fact. . *See* *Am. Title Ins. Co. v.*  
27 *Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (“Factual assertions in pleadings and  
28 pretrial documents, unless amended, are considered judicial admissions conclusively  
binding on the party who made them.”).

1 power. While formal market analysis is not necessary to allege direct market power, a  
2 party must allege “actual, sustained adverse effects on competition” in the relevant  
3 market, “viewed in light of the reality” of the market. *Ind. Fed’n of Dentists*, 476 U.S.  
4 at 461. Pandora does not allege enough about the reality of the market to demonstrate  
5 that Word Collections’ offer of a supracompetitive license exhibited the requisite  
6 market power. For example, while Pandora describes an impressive collection of  
7 comedians whose works Word Collections offers, (Countercl. ¶¶ 57–59), Pandora does  
8 not plead facts demonstrating that these comedians are a “must have,” (*id.* ¶ 60), the  
9 source of injury Pandora articulated in its opposition and at the hearing. Pandora alleges  
10 that it only needs a “critical mass” of comedy performances (an undefined amount) to  
11 offer a viable streaming service. (*Id.* ¶ 44(b).) As Pandora’s own Securities and  
12 Exchange Commission filings show, Pandora’s comedy collection included “more than  
13 1,000 comedians with more than 15,000 tracks” in 2012, (RJN Ex. A, at 6), and included  
14 “more than 3,000 comedians with more than 35,000 tracks” in 2016, (RJN Ex. B, at 8).  
15 Pandora fails to connect Word Collections’ representation of about 30 comedians to its  
16 inability to amass the critical mass needed to offer a viable comedy streaming service,  
17 especially when Pandora offers recordings by *several thousand* other comedians. The  
18 Court understands the implicit argument in the counterclaim that the comedians  
19 represented by Word Collections form a significant part of the critical mass necessary  
20 to offer a viable streaming service and may garner a significant percentage of Pandora’s  
21 comedy streams. (*See* Countercl. ¶ 31.) Pandora cannot rest on such an implicit  
22 argument to satisfy Rule 8(a)(2), however. Pandora must plead “factual content that  
23 allows the court to draw the reasonable inference that the defendant is liable for the  
24 misconduct alleged.” *Iqbal*, 556 U.S. at 678. These allegations fail to establish direct  
25 market power.

26 Pandora’s allegations of circumstantial market power fare even worse. Pandora  
27 pleads a market in the United States “for the rights to comedy routines embodied in  
28 comedy recordings” that only includes “written comedic works . . . that have been

1 recorded and for which the recording is available to Pandora for streaming.” (Countercl.  
2 ¶¶ 71–72.) Pandora also pleads that other written works are not substitutes for the  
3 written works embodied in comedy recordings “[b]ecause consumer demand for  
4 streaming comedy recordings is specific to recorded comedy.” (*Id.* ¶ 73; *see also id.*  
5 ¶ 74 (“If comedy recordings become unavailable, . . . [Pandora] listeners would not  
6 readily shift to other types of streamed content.”).) Here, Pandora properly alleges a  
7 product market that includes economic substitutes. Word Collections argues the market  
8 is overbroad because Pandora implicitly defines the market without reference to the  
9 “price, quality, and desirability to listeners” of the comedy recordings. (Mot. 18–19.)  
10 Word Collections argues that Pandora has included products in its market that are not  
11 substitutes with the comedy recordings, but Word Collections misreads this portion of  
12 the counterclaim. Pandora merely states that offering a viable comedy streaming service  
13 requires amassing a critical mass of comedy recordings that depends on the “price,  
14 quality, and desirability to listeners” of the recordings. (Countercl. ¶ 38.) Pandora’s  
15 allegation of discernment in selecting its comedy offerings plausibly alleges that the  
16 low-quality, less desirable material related to the tying claim is not included in the  
17 market.

18 Even though Pandora adequately defines a relevant market, Pandora offers no  
19 allegations that Word Collections owns a dominant share of the market or that there are  
20 significant barriers to entry in the market. Pandora argues that it has alleged through  
21 conduct that Word Collections owns a dominant share of the market. For the same  
22 reasons discussed above, Pandora’s description of Word Collections’ impressive but  
23 short list of comedians whose works it licenses does not suffice to demonstrate that  
24 Word Collections owns a dominant share of the comedy recording market in the United  
25 States. Importantly, nothing in the counterclaim gives any indication of the size of the  
26 market (although the size of Pandora’s own catalog casts significant doubts on Word  
27 Collections’ dominance in the market).

28 Pandora argues that commercial realities like copyrights, contract agreements,



1 and a high share of the comedy market can demonstrate the existence of market barriers.  
2 *See Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208 (9th Cir.  
3 1997). Pandora does not plead enough facts supporting that any barriers to entry exist,  
4 however. “The main sources of entry barriers are: (1) legal license; (2) control over an  
5 essential or superior resource; (3) entrenched buyer preferences for established brands  
6 or company reputations; (4) capital markets evaluations imposing higher capital costs  
7 on new entrants”; and (5) economies of scale in some situations. *L.A. Land Co. v.*  
8 *Brunswick Corp.*, 6 F.3d 1422, 1428 n.4 (9th Cir. 1993). Pandora does not allege any  
9 control by Word Collections over a critical mass of comedians, any entrenched listener  
10 preferences for the comedians represented by Word Collections, or any other restraints  
11 that would prevent new comedians or licensors from entering the market to compete  
12 with Word Collections.

13 Because Pandora fails to demonstrate market power directly or circumstantially,  
14 the Court grants Word Collections’ motion to dismiss Pandora’s monopolization  
15 claims.

### 16 **G. Price Fixing Conspiracy Claim**

17 Word Collections argues that Pandora fails to properly allege a conspiracy to fix  
18 prices. (Mot. 21–23.)

19 When evaluating a blanket licensing claim, unless there is no purpose but to stifle  
20 competition, courts apply rule of reason analysis. *Broad. Music, Inc. v. Columbia*  
21 *Broad. Sys., Inc.*, 441 U.S. 1, 20 (1979). Rule of reason analysis requires determining  
22 whether anticompetitive effects outweigh procompetitive effects. *Nat’l Soc’y of Prof.*  
23 *Eng’rs v. United States*, 435 U.S. 679, 691 (1978). To demonstrate the existence of a  
24 conspiracy to fix prices, a plaintiff must allege the conspiracy with significant  
25 specificity. “A statement of parallel conduct, even conduct consciously undertaken,  
26 needs some setting suggesting the agreement necessary to make out a § 1 claim; without  
27 that further circumstance pointing toward a meeting of the minds, an account of a  
28 defendant’s commercial efforts stays in neutral territory.” *Twombly*, 550 U.S. at 557.



1 To overcome mere allegations of parallel conduct, a plaintiff must allege “who, did  
2 what, to whom (or with whom), where, and when.” *In re Musical Instruments & Equip.*  
3 *Antitrust Litig.*, 798 F.3d 1186, 1194 n.6 (9th Cir. 2015) (quoting *Kendall v. Visa U.S.A.,*  
4 *Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008)).

5 To make out a case for concerted activity under § 1, a plaintiff must plead  
6 concerted action between two distinct entities. However, the Supreme Court has  
7 “eschewed . . . formalistic distinctions in favor of a functional consideration of how the  
8 parties involved in the alleged anticompetitive conduct actually operate.” *Am. Needle*,  
9 560 U.S. at 191. While the Supreme Court has recognized that “a parent corporation  
10 and its wholly owned subsidiary ‘are incapable of conspiring with each other for the  
11 purposes of § 1 of the Sherman Act,’” *id.* at 195 (quoting *Copperworld Corp. v. Indep.*  
12 *Tube Corp.*, 467 U.S. 752, 777 (1984)), courts must conduct an inquiry separate from  
13 the formal labels of the corporate form. “The relevant inquiry . . . is whether there is a  
14 contract, combination, or conspiracy amongst separate economic actors pursuing  
15 separate economic interests such that the agreement deprives the marketplace of  
16 independent centers of decisionmaking, and therefore of diversity of entrepreneurial  
17 interests, and thus of actual or potential competition.” *Id.* (cleaned up). Thus, while the  
18 Supreme Court recognized in *Copperworld* that a parent and subsidiary corporation  
19 cannot conspire to violate the Sherman Act, “[a]greements made within a firm can  
20 constitute concerted action covered by § 1 when the parties to the agreement act on  
21 interests separate from those of the firm itself, and the intrafirm agreements may simply  
22 be a formalistic shell for the ongoing concerted action.” *Id.* at 200 (footnote omitted).

23 Pandora does not offer the necessary facts to support a conspiracy. Pandora  
24 argues that the allegations throughout the counterclaim describe a conspiracy. Pandora  
25 describes the counterclaim as detailing the “licensing tactics of [Word Collections] and  
26 its co-conspirator comedians,” describing “how those licensing tactics are even more  
27 harmful to competition than those employed by ASCAP and BMI,” explaining “that  
28 comedians compete to have Pandora and others stream their content,” describing “how

1 [Word Collections’] ‘exclusive affiliation agreements’ foreclose even the possibility of  
2 price competition by comedians,” describing “the impact that competition between  
3 comedians would have on price were it to take place,” detailing “when individual  
4 comedians signed on to the [Word Collections] cartel and how the number of cartel  
5 member comedians has grown steadily over time,” explaining “how [Word Collections]  
6 has been empowered to set a single fixed price for all of the works of its cartel  
7 members,” explaining “that it is implausible that individual comedians were not aware  
8 of [Word Collections’] scheme, particularly given the public statements made by [Word  
9 Collections] and its founder, and that by affiliating with [Word Collections], they are  
10 necessarily buying into the price-fixing conspiracy,” and explaining “how this  
11 conspiracy works as a business matter only if there is a critical mass of comedians  
12 agreeing to band together to collectively license their works at a fixed price.” (Opp’n  
13 21 n.17.) These allegations, however, are consistent with the parallel conduct that is  
14 insufficient under *Twombly* and, therefore, Pandora does not state a claim for antitrust  
15 conspiracy. Pandora rests its conspiracy claim on the individual comedians’ decisions  
16 to associate with Word Collections. Pandora described this as a hub-and-spoke  
17 conspiracy at the hearing. Under the standard articulated in *In re Musical Instruments*,  
18 this is not enough. Pandora must allege “who, did what, to whom (or with whom),  
19 where, and when.” *In re Musical Instruments*, 798 F.3d at 1194 n.6. Pandora need not  
20 do so with the specificity demanded by Federal Rule of Civil Procedure 9(b), but it must  
21 offer some facts plausibly suggesting concerted activity that is distinct from parallel  
22 conduct. Pandora has not done so and has not alleged any agreement other than  
23 agreements between the comedians and Word Collections for Word Collections to  
24 represent the comedians in licensing negotiations. This failure to properly demonstrate  
25 the requisite agreement thus demonstrates that Pandora’s reliance on *United States v.*  
26 *Apple*, 791 F.3d 290, 325 (2d Cir. 2015), which applied a per se rule analysis to a  
27 properly alleged and proven price fixing claim against a copyright pool, is misplaced.  
28 Pandora has not properly stated a claim for conspiracy.

1 The Court grants Word Collections’ motion to dismiss the price fixing claim.

2 **H. Tying Claim**

3 Word Collections argues that Pandora fails to properly plead a tying claim. (Mot.  
4 24–25.)

5 The Sherman Act prohibits the unlawful tying of the sale of one product to  
6 another. “It is clear, however, that not every refusal to sell two products separately  
7 cannot be said to restrain competition.” *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466  
8 U.S. 2, 11 (1984), *superseded by statute on other grounds as recognized in Ill. Tool*  
9 *Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 31 (2006). “If each of the products may be  
10 purchased separately in a competitive market, one seller’s decision to sell the two in a  
11 single package imposes no unreasonable restraint on either market, particularly if  
12 competing suppliers are free to sell either the entire package or its several parts.” *Id.* at  
13 11–12. “The Supreme Court has developed a unique per se rule for illegal tying  
14 arrangements. For a tying claim to suffer per se condemnation, a plaintiff must prove:  
15 (1) that the defendant tied together the sale of two distinct products or services; (2) that  
16 the defendant possesses enough economic power in the tying product market to coerce  
17 its customers into purchasing the tied product; and (3) that the tying arrangement affects  
18 a not insubstantial volume of commerce in the tied product market.” *Cascade Health*  
19 *Sols. v. PeaceHealth*, 515 F.3d 883, 913 (9th Cir. 2008) (internal quotation marks  
20 omitted). Under rule of reason analysis, a plaintiff must also show an injury to  
21 competition. *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1200 (9th Cir. 2012).

22 Pandora has alleged that Word Collections tied together two distinct products—  
23 the comedy recordings at issue in the other claims and the “less desirable material,  
24 including not just comedy but other spoken-word material as well.” (Countercl. ¶ 66.)  
25 Pandora provides no allegations supporting Word Collections’ market power. Pandora  
26 provides no allegations about the realities of the less desirable material market, provides  
27 no allegations that Pandora must pay supracompetitive prices for those materials,  
28 provides no allegations that offerings of less desirable market products have decreased,

1 and provides no allegations that there is decreased product quality of products in the  
2 less desirable market. Pandora thus does not establish direct market power in the  
3 secondary product market. Pandora does not even provide a market definition that could  
4 support a circumstantial market power analysis. The counterclaim completely lacks  
5 allegations about the volume of commerce in the less-desirable material market affected  
6 by Word Collections’ tying. Pandora thus fails to state a tying claim.

7 Pandora argues that it does not need to allege the elements outlined in *Cascade*  
8 *Health* and can instead state a claim under *United States v. Paramount Pictures, Inc.*,  
9 334 U.S. 131 (1948), and *United States v. Loew’s Inc.*, 371 U.S. 38 (1962). One  
10 prominent antitrust treatise notes that *Paramount Pictures* and *Loew’s* are still good law  
11 for the proposition that there can be “an illegal tie between copyrighted films that were  
12 partial substitutes competing in the same market for film audiences.” Phillip E. Areeda  
13 & Herbert Hovenkamp, *Antitrust Law* § 1747c (5th ed. 2021). *Paramount Pictures* held  
14 that it is illegal to refuse “to license one or more copyrights unless another copyright is  
15 accepted,” 334 U.S. at 159, and thus prohibited block billing in the film industry. *Loew’s*  
16 held the same for the television industry. 371 U.S. at 47–48. These cases rested on the  
17 assumption that intellectual property automatically confers market power. The Supreme  
18 Court explicitly overturned this assumption in *Illinois Tool Works*. 547 U.S. at 42–43.  
19 The Supreme Court stated that “tying arrangements involving patented products should  
20 be evaluated under the standards applied in cases like . . . *Jefferson Parish* rather than  
21 under the *per se* rule applied in . . . *Loew’s*.” *Id.* at 42. The Supreme Court noted that  
22 “some such arrangements are still unlawful, such as those that are the product of a true  
23 monopoly or a marketwide conspiracy,” *id.* at 42–43, and cited *Paramount Pictures* as  
24 an example. Such a true monopoly or marketwide conspiracy “must be supported by  
25 proof of power in the relevant market rather than by a mere presumption thereof.” *Id.*  
26 at 43. Because Pandora has not properly alleged the type of marketwide conspiracy or  
27 true monopoly necessary to invoke the application of the *per se* rule, Pandora must  
28 allege that Word Collections possesses market power in the relevant market for the less

1 desirable materials. For the reasons discussed above, Pandora fails to do so.

2 The Court grants Word Collections’ motion to dismiss the tying claim.

3 **I. Leave to Amend**

4 Given the Ninth Circuit policy of granting leave to amend with “extreme  
5 liberality,” *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020)  
6 (internal quotation marks omitted), the Court gives Plaintiff leave to amend.

7 While the Court grants leave to amend on the price fixing and tying claims, the  
8 Court doubts whether Pandora can allege the necessary facts at this stage. The Court  
9 recognizes that discovery may yield information about the nature of the agreements  
10 between the comedians and Word Collections, at the very least in the context of  
11 Pandora’s copyright misuse defense. (Answer, First Defense.) The Court has not set a  
12 deadline to amend the pleadings. Thus, the Court will “freely give leave” to amend the  
13 pleadings “when justice so requires,” including if previously unavailable information  
14 made available during discovery gives life to a new claim. Fed. R. Civ. P. 15(a)(2).

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1 **IV. CONCLUSION**

2 The Court grants in part and denies in part the request for judicial notice. The  
3 Court grants in part and denies in part the motion. The counterclaim is dismissed in its  
4 entirety. Pandora may file an amended counterclaim no later than 14 days from the date  
5 of this Order, if it can do so consistent with Federal Rule of Civil Procedure 11(b) and  
6 this Order. The parties are encouraged to review the propriety of amendment of the  
7 counterclaim filed at ECF No. 72 in light of this Order. The Court will accept a  
8 stipulation by the parties to file all amended counterclaims simultaneously. In preparing  
9 such a stipulation, the parties should suggest dates that will “secure the just, speedy, and  
10 inexpensive determination” of this matter. Fed. R. Civ. P. 1. Failure to file a timely  
11 amended counterclaim will waive the right to do so. Leave to add new defendants or  
12 claims must be sought by a separate, properly noticed motion.

13  
14 **IT IS SO ORDERED.**

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16 Dated: October 26, 2022



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17 MARK C. SCARSI  
18 UNITED STATES DISTRICT JUDGE  
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