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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re PANDORA MEDIA, LLC
COPYRIGHT LITIGATION

Master File No.: 2:22-cv-00809-MCS-
MAR

CONSOLIDATED ACTION

**ORDER RE: COUNTERCLAIM
DEFENDANT SPOKEN GIANTS,
LLC’S MOTION TO DISMISS
COUNTERCLAIM PLAINTIFF
PANDORA MEDIA, LLC’S
COUNTERCLAIMS;
COUNTERCLAIM DEFENDANT
WORD COLLECTIONS, INC.’S
MOTION TO DISMISS
COUNTERCLAIM PLAINTIFF
PANDORA MEDIA, LLC’S
COUNTERCLAIMS;
COUNTERCLAIM DEFENDANTS’
MOTION FOR SANCTIONS
AGAINST COUNTERCLAIM
PLAINTIFF PANDORA MEDIA,
LLC; COUNTERCLAIM
DEFENDANTS’ MOTIONS FOR
JOINDER (ECF Nos. 102–05, 128, 134,
136–37)**

1 In this consolidated action, Counterclaim Defendants Spoken Giants, LLC
2 (“Spoken Giants”) and Word Collections, Inc. (“Word Collections”) filed separate
3 motions to dismiss Counterclaim Plaintiff Pandora Media, Inc.’s (“Pandora”) First
4 Amended Counterclaims. (SG Mot., ECF No. 102; WC Mot., ECF No. 104.) Pandora
5 opposed the motions, (SG Opp’n, ECF No. 129; WC Opp’n, ECF No. 131), and Spoken
6 Giants and Word Collections replied, (SG Reply, ECF No. 143; WC Reply, ECF No.
7 141.) Counterclaim Defendant Lewis Black filed a motion to join Spoken Giants’
8 motion to dismiss individually and on behalf of Stark Raving Black Production, Inc.
9 (Black MTD Joinder Mot., ECF No. 103.) Pandora filed an opposition to the motion
10 for joinder, (Black MTD Joinder Opp’n, ECF No. 130), and Lewis Black replied, (Black
11 MTD Joinder Reply, ECF No. 144). The following Counterclaim Defendants
12 (collectively, the “Comedians”) filed a motion to join Word Collections’ motion to
13 dismiss: Yellow Rose Productions, Inc., on behalf of Bill Engvall; Main Sequence, Ltd.;
14 Ron White, Inc., on behalf of Ron White; Robin Williams Trust; Brave Lion, Inc., on
15 behalf of Andrew Clay Silverstein a/k/a Andrew Dice Clay; Nick Di Paolo, individually
16 and on behalf of Acid Tongue, Inc.; and Mary Reese Hicks, individually and on behalf
17 of Arizona Bay Production Co., Inc. (Comedians MTD Joinder Mot., ECF No. 105.)
18 Pandora filed an opposition, (Comedians MTD Joinder Opp’n, ECF No. 132), and the
19 Comedians replied, (Comedians MTD Joinder Reply, ECF No. 142).

20 Separately from the motions to dismiss Pandora’s Amended Counterclaims,
21 Spoken Giants and Word Collections filed motions for sanctions against Pandora and
22 its counsel, Mayer Brown, pursuant to Federal Rule of Civil Procedure 11. (SG
23 Sanctions Mot., ECF No. 128; WC Sanctions Mot., ECF No. 136.) Pandora opposed
24 the motions, (SG Sanctions Opp’n, ECF No. 140; WC Sanctions Opp’n, ECF No. 148),
25 and Spoken Giants and Word Collections replied, (SG Sanctions Reply, ECF No. 150;
26 WC Sanctions Reply, ECF No. 152). Lewis Black moved to join Spoken Giants’
27 motion for sanctions. (Black Sanctions Joinder Mot., ECF No. 134.) Pandora opposed
28 Black’s motion, (Black Sanctions Joinder Opp’n, ECF No. 146), and Black replied,

1 (Black Sanctions Joinder Reply, ECF No. 151). The Comedians moved to join Word
2 Collections’ motion for sanctions. (Comedians Sanctions Joinder Mot., ECF No. 137.)
3 Pandora opposed the Comedians’ motion (Comedians Sanctions Joinder Opp’n, ECF
4 No. 149), and the Comedians replied, (Comedians Sanctions Joinder Reply, ECF No.
5 153).

6 The Court deems these matters appropriate for decision without oral argument.
7 *See* Fed. R. Civ. P. 78(b); C.D. Cal. R. 7-15.

8 **I. BACKGROUND**

9 The facts and procedural history of this case are outlined in greater detail in the
10 Court’s order dismissing Pandora’s Original Counterclaims. (Order, ECF No. 83.) The
11 causes of action in both Amended Counterclaims mirror one another. Count I alleges a
12 price fixing conspiracy in violation of section 1 of the Sherman Act. (SG Am.
13 Countercl. ¶¶ 120–26, ECF No. 94; WC Am. Countercl. ¶¶ 128–34, ECF No. 93.)
14 Count II alleges agreements in unreasonable restraint of trade in violation of section 1
15 of the Sherman Act. (SG Am. Countercl. ¶¶ 127–34; WC Am. Countercl. ¶¶ 135–42.)
16 Count III alleges attempted monopolization and monopolization in violation of section
17 2 of the Sherman Act. (SG Am. Countercl. ¶¶ 135–40; WC Am. Countercl. ¶¶ 143–
18 48.) Count IV alleges conspiracy to monopolize in violation of section 2 of the Sherman
19 Act. (SG Am. Countercl. ¶¶ 141–47; WC Am. Countercl. ¶¶ 149–55.)

20 **II. LEGAL STANDARDS**

21 **A. Rule 12(b)(1)**

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

28 Rule 12(b)(1) jurisdictional challenges can be either facial or factual. *Safe Air*

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

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

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

20 The determination of whether a complaint satisfies the plausibility standard is a
21 “context-specific task that requires the reviewing court to draw on its judicial
22 experience and common sense.” *Id.* at 679. Generally, a court must accept the factual
23 allegations in the pleadings as true and view them in the light most favorable to the
24 plaintiff. *Park v. Thompson*, 851 F.3d 910, 918 (9th Cir. 2017); *Lee v. City of Los*
25 *Angeles*, 250 F.3d 668, 679 (9th Cir. 2001). But a court is “not bound to accept as true
26 a legal conclusion couched as a factual allegation.” *Iqbal*, 556 U.S. at 678 (quoting
27 *Twombly*, 550 U.S. at 555).

28 As a general rule, leave to amend a dismissed complaint should be freely granted

1 unless it is clear the complaint could not be saved by any amendment. Fed. R. Civ. P.
2 15(a); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir.
3 2008). Where a plaintiff has previously amended its complaint, “the court’s discretion
4 to deny such leave is particularly broad.” *Ecological Rts. Found. v. Pac. Gas & Elec.*
5 *Co.*, 713 F.3d 502, 520 (9th Cir. 2013) (internal quotation marks omitted).

6 C. Sanctions

7 A court may issue sanctions pursuant to Federal Rule of Civil Procedure 11. Fed.
8 R. Civ. P. 11(c)(1). “Rule 11 is intended to deter baseless filings in district court and
9 imposes a duty of ‘reasonable inquiry’ so that anything filed with the court is ‘well
10 grounded in fact, legally tenable, and not interposed for any improper purpose.’”
11 *Islamic Shura Council of S. Cal. v. FBI*, 757 F.3d 870, 872 (9th Cir. 2014) (quoting
12 *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990)). The Court “must conduct
13 a two-prong inquiry to determine (1) whether the [pleading] is legally or factually
14 ‘baseless’ from an objective perspective, and (2) if the attorney has conducted ‘a
15 reasonable and competent inquiry’ before signing and filing it.” *Christian v. Mattel,*
16 *Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002) (quoting *Buster v. Greisen*, 104 F.3d 1186,
17 1190 (9th Cir. 1997)). “As shorthand for this test,” courts “use the word ‘frivolous’” to
18 refer to any “filing that is *both* baseless *and* made without a reasonable and competent
19 inquiry.” *Holgate v. Baldwin*, 425 F.3d 671, 676 (9th Cir. 2005) (internal quotation
20 marks omitted). If a filing “is not frivolous, it cannot fall within the ‘improper purpose’
21 clause of Rule 11.” *United States v. Stringfellow*, 911 F.2d 225, 226 n.1 (9th Cir. 1990);
22 *see also Newton v. Thomason*, 22 F.3d 1455, 1463 (9th Cir. 1994); *Truesdell v. S. Cal.*
23 *Permanente Med. Grp.*, 209 F.R.D. 169, 174 n.6 (C.D. Cal. 2002).

24 A Rule 11 inquiry is governed by an objective standard. *Golden Eagle Distrib.*
25 *Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537–38 (9th Cir. 1986); *Truesdell*, 209
26 F.R.D. at 174 n.6. “Rule 11 sanctions shall be assessed if the paper filed in district court
27 and signed by an attorney or an unrepresented party is frivolous, legally unreasonable
28 or without factual foundation, even though the paper was not filed in subjective bad

1 faith.” *Golden Eagle*, 801 F.2d at 1538 (internal quotation marks omitted); *Christian*,
2 286 F.3d at 1127.

3 A court may also order sanctions pursuant to 28 U.S.C. § 1927. Under this
4 statute, “[a]ny attorney or other person admitted to conduct cases in any court of the
5 United States or any Territory thereof who so multiplies the proceedings in any case
6 unreasonably and vexatiously may be required by the court to satisfy personally the
7 excess costs, expenses, and attorneys’ fees reasonably incurred because of such
8 conduct.” *Id.*

9 Finally, a court has inherent authority to impose sanctions “when a party has
10 acted in bad faith, vexatiously, wantonly, or for oppressive reasons, delaying or
11 disrupting litigation, or has taken actions in the litigation for an improper purpose.”
12 *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001) (citing *Chambers v. NASCO, Inc.*,
13 501 U.S. 32, 45–46 & n.10 (1991)). The decision of a district court to impose sanctions
14 is discretionary. *Air Separation, Inc. v. Underwriters at Lloyd’s of London*, 45 F.3d
15 288, 291 (9th Cir. 1995). Before imposing a monetary sanction, a court must afford an
16 opportunity to demonstrate the sanctionable actions were “not undertaken recklessly or
17 willfully.” *Toombs v. Leone*, 777 F.2d 465, 472 (9th Cir. 1985).

18 **III. MOTIONS TO DISMISS**

19 **A. Pandora’s Article III and Antitrust Standing**

20 1. *Article III Standing*

21 Spoken Giants claims that Pandora lacks Article III standing to bring its
22 counterclaims. (SG Mot. 5–8.) Specifically, Spoken Giants asserts that Pandora lacks
23 standing because it was never actually presented with “the Hobson’s Choice between
24 taking this price fixed and economically unviable bundle—its blanket license—and
25 abandoning its comedy service altogether.” (*Id.* at 6 (quoting SG Am. Countercl.
26 ¶ 117).) In essence, Spoken Giants claims that it never insisted upon an all-or-nothing
27 licensing arrangement, and that Pandora was free to negotiate for individual licenses
28 but failed to do so. (*Id.* at 7–8.) Pandora responds by pointing to Spoken Giants’

1 statements suggesting that Spoken Giants’ “business model” was premised upon
2 “bundling individual rights into a blanket license.” (SG Opp’n 5 (citing SG Am.
3 Countercl. ¶¶ 53–54, 57, 58).)

4 The Court addressed the standing issue in its prior order, concluding that Pandora
5 adequately alleged the ability to procure individual licenses was “illusory.” (Order 17.)
6 Spoken Giants claims the Amended Counterclaims changes the analysis and requests
7 the Court consider certain documents, specifically a sample affiliation agreement, (ECF
8 No. 102-2); an April 19, 2021 email from Spoken Giants to Pandora attaching a
9 proposed term sheet, (ECF No. 102-3); and the proposed term sheet (ECF No. 102-4),
10 on the grounds they are incorporated into the pleadings by reference. (SG Mot. 5.)
11 When evaluating a motion to dismiss, a court may properly “consider evidence on
12 which the complaint ‘necessarily relies’ if: (1) the complaint refers to the document;
13 (2) the document is central to the plaintiff’s claim; and (3) no party questions the
14 authenticity of the copy attached to the 12(b)(6) motion.” *Marder v. Lopez*, 450 F.3d
15 445, 448 (9th Cir. 2006). If these conditions are met, a “court may treat such a document
16 as part of the complaint, and thus may assume that its contents are true for purposes of
17 a motion to dismiss under Rule 12(b)(6).” *Id.* (internal quotation marks omitted).
18 Because Pandora does not oppose Spoken Giants’ request, (SG Opp’n 1 n.2), the Court
19 considers the affiliation agreement, the April 19 email, and the proposed term sheet as
20 part of the Counterclaim.

21 These documents notwithstanding, Pandora provides numerous factual
22 allegations giving rise to the plausible inference that a blanket license was required.
23 (*See, e.g.*, SG Am. Countercl. ¶ 53 (citing a Spoken Giants press release stating Spoken
24 Giants’ “very purpose is to license the works of comedians on a ‘collective’ basis” and
25 that “Spoken Giants is going to change the comedy licensing marketplace through
26 ‘collective representation for all to strengthen the marketplace in favor of the
27 [comedian] creator.” (alteration in original)).) Accordingly, the Court again concludes
28 that “Pandora has plausibly alleged Word Collections [and Spoken Giants] require[] a

1 blanket license for access to [their] literary works.” (Order 18.)

2 Spoken Giants also asserts that the costs of defending against copyright
3 infringement claims, including removing content from its service, is insufficient to give
4 rise to an Article III injury. (SG Mot. 8.) Spoken Giants’ arguments are
5 indistinguishable from those considered and rejected in the Court’s prior Order. (Order
6 11.) As such, the Court declines to address them again here.

7 2. *Antitrust Standing*

8 In the prior order, the Court considered whether Pandora had adequately
9 demonstrated it had the requisite antitrust standing to sustain its claims. (Order 11–14.)
10 Spoken Giants claims “new case law not yet decided at the time of the Court’s Decision”
11 is relevant and should be considered here. (SG Mot. 6). Specifically, Spoken Giants
12 asserts that *Intel Corp. v. Fortress Investment Group LLC*, No. 21-16817, 2022 WL
13 16756365 (9th Cir. Nov. 8, 2022), an unpublished memorandum decision, stands for
14 the proposition that a plaintiff suffers no antitrust injury when it has not actually paid
15 higher royalty payments. (SG Mot. 9.) In *Intel*, the plaintiff identified “no instance in
16 which it has actually paid higher royalties” but instead “merely cite[d the defendant’s]
17 litigation demands as evidence that licensing prices have increased.” 2022 WL
18 16756365, at *2. The court acknowledged “[t]here are substantial questions regarding
19 whether a litigation demand is even a cognizable ‘price’ for purposes of the antitrust
20 laws,” but proceeded to set “these potential problems to the side” and address the
21 plaintiff’s failure to allege that any price increases were the result of the defendant’s
22 conduct. *Id.*

23 Spoken Giants acknowledges that the Ninth Circuit did not decide *Intel* on the
24 basis of standing, but instead contends “the *logic* driving the Ninth Circuit’s
25 decision . . . forecloses Pandora’s theory of harm.” (SG Mot. 9 (emphasis added).) The
26 fact that the Ninth Circuit refused to explicitly state that litigation costs cannot confer
27 antitrust standing and instead went on to address the parties’ other arguments strongly
28 suggests the court did not intend to create a rule in an unpublished disposition

1 concerning antitrust standing. The Ninth Circuit had an opportunity to pronounce the
2 rule proposed by Spoken Giants, and pointedly declined to do so. For this reason, the
3 Court is not persuaded that the logic of the *Intel* decision forecloses anything. The
4 Court rejects Spoken Giants’ argument with respect to antitrust injury for the reasons
5 stated in the prior order.

6 ***

7 For the reasons stated above, the Court concludes that Pandora has standing to
8 bring its Amended Counterclaims.

9 **B. Pandora’s Section 1 Claims**

10 “Section 1 of the Sherman Act prohibits ‘[e]very contract, combination in the
11 form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the
12 several States.’” *FTC v. Qualcomm Inc.*, 969 F.3d 974, 988 (9th Cir. 2020) (alteration
13 in original) (quoting 15 U.S.C. § 1). “Although the Sherman Act, by its terms, prohibits
14 every agreement ‘in restraint of trade,’” the Supreme Court “has long recognized that
15 Congress intended to outlaw only *unreasonable* restraints.” *State Oil Co. v. Khan*, 522
16 U.S. 3, 10 (1997) (emphasis added). “Thus, to establish liability under § 1, a plaintiff
17 must prove (1) the existence of an agreement, and (2) that the agreement was in
18 *unreasonable* restraint of trade.” *Qualcomm*, 969 F.3d at 988–89 (cleaned up).

19 “Some types of [restraints on trade] have such predictable and pernicious
20 anticompetitive effect, and such limited potential for procompetitive benefit, that they
21 are deemed unlawful *per se*.” *State Oil*, 522 U.S. at 10. “Typically only horizontal
22 restraints—restraints imposed by agreement between competitors—qualify as
23 unreasonable *per se*.” *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283–84 (2018)
24 (internal quotation marks omitted). Horizontal restraints are different from vertical
25 restraints, which involve “agreement between firms at different levels of distribution.”
26 *Id.* at 2884 (internal quotation marks omitted). “Restraints that are not unreasonable
27 *per se* are judged under the ‘rule of reason,’” which “requires courts to conduct a fact-
28 specific assessment of market power and market structure to assess the restraint’s actual

1 effect on competition.” *Id.* (cleaned up). “The goal is to distinguish between restraints
2 with anticompetitive effect that are harmful to the consumer and restraints stimulating
3 competition that are in the consumer’s best interest.” *Id.* (cleaned up).

4 Pandora alleges two forms of section 1 liability. Count I alleges an agreement
5 among the Spoken Giants’ and Word Collections’ member comedians, facilitated by
6 Spoken Giants and Word Collections, to fix prices. (SG Am. Countercl. ¶¶ 120–26;
7 WC Am. Countercl. ¶¶ 128–34.) Count II alleges that the multiple bilateral agreements
8 between Spoken Giants and Word Collections and their respective member comedians
9 unreasonably restrain trade. (SG Am. Countercl. 127–34; WC Am. Countercl. ¶¶ 135–
10 42.) With respect to Count II’s unreasonable restraint of trade claims, Pandora alleges
11 Spoken Giants and Word Collections entered into “de facto exclusive affiliation
12 agreements” which cannot be upheld under a rule of reason analysis. (SG Opp’n 19.)
13 As described in greater detail below, Pandora has not adequately alleged liability under
14 either theory.

15 1. *Pandora Has Not Adequately Alleged an Agreement Among the*
16 *Spoken Giants’ or Word Collections’ Member Comedians*

17 To allege an agreement among competitors in an antitrust case, a plaintiff must
18 allege something beyond “parallel conduct, even conduct consciously undertaken.”
19 *Twombly*, 550 U.S. at 557. “Conscious parallelism occurs when two or more [entities]
20 in a concentrated, interdependent market base their actions in part on the anticipated
21 reactions of their competitors, and thus ‘arrive at identical decisions independently, as
22 they are cognizant of—and reacting to—similar market pressures.’” *In re Dynamic*
23 *Random Access Memory (DRAM) Indirect Purchaser Antitrust Litig.*, 28 F.4th 42, 48
24 n.2 (9th Cir. 2022) (“*DRAM*”) (quoting *In re Musical Instruments & Equip. Antitrust*
25 *Litig.*, 798 F.3d 1186, 1193 (9th Cir. 2015) (“*Musical Instruments*”). At most, parallel
26 conduct is “circumstantial evidence of anticompetitive behavior,” and “mere allegations
27 of parallel conduct—even consciously parallel conduct—are insufficient to state a claim
28 under § 1.” *Musical Instruments*, 798 F.3d at 1193. “[P]ermissible parallel conduct” is

1 distinguished “from impermissible conspiracy by looking for certain ‘plus factors.’” *Id.*
2 at 1194. “[P]lus factors are economic actions and outcomes that are largely inconsistent
3 with unilateral conduct but largely consistent with explicitly coordinated action.” *Id.*
4 (citing *Twombly*, 550 U.S. at 557 n.4).

5 Pandora acknowledges that each comedian engaged in “parallel conduct.” (SG
6 Am. Countercl. ¶ 48; WC Am. Countercl. ¶ 60.) However, it claims there are sufficient
7 allegations of circumstantial evidence showing “a conscious commitment to a common
8 scheme designed to achieve an unlawful objective.” (SG Opp’n 13 (internal quotation
9 marks omitted); WC Opp’n 13 (internal quotation marks omitted).) Pandora states it
10 has alleged a sufficient number of “plus factors” to show Spoken Giants’ and Word
11 Collections’ member comedians’ conduct was not just parallel conduct but was instead
12 an impermissible conspiracy. (SG Opp’n 17; WC Opp’n 17.)

13 Pandora first asserts that “no individual Comedian would demand a supra-
14 competitive extra royalty on top of what they have historically been paid from a service
15 like Pandora.” (SG Opp’n 17 (cleaned up); *see id.* at 17–19; WC Opp’n 17–20.) In
16 *Musical Instruments*, the Ninth Circuit recognized when “prices can be easily readjusted
17 without persistent negative consequences, one firm can risk being the first to raise
18 prices, . . . [and] supra competitive prices and other anticompetitive practices, once
19 initiated, can spread through a market without any prior agreement.” 798 F.3d at 1195.
20 Pandora claims this case is different because “many comedians compete to have their
21 performances streamed; as the FACCs allege, no individual Comedian would risk
22 seeking a supracompetitive royalty on her own.” (SG Opp’n 18; WC Opp’n 18.) Aside
23 from a reliance upon historical practice, this conclusory statement is unsupported by
24 factual allegations. Mere reliance on historical practice was plainly insufficient for the
25 Ninth Circuit in *Musical Instruments*, and the Court is not satisfied that the “individual
26 action” proffered here “would be so perilous in the absence of advance agreement that
27 no reasonable [comedian] would make the challenged move without such an
28 agreement.” *Musical Instruments*, 798 F.3d at 1195.

1 Further, notwithstanding the principle that a party may plead claims “regardless
2 of consistency,” Fed. R. Civ. P. 8(d)(3), the claim that no comedian would risk
3 requesting higher royalties is both contradictory and implausible considering Pandora’s
4 theory of liability underlying their section 2 claims. As discussed in greater detail
5 below, Pandora’s section 2 monopolization claims allege that Spoken Giants’ and Word
6 Collections’ ability to control the small, but economically necessary, cadre of
7 “superstar” comedians lets them restrict output and demand supracompetitive prices for
8 licensing rights. (SG Opp’n 7–9; WC Opp’n 6–9.) In this competitive landscape
9 described by Pandora, it is hard to comprehend why “superstar” comedians would be
10 afraid to “risk seeking a supracompetitive royalty,” (SG Opp’n 18; WC Opp’n 18),
11 armed with the knowledge they are among the pantheon of “must-have” comedians to
12 run a viable comedy streaming service.

13 For similar reasons, Pandora also fails to show that prices could not “be easily
14 readjusted without persistent negative consequences.” *Musical Instruments*, 798 F.3d
15 at 1195. Pandora claims that any attempt to charge supracompetitive royalties by an
16 individual comedian “would likely result in their recordings being removed from
17 Pandora and losing out on the royalties and promotion that would have otherwise
18 occurred.” (SG Am. Countercl. ¶ 63; WC Am. Countercl. ¶ 75.) It seems clear,
19 however, that if these “superstar” performers are indeed as critical as Pandora claims,
20 “one [comedian] can risk being the first to raise prices, confident that if [his or her]
21 price *is* followed, all [comedians] will benefit.” *Musical Instruments*, 798 F.3d at 1195;
22 *see Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir.
23 2014) (“[W]hen faced with two possible explanations, only one of which can be true
24 and only one of which results in liability, plaintiffs cannot offer allegations that are
25 merely consistent with their favored explanation but are also consistent with the
26 alternative explanation.” (internal quotation marks omitted)).

27 Next, Pandora asserts that Spoken Giants’ and Word Collections’ member
28 comedians have a common motive to conspire with other comedians. (SG Opp’n 18;

1 WC Opp’n 18–19.) Again, *Musical Instruments* is instructive. “[C]ommon motive
2 does not suggest an agreement. Any firm that believes that it could increase profits by
3 raising prices has a motive to reach an advance agreement with its competitors.”
4 *Musical Instruments*, 798 F.3d at 1194. Even assuming Spoken Giants’ and Word
5 Collections’ member comedians are indeed competitors and had a sufficient motive to
6 enter into an illicit agreement, “alleging ‘common motive to conspire’ simply restates
7 that a market is interdependent.” *Id.* at 1195. Because an interdependent market is the
8 reason entities engage in permissible parallel conduct in the first place, this allegation
9 is not sufficient to “nudge [Pandora’s] claims across the line from conceivable to
10 plausible.” *Twombly*, 550 U.S. at 570.

11 Pandora next argues that each member comedian entered into an exclusive
12 “affiliation agreement within a short period of time, despite having never individually
13 demanded a literary-works license from Pandora and never previously affiliating with
14 a ‘literary works’ licensing agency.” (SG Opp’n 18; WC Opp’n 19.) “[C]omplex and
15 historically unprecedented changes in pricing structure made at the very same time by
16 multiple competitors, and made for no other discernible reason, would support a
17 plausible inference of conspiracy.” *Twombly*, 550 U.S. at 556 n.4 (internal quotation
18 marks omitted). In its motion, Word Collections persuasively argues that Pandora
19 “itself supplies the ‘other discernible reason’ for the Comedians’ actions within a short
20 period of time: the formation and public launch of Word Collections in 2020, a ‘first of
21 its kind’ agency whose stated purpose was to seek to recover royalties for the use of
22 comedic literary works.” (WC Mot. 27.) Given there was previously no entity who
23 negotiated a license for the rights at issue in this case, the formation of Word Collections
24 offers a reasonable and non-conspiratorial reason for any sudden change in pricing
25 practices. As a result, the Amended Counterclaims’ allegations show nothing “more
26 than [a] similar reaction to similar pressures within an interdependent market, or
27 conscious parallelism.” *Musical Instruments*, 798 F.3d at 1196.

28 Finally, Pandora alleges that Spoken Giants and Word Collections took steps to

1 provide assurances to their member comedians that the collective remained intact. (SG
2 Am. Countercl. ¶ 66; WC Am. Countercl. ¶ 78.) “Allegations of facts that could just as
3 easily suggest rational, legal business behavior by the defendants as they could suggest
4 an illegal conspiracy are insufficient to plead a violation of the antitrust laws.” *Kendall*
5 *v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1049 (9th Cir. 2008). Similarly, “making
6 announcements about new practices or developments is common and doesn’t imply
7 illicit or surreptitious signaling was going on.” *In re Nat’l Ass’n of Music Merchants,*
8 *Musical Instruments & Equip. Antitrust Litig.*, No. 09CV2002 etc., 2012 WL 3637291,
9 at *5 (S.D. Cal. Aug. 20, 2012), *aff’d sub nom. Musical Instruments*, 798 F.3d 1186. It
10 is difficult to read the press releases cited in the Amended Counterclaims as anything
11 beyond the kind of client development or standard business promotion that would have
12 happened in the absence of a conspiracy. Even “[i]f no conspiracy existed,
13 [Counterclaim] Defendants would likely [have made] the same public statements,” and
14 this is not enough to plausibly allege an illicit price fixing agreement. *DRAM*, 28 F.4th
15 at 50.

16 Pandora’s “plus factors” consist of conduct that, when taken individually or
17 collectively, is entirely consistent with permissible conscious parallel conduct.
18 Therefore, Pandora again fails to adequately allege a violation of section 1 of the
19 Sherman Act, and Spoken Giants’ and Word Collections’ motions to dismiss Count 1
20 of the Amended Counterclaims is GRANTED.

21 2. *Pandora Has Not Alleged the Bilateral Agreements Between Spoken*
22 *Giants or Word Collections and Their Member Comedians*
23 *Unreasonably Restrain Trade*

24 Count II in the Amended Counterclaims alleges that Spoken Giants and Word
25 Collections unreasonably restrained trade by eliminating competition among comedians
26 through a series of bilateral “exclusive affiliation agreements.” (SG Am. Countercl.
27 ¶ 71; WC Am. Countercl. ¶ 79.) “[A]n exclusive-dealing arrangement does not
28 constitute a per se violation of section 1. Therefore, any particular exclusive-dealing

1 arrangement does not violate section 1 unless it is found to be unreasonable.” *Twin City*
2 *Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1303–04 (9th Cir.
3 1982) (citations omitted). “In order to state a Section 1 claim under the rule of reason,
4 plaintiffs must plead four separate elements.” *Brantley v. NBC Universal, Inc.*, 675
5 F.3d 1192, 1197 (9th Cir. 2012). These elements are: 1) a contract, combination, or
6 conspiracy among two or more persons or distinct business entities; 2) by which the
7 persons or entities intended to harm or restrain trade; 3) which actually injures
8 competition; and 4) that plaintiff was harmed by the defendant’s anticompetitive
9 agreement. *Id.*

10 In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771–72 (1984),
11 the Supreme Court concluded that a corporation and its wholly-owned subsidiaries were
12 legally incapable of forming the requisite contract, combination, or conspiracy to
13 sustain liability under section 1. “Lower courts have since applied *Copperweld*’s
14 reasoning (sometimes referred to as the ‘single-entity’ rule) to a broader variety of
15 economic relationships.” *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club,*
16 *Inc.*, 407 F.3d 1027, 1034 (9th Cir. 2005). “[T]he single entity rule applies to principal-
17 agent relationships” *Id.* (citing *Calculators Haw., Inc. v. Brandt, Inc.*, 724 F.2d
18 1332, 1336 (9th Cir. 1983)). “The crucial question” in determining whether the single-
19 entity rule applies “is whether the entities alleged to have conspired maintain an
20 ‘economic unity,’ and whether the entities were either actual or potential competitors.”
21 *Id.*

22 Here, the Court is guided by the logic of *Levi Case Co. v. ATS Products, Inc.*,
23 788 F. Supp. 428 (N.D. Cal. 1992). In that case, the defendant obtained the right to
24 manufacture heating, ventilation, and air conditioning ductwork after being granted an
25 exclusive license by the patent holder. *Id.* at 429. The plaintiff brought a claim alleging
26 that the manufacturer and patent holder conspired to restrain trade in violation of section
27 1 of the Sherman Act. *Id.* at 430. The court concluded that the patent holder was legally
28 incapable of entering into an antitrust conspiracy with its exclusive patent licensee given

1 the entities’ licensing relationship. *Id.* at 432.

2 The Court sees no principled distinction between the patent license in *Levi* and
3 the exclusive affiliation agreements at issue here. Pandora alleges that the affiliation
4 agreements allow Spoken Giants “to become the de facto exclusive licensor” of the
5 rights assigned by the individual comedians, (SG Opp’n 13 (citing SG Am. Countercl.
6 ¶¶ 45–59)), and Word Collections to serve as the “the exclusive licensor of the works”
7 of its member comedians, (WC Am. Countercl. ¶ 79). Accepting Pandora’s allegations
8 as true, the “exclusive license” shows a degree of economic unity such that Spoken
9 Giants and Word Collections and their member comedians “could not compete” in the
10 market for standup comedy licensing rights. *Levi Case Co.*, 788 F. Supp. at 432. As
11 alleged, “no agreement between” the comedians and either Spoken Giants or Word
12 Collections “involving the exploitation of the [licensing rights] in which they both held
13 an interest can be considered to deprive the marketplace of independent sources of
14 economic power previously pursuing separate interests.” *Id.* (internal quotation marks
15 omitted). At bottom, Pandora alleges the affiliation agreements established a principal-
16 agent relationship that cannot form the basis of an agreement to restrain trade in
17 violation of section 1. *See Calculators Haw.*, 724 F.2d at 1336.

18 Pandora also does not adequately allege injury to competition. The Court will
19 not belabor the analysis here because it is discussed in greater detail in the following
20 section. In essence, Pandora claims consolidating the right to license comedy routines
21 harms competition because Spoken Giants and Word Collections effectively control the
22 market for the rights to stream “superstar” comedians’ performances. (*See* SG Opp’n
23 7–9; WC Opp’n 6–9.) Without a “critical mass” of these licenses, Pandora claims it
24 cannot offer a viable streaming comedy service. (*Id.*) Pandora does not adequately
25 explain who these “superstar” comedians are, how many are necessary to form a
26 “critical mass,” or even the size of the relevant market. Accordingly, the Court cannot
27 reasonably conclude that the aggregation of licensing rights for a handful of performers
28 into two distinct entities has injured competition in the “the U.S. market for the rights

1 to comedy routines embodied in comedy recordings.” (SG Am. Countercl. ¶ 89; WC
2 Am. Countercl. ¶ 99.)

3 For the reasons stated above, Spoken Giants’ and Word Collections’ motion to
4 dismiss Count 2 of the Amended Counterclaims is GRANTED.

5 **C. Pandora’ Monopolization and Attempted Monopolization Claims**

6 Count III of the Amended Counterclaims alleges monopolization and attempted
7 monopolization by Spoken Giants and Word Collections in violation of section 2 of the
8 Sherman Act. (SG Am. Countercl. ¶¶ 135–40; WC Am. Countercl. ¶¶ 143–48.)
9 Section 2 of the Sherman Act states that “[e]very person who shall monopolize, or
10 attempt to monopolize, or combine or conspire with any other person or persons, to
11 monopolize any part of the trade or commerce among the several States, or with foreign
12 nations” violates the law. 15 U.S.C. § 2. To state a claim for monopolization, a plaintiff
13 must adequately allege 1) the possession of monopoly power in the relevant market,
14 2) the willful acquisition or maintenance of such power, and 3) a causal antitrust injury.
15 *In re NFL’s Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1159 (9th Cir. 2019). To
16 state a claim for attempted monopolization, a party must plead “(1) that the defendant
17 has engaged in predatory or anticompetitive conduct with (2) a specific intent to
18 monopolize and (3) a dangerous probability of achieving monopoly power.” *Coal. for*
19 *ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 506 (9th Cir. 2010).

20 For the purposes of a section 2 claim, “monopoly power” is defined “as the power
21 to control prices or exclude competition.” *United States v. Grinnell Corp.*, 384 U.S.
22 563, 571 (1966) (internal quotation marks omitted). In most cases, whether a defendant
23 can reasonably control prices or exclude competition is determined by examining their
24 “market power.” *See, e.g., Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 894
25 (10th Cir. 1991) (defining monopoly power as “substantial market power”); *Deauville*
26 *Corp. v. Federated Dep’t Stores, Inc.*, 756 F.2d 1183, 1192 n.6 (5th Cir. 1985) (defining
27 monopoly power as an “extreme degree of market power”); *Safeway Inc. v. Abbott*
28 *Lab’ys*, 761 F. Supp. 2d 874, 886 n.2 (N.D. Cal. 2011) (defining monopoly power as a

1 “substantial degree of market power”). A defendant’s market power may be shown
2 directly or through circumstantial evidence. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d
3 1421, 1434 (9th Cir. 1995).

4 Pandora’s monopolization and attempted monopolization claims fail because it
5 does not sufficiently allege direct or circumstantial evidence of Spoken Giants’ or Word
6 Collections’ market power. Additionally, Pandora does not adequately allege that
7 “rivals are barred from entering the market” or that “existing competitors lack the
8 capacity to expand their output to challenge the predator’s high price.” *Id.* at 1439.

9 1. *Pandora Fails to Allege Direct Evidence of Market Power*

10 A plaintiff may supply direct evidence of a defendant’s market power by
11 presenting “evidence of restricted output and supracompetitive prices.” *Rebel Oil Co.*,
12 51 F.3d at 1434. Pandora argues Spoken Giants and Word Collections have restricted
13 access to streaming rights of their member comedians, forcing Pandora to remove
14 comedy content from its streaming service, thereby restricting output. (WC Opp’n 10;
15 SG Opp’n 11.) Pandora contends that “it cannot simply reject” Spoken Giants and
16 Word Collections’ “price fixed ‘offer’ and deal instead with a competitor,” forcing it to
17 choose between paying supracompetitive prices or getting nothing at all. (SG Am.
18 Countercl. ¶ 97; WC Am. Countercl. ¶ 107.)

19 Pandora defines the relevant market as “the U.S. market for the rights to comedy
20 routines embodied in comedy recordings.” (SG Am. Countercl. ¶ 89; WC Am.
21 Countercl. ¶ 99.) Taken at face value, the fact that Spoken Giants and Word Collections
22 control licensing rights to a small fraction of the overall number of recordings
23 previously available on Pandora would be fatal to its claim. (*See* Order 20
24 (acknowledging that in 2016 Pandora offered “more than 3,000 comedians with more
25 than 35,000 tracks” as part of its comedy collection, whereas Word Collections
26 represented “about 30 comedians” (internal quotation marks omitted)).) Instead,
27 Pandora argues that Spoken Giants and Word Collections control the licensing rights
28 for comedians who “form a significant part of the critical mass necessary to offer a

1 viable streaming service and may garner a significant percentage of Pandora’s comedy
2 streams.” (Order 20; *see also* SG Am. Countercl. ¶ 88; WC Am. Countercl. ¶ 98.)
3 Without this “critical mass,” according to Pandora, “the raw number of comedy
4 recordings in Pandora’s library is beside the point,” (WC Opp’n 8), because “the ability
5 to provide listeners with the recordings of a sufficient number of the ‘superstar’
6 comedians that they actually want to hear” is competitively essential. (*Id.* at 6–7; SG
7 Opp’n 7.) Pandora goes on to claim that “if a single economic actor gained control over
8 the comedy routines embodied in the recordings of numerous ‘superstar’ comedians,
9 Pandora could not substitute away from that collection of rights to other comedians’
10 works.” (SG Opp’n 7; WC Opp’n 7.)

11 In its Original Counterclaims, Pandora made the same “implicit argument,”
12 namely that Spoken Giants’ and Word Collections’ ability to control the small, but
13 economically necessary, cadre of “superstar” comedians is what allows them to restrict
14 output and demand supracompetitive prices. (Order 20.) Even assuming the relevant
15 market could be redefined as Pandora suggests, Pandora offers no reliable basis to
16 determine who these “superstar” comedians are. Pandora has therefore failed to plead
17 enough “factual content that allows the court” to conclude Spoken Giants or Word
18 Collections is liable for a section 2 violation because either can restrict output or charge
19 supracompetitive prices in the relevant market. *Iqbal*, 556 U.S. at 678.

20 In attempting to identify the “superstar” or “must-have” comedians affiliated with
21 Word Collections, Pandora cites a 2017 list from *Rolling Stone* magazine of the 50 Best
22 Stand-Up Comics of All Time, (WC Am. Countercl. ¶ 114), *Billboard*’s list of the 20
23 bestselling comedy albums from 1991 to 2014, (*id.*), and the conclusions of its “comedy
24 curation team,” (*id.* ¶ 116). Of the 59 comedians who appear on the *Rolling Stone* and
25 *Billboard* lists (there is understandably some degree of overlap), Pandora alleges that
26 Word Collections controls the licensing rights for just 12 “must-have” comedians:
27 Richard Pryor, George Carlin, Jerry Seinfeld, Robin Williams, Bill Hicks, Steven
28 Wright, Jonathan Williams, Dick Gregory, Margaret Cho, Adam Sandler, Dane Cook,

1 and Bill Engvall. (*Id.* ¶ 114.) Elsewhere in the Amended Counterclaim, Pandora asserts
2 that Ron White and Andrew Dice Clay, who do not appear on either list, are also “must-
3 have” comedians. (*Id.* ¶ 116.) With respect to Spoken Giants, Pandora alleges that its
4 member comedians includes “[a]ll of the top five comedians played on Pandora in 2021:
5 Tom Segura, Chad Daniels, Jim Gaffigan, Dan Cummins, and Gabriel Iglesias.” (SG
6 Am. Countercl. ¶ 103.) Pandora also represents that Spoken Giants’ members include
7 “twelve of the top twenty-five [comedians] played that year.” (SG Opp’n 8 (citing SG
8 Am. Countercl. ¶ 103.) Pandora also alleges that Jeff Foxworthy and Larry the Cable
9 Guy, who appear on the Billboard list, are “must-have” comedians, although it is not
10 clear if they are also among the top-played comedians on Pandora. (SG Am. Countercl.
11 ¶ 103.)

12 Pandora’s allegations are entirely conclusory. Pandora’s claims that Spoken
13 Giants portfolio is a “must-have” because “of the many high-profile and wildly popular
14 comedians” that are members. (*Id.* ¶ 107.) Similarly, Pandora alleges Word Collections
15 portfolio is a “must-have” because it controls “the rights of the many legendary
16 comedians.” (WC Am. Countercl. ¶ 115.) Pandora fails to articulate a consistent basis
17 by which a comedian (or group of comedians) could be considered a “must-have.” At
18 most, the Amended Counterclaims indicate Spoken Giants and Word Collections are
19 affiliated with popular comedians. However, saying a defendant has market power
20 because they control licensing rights for a group of *popular* comedians, without more,
21 is only slightly better than saying the defendant has market power because they control
22 licensing rights for a group of *funny* comedians. Both statements may very well be true,
23 but neither is sufficient to state a monopolization claim consistent with the standards
24 articulated in *Twombly* and *Iqbal*.

25 Stated simply, the Amended Counterclaims fail to provide a method of answering
26 a number of simple, but critically important, questions. As one example, given he does
27 not appear on either the *Rolling Stone* or *Billboard* list, why is Lewis Black a “superstar”
28 such that his routines might form part of a “must-have” portfolio? For another, if Larry

1 the Cable Guy is a “superstar” comedian, is Jerry Clower?¹ What about comedians who
2 have risen to prominence more recently? Is it fair to call Hannibal Buress a “must-
3 have” talent? What about Hannah Gadsby? Ali Wong? Ultimately, the Court can only
4 speculate.

5 It is clear that Pandora has not alleged that Spoken Giants or Word Collections
6 has restricted access to, or charged supracompetitive rates for, the rights “embodied in
7 comedy recordings” in the “U.S. market” as a whole. Pandora has also failed to allege
8 direct evidence of Spoken Giants’ or Word Collections’ ability to do the same for the
9 much smaller universe of “superstar” comedians because Pandora does not provide a
10 reasonable basis for identifying any of the “superstar” comedians it claims it needs. As
11 a result, its contentions that “it cannot simply reject” Spoken Giants and Word
12 Collections’ “price fixed ‘offer’ and deal instead with a competitor” are conclusory and
13 therefore insufficient to state a claim for monopolization or attempted monopolization
14 under section 2. (SG Am. Countercl. ¶ 97; WC Am. Countercl. ¶ 107.)

15 2. *Pandora’s Circumstantial Evidence of Market Power*

16 As with the Original Counterclaims, “Pandora’s allegations of circumstantial
17 market power fare even worse.” (Order 20.) “To demonstrate market power
18 circumstantially, a plaintiff must: (1) define the relevant market, (2) show that the
19 defendant owns a dominant share of that market, and (3) show that there are significant
20 barriers to entry and show that existing competitors lack the capacity to increase their
21 output in the short run.” *Rebel Oil*, 51 F.3d at 1434. In addition to the issues with
22

23 ¹ Although unnecessary to the resolution of this motion, the Court notes that Mr. Clower
24 was also included on the *Billboard* list of best-selling comedy albums. Keith Caulfield,
25 *Top 20 Best Selling Comedy Albums (Nielsen SoundScan Era)*, *Billboard* (May 16,
26 2014), <https://www.billboard.com/lists/top-20-best-selling-comedy-albums-nielsen-soundscan-era>. With all due respect to *The Mouth of Mississippi*, this gives reason for
27 the Court to wonder whether the list, which itself is almost a decade old, accurately
28 reflects consumer preferences in the streaming era (or at least following the cancellation
of *Hee Haw*).

1 identifying who the “superstar” comedians might be, Pandora also fails to allege facts
2 from which the Court could conclude that Spoken Giants or Word Collections controls
3 a dominant share of the market or that there are significant barriers to entry.

4 Pandora has been clear “that *no* individual comedian is a must-have,” (WC Opp’n
5 9), and that Spoken Giants and Word Collections’ monopoly power comes from their
6 “*aggregation* of the rights to many ‘superstar’ (and other) comedians, making” their
7 respective “*portfolio[s]* a must-have,” (SG Opp’n 9; WC Opp’n 9). Even if it were
8 possible to determine who the “superstar” comedians are, the total number of these
9 “superstars” remains unpleaded. The size of the market is therefore unascertainable,
10 and it is impossible to determine that Spoken Giants or Word Collections controls a
11 dominant (or even moderately large) share of the relevant market.

12 The closet Pandora comes to defining the market is when it states that “there are
13 only a few dozen comedians who account for any significant number of streams across
14 Pandora’s services.” (SG Am. Countercl. ¶ 23; WC Am. Countercl. ¶ 33.) This is
15 insufficient to sustain a claim for a number of reasons. First, what constitutes a
16 “significant number of streams” is not identified with any degree of certainty. Second,
17 Pandora does not get any more specific than alleging the number of “superstar”
18 comedians amounts to “a few dozen.” Third and finally, Pandora offers no reason to
19 conclude that the universe of “superstar” comedians necessary to run a viable streaming
20 comedy service and the universe of comedians with “any significant number of streams
21 across Pandora’s services” are identical or substantially overlap.

22 Even if Pandora’s vague reference to the size of the market were sufficient, the
23 Amended Counterclaims do not show that either Spoken Giants or Word Collections
24 owns a sufficient share of that market to demonstrate monopoly power. “The threshold
25 of market share for finding a *prima facie* case of monopoly power is generally no less
26 than 65% market share.” *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1029
27 (N.D. Cal. 2021); *accord Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d
28 1195, 1206 (9th Cir. 1997) (“Courts generally require a 65% market share to establish

1 a prima facie case of market power.”). “When the claim involves attempted
2 monopolization, most cases hold that a market share of 30 percent is presumptively
3 insufficient to establish the power to control price.” *Rebel Oil*, 51 F.3d at 1438.
4 Adopting arguendo the number from the *Rolling Stone* article cited by Pandora,
5 Matthew Love, *50 Best Stand-Up Comics of All Time*, *Rolling Stone* (Feb. 14, 2017),
6 [https://www.rollingstone.com/culture/culture-lists/50-best-stand-up-comics-of-all-](https://www.rollingstone.com/culture/culture-lists/50-best-stand-up-comics-of-all-time-126359)
7 [time-126359](https://www.rollingstone.com/culture/culture-lists/50-best-stand-up-comics-of-all-time-126359), and assuming “a few dozen” equates to fifty comedians, (SG Am.
8 Countercl. ¶ 23; WC Am. Countercl. ¶ 33), Pandora has not made a prima facie case of
9 monopoly power. Pandora claims Spoken Giants and Word Collections each controls
10 the licensing rights for up to 14 “superstars,” or 28% of the hypothetical total.² (WC
11 Am. Countercl. ¶ 114; SG Am. Countercl. ¶ 103.)

12 Finally, Pandora undermines its monopolization claims by acknowledging that it
13 “must have access to at least a portion of the catalogs of *both*” Spoken Giants and Word
14 Collections “if it is to offer a viable comedy service in the long run.” (SG Am.
15 Countercl. ¶ 112; WC Am. Countercl. ¶ 120.) “To pose a threat of monopolization, one
16 firm *alone* must have the power to control market output and exclude competition.”
17 *Rebel Oil*, 51 F.3d at 1443. “Section 2 of the Sherman Act does not punish behavior
18 aimed at creating or maintaining oligopolies.” *Reudy v. Clear Channel Outdoors, Inc.*,
19 693 F. Supp. 2d 1091, 1127 (N.D. Cal. 2010). Even an allegation that Spoken Giants
20 could raise prices above competitive levels knowing Word Collections would do
21 likewise (or vice versa) would not be sufficient to sustain a section 2 violation. As the
22 Ninth Circuit recognized in *Rebel Oil*, the fact that both Spoken Giants and Word

23
24 ² Underscoring the lack of specificity in the pleading, Pandora alleges that twelve of the
25 top twenty-five most played comedians on Pandora in 2021 are affiliated with Spoken
26 Giants. (SG Am. Countercl. ¶ 103.) Pandora also claims Jeff Foxworthy and Larry the
27 Cable Guy are responsible for seven of the top twenty comedy albums sold from 1991
28 to 2014. It is not clear whether Messrs. Foxworthy and Cable Guy are among the most
streamed comedians, whether they are “superstars” by virtue of their inclusion on the
Billboard list, or both.

1 Collections “may see proper, in the exercise of their own judgment, to follow the prices
2 of” the other “does not establish any suppression of competition or any sinister
3 domination, and does not violate the Sherman Act.” 51 F.3d at 1442 (internal quotation
4 marks omitted); *see also Lenhoff Enters., Inc. v. United Talent Agency, Inc.*, No. CV
5 15-01086-BRO (FFMx), 2015 WL 7008185, at *3 (C.D. Cal. Sep. 18, 2015) (“[T]he
6 Ninth Circuit has specifically emphasized that a claim under § 2 requires the power to
7 be in one entity rather than shared among multiple entities.”). Absent a showing that
8 Spoken Giants or Word Collections could unilaterally control “market output and
9 exclude competition,” Pandora’s section 2 claims are inadequately pleaded. *Rebel Oil*,
10 51 F.3d at 1443.

11 3. *Pandora Does Not Adequately Allege Rivals Cannot Enter the*
12 *Market or that Existing Competitors Lack the Capacity to Expand*
13 *Their Output*

14 Pandora has pleaded no facts to “show that there are significant barriers to entry”
15 into the licensing market or “that existing competitors lack the capacity to increase their
16 output in the short run.” *Rebel Oil*, 51 F.3d at 1434. The fact that there are two
17 performing rights organizations involved in this suit strongly undermines the
18 plausibility of any claim that a single monopoly presents an insurmountable barrier to
19 entry. Pandora also alleges that “no unaffiliated comedian could serve as a substitute”
20 for access to both Spoken Giants and Word Collections “must-have” catalogues. (SG
21 Opp’n 12.) However, applying the Court’s hypothetical above, roughly 44% of the top
22 fifty “superstar” comedians are unaffiliated with either Spoken Giants or Word
23 Collections. It is unclear, then, why Pandora could not form its own “critical mass”
24 from individual (or collective) licenses from the unaffiliated “superstar” comedians.
25 For these reasons, the Court concludes Pandora has failed to plausibly allege
26 “insurmountable barriers to entry protect” Spoken Giants’ or Word Collections’
27 monopoly power. (SG Opp’n 12; WC Opp’n 11.)

28 ***

1 Pandora has failed to establish that Spoken Giants or Word Collections possesses
2 monopoly power or has a dangerous probability of achieving monopoly power. As a
3 result, Pandora’s allegations are insufficient to state a claim of monopolization or
4 attempted monopolization, and Spoken Giants’ and Word Collections’ motion to
5 dismiss Count III is GRANTED.

6 **D. Conspiracy to Monopolize**

7 Pandora alleges Counterclaim Defendants “conspired to monopolize the
8 Relevant Market by agreeing to accumulate and consolidate control . . . over the
9 licensing of the rights to a sufficiently great number of comedy routines embodied in
10 comedy recordings.” (SG Am. Countercl. ¶ 142; WC Am. Countercl. ¶ 150.) “To
11 prove a conspiracy to monopolize in violation of § 2, [Pandora] must show four
12 elements: (1) the existence of a combination or conspiracy to monopolize; (2) an overt
13 act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal
14 antitrust injury.” *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1158 (9th
15 Cir. 2003). “A conspiracy to monopolize action is similar in its essence to an attempt
16 to monopolize action. Both focus on specific intent to monopolize and anticompetitive
17 acts designed to effect that intent, although in the conspiracy claim the act may be no
18 more than the agreement itself.” *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627
19 F.2d 919, 926 (9th Cir. 1980). “[N]o particular level of market power or dangerous
20 probability of success has to be alleged or proved in a conspiracy claim where the
21 specific intent to monopolize is otherwise apparent from the character of the actions
22 taken.” *Id.* (internal quotation marks omitted). “But where actions are ambiguous, the
23 existence and extent of market power may make the inference of specific intent from
24 conduct more or less plausible.” *Id.* at 927.

25 Pandora’s section 2 conspiracy to monopolize claims fail for reasons largely
26 identical to Pandora’s section 1 conspiracy claims. Pandora failed to adequately allege
27 facts giving rise to a reasonable inference of anything but parallel conduct. This is
28 insufficient to establish an agreement among the parties, let alone one in which the

1 parties had the specific intent to monopolize. *See In re Elevator Antitrust Litig.*, 502
2 F.3d 47, 51 (2d Cir. 2007) (concluding allegations of parallel conduct, without more,
3 are insufficient to sustain a section 2 conspiracy claim). Additionally, the lack of
4 Spoken Giants’ and Word Collections’ market power (discussed above) makes any
5 inference of an agreement to monopolize implausible. *Ragu Foods*, 627 F.2d at 926.

6 Because the Amended Counterclaims lack sufficient factual allegations to make
7 these section 2 conspiracy claims plausible, Spoken Giants’ and Word Collections’
8 motions to dismiss Count IV is GRANTED.

9 **E. Conclusion**

10 The Ninth Circuit has “repeatedly held that a district court should grant leave to
11 amend . . . unless it determines that the pleading could not possibly be cured by the
12 allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (internal
13 quotation marks omitted). Where a claimant has previously amended its pleading, “the
14 court’s discretion to deny such leave is particularly broad.” *Ecological Rts. Found.*, 713
15 F.3d at 520 (internal quotation marks omitted). In its prior order, the Court expressed
16 doubt that Pandora’s pleadings could be amended to adequately state a claim. (Order
17 27.) The analysis of the Amended Counterclaims confirmed this initial impression was
18 correct.

19 The motions to dismiss Pandora’s Amended Counterclaims are GRANTED, and
20 the Amended Counterclaims against Word Collections and Spoken Giants are dismissed
21 in their entirety without leave to amend. On its own motion, the Court dismisses without
22 leave to amend the Amended Counterclaims against the other Counterclaim Defendants
23 on the same basis it has dismissed the claims against Spoken Giants and Word
24 Collections. *See Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 742–43 (9th Cir.
25 2008). The motions to join the motions to dismiss are denied as moot.

26 **IV. MOTIONS FOR SANCTIONS**

27 Spoken Giants and Word Collections moved for sanctions, claiming that Pandora
28 misrepresented the record, offered legally frivolous arguments, and filed the Amended

1 Counterclaims for an improper purpose. (SG Sanctions Mot.; WC Sanctions Mot.)
2 “Rule 11 is an extraordinary remedy, one to be exercised with extreme caution.”
3 *Operating Eng’rs Pension Tr. v. A-C Co.*, 859 F.2d 1336, 1345 (9th Cir. 1988). This is
4 particularly true when a “court grants leave to amend a complaint and later finds, as it
5 often does, that an amended complaint continues to fail to state a claim.” *Harvey v.*
6 *CNN, Inc.*, 48 F.4th 257, 280 (4th Cir. 2022). In such situations, “the typical outcome
7 is dismissal of the amended complaint, not an award of sanctions against the litigant
8 and his counsel for making an attempt.” *Id.*

9 Spoken Giants and Word Collections do not make a persuasive case that
10 sanctions are warranted. Although they claim Pandora misrepresented the record, this
11 “misrepresentation” appears to be nothing more than the kind of factual disagreement
12 that is commonplace in any litigation. In essence, the parties adamantly disagree
13 whether Spoken Giants or Word Collections demanded an “all-or-nothing blanket
14 license,” (SG Sanctions Mot. 5; WC Sanctions Mot. 9), or properly characterized the
15 affiliation agreements as “‘de facto’ exclusive licensing agreements,” (SG Sanctions
16 Mot. 11). Pandora’s oppositions make clear, however, that whatever the merits of their
17 characterizations, they were not fabrications manufactured from whole cloth. (SG
18 Sanctions Opp’n 6–10; WC Sanctions Opp’n 13–16.) As a result, these arguments are
19 not “baseless” and therefore do not warrant sanctions under Rule 11. *Mattel*, 286 F.3d
20 1127.

21 Pandora’s remaining arguments are also not frivolous or so lacking in evidentiary
22 support that sanctions might be justified. Although Pandora’s Amended Counterclaims
23 fell short of the mark, “an unsuccessful argument alone does not warrant sanctions.”
24 *Jackson v. Jacob*, No. 2:20-cv-09399-RGK-AGR, 2021 WL 3578671, at *2 (C.D. Cal.
25 Apr. 9, 2021). The changes reflected in Pandora’s Amended Counterclaims are not
26 mere window dressing. The Amended Counterclaims include substantive additions and
27 reflect a good faith attempt to correct the deficiencies identified in the Court’s order
28 dismissing the Original Counterclaims. (See SG Amended Counterclaim Redline, ECF

1 No. 93-8; WC Amended Counterclaim Redline, ECF No. 94-2.) These changes were
2 insufficient to state a claim, but they were not “legally or factually ‘baseless’ from an
3 objective perspective”; nor does it appear that Pandora’s counsel failed to conduct “a
4 reasonable and competent inquiry before signing and filing” the Amended
5 Counterclaims. *Mattel*, 286 F.3d at 1127 (internal quotation marks omitted). The Court
6 concludes that Pandora had a good faith, if ultimately meritless, basis for filing the
7 Amended Counterclaims. Because the Amended Counterclaims were “not frivolous,
8 [they] cannot fall within the ‘improper purpose’ clause of Rule 11.” *Stringfellow*, 911
9 at 226 n.1. Accordingly, the Amended Counterclaims do not justify the imposition of
10 sanctions under Rule 11.

11 Because the Court does not find the Amended Counterclaims were filed in bad
12 faith or based on any intentional misconduct by Pandora or its counsel, sanctions are
13 also not appropriate under 28 U.S.C. § 1927 or the Court’s inherent authority. *See*
14 *MGIC Indem. Corp. v. Moore*, 952 F.2d 1120, 1122 (9th Cir. 1991); *Primus Auto. Fin.*
15 *Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997).

16 Spoken Giants’ and Word Collections’ motions for sanctions are DENIED.³

17 **V. CONCLUSION**

18 Spoken Giants’ and Word Collections’ motions to dismiss Pandora’s Amended
19 Counterclaims are GRANTED, and the Amended Counterclaims are dismissed in their
20 entirety without leave to amend.

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23 ³ The timing of the Amended Counterclaims notwithstanding, the Court declines to find
24 that Pandora’s claims against Lewis Black or the other individual comedians merit
25 sanctions. *See Stringfellow*, 911 F.2d at 226 n.1. Pandora did not possess an Article III
26 injury giving it standing to sue until it had incurred litigation expenses. As a result, the
27 fact that these claims were not brought until after the underlying litigation had
28 commenced does not give rise to a finding of bad faith. Additionally, because there
appears to be a disputed issue of fact as to whether Lewis Black remained affiliated with
Spoken Giants, it was reasonable for Pandora to proceed as if the relationship remained
intact. (Black Sanctions Joinder Opp’n 5–6.)

1 Spoken Giants’ and Word Collections’ motions for sanctions are DENIED. The
2 joinder motions are DENIED.

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4 **IT IS SO ORDERED.**

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6 Dated: April 5, 2023



MARK C. SCARSI
UNITED STATES DISTRICT JUDGE

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