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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RADIKAL RECORDS, INC.,)
Plaintiff,)
vs.)
WARNER MUSIC GROUP CORP., and)
DOES 1-100,)
Defendants.)

CASE NO. CV 06-1713 MMM (JWJx)

TSR RECORDS, INC.,)
Plaintiff,)
vs.)
WARNER MUSIC GROUP CORP., and)
DOES 1-100,)
Defendants.)

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTIONS TO DISMISS

Plaintiff Radikal Records filed an action against defendant Warner Music Group Corp. on March 21, 2006, alleging that bribes Warner pays to radio stations to play sound recordings it produces have made it impossible for Radikal to secure radio airtime for its sound recordings. As a result of Warner's alleged conduct, Radikal asserts that it has lost profits from the sale of sound recordings and sustained other types of damage. It pleads claims for violation of the

1 Sherman Act, 9 U.S.C. § 1, as made actionable by the Clayton Act, 9 U.S.C. § 15, and for
2 intentional interference with prospective economic advantage. On March 28, 2006, plaintiff TSR
3 Records filed a nearly identical action against Warner. In addition to Sherman Act and intentional
4 interference claims, TSR asserts a claim for violation of California's Cartwright Act, California
5 Business & Professions Code §§ 16270 et seq. The two actions were consolidated on August 30,
6 2006.

7 On May 16 and 23, 2006, Warner moved to dismiss Radikal's and TSR's claims under
8 Rule 12(b)(6) of the Federal Rules of Civil Procedure. Warner asserts that plaintiffs' federal and
9 state antitrust claims are not adequately pled because plaintiffs have alleged facts affirmatively
10 showing both that Warner lacks market power and that its allegedly anticompetitive conduct did
11 not harm competition within the market for the sale of musical sound recordings. Warner also
12 asserts that plaintiffs' state law claims for intentional interference with prospective economic
13 advantage should be dismissed because plaintiffs failed adequately to allege the existence of third-
14 party relationships offering a probability of future economic benefit.

15 I. FACTUAL BACKGROUND

16 Warner is one of the four major American record labels.¹ Between 2000 and 2005,
17 Warner's share of the "relevant market," i.e., the market for the sale and distribution of musical
18 sound recordings, was approximately twenty percent.² In the aggregate, the market share of the
19 four major record labels during this period was approximately eighty-five percent.³ Beginning in
20 at least 2000, Warner purportedly entered into numerous illegal "payola" agreements with radio
21 stations, pursuant to which it offered those stations and their employees bribes and other
22 inducements to play Warner's sound recordings more frequently than the stations otherwise would
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26 ¹Radikal Complaint, ¶ 4; TSR Complaint, ¶ 4.

27 ²Radikal Complaint, ¶¶ 6, 13; TSR Complaint, ¶¶ 6, 13.

28 ³Radikal Complaint, ¶ 12; TSR Complaint, ¶ 12.

1 have.⁴ Plaintiffs allege that the three remaining major record labels also extensively engaged in
2 this practice.⁵ In 2004, the Attorney General of New York, Eliot Spitzer, initiated an
3 investigation into the labels' "payola" practices; Warner ultimately entered into a settlement
4 agreement with Spitzer.⁶

5 Plaintiffs are two of thousands of independent record labels, which collectively constitute
6 the remaining fifteen percent of the market for the sale of distribution of sound recordings.⁷ The
7 commercial success of the independent record labels is dependent on radio airplay, as airplay is
8 critical in encouraging consumers to purchase particular sound recordings.⁸ Because of Warner's
9 "payola" agreements with radio stations, and those into which the other major labels entered,
10 plaintiffs and other independent record labels have been systematically excluded from radio station
11 playlists.⁹ As a result, plaintiffs' recording artists have purportedly been incapable of achieving
12 the commercial success they would otherwise have achieved, and plaintiffs have allegedly been
13 denied profits they would otherwise have made.¹⁰ Additionally, competition between Warner and
14 independent record labels has allegedly been reduced; total output has decreased; consumers'
15 freedom of choice has been limited; and free trade in the interstate and foreign market for records
16 has been substantially restrained.¹¹

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20 ⁴Radikal Complaint, ¶¶ 11-12, 16-17; TSR Complaint, ¶¶ 11-12, 16-17.

21 ⁵Radikal Complaint, ¶¶ 11-12, 19; TSR Complaint, ¶¶ 11-12, 19.

22 ⁶Radikal Complaint, ¶¶ 14-16; TSR Complaint, ¶¶ 14-16.

23 ⁷Radikal Complaint, ¶¶ 9-10, 12; TSR Complaint, ¶¶ 9-10, 12.

24 ⁸Radikal Complaint, ¶ 7; TSR Complaint, ¶ 7.

25 ⁹Radikal Complaint, ¶ 10; TSR Complaint, ¶ 10.

26 ¹⁰Radikal Complaint, ¶¶ 7, 9, 22; TSR Complaint, ¶¶ 7, 9, 22.

27 ¹¹Radikal Complaint, ¶ 21; TSR Complaint, ¶ 21.

II. DISCUSSION

A. Legal Standard Governing Motions To Dismiss Under Rule 12(b)(6)

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. A court may not dismiss a complaint for failure to state a claim “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); see also, e.g., *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997). A Rule 12(b)(6) dismissal is proper only where there is either a “lack of a cognizable legal theory” or “the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988).

In deciding a Rule 12(b)(6), the court generally looks only to the face of the complaint and documents attached thereto. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990). The court must accept all factual allegations pleaded in the complaint as true, and construe them and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996); *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995). It need not, however, accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

B. The Sherman Act Claim

Section 1 of the Sherman Act declares that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations,” is illegal. 15 U.S.C. § 1. Because even beneficial business contracts and combinations restrain trade to some degree, § 1 has been interpreted to prohibit only those contracts or combinations that are “unreasonably restrictive of competitive conditions.” *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911); see also *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1033 (9th Cir. 2005) (“Section 1 is intended to prohibit actions that *unreasonably* restrain competition” (emphasis added)). To prevail on a claim under § 1 of the Sherman Act, plaintiff must prove: (1) that there was a contract, combination, or

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1 conspiracy; (2) that unreasonably restrained competition; and (3) that affected interstate or foreign
2 commerce. See, e.g., *Tanaka v. University of Southern California*, 252 F.3d 1059, 1062 (9th
3 Cir. 2001).

4 Activity that allegedly violates § 1 is evaluated under either a per se or “rule of reason”
5 standard.¹² See *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1154 (9th Cir.
6 2003). Whichever standard is used, the court must assess the effect of the challenged conduct on
7 competition. See *NCAA v. Board of Regents*, 468 U.S. 85, 104 (1984) (“[W]hether the ultimate
8 finding is the product of a presumption or of actual market analysis, the essential inquiry remains
9 the same – whether or not the challenged restraint enhances competition” (footnote omitted)).
10 The per se standard applies only to “conduct that is manifestly anticompetitive, that is, conduct
11 that would always or almost always tend to restrict competition and decrease output.” *Business*
12 *Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988) (citations and internal
13 quotation marks omitted). In contrast, “the rule of reason is to be applied ‘where the economic
14 impact of the challenged practice is not obvious.’” *Jack Russell Terrier Network of N. Cal.*, 407
15 F.3d at 1033 n. 13 (quoting *Harkins Amusement Enters., Inc. v. Gen. Cinema Corp.*, 850 F.2d
16 477, 486 (9th Cir. 1988), and *Dimidowich v. Bell Howell*, 803 F.2d 1473, 1480 (9th Cir. 1986)).
17 Rule of reason review is the presumptive mode of analysis in § 1 cases. See, e.g., *Continental*
18 *T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) (“Since the early years of this century
19 a judicial gloss on this statutory language has established the ‘rule of reason’ as the prevailing
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21 ¹²A plaintiff may also attempt to establish that challenged conduct “unreasonably restrained
22 competition” by “proof of a ‘naked restraint,’ where an adverse effect on price or output is
23 obvious.” *Carter v. Variflex, Inc.*, 101 F.Supp.2d 1261, 1266 (C.D. Cal. 2000); see also 1 ABA
24 Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 62-63 (5th ed. 2002) (“ANTITRUST
25 LAW DEVS.”) (“In quick look cases where ‘an observer with even rudimentary understanding of
26 economics could conclude that the arrangements in question have an anticompetitive effect on
27 customers and markets,’ courts do not require the plaintiff to establish every aspect of
28 anticompetitive effect before the burden shifts to the defendant to prove the restraint’s offsetting
procompetitive effects,” quoting *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999) (footnotes
omitted)). “The quick look analysis . . . is the exception, not the rule.” *Carter*, 101 F.Supp.2d
at 1266. Neither party has suggested that the court should employ the “quick look” approach to
analyze the allegedly anticompetitive conduct at issue here.

1 standard of analysis”). “The rule of reason weighs legitimate justifications for a restraint against
 2 any anticompetitive effects.” *Paladin Assocs., Inc.*, 328 F.3d at 1156. The parties appear to
 3 agree that the “rule of reason” standard governs evaluation of the adequacy of plaintiffs’
 4 allegations of anticompetitive conduct,¹³ and the court agrees.¹⁴

5 To establish that a challenged agreement has unreasonably restrained trade in a rule of
 6 reason case, plaintiff can show “that the alleged combination or agreement produced adverse,
 7 anti-competitive effects within the relevant product and geographic markets” by “proving the
 8 existence of actual anticompetitive effects, such as reduction of output, increase in price, or
 9 deterioration in quality of goods or services.” *United States v. Brown University*, 5 F.3d 658,
 10 668 (3d Cir. 1993); see also 1 ANTITRUST LAW DEVS. at 65 (“[P]roof of actual competitive harm
 11 can obviate the need for proof of market power in the case of restraints that are not naked

13 ¹³See, e.g., Defendant’s Memorandum of Points and Authorities in Support of Motion to
 14 Dismiss the TSR Complaint (“Def.’s TSR Mem.”) at 7-8 (“[Plaintiff] does not allege any conduct
 15 that fits within the recognized categories of *per se* antitrust violations – such as horizontal price
 16 fixing or market allocation – and therefore this case is governed by the rule of reason standard”);
 17 Plaintiffs’ Memorandum of Points and Authorities in Opposition to Defendant’s Motion to
 Dismiss (“Pls.’ Opp.”) at 3 (“To establish a [§ 1] ‘rule of reason’ violation (such as this). . .”
 (footnote omitted)).

18 ¹⁴Per se analysis of a restraint is appropriate only after the court has sufficient “experience
 19 with a particular kind of restraint” to enable it “to predict with confidence that the rule of reason
 20 will condemn it.” *Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332, 344 (1982). Because
 21 of the level of certitude required, courts have been hesitant to adopt per se rules “with regard ‘to
 22 restraints imposed in the context of business relationships where the economic impact of certain
 23 practices is not immediately obvious.” *State Oil Co. v. Kahn*, 522 U.S. 3, 10 (1997) (quoting
 24 *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458-59 (1986)). Here, the effect of
 25 Warner’s alleged payola scheme on competition in the music industry is far from immediately
 26 obvious. Moreover, plaintiffs appear to allege that Warner imposed a vertical non-price restraint
 27 on distribution through its “combinations” with various radio stations. “Vertical arrangements
 28 are almost always judged by the rule of reason.” *Chrisofferson Dairy, Inc. v. MMM Sales, Inc.*,
 849 F.2d 1168, 1172 (9th Cir. 1988); see also *Business Electronics Corp.*, 485 U.S. at 724
 (noting that “vertical agreements on resale prices” are illegal per se, but that “the scope of per
 se illegality should be narrow in the context of vertical constraints,” and that, in evaluating such
 restraints, “‘departure from the rule-of-reason standard must be based on demonstrable economic
 effect rather than . . . upon formalistic line drawing,’” quoting *Continental T. V.*, 433 U.S. at 58-
 59)).

1 restraints on price or output.”). “Such proof[, however,] is often impossible to make . . . due
 2 to the difficulty of isolating the market effects of challenged conduct.” *Brown University*, 5 F.3d
 3 at 668; see also 1 ANTITRUST LAW DEVS. at 66 (“Efforts to prove substantial actual
 4 anticompetitive effects have seldom been successful, in part because of the difficulty of isolating
 5 the market effects of the challenged conduct.”). As a result, plaintiff can alternatively “attempt[]
 6 to prove that the restraint is *likely* to have a substantial, adverse effect on competition by engaging
 7 in a market analysis to predict the restraint’s effect.” *Id.* at 67 (emphasis added). This is the
 8 approach adopted in most rule of reason cases. *Id.*

9 Warner argues that plaintiffs’ complaints fail to state a § 1 claim for two reasons – first,
 10 that “[plaintiffs] cannot establish that [Warner] possesses market power in the defined relevant
 11 market because [they] concede[] that [Warner] has only a 20% market share”;¹⁵ and second, that
 12 “[plaintiffs] fail[] to allege facts sufficient to establish harm to competition,” because certain of
 13 the allegations in their complaints “show that competition in the relevant markets is fierce and
 14 thriving.”¹⁶

15 1. Whether Plaintiffs Have Adequately Alleged Market Power

16 Warner contends that plaintiffs’ § 1 claims are fatally defective because plaintiffs allege
 17 that Warner has only a twenty percent share of the relevant market.¹⁷ Warner asserts that market
 18 power is necessary to establish a § 1 claim, and that a twenty percent market share demonstrates,
 19 as a matter of law, that it does *not* have market power.¹⁸ Plaintiffs counter that the court should
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21 ¹⁵Defendant’s Memorandum of Points and Authorities in Support of Motion to Dismiss the
 22 Radikal Complaint (“Def.’s Radikal Mem.”) at 8; Def.’s TSR Mem. at 9.

23 ¹⁶Def.’s Radikal Mem. at 11; Def.’s TSR Mem. at 11.

24 ¹⁷Def.’s Radikal Mem. at 8-11 (citing Radikal Complaint, ¶ 13, and stating: “This is not
 25 a mere technical pleading defect that can be cured by amendment. It is a binding admission that
 26 renders the Section 1 claim incurably deficient as a matter of law. The Section 1 Sherman Act
 27 claim should be dismissed without leave to amend”); Def.’s TSR Mem. at 9-11 (same, citing TSR
 28 Complaint, ¶ 13).

¹⁸*Id.*

1 aggregate Warner's market share and that of the three other major record labels, all of which have
2 allegedly entered into "payola" agreements with radio stations.¹⁹ Doing so, plaintiffs argue,
3 demonstrates that Warner has market power, since the combined market share of the four major
4 labels is eighty-five percent.²⁰ Warner contends that aggregation of market share is appropriate
5 only when plaintiff alleges horizontal collusion.²¹ It asserts that no such allegations have been
6 made here, and that they most likely could not be made "truthfully and consistent with [plaintiffs']
7 obligations under Rule 11."²²

8 Warner's argument has considerable force. Indeed, the overwhelming weight of circuit
9 authority suggests that "proof of a defendant's market power is an *absolute prerequisite* for a
10 plaintiff . . . to satisfy its burden of proving likely anticompetitive effect."²³ 1 ANTITRUST LAW
11 DEVS. at 68 (collecting authorities) (emphasis added). But see *K.M.B. Warehouse Distribs., Inc.*
12 *v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995) ("This court has not made a showing of
13 market power a prerequisite for recovery in all § 1 cases. If a plaintiff can show an actual adverse
14 effect on competition, such as reduced output, we do not require a further showing of market
15 power." (citation omitted)). In addition, "it has become clear [as 'more cases have reached the
16 appellate courts' over the past fifty years] that possession of a 30 percent market share is *the*
17 *minimum* sufficient by itself to confer market power." *In re Wireless Telephone Services Antitrust*
18 *Litigation*, 385 F.Supp.2d 403, 418 (S.D.N.Y. 2005); see also 1 ANTITRUST LAW DEVS. at 69
19 ("[C]ourts rarely find market power if the defendant's market share is (and likely will remain)
20 under 30 percent"). In the absence of allegations that Warner and its three largest competitors
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22 ¹⁹Pls.' Opp'n at 6-7 (citing Radikal Complaint, ¶¶ 12-13; TSR Complaint, ¶¶ 12-13).

23 ²⁰*Id.*

24 ²¹Def.'s Reply at 5-9.

25 ²²*Id.* at 7 n. 5.

26
27 ²³Market power is defined as "the [defendant's] ability to raise prices above those that
28 would be charged in a competitive market" by restricting supply. *NCAA v. Board of Regents*, 468
U.S. 85, 109 n. 38 (1984).

1 horizontally conspired to effect the alleged payola scheme, moreover, plaintiffs may not aggregate
2 Warner's market share with that of its competitors to establish that it has the requisite market
3 power. See, e.g., *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1444 (9th Cir. 1995)
4 (holding, in the context of a claim that defendant violated § 1 of the Sherman Act through vertical
5 price fixing, that aggregation of market shares is inappropriate absent allegations of conspiracy).
6 Plaintiffs' argument to the contrary is unavailing for the reasons articulated Warner's reply.²⁴

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8 ²⁴See Def.'s Reply at 7-9. In their opposition, plaintiffs assert that "[t]he Supreme Court
9 has articulated that no single defendant is required to have market power if substantially all its
10 competitors in the market are engaging in the same conduct." (Pls.' Opp'n at 6 (citing *Standard
11 Oil Co. v. United States*, 337 U.S. 293, 314 (1949).) *Standard Oil* does not support the
12 proposition for which it is cited.

13 In *Standard Oil*, the Supreme Court considered a particular type of restraint on trade, i.e.,
14 requirements contracts that require a buyer to satisfy all of its needs for a particular product from
15 one particular seller. *Id.* at 294. Such contracts are explicitly illegal under § 3 of the Clayton
16 Act, 15 U.S.C. § 14, but only where "the effect of [the contract] may be to substantially lessen
17 competition or tend to create a monopoly in any line of commerce." *Id.* at 297. At issue in
18 *Standard Oil* was the meaning of this phrase. *Id.* at 299. The Court held that, to establish
19 Clayton Act liability, proof of actual harm to competition is unnecessary, *id.* at 311, and that all
20 a plaintiff must establish is "that competition has been foreclosed in a substantial share of the line
21 of commerce affected." *Id.* at 314. It was in this context that the Court observed that, because
22 all of defendant's major competitors were alleged also to have adopted mandatory requirements
23 contracts, "evidence that competitive activity has not actually declined is inconclusive," *id.*,
24 because "the effect [of the combined action] [may have] been to enable the established suppliers
25 individually to maintain their own standing and at the same time collectively, even though not
26 collusively, to prevent a late arrival from wresting away more than an insignificant portion of the
27 market." *Id.* at 309.

28 Plaintiffs do not explain how the Court's holding in *Standard Oil* applies to a claim under
the Sherman Act, which establishes a substantially different standard of liability. Compare 15
U.S.C. § 1 (plaintiff must establish "that the agreement unreasonably restrained competition")
with 15 U.S.C. § 14 (plaintiff must establish that "the effect of [the agreement] may be to
substantially lessen competition or tend to create a monopoly in any line of commerce"). Indeed,
the *Standard Oil* Court expressly limited its holding to alleged violations of the Clayton Act. See
id. ("Since the decree below is sustained by our interpretation of § 3 of the Clayton Act, we need
not go on to consider whether it might also be sustained by § 1 of the Sherman Act"). Moreover,
the Court emphasized that a fundamentally different type of economic analysis was required in
assessing alleged violations of the Sherman Act. See *id.* at 313 ("To insist upon [an 'economic
investigation . . . of the same broad scope' as is required under the Sherman Act] would be to
stultify the force of Congress' declaration that requirements contracts are to be prohibited
wherever their effect 'may be' to substantially lessen competition."). As a result, and contrary

1 Although Warner's argument is persuasive, the court concludes that it would be premature
2 to dismiss plaintiffs' complaints. Despite the clear weight of circuit authority,²⁵ the court is not

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4 to plaintiffs' assertion, *Standard Oil* has no applicability to alleged violations of the Sherman Act.
5 At least one other court that has considered the applicability of *Standard Oil*'s holding to alleged
6 Sherman Act violations has reached the same conclusion. See *Paddock Pubs., Inc. v. Chicago*
7 *Tribune Co.*, No. 93-C-7493, 1995 WL 632031, *5 (N.D. Ill. Oct 25, 1995) ("*Standard Oil*
8 simply does not authorize a court to consider the aggregate effects of competitors' exclusive
contracts to establish an unreasonable restraint of trade in the absence of a conspiracy between the
competitors").

9 Plaintiffs also cite *Wilk v. American Medical Association*, 895 F.2d 352, 360 (7th Cir.
10 1990). (See Pls.' Opp'n at 7.) The case is inapposite, as *Wilk* involved the uniform policies of
11 a professional association comprised of individual doctors whose "market share" (for medical
12 fees) was greater than fifty percent. *Id.* at 360. Here, in contrast to *Wilk*, there is no allegation
that Warner and its three primary competitors belong to a trade association, either formal or
informal, through which the payola scheme was jointly and uniformly implemented.

13 ²⁵At oral argument, Warner asked that the court reconsider *Rebel Oil Co. v. Atlantic*
14 *Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995). Warner contended that the case requires that
15 plaintiffs establish market power to assert a § 1 claim. Having reconsidered the decision, the
16 court cannot agree. In *Rebel Oil*, plaintiff alleged that defendant had entered into a vertical price-
17 fixing agreement with its largest dealer to sell gasoline at below-market prices so to drive its
18 competitors out of business, monopolize the market, and subsequently charge monopoly prices.
19 *Id.* at 1443. Because vertical price-fixing agreements are per se illegal under § 1, see *id.* (citing
Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 347 (1982)), the court presumed that the
20 challenged agreement had an anticompetitive effect on the market. As a consequence, *Rebel Oil*
does not hold – indeed, does not address – whether a showing of market power is necessary to
establish anticompetitive effect under the § 1 rule of reason standard.

21 Rather than addressing whether proving market power is necessary to show anticompetitive
22 effect, the *Rebel Oil* court addressed whether plaintiff had established the requisite nexus between
23 defendant's *presumptively* anticompetitive conduct and the injury plaintiff purportedly suffered,
24 i.e., being driven out of the market due to below-cost price fixing. *Id.* at 1443-44 ("*Per se* rules
relieve plaintiffs of the burden of proving anticompetitive effects, which are assumed, but they
do no excuse plaintiffs from showing that their injury was caused by the anticompetitive aspects
of the illegal act"). In evaluating whether causation had been proved, the court observed that
25 "plaintiff must show . . . market power . . . [t]o show antitrust injury under [§ 1]." *Id.* at 1444.
26 This observation, however, was made in the context of below-cost price fixing agreements. The
27 court noted, in that context, that the Supreme Court had held that below-cost price fixing, despite
any allocative inefficiency it may temporarily create, is a "boon to consumers" so long as it
ultimately does not result in monopolization. *Id.* (quoting *Brooke Group Ltd. v. Brown &*
Williamson Tobacco Corp., 509 U.S. 209, 224 (1993)). Consequently, the *Rebel Oil* court held
28 that plaintiff had failed to establish that its injury "flow[ed] from the *anticompetitive* aspect of

1 convinced, under controlling Supreme Court precedent, that showing a defendant has market
 2 power is an absolute prerequisite to proving a § 1 claim. In *FTC v. Indiana Federation of*
 3 *Dentists*, 476 U.S. 447 (1986), the Court identified two situations in which a detailed analysis of
 4 market power may be unnecessary. It noted first that “[a]s a matter of law, the absence of proof
 5 of market power does not justify a naked restriction on price or output.” Rather, such a
 6 restriction “requires some competitive justification.” *Id.* at 460 (quoting *NCAA v. Bd. of*
 7 *Regents*, 468 U.S. 85, 109-10 (1984)). Second, even where a restraint is not sufficiently
 8 “naked,” “‘proof of actual detrimental effects, such as a reduction of output’ can obviate the need
 9 for an inquiry into market power, which is but a ‘surrogate for detrimental effects.’” *Id.* at
 10 460-61 (quoting 7 Phillip Areeda et al., *ANTITRUST LAW*, ¶ 1511, at 429 (1986)).

11 While it does not appear that the “payola” scheme in which Warner allegedly engaged
 12 constitutes a “naked restriction on price or output,” it is possible that plaintiffs will be able to
 13 prove that the scheme had “actual detrimental effects” on competition in the music industry.
 14 Plaintiffs allege that Warner’s conduct has actually harmed the sound recording market by, *inter*
 15 *alia*, reducing total output.²⁶ If they are able to prove this, then a showing of market power may
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19 defendant’s conduct.” It noted that, even if plaintiff had been forced out of the market due to
 20 defendant’s below-cost price-fixing agreement, the price-fixing agreement could not possibly have
 21 “harmed the market,” because defendant’s lack of market power foreclosed any possibility that
 the price fixing would lead to monopolization. *Id.*

22 In short, (1) *Rebel Oil* did not address whether market power is necessary to establish
 23 anticompetitive effect under the § 1 rule of reason standard, and (2) its holding that market power
 24 is necessary to establish antitrust injury applies only to a particular type of potentially
 anticompetitive agreement that is not at issue here.

25 ²⁶See Radikal Complaint, ¶ 21(b); TSR Complaint, ¶ 21(b). This harm has allegedly
 26 occurred because “defendant and other major record labels” have a “stranglehold on radio air
 27 time and playlists.” As a result, plaintiffs assert, they and “thousands of [other] independent
 28 record labels” have been “systemically excluded from radio station air time and playlists,” and
 prevented from marketing their music to consumers successfully. (See Radikal Complaint, ¶¶ 7-
 10; TSR Complaint, ¶¶ 7-10.)

1 not be required.²⁷

2 Moreover, even if demonstrating that a defendant has market power is an absolute
 3 prerequisite to proving a § 1 claim, market share alone is not necessarily dispositive. Indeed, the
 4 Ninth Circuit has expressed reluctance to apply any “bright-line rules regarding market share in
 5 deciding whether defendant has market power to restrict output or raise prices,” and cautioned
 6 that courts “should be ‘wary of the numbers game of market percentage.’” *Rebel Oil*, 51 F.3d
 7 at 1438 n. 10 (quoting *Dimmitt Agri Indus., Inc. v. CPC Int’l, Inc.*, 679 F.2d 516, 533 (5th Cir.
 8 1982)). As a consequence, it has instructed courts to analyze “market share, entry barriers, and
 9 the capacity of existing competitors to expand output” when considering whether a defendant has
 10 sufficient market power to be held liable for antitrust violations. *Id.* Warner discusses none of
 11 these factors in its motion to dismiss. Furthermore, assessing market power is a fact-intensive

12 _____
 13 ²⁷At oral argument, Warner argued that *Indiana Federation of Dentists* stands only for the
 14 proposition that – as a matter of pleading – a plaintiff is not required to allege market power if
 15 it can allege actual harm to competition. Under Warner’s reading of *Indiana Federation of*
 16 *Dentists*, proof of market power is still required to establish a § 1 violation, and the complaint –
 which alleges that Warner has a twenty percent market share – forecloses the possibility that
 plaintiff can prove it wields market power.

17 The court cannot agree with defendant’s reading of *Indiana Federation of Dentists*.
 18 Rather, the procedural posture and explicit language of the case foreclose the reading defendants
 19 give it. The Court there did not address the allegations necessary to state a § 1 claim; rather, it
 20 examined the statute’s standard of liability, as the Federal Trade Commission had already
 21 determined that defendant had violated § 1. 476 U.S. at 448-53. Specifically, the Court
 22 considered whether the FTC’s determination was erroneous as a matter of law “in the absence of
 23 specific findings . . . concerning the definition of the market in which [defendant] allegedly
 restrained trade and the power of [defendant] in that market.” *Id.* at 460. The Court concluded,
 24 in no uncertain language, that the FTC had not erred. *Id.* at 461 (“The finding of actual,
 25 sustained adverse effects on competition . . . is legally sufficient to support a finding that the
 26 challenged restraint was unreasonable *even in the absence of elaborate market analysis.*”
 (emphasis added)).

27 The court appreciates Warner’s concern that, if *Indiana Federation of Dentists* is
 28 interpreted in this manner, a § 1 plaintiff need only allege in conclusory terms that competition
 has been harmed to survive a motion to dismiss. As noted, however, “[e]fforts to prove
 substantial actual anticompetitive effects have seldom been successful” due to difficulties of proof.
 1 ANTITRUST LAW DEVS. at 66. As a result, to the extent plaintiffs’ § 1 claim is predicated on
 actual harm to competition in the market for the sale of musical sound recordings, plaintiffs may
 face significant obstacles at later stages of this proceeding.

1 inquiry ill-suited to decision on the face of the pleadings. See, e.g., *Jefferson Parish Hosp. Dist.*
 2 *No. 2 v. Hyde*, 466 U.S. 2, 34 (1984) (O'Connor, J., concurring in the judgment) (observing that
 3 assessing market power requires "extensive and time-consuming economic analysis").

4 Here, for example, plaintiffs allege that Warner has only a twenty percent market share.²⁸
 5 They also allege, however, that Warner operates in a highly concentrated industry, in which four
 6 major record labels hold an eighty-five percent share of the market, and "thousands" of
 7 independent labels compete for the remaining fifteen percent.²⁹ These allegations suggest that the
 8 record industry is a highly concentrated oligopolistic market, in which "'sellers are few in number
 9 and any one of them is of such size that an increase or decrease in his output will appreciably
 10 affect the market price.'" See Joseph F. Brodley, *Oligopoly Power Under the Sherman and*
 11 *Clayton Acts - From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285, 289 (1967); see
 12 also *id.* at 291 n. 18 (observing that a "tight [or concentrated] oligopoly is defined as a market
 13 in which eight or fewer firms supply 50% or more of the market with the largest firm having 20%
 14 or more," and that in such tight oligopolies the large firms share monopoly-like excess profits).
 15 If plaintiffs are able to prove the allegations in their complaints, therefore, they may well be able
 16 to establish that, even with a mere twenty percent market share, Warner wields market power.
 17 See *id.* at 289 ("Oligopoly power is the market power possessed by jointly acting oligopolists");³⁰

18
 19 ²⁸Radikal Complaint, ¶¶ 12-13; TSR Complaint, ¶¶ 12-13.

20 ²⁹Radikal Complaint, ¶ 10; TSR Complaint, ¶ 10.

21 ³⁰Whether oligopoly power is sufficient to establish "market power" as a matter of law for
 22 purposes of § 1 liability is unclear. The court is aware of only two decisions that addressed this
 23 issue. Both did so indirectly, with conflicting results. Compare *United States v. Visa U.S.A.,*
 24 *Inc.*, 344 F.3d 229, 239-40 (2d Cir. 2003) ("We agree with the district court's finding that Visa
 25 U.S.A. and MasterCard, *jointly and separately*, have power within the market for network
 26 services. . . . [T]he court inferred market power from the defendants' large shares of a highly
 27 concentrated *market*: In 1999, Visa U.S.A. members accounted for approximately 47% of the
 28 dollar volume of credit and charge card transactions, while MasterCard members accounted for
approximately 26%" (emphasis added)) with *In re Wireless Telephone Services Antitrust*
Litigation, 385 F.Supp.2d at 419-21 (rejecting plaintiffs' attempt to establish that defendants, six
 major firms in an allegedly oligopolistic industry, wielded market power, and finding that "the
 structure of the wireless services market reflects intense competition with no single, dominant

1 cf. *Pac. Coast Agric. Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1204 (9th Cir. 1975)
2 (holding, in the context of a § 2 monopolization claim, that a market share as low as forty-five
3 percent, coupled with factors such as highly fragmented competition and defendant's control over
4 the supply market, was sufficient to support finding that defendant exercised monopoly power,
5 and emphasizing that defendant's competitors "were relatively small, with no single competitor
6 controlling over 18% of the market before, or 12% of the market after, [defendant's] entry").
7 Consequently, Warner's motion to dismiss plaintiffs' § 1 claims on the ground that their
8 allegations show they cannot prove Warner has market power is denied.³¹

9 _____
10 seller"). See also *id.* at 421 (faulting plaintiffs for attempting to aggregate defendants' market
11 shares for purposes of establishing market power after expressly disavowing any claim of
12 horizontal collusion; "having elected not to proceed on a theory of conspiracy . . . the plaintiffs
13 must demonstrate that each defendant individually has market power"). At oral argument,
14 defendant attempted to distinguish *Visa U.S.A.* on the ground that, in entering into a vertical
15 exclusive-dealing agreement, Visa and MasterCard allegedly acted jointly or in concert. In fact,
16 the *Visa U.S.A.* court did not rely on allegations that the two companies had acted in concert in
17 promulgating the challenged exclusive-dealing agreements. The companies' "respective" versions
18 of the exclusive-dealing agreements prohibited their member banks from issuing credit or charge
19 cards other than Visa or MasterCard. See *Visa U.S.A.*, 344 F.3d at 234-36. Although the
20 agreements jointly benefitted defendants, the court found that they did not result from collusion.
21 Indeed, it expressly noted that Visa and MasterCard were direct and active competitors in the
22 relevant market. *Id.* at 237.

23 ³¹It is unclear whether plaintiffs have adequately alleged a nexus between Warner's
24 purported market power and the allegedly anticompetitive effect of the "payola" agreements into
25 which it entered with radio stations. There would be a clear antitrust violation if plaintiffs alleged
26 that a defendant with market power in the market for record sales required that radio stations play
27 its sound recordings exclusively or not at all. Such a defendant would be leveraging its market
28 power in one industry (the market for record sales) to gain dominance in another industry (the
market for radio airtime). In contrast, *any* company in the music industry (no matter how small
its market share) could harm competition in the market for record sales by entering into "payola"
agreements with radio stations. It is not clear, however, that the resulting injury to competition
would be cognizable under the federal antitrust laws. For example, if the independently wealthy
owner of a record label with a one percent market share bribed radio stations to play his label's
music to the exclusion of competitors', it is doubtful that an antitrust violation would be stated.
See *Glen Holly Entertainment, Inc. v. Tektronix, Inc.*, 352 F.3d 367, 371 (9th Cir. 2003)
("Antitrust injury is defined not merely as injury caused by an antitrust violation, but more
restrictively as 'injury of the type the antitrust laws were intended to prevent and that flows from
that which makes defendants' acts unlawful,'" quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat*,

1 **2. Whether Plaintiffs Have Adequately Pleaded Injury To Competition**

2 To state a § 1 claim, plaintiffs must allege that the challenged “contract, combination, or
3 conspiracy . . . unreasonably restrained competition.” *Tanaka*, 252 F.3d at 1062 (internal
4 quotation marks omitted); see also *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328,
5 338 (1990) (observing that the antitrust laws “were enacted for ‘the protection of competition, not
6 competitors,’” quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). “It is the
7 impact upon competitive conditions in a definable market which distinguishes the antitrust
8 violation from the ordinary business tort.” *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 812-
9 13 (9th Cir. 1988) (quoting *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979)). As
10 a result, a plaintiff must, in his or her complaint, assert facts showing an actual injury to
11 competition, beyond the impact on the claimant, within a field of commerce in which the claimant
12 is engaged. See *id.* at 811-13; see also, e.g., *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839,
13 847-48 (9th Cir. 1996). “[F]ailure to allege injury to competition is a proper ground for dismissal
14 by judgment on the pleadings.” *McGlinchy*, 845 F.2d at 813.

15 Warner argues that plaintiffs have failed adequately to allege that its “payola” agreements
16 with radio stations have harmed competition.³² Specifically, Warner asserts (1) that plaintiffs
17 offer only conclusory allegations regarding harm to competition, which are inadequate as a matter
18 of law to state a § 1 claim;³³ and (2) that specific factual allegations included in the complaints
19 *contradict* plaintiffs’ conclusory assertions that Warner’s conduct has harmed competition.³⁴
20 Plaintiffs respond that federal notice pleading standards are applicable to their antitrust claims.³⁵

21 _____
22 *Inc.*, 429 U.S. 477, 489 (1977)); see also *Williams Electronics Games, Inc. v. Garrity*, 366 F.3d
23 569, 578 (7th Cir. 2004) (“[C]ommercial bribery that does not involve any collusion between
24 competitors does not violate the Sherman Act’s prohibition against price-fixing”).

25 ³²Def.’s Radikal Mem. at 11-16; Def.’s TSR Mem. at 11-17.

26 ³³Def.’s Radikal Mem. at 12; Def.’s TSR Mem. at 12-13.

27 ³⁴*Id.*

28 ³⁵Pls.’ Opp’n at 4-6.

1 They contend they have adequately alleged harm to competition by pleading that thousands of
 2 independent records labels and artists have been systemically excluded from radio station airtime,
 3 reducing output and limiting consumer choice.³⁶ This, they argue, is sufficient to state a
 4 claim.

5 **a. Whether The Allegations Are Too Conclusory To State a Claim**

6 There is no doubt that the notice pleading requirements of Rule 8(a) govern the pleading
 7 of antitrust claims. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 984 (9th Cir. 2000)
 8 (“Antitrust cases are not to be judged by a higher or different pleading standard than other
 9 cases”); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980)
 10 (“There is no special rule requiring more factual specificity in antitrust pleadings”); see also
 11 *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 107 (2d Cir. 2005) (noting that “[a]ntitrust actions
 12 are not among [the] exceptions” to notice pleading identified in the Federal Rules of Civil
 13 Procedure); *South Austin Coalition Community Council v. SBC Communications, Inc.*, 274 F.3d
 14 1168, 1171 (7th Cir. 2001) (declining to dismiss an antitrust complaint that satisfied Rule 8(a);
 15 “Rule 9 sets out special pleading requirements for some matters, such as fraud and admiralty, but
 16 it does not require extra detail for antitrust suits – and the Supreme Court insists that courts not
 17 add to the requirements of Rule 8. Doubtless antitrust litigation is expensive, but Congress has
 18 not responded to this expense with extra pleading requirements – as it did, for example, in the
 19 field of private securities litigation. As long as Rule 8 stands unaltered, and there is no antitrust
 20 parallel to the Private Securities Litigation Reform Act, courts must follow the norm that a
 21 complaint is sufficient if any state of the world consistent with the complaint could support relief”
 22 (citations omitted)).

23 Rule 8(a) does not require that a plaintiff plead the specifics of its claim. See, e.g.,
 24 *Lanigan v. Village of East Hazel Crest, Illinois*, 110 F.3d 467, 474 (7th Cir. 1997) (“Lanigan did
 25 not have to plead with specificity to meet the requirements of Rule 8(a)”); *Hammes v. AAMCO*
 26 *Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994) (“The Federal Rules of Civil Procedure
 27

28 ³⁶Pls.’ Opp’n at 8 (citing Radikal Complaint, ¶ 10; TSR Complaint, ¶ 10).

1 do not require the plaintiff to plead the particulars of his claim, Fed. R. Civ. P. 8(a)(1), with the
2 exceptions (of which the best known is fraud) listed in Rule 9(b)"); see also *Theme Promotions,*
3 *Inc. v. News America FSI*, 35 Fed. Appx. 463, 466 (9th Cir. May 3, 2002) (Unpub. Disp.)
4 (stating, in an antitrust case, that a plaintiff is not "'require[d] . . . to plead the particulars of his
5 claim,'" quoting *Hammes*).

6 As a result, even where a plaintiff "may not have provided the most detailed description
7 of facts from which to infer antitrust injury," *Theme Promotions*, 35 Fed. Appx. at 466, the
8 complaint will survive dismissal so long as it alleges some injury to competition, and the court
9 can infer that the injury was the result of defendant's purportedly anticompetitive conduct. *Id.*
10 (reversing the district court's dismissal of a § 1 claim for failure to plead harm to competition
11 adequately where plaintiff alleged that defendant's conduct resulted in "an increase in the cost of
12 advertising per unit sold" because this allegation, if true, "would have a direct effect on the
13 availability of promotional and advertising services" in the relevant market, and hence would
14 constitute "an injury to consumers and competition . . . not just [to plaintiff's] own business").

15 Here, plaintiffs have plainly alleged harm to competition that can fairly be inferred to have
16 been caused by Warner's "payola" agreements with radio stations. Specifically, plaintiffs allege
17 that the "payola" agreements prevent plaintiffs from securing radio airtime for their recordings;³⁷
18 that "thousands" of other small independent record labels are likewise unable to secure airtime
19 due to Warner's "stranglehold" on the radio airtime market;³⁸ and that plaintiffs (along with other
20 independent labels) have been "systemically" excluded from a critical means of marketing their
21 sound recordings.³⁹ Plaintiffs allege that, as a result, (1) "competition among and between
22 defendant and independent record labels has been suppressed and eliminated"; (2) independent
23 record labels are incapable of "lawfully engaging in their trade," which "reduces total output";
24 (3) "freedom of choice among record label companies is suppressed and eliminated"; (4) interstate

25
26 ³⁷Radikal Complaint, ¶¶ 8, 11-12, 17; TSR Complaint, ¶¶ 8, 11-12, 17.

27 ³⁸Radikal Complaint, ¶¶ 9-10; TSR Complaint, ¶¶ 9-10.

28 ³⁹Radikal Complaint, ¶¶ 7, 10; TSR Complaint, ¶¶ 7, 10.

1 and foreign commerce in the promotion of records is “substantially restrained”; and
 2 (5) “consumer choice is limited and distorted.”⁴⁰ These allegations of harm to competition,
 3 although conclusory, are clearly sufficient under the notice pleading requirements of the Federal
 4 Rules of Civil Procedure to state a § 1 claim.⁴¹ Rule 8(a) does not require that plaintiffs plead
 5 with the factual specificity Warner argues is necessary. They need not, for example, plead the
 6 names of the radio stations that did not play their sound recordings, the specific recordings for
 7 which plaintiffs could not secure airplay, or the specific recordings that lost sales because of
 8 Warner’s alleged conduct.⁴² Plaintiff may have to adduce evidence of these facts to survive a
 9 motion for summary judgment, but the complaints are not defective because plaintiffs chose not
 10 to “plead the particulars” of their claims.

11 **b. Whether Plaintiffs’ Allegations Of Harm Are Contradicted By**
 12 **Other, More Factually Specific Allegations**

13 Warner next argues that the specific factual allegations in plaintiffs’ complaints contradict
 14

15 ⁴⁰Radikal Complaint, ¶ 21; TSR Complaint, ¶ 21.

16 ⁴¹In both its moving papers and its reply, Warner relies heavily on *Rock TV Entertainment,*
 17 *Inc. v. Time Warner, Inc.*, No. 97 Civ 0161 (LMM), 1998 WL 37498 (S.D.N.Y. Jan. 30, 1998),
 18 to support its argument that plaintiffs’ conclusory allegations of harm are insufficient to state a
 19 § 1 claim. (See Def.’s Radikal Mem. at 12, 14-15; Def.’s TSR Mem. at 12, 14-15; Def.’s Reply
 20 at 10.) *Rock TV Entertainment* is inapposite, as that case involved a purported group boycott
 21 orchestrated by the “major” recording companies against a single plaintiff engaged in the
 22 broadcast of rock music videos. *Rock TV Entertainment*, 1998 WL 37498 at *1. After rejecting
 23 plaintiff’s argument that the group boycott was a per se violation of § 1, *id.* at *3, the court
 24 assessed the claim, as pleaded, under the rule of reason standard, and determined that plaintiff had
 25 failed to plead any connection between the group boycott – directed solely against him – and harm
 26 to the market as a whole. *Id.* Plaintiff merely argued that the fact that it had gone out of business
 27 as a result of the boycott, in itself, affected “competition” in the relevant market by “le[aving]
 artists in the cold, reduc[ing] consumers’ free choice . . . and diminish[ing] the programming on
 which advertisers could promote their products.” *Id.* It was only for this reason that the court
 determined that plaintiff’s conclusory allegations of harm were insufficient. Here, by contrast,
 plaintiffs allege that Warner’s “payola” agreements, which are not directed against any one
 competitor, affect the market as a whole by “systemically” excluded “thousands” of competitors
 from a crucial medium for promoting their sound recordings.

28 ⁴²Radikal Complaint, ¶ 13, 15 n. 6; TSR Complaint, ¶ 13-14, 15 n. 7.

1 their conclusory allegations of harm to competition. It asserts that the following allegations show
2 that competition in the market for the sale and distribution of musical sound recordings is robust,
3 and that plaintiffs have suffered no harm from Warner's allegedly anticompetitive conduct:
4 (1) "there are thousands of independent record labels and artists";⁴³ (2) "[defendant] is the third
5 largest record company in the world," but only "one of the four major record companies";⁴⁴
6 (3) "[plaintiffs] ha[ve] had numerous songs and artists that were very big sellers";⁴⁵ and
7 (4) "plaintiff[s] ha[ve] economic relationships with radio stations" despite the fact that Warner's
8 allegedly anticompetitive conduct began "at least as early as 2000."⁴⁶

9 Factual allegations that conclusively demonstrate the plaintiff will not be able to prove a
10 § 1 violation will support dismissal of the complaint. See, e.g., *Tanaka*, 252 F.3d at 1063, 1065
11 (affirming the district court's dismissal of a § 1 claim with prejudice where plaintiff's allegations
12 prevented her from establishing either anticompetitive conduct, if the relevant market was defined
13 nationally, or harm to competition, if the relevant market was defined regionally). The allegations
14 Warner cites, however, are not of this type. Warner effectively asks that the court draw
15 inferences from these allegations in its favor. In evaluating a motion to dismiss, however, the
16 court must construe the allegations and draw all reasonable inferences in plaintiffs' favor. See,
17 e.g., *Cahill*, 80 F.3d at 337-38. Considered under this standard, the allegations cited by Warner
18 can be construed as supporting plaintiffs' § 1 claims. The fact that there are thousands of
19 independent record labels, for example, which *collectively* constitute only fifteen percent of the
20 sound recordings market, does not foreclose the possibility that Warner, through its dominant

22 ⁴³Def.'s Radikal Mem. at 12 (citing Radikal Complaint, ¶ 12); Def.'s TSR Mem. at 14
23 (citing TSR Complaint, ¶ 14).

24 ⁴⁴Def.'s Radikal Mem. at 12 (citing Radikal Complaint, ¶ 4); Def.'s TSR Mem. at 14
25 (citing TSR Complaint, ¶ 4).

26 ⁴⁵Def.'s Radikal Mem. at 13 (citing Radikal Complaint, ¶ 9); Def.'s TSR Mem. at 14
27 (citing TSR Complaint, ¶ 9).

28 ⁴⁶Def.'s Radikal Mem. at 14 (citing Radikal Complaint, ¶¶ 19, 25); Def.'s TSR Mem. at
14 (citing TSR Complaint, ¶¶ 19, 28).

1 position in a highly concentrated oligopolistic market, was able to harm competition by entering
 2 into “payola” agreements with radio stations. In addition, the fact that plaintiffs have economic
 3 relationships with some radio stations – of which there are presumptively thousands in the United
 4 States – does not imply that Warner did not substantially impair those relationships or prevent
 5 others from forming. Finally, the fact that plaintiffs “had numerous songs and artists that were
 6 very big sellers” does not exclude the possibility that they would have had substantially more were
 7 it not for Warner’s allegedly anticompetitive conduct. Indeed, Warner quotes selectively from
 8 this allegation in its motion to dismiss. The paragraph actually alleges:

9 “In the course of doing business, [plaintiffs] ha[ve] had numerous songs and artists
 10 that were very big sellers or were high-ranking *on non-radio charts*. . . . *However,*
 11 *[plaintiffs] sound recordings could not ‘break out’ into the mainstream because of*
 12 *the interference by defendant and the other major record labels and their*
 13 *stanglehold on radio air time and playlists. . . .”⁴⁷*

14 Therefore, the court declines to find that the specific factual allegations in plaintiffs’ complaint
 15 show that they cannot prove a § 1 claim.

16 Warner also relies heavily on the findings included in its settlement agreement with New
 17 York Attorney General Eliot Spitzer – known as the “Assurance of Discontinuance Pursuant to
 18 Executive Law § 63(15)” (“AOD”).⁴⁸ Warner argues that the AOD “expressly recognizes that
 19 ‘intense competition’ exists between record labels and that the practices at issue in [Attorney
 20 General Spitzer’s investigation] were the product of that competition.”⁴⁹ It asserts that plaintiffs
 21 incorporated the AOD by reference in their complaints, that the court may accordingly “consider
 22 the full document on a motion to dismiss,” and that it should ignore any allegations that are
 23

24
 25 ⁴⁷Radikal Complaint, ¶ 9 (emphasis added); TSR Complaint, ¶ 9 (emphasis added).

26 ⁴⁸Def.’s Radikal Mem. at 5-6, 13, 16; Def.’s TSR Mem. at 5-6, 13, 16.

27 ⁴⁹Def.’s Radikal Mem. at 5, 13 (citing AOD, ¶ 13); Def.’s TSR Mem. at 6, 13 (citing
 28 AOD, ¶ 13).

1 contradicted by the AOD.⁵⁰

2 Warner is incorrect. While a court may consider “documents whose contents are alleged
3 in a complaint and whose authenticity no party questions,” *Branch v. Tunnell*, 14 F.3d 449, 454
4 (9th Cir. 1994), overruled on other grounds by *Galbraith v. County of Santa Clara*, 307 F.3d
5 1119, 1127 (9th Cir. 2002), “a plaintiff’s *reliance* on the terms and effect of a document in
6 drafting the complaint is a necessary prerequisite to the court’s consideration of the document on
7 a dismissal motion.” *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 & n. 3 (2d Cir. 2002)
8 (collecting authorities); see also *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (“[A]
9 a district court ruling on a motion to dismiss may consider a document the authenticity of which
10 is not contested, and upon which the plaintiff’s complaint necessarily relies”). The incorporation-
11 by-reference doctrine is often invoked in the context of contract disputes, for example, where the
12 contents of the underlying agreement are a necessary predicate for plaintiff’s claim. See, e.g.,
13 *Parrino*, 146 F.3d at 706 (terms of an ERISA “group plan”); *Nishimatsu Const. Co. v. Houston*
14 *Nat’l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975) (capacity in which a contracting party executed
15 an agreement). Here, the contents of the AOD are not central to plaintiffs’ § 1 claims; had
16 Attorney General Spitzer not conducted an investigation, or had plaintiffs not alleged any facts
17 regarding the investigation, their claims would not be affected.⁵¹ As a result, the court declines
18 to consider the findings included in the AOD in assessing Warner’s motion to dismiss.

19
20
21 ⁵⁰ Def.’s Radikal Mem. at 5 n. 2; Def.’s TSR Mem. at 5 n. 3.

22 ⁵¹ The court also notes that, had one of the parties requested judicial notice of the AOD,
23 this request most likely *would* have been granted, as the AOD is a matter of public record.
24 However, the court would *not* have considered the AOD’s findings of fact as conclusive in
25 deciding this motion, because “[f]actual findings in one case ordinarily are not admissible for their
26 truth in another case through judicial notice.” *Wyatt v. Terhune*, 315 F.3d 1108, 1114 n. 5 (9th
27 Cir. 2003). At most, the court could consider the fact that the AOD investigation had occurred
28 and ended in a settlement. See *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001)
 (“On a Rule 12(b)(6) motion to dismiss, when a court takes judicial notice of another court’s
 opinion, it may do so not for the truth of the facts recited therein, but for the existence of the
 opinion, which is not subject to reasonable dispute over its authenticity.” (internal quotation marks
 omitted)).

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1 In sum, for all of the reasons stated, the court denies Warner's motion to dismiss plaintiffs'
2 § 1 claims.

3 **C. The Cartwright Act Claim**

4 In addition to its § 1 claim, plaintiff TRS has alleged a state Cartwright Act claim against
5 Warner. See CAL. BUS. & PROF. CODE §§ 16270 et seq. Warner's sole argument regarding this
6 claim is that (1) it is based on the same operative facts as the Sherman Act claim; (b) "'federal
7 cases interpreting the Sherman Act are applicable to . . . the Cartwright Act';⁵² and (c) the
8 Cartwright Act claim must be dismissed for the same reasons as the Sherman Act claims.⁵³
9 Because the court has denied Warner's motion to dismiss plaintiffs' Sherman Act claims, it denies
10 Warner's motion to dismiss TSR's Cartwright Act claim as well.

11 **D. The Intentional Interference With Prospective Economic Advantage Claim**

12 To state a claim for interference with prospective economic advantage, a plaintiff must
13 allege: "(1) an economic relationship between the plaintiff and some third party, with the
14 probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the
15 relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship;
16 (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused
17 by the acts of the defendant." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134,
18 1154 (2003) (internal quotation marks omitted). In addition, the plaintiff "must plead and prove
19 as part of its case-in-chief that the defendant's conduct was 'wrongful by some legal measure other
20 than the fact of interference itself.'" *Id.* at 1153 (quoting *Della Penna v. Toyota Motor Sales,*
21 *U.S.A., Inc.*, 11 Cal.4th 376, 393 (1995)). Warner contends that plaintiffs have failed to allege
22 facts sufficient to plead all of these elements except the third.⁵⁴

23 Warner attacks plaintiffs' pleading of the first element of the tort - the existence of an
24

25 ⁵²Def.'s TSR Mem. at 17-18 (quoting *Marin County Bd. of Realtors, Inc. v. Palsson*, 16
26 Cal.3d 920, 925 (1976)).

27 ⁵³*Id.*

28 ⁵⁴Def.'s Radikal Mem. at 17-22; Def.'s TSR Mem. at 18-24.

1 economic relationship between plaintiff and a third party, with the probability of future economic
2 benefit to the plaintiff – on two grounds. First, it argues that plaintiffs’ failure to identify any
3 specific ongoing economic relationship with which it allegedly interfered renders the claims fatally
4 defective.⁵⁵ Second, it contends that plaintiffs’ expectancy of future economic benefits is too
5 attenuated to state a claim, due – at least in part – to the fact that plaintiffs have improperly
6 predicated their claims on relationships with radio stations rather than relationships with record
7 purchasers.⁵⁶ Plaintiffs counter that they can recover damages for lost opportunities with
8 unidentified third parties with which they did not have economic relations at the time of Warner’s
9 alleged tortious conduct, but with whom they would have had relations but for Warner’s
10 conduct.⁵⁷ They assert “[d]iscovery will demonstrate that [their] damages caused by Warner’s
11 conduct are straightforward and certain.”⁵⁸

12 To the extent plaintiffs assert they can recover damages for relationships that did not exist
13 at the time of Warner’s allegedly tortious conduct, they are wrong. It is well-settled that “[a]n
14 allegation of interference with a *potential* customer is too speculative to state a claim for
15 interference with prospective economic advantage.” *TPS Utilicom Servs., Inc. v. AT&T Corp.*,
16 223 F.Supp.2d 1089, 1106 (C.D. Cal. 2002) (emphasis original). Instead, the tort applies only
17 to relationships that were in existence at the time of defendant’s alleged interference. See, e.g.,
18 *Westside Center Assocs. v. Safeway Stores 23, Inc.*, 42 Cal.App.4th 507, 522 (1996) (observing
19 that plaintiff’s burden to establish the “probability of future economic benefit” precluded
20 application of the tort to “hypothetical relationships” that had not developed at the time of
21 defendant’s allegedly tortious act); *Roth v. Rhodes*, 25 Cal.App.4th 530, 546 (1994) (holding that
22 an interference plaintiff could not recover for loss of “future referrals and patient contacts,” and
23

24 _____
25 ⁵⁵Def.’s Radikal Mem. at 17-19; Def.’s TSR Mem. at 18-20.

26 ⁵⁶Def.’s Radikal Mem. at 19-20; Def.’s TSR Mem. at 20-21.

27 ⁵⁷Pls.’ Opp’n at 11-13.

28 ⁵⁸*Id.* at 15.

1 stating that “an essential element of the tort of intentional interference with prospective business
2 advantage is the existence of a business relationship with which the tortfeasor interfered”); see
3 also *D.A. Rickards, M.A., v. Canine Eye Registration Found., Inc.*, 704 F.2d 1449, 1456 (9th
4 Cir. 1983) (“Some identifiable pecuniary or economic benefit must accrue to [the defendant] that
5 formerly accrued to [the plaintiff]” (citation omitted)). Therefore, plaintiffs can recover damages
6 only for interference with third-party relationships that were in existence at the time of Warner’s
7 alleged tortious conduct.

8 Warner contends that plaintiffs must identify specific third parties with whom they had
9 ongoing economic relations to state an interference claim. A number of federal courts have
10 dismissed intentional interference with prospective economic advantage claims on the ground that
11 the complaint failed to allege the identity of the third parties with which the plaintiff had economic
12 relationships. See, e.g., *Tele Atlas N.V. v. Navteq Corp.*, 397 F.Supp.2d 1184, 1193-94 (N.D.
13 Cal. 2005); *Google Inc. v. Am. Blind & Wallpaper Factory*, No. C-03-05340 JF, 2005 WL
14 832398, *8-9 (N.D. Cal. Mar. 30, 2005); *In re Global Crossings, Ltd. Sec. Litig.*, No. 02 Civ.
15 910 (GEL), 2004 WL 725969, *5 (S.D.N.Y. Apr. 2, 2004) (applying California law). The court
16 concludes, however, that imposing such a pleading requirement would be inconsistent with the
17 liberal notice-pleading standard established by the Federal Rules of Civil Procedure. This
18 standard requires only a “short and plain statement” of a claim. See FED. R. CIV. PROC. 8(a);
19 see also *Aagard v. Palomar Builders, Inc.*, 344 F.Supp.2d 1211, 1219 (E.D. Cal. 2004)
20 (identifying third parties was not necessary under notice-pleading standard, although plaintiff was
21 bound by Rule 11). Additionally, Warner has not cited any state authority holding that the
22 identity of third parties must be pleaded to state a claim for intentional interference with
23 prospective economic advantage. Indeed, at least one California Supreme Court decision suggests
24 (without holding) that such specificity in pleading is not required. See *Blank v. Kirwan*, 39 Cal.
25 3d 311, 330-31 (1985) (affirming the dismissal of a complaint that “[did] not identify the other
26 party to the ‘economic transaction,’” but only after assessing the viability of the claim with
27 respect to all people or entities that could have been the “other party”).

28 Although the court is not persuaded that plaintiffs must specifically identify the third-party

1 relationships with which Warner allegedly interfered, it concludes that plaintiffs' expectancy of
2 future economic benefits, as pleaded, is too attenuated to state a claim. Plaintiffs allege that
3 Warner interfered with their ongoing relationships with radio stations by bribing those stations
4 to play Warner's sound recordings. They assert that, as a result, they could not secure radio airplay
5 for their recordings, and suffered pecuniary harm when their records did not achieve the market
6 sales they otherwise would have achieved. Under controlling California Supreme Court authority,
7 these allegations do not adequately plead the first element of a claim for intentional interference
8 with prospective economic advantage. See *Blank*, 39 Cal.3d at 311.

9 In *Blank*, the California Supreme Court considered allegations regarding a city's adoption
10 of a zoning ordinance that permitted the operation of poker clubs on a twenty-acre parcel within
11 city limits. *Id.* at 316-17. Plaintiff was an applicant for a city license to operate a poker club.
12 *Id.* at 317. His application was ultimately rejected because he did not own a lot of adequate size
13 in the newly zoned area. *Id.* Plaintiff sued city officials as well as a group of private individuals
14 who had filed a successful application for a poker-club license. *Id.* at 317-18. Plaintiff alleged
15 that the private individuals had bribed city officials to draft the zoning ordinance in such a way
16 that only they would be able to obtain a poker-club license. *Id.* at 318. The Supreme Court
17 upheld the trial court's dismissal of plaintiff's intentional interference with prospective economic
18 advantage claim. *Id.* at 329-30. It held that plaintiff did not have an "economic relationship"
19 with the city because his pecuniary losses stemmed *not* from his relationship with city officials,
20 but from his relationship with the "potential poker club patrons" who would have been his
21 customers but for defendants' bribery. *Id.* at 330 ("First, '[t]he relationship between [plaintiff]
22 and the City cannot be characterized as an economic relationship. It was [plaintiff's] relationship
23 to a class of as yet unknown [patrons] which was the prospective business relationship'" (citation
24 omitted, alterations original)). Turning to plaintiff's relationship with the "potential poker club
25 patrons," the Court held that, because it did not exist at the time of the bribery, it was "at most
26 a hope for an economic relationship and a desire for future benefit," not a "protectible
27 'expectancy'" that would support a tort claim. *Id.* Consequently, the Court concluded that the
28 dismissal of plaintiff's complaint had been proper.

1 *Blank* is directly on point. Like *Blank*, plaintiffs base their interference claim on a
2 relationship with intermediaries (the radio stations), which have purportedly been bribed by a
3 competitor (Warner) to prevent plaintiffs from gaining access to their customers (record buyers).
4 *Blank* squarely holds that plaintiffs' relationships with the radio stations are not the proper
5 relationships to consider in evaluating whether they have adequately alleged interference with
6 prospective economic advantage. This is because the pecuniary losses plaintiffs seek to redress
7 through a damages award flow *not* from the radio stations directly, but from plaintiffs'
8 relationships with record purchasers. As in *Blank*, the loss of revenues from these prospective
9 purchasers is too attenuated to constitute a protectable expectancy; it is, at most, "a hope for an
10 economic relationship and a desire for future benefit." *Id.* at 330. See also *Google Inc.*, 2005
11 WL 832398 at *9 ("Even though [plaintiff] has alleged relationships with 'repeat customers' who
12 'probabl[y]' will 'continue to seek to visit' its Web site and purchase its goods and services,
13 [plaintiff's] alleged expectation of 'future and prospective sales' to these customers, with which
14 [d]efendants are alleged to have interfered, is too speculative to support this claim. It does not
15 rise to the level of the requisite 'promise of future economic advantage,' instead expressing
16 merely a 'hope . . . and a desire' for unspecified future sales to unspecified returning customers
17 in the form of a legal conclusion" (citations omitted, second alteration and ellipsis original));
18 *Silicon Knights, Inc. v. Crystal Dynamics, Inc.*, 983 F.Supp. 1303, 1312 (N.D. Cal. 1997)
19 (holding that the loss of "potential customers" was "the type of speculative economic harm" that
20 was not actionable as intentional interference with prospective economic advantage).⁵⁹

21
22 ⁵⁹At oral argument, plaintiffs cited *SCEcorp v. Superior Court*, 3 Cal. App. 4th 673
23 (1992), as a case that limited *Blank* to its facts, and narrowed its precedential effect. In
24 *SCEcorp.*, a private corporation prevented the consummation of a merger between two electric
25 utilities by, *inter alia*, "improperly inducing members of [one merging partner's] board of
26 directors and management to abandon the proposed merger." *Id.* at 676. The other merging
27 partner sued, arguing that defendant had interfered with its "prospective economic advantage" in
28 the merger. The question before the court was whether the fact that the government had to
approve the merger made plaintiff's expectancy too speculative to support an intentional
interference claim. *Id.* at 679-83. It was only in this context that the court considered - and
purported to distinguish - *Blank*. See *id.* at 679. The *SCEcorp* court did not address *Blank's*

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1 Because plaintiffs failed adequately to plead economic relationships with third parties that
2 have the probability of future economic benefit to plaintiffs, their intentional interference with
3 prospective economic advantage claims must be dismissed.⁶⁰

4
5 **III. CONCLUSION**

6 For the foregoing reasons, defendants' motion to dismiss is granted in part and denied in
7 part. Plaintiffs are granted leave to amend to replead their claims for intentional interference with
8 prospective economic advantage. Any amended complaints must be filed within twenty days of
9 the date of this order.

10
11 DATED: October 11, 2006

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13 _____
14 MARGARET M. MORROW
15 UNITED STATES DISTRICT JUDGE
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24 holding regarding the appropriate relationship to consider in assessing an intentional interference
25 claim, nor did it hold – or even suggest – that a company's expectation of future sales to existing
26 or potential customers is sufficiently concrete to support such a claim. Indeed, the court
27 observed, in attempting to distinguish *Blank*, that the plaintiff in *Blank*. (much like the plaintiffs
28 here, and unlike the *SCEcorp* plaintiff) “had no valid contract which was interfered with by the
defendant.” *Id.* at 679.

⁶⁰Because the court grants defendant's motion to dismiss on this basis, it does not address
Warner's arguments concerning other elements of the tort.