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17 *Ultimate Fighting Championship and UFC*

18 UNITED STATES DISTRICT COURT

19 NORTHERN DISTRICT OF CALIFORNIA - SAN JOSE DIVISION

20 Cung Le, Nathan Quarry, Jon Fitch, on behalf
21 of themselves and all others similarly situated,

22 Plaintiffs,

23 v.

24 Zuffa, LLC, d/b/a Ultimate Fighting
Championship and UFC,

25 Defendant.

Case No. 5:14-cv-05484 EJD

**DEFENDANT ZUFFA, LLC'S
CONSOLIDATED NOTICE OF MOTION
AND MOTION TO DISMISS PLAINTIFFS'
COMPLAINTS PURSUANT TO FED. R.
CIV. P. 12(b)(6)**

Date: July 23, 2015
Time: 9:00 a.m.
Place: Courtroom 4
Judge: Hon. Edward J. Davila

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<p>Luis Javier Vazquez and Dennis Lloyd Hallman, on behalf of themselves and all others similarly situated,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>Zuffa, LLC, d/b/a Ultimate Fighting Championship and UFC,</p> <p style="text-align: center;">Defendant.</p>
<p>Brandon Vera and Pablo Garza, on behalf of themselves and all others similarly situated,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>Zuffa, LLC, d/b/a Ultimate Fighting Championship and UFC,</p> <p style="text-align: center;">Defendant.</p>
<p>Gabe Ruediger and Mac Danzig, on behalf of themselves and all others similarly situated,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>Zuffa, LLC, d/b/a Ultimate Fighting Championship and UFC,</p> <p style="text-align: center;">Defendant.</p>

Case No. 5:14-cv-05591 EJD

Case No. 5:14-cv-05621 EJD

Case No. 5:15-cv-00521 EJD

1 TO THE COURT, ALL PARTIES AND COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE THAT on July 23, 2015 at 9:00 a.m., or as soon thereafter as
3 this matter may be heard, Defendant Zuffa, LLC will and hereby does move this Court for an
4 order dismissing the Complaints of Plaintiffs Cung Le, Nathan Quarry, Jon Fitch, Luis Javier
5 Vazquez, Dennis Hallman, Brandon Vera, Pablo Garza, Gabe Ruediger, and Mac Danzig on the
6 ground that the Complaints fail to state a claim upon which relief can be granted pursuant to
7 Federal Rule of Civil Procedure 12(b)(6). The hearing will be conducted before the Hon. Edward
8 J. Davila, United States District Court Judge for the Northern District of California, in
9 Courtroom 4 of the San Jose Courthouse, 280 South 1st Street, San Jose, CA 95113.

10 This motion is based on this Notice of Motion and Motion, the supporting Memorandum
11 of Points and Authorities, the attached appendix, Zuffa's Request for Judicial Notice, the
12 Declaration of Suzanne E. Jaffe, and any other evidence or materials that the Court may allow
13 before or at the time the matter is set to be heard.

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1 **I. INTRODUCTION**

2 Defendant Zuffa, LLC (“Zuffa”) moves to dismiss the Complaints in the above-entitled
3 actions for failure to state a claim on which relief may be granted. Fed. R. Civ. P. 12(b)(6).

4 Plaintiffs, professional mixed martial arts (“MMA”) fighters, allege that Zuffa, d/b/a the
5 Ultimate Fighting Championship® and the UFC®, uses exclusive dealing arrangements to
6 foreclose rival MMA promoters from the inputs necessary to compete in the alleged markets for
7 what Plaintiffs call “Elite Professional MMA Fighter services” and the “promotion of Elite
8 Professional MMA bouts” in violation of Section 2 of the Sherman Act. Plaintiffs allege that this
9 scheme enabled the UFC to obtain monopoly power and depress fighters’ compensation for bouts
10 and for the rights to their names and likenesses. The Complaints’ vague and conclusory
11 allegations fall far short of the Supreme Court’s requirements in *Bell Atlantic Corp. v. Twombly*,
12 550 U.S. 544 (2007) for pleading specific facts showing a plausible antitrust claim.

13 First, Plaintiffs fail to allege facts that plausibly show that Zuffa’s alleged exclusive
14 dealing arrangements are anticompetitive. Exclusive deals are common and procompetitive,
15 including in sports, because they encourage interbrand competition, encourage promoters to
16 invest in marketing both the athlete and the sport, and prevent competitors from free-riding on
17 those investments. Plaintiffs’ conclusory accusation that Zuffa’s contracts “indefinitely” lock up
18 “all or virtually all” of the Professional MMA fighters necessary to compete in the promotion of
19 MMA bouts is unsupported by specific factual allegations and implausible on its face. Plaintiffs’
20 conclusory allegation that Zuffa has locked up all the venues, television outlets and sponsors
21 necessary to compete is similarly implausible and without factual foundation. Plaintiffs’
22 Complaints do not show that Zuffa has foreclosed any competition in the alleged markets, much
23 less foreclosed a substantial share of the alleged markets. Absent plausible allegations that the
24 UFC’s exclusive deals have foreclosed competitors from obtaining the necessary inputs to
25 compete, Plaintiffs cannot show that Zuffa’s contracts are anticompetitive or justify the enormous
26 expense of a large antitrust case.

27 Second, Plaintiffs have failed to allege plausible, properly defined relevant product
28 markets. Plaintiffs have *invented* the term “Elite Professional MMA Fighter” and then defined it

1 only by their vague and subjective perceptions of fighters' degrees of quality. But antitrust
 2 plaintiffs are required to define relevant markets clearly and based on principles of reasonable
 3 substitutability, not their own outcome-driven preferences. Plaintiffs' incomprehensible and
 4 artificially narrow markets for "Elite" fighters and bouts fail to meet that basic requirement.

5 Third, Plaintiffs' allegations that the UFC refused to co-promote events with rivals does
 6 not state a cognizable antitrust claim nor do their allegations regarding contractual restrictions on
 7 the use of the UFC name and brand. Firms, even alleged monopolists, have no duty to deal with
 8 competitors or to allow their intellectual property to be used by competitors.

9 Fourth, Plaintiffs have not plausibly alleged that the contractual provisions relating to their
 10 name and likeness rights are anticompetitive. Grants of exclusive name and likeness rights,
 11 including rights in perpetuity, are common in the sports and entertainment industries and have
 12 been consistently upheld by the courts. Plaintiffs have failed to allege any facts showing the
 13 granting of such rights has impacted competition in either of the alleged markets. Although
 14 Plaintiffs might have preferred to license fewer rights to the UFC or to receive more money for
 15 their rights, those desires do not give rise to an antitrust claim.

16 Finally, Plaintiffs have not pled specific facts showing that the UFC's acquisition of other
 17 MMA promoters has resulted in any anticompetitive effect. The Complaints make clear that even
 18 after these acquisitions, the UFC continues to face robust competition from multiple, well-funded
 19 competitors able to stage bouts with prominent fighters and television distribution.

20 **II. SUMMARY OF ALLEGATIONS**

21 **A. The Sport and Business of Mixed Martial Arts.**

22 MMA, an interdisciplinary sport that combines attributes of boxing, wrestling, karate,
 23 muay thai, Brazilian jiu jitsu, judo and other sports, first emerged as a sport in the early 1990s.¹
 24 *Le Compl.* ¶¶ 59, 105.² The UFC was one of the earliest promotions, founded in 1993, and

25 _____
 26 ¹ For purposes of this motion only, Zuffa assumes the truth of the Complaints' factual allegations.

27 ² Because all four complaints are essentially identical and for ease of reading, this motion cites
 28 only the *Le Compl.* where identical allegations are contained in the other complaints. A list of
 cross-references to identical allegations in the other complaints is attached as Appendix A.

1 purchased by Zuffa in 2001. *Id.* ¶ 105. Zuffa “built the UFC into an international brand that, in
 2 many instances, has been synonymous with the rapidly growing sport of MMA.” *Id.* ¶ 75. As the
 3 sport has grown, so have opportunities for athletes. Plaintiffs allege that in 2015, the UFC plans
 4 to hold 45 events — nearly one every week. *Id.* ¶ 155. With events typically containing 11
 5 bouts, according to Plaintiffs’ math, there will be a total of 495 bouts or 990 opportunities for
 6 fighters in the UFC in 2015. *Id.* Plaintiffs acknowledge that today, professional MMA in general
 7 is now “one of the most popular and fastest growing spectator sports in the U.S. and North
 8 America.” *Id.* ¶ 95.

9 **B. The Alleged “Scheme” to Monopolize and Monopsonize.**

10 The gravamen of the Plaintiffs’ claim is that Zuffa has engaged in a “scheme” to
 11 monopolize and monopsonize by alleged exclusive dealing arrangements with fighters, venues,
 12 sponsors, TV networks and other third parties that have allegedly reduced competition by denying
 13 rivals access to inputs that are “necessary” to promote live “Elite Professional MMA bouts.” Le
 14 Compl. ¶¶ 9-10. Plaintiffs also claim that acquisitions of certain rival promoters reduced
 15 competition in the alleged markets. *Id.* ¶¶ 11-12, 129. Plaintiffs allege that the result of this
 16 “scheme” is that they received less compensation for participation in bouts and related grants of
 17 ancillary rights than they otherwise would have. *Id.* ¶¶ 153, 160.

18 **1. The Alleged Relevant Markets.**

19 Plaintiffs allege two relevant product markets: (1) the input market — the market for
 20 “Elite” Professional MMA Fighter services, and (2) the output market — a market for the
 21 promotion of live “Elite” Professional MMA bouts. Le Compl. ¶¶ 55, 76. Plaintiffs define an
 22 “Elite Professional MMA Fighter” as “any Professional MMA fighter who has demonstrated
 23 success through competition in local and/or regional MMA promotions, or who has developed
 24 significant public notoriety amongst MMA Industry media and the consuming audience through
 25 demonstrated success in athletic competition.” *Id.* ¶ 30(d).

26 Plaintiffs allege that the relevant geographic market for both the input and output markets
 27 is “the United States, and, in the alternative, North America.” *Id.* ¶ 63.
 28

2. Putative Classes.

All Plaintiffs but one seek to represent the same two putative classes: the “Bout Class” and the “Identity Class.” The “Bout Class” consists of “All persons who competed in one or more live professional UFC-promoted MMA bouts taking place or broadcast in the United States” since December 16, 2010. Le Compl. ¶¶ 30(c), 39. The “Identity Class” consists of “Each and every UFC Fighter whose Identity was expropriated or exploited by the UFC, including in UFC Licensed Merchandise and/or UFC Promotional Materials . . . in the United States” for the same period. *Id.* ¶¶ 30(c), 47.

3. Alleged Anticompetitive Conduct.

Plaintiffs claim that successful promotion of a live Elite Professional MMA event requires “Elite Professional MMA fighters” and “a suitable venue, access to PPV or television distribution outlets, sponsors and endorsements,” *id.* ¶ 58, and the UFC has locked up: “(i) all or virtually all Elite Professional MMA Fighters with substantial national or regional notoriety; (ii) the vast majority of major sponsors; and (iii) key physical and television venues.” *Id.* ¶ 10. They also allege the UFC “shuts out rival promotion opportunities for promoters and fighters by refusing to co-promote events with would-be rival MMA Promoters and prohibiting its athletes from competing against non-UFC MMA Fighters in live Elite Professional MMA bouts.” *Id.* ¶ 17.

a. Alleged Exclusive Deals Between Zuffa and Fighters.

Plaintiffs allege that the UFC deprives rivals of access to “Elite Professional MMA Fighters” through “exclusive dealing agreements with UFC Fighters that lock in Elite Professional MMA Fighter services *perpetually and exclusively* for the UFC.” Le Compl. ¶ 110 (emphasis added). Plaintiffs cite certain contract provisions in support of this conclusion, including (1) the “Exclusivity Clause,” which prohibits fighters from working with rival promoters while under contract with the UFC without the UFC’s approval, *id.* ¶ 113(a); (2) the “Champion’s Clause,” which applies only to the few weight class champions at any given time and purportedly “allows the UFC to extend a UFC Fighter’s contract for as long as the athlete is a ‘champion’ in his or her weight class,” *id.* ¶ 113(b); and (3) unspecified “Tolling provisions,” which allegedly “extend the term of the UFC Fighter’s contract during periods when he or she is

1 injured, retired, or otherwise declines to compete,” *id.* ¶ 113(g). Plaintiffs claim these provisions
 2 allow the UFC to extend the period of exclusivity “indefinitely.” *Id.* ¶ 113(a), (b). Plaintiffs do
 3 not allege the actual duration of any fighter’s contract with the UFC, including their own.

4 Thus, the Complaints conclude that “all or virtually all” Elite Professional MMA Fighters
 5 are locked up by the UFC “indefinitely.” *Id.* ¶¶ 10, 113(a), (b). Many allegations in the
 6 Complaints and many facts properly subject to judicial notice contradict this conclusion.³ For
 7 example, Plaintiffs acknowledge that UFC fighters whose contracts have ended have fought for
 8 Bellator, a rival MMA promoter. *Le Compl.* ¶ 146. Further, judicially noticeable state records
 9 show that some of Plaintiffs themselves actually fought for competitors after fighting for the
 10 UFC. Plaintiffs Fitch and Hallman both fought for World Series of Fighting,⁴ Hallman also
 11 fought for Titan Fighting Championship,⁵ and Plaintiff Ruediger fought for promoter BAMMA.⁶
 12 The Complaints also refer to several prominent fighters who either never fought for the UFC or
 13 fought for other promoters since fighting for the UFC — Fedor Emelianenko (*id.* ¶ 126), Ben
 14

15
 16 ³ “[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily
 17 examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated
 18 into the complaint by reference, and matters of which a court may take judicial notice.” *Tellabs,*
 19 *Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Public records of athletic contests
 20 maintained by state athletic commissions are judicially noticeable. *E.g., J&J Sports Prods.,*
 21 *Inc., v. Medinarios*, No. C 08-0998 JF (RS), 2008 WL 4412240, at *1 n.4 (N.D. Cal. Sept. 25,
 22 2008) (taking judicial notice of Nevada Athletic Commission records of bout); *Kingvision Pay-*
 23 *Per-View, Ltd. v. Guzman*, No. CV-07-0963-PHX-PGR, 2008 WL 1924988, at *2 (D. Ariz.
 24 Apr. 30, 2008) (judicial notice of the Nevada Athletic Commission records of bout).

21 ⁴ Declaration of Suzanne E. Jaffe in support of Zuffa, LLC’s Request for Judicial Notice (“RJN”),
 22 ¶ 3, Ex. A (Fla. State Boxing Comm’n, Match Results, July 5, 2014 event for “WSofF” at
 23 Convention Ctr. — Daytona (bout between Fitch and Hallman on line 7)); ¶ 4, Ex. B (Nev. State
 24 Ath. Comm’n, MMA Show Results, June 14, 2013 event for WSOF, LLC at Hard Rock Hotel &
 25 Casino, Las Vegas (bout involving Fitch)); ¶ 5, Ex. C (Fla. State Boxing Comm’n, Match Results,
 26 Oct. 26, 2013 event for World Series of Fighting at Bank United Ctr. — Coral Gables, FL (bout
 27 involving Fitch on line 9)); ¶ 6, Ex. D (Cal. State Ath. Comm’n, MMA Bout Results, Dec. 13,
 28 2014 event for promoter “WSOF” at McClellan Civic Ctr., Sacramento, CA (Fitch in Bout 11)).

26 ⁵ RJN ¶ 7, Ex. E (Mo. Office of Athletics, MMA Bout Results, Aug. 30, 2013 event for “Titan
 Fighting Champ” at Union Station in Kansas City, MO (Hallman in Bout 6)).

27 ⁶ RJN ¶ 8, Ex. F (Cal. State Ath. Comm’n, MMA Bout Results, May 31, 2013 event for promoter
 BAMMA at Commerce Casino, Commerce, CA (Ruediger in Bout 7)).

1 Askren (*id.* ¶ 137), Jake Shields (*id.* ¶ 28),⁷ and Quinton “Rampage” Jackson (*id.* ¶ 123).⁸

2 **b. Alleged Exclusive Deals Between Zuffa and Event Venues,**
3 **Sponsors and Television Distribution Channels.**

4 Plaintiffs allege that the UFC has locked up: “the vast majority of major sponsors; and
5 (iii) key physical and television venues.” Le Compl. ¶ 10. Plaintiffs do not allege how many
6 sponsors or potential sponsors exist or what percentage of those sponsors the UFC has under
7 contract. In regards to venues, Plaintiffs do not describe the universe of “key” venues or explain
8 why other venues would be not reasonable substitutes. As for television distribution, Plaintiffs do
9 not allege which or how many networks are restricted, nor why any other of the hundreds of
10 television networks that do not carry UFC bouts are not adequate alternatives for competitors.

11 **c. Alleged Expropriation of Identity Rights.**

12 Plaintiffs also allege that the UFC’s contracts with fighters have resulted in fighters’
13 names and likenesses being “exploited or expropriated” (1) without adequate compensation to the
14 fighters based on the scope and duration of the contracts; and (2) in a way that denies fighters the
15 opportunity to exploit their connection with the UFC brand to profit outside of their dealings with
16 the UFC. Le Compl. ¶¶ 3, 6, 92, 113(d).

17 **d. Allegations Related to Zuffa’s Acquisitions.**

18 The Complaints allege that Zuffa acquired certain other MMA promoters between 2006
19 and 2011. Le Compl. ¶¶ 12, 129, 133. Of these acquisitions, only one — the Strikeforce
20 acquisition in March 2011 — is alleged to have occurred since December 16, 2010. *Id.* ¶ 133.

21 **4. Professional MMA Competitors.**

22 The Complaints acknowledge that many new MMA promoters have emerged since 2006,
23 including five named in the Complaints, and compete with the UFC for both fighter services and
24 the promotion of live events. Le Compl. ¶¶ 141-144, 146, 150. Many of these competitors are

25 _____
26 ⁷ RJN ¶ 9, Ex. G (Nev. State Ath. Comm’n, MMA Show Results, January 17, 2015 event for
WSOF at Planet Hollywood Resort, Las Vegas (bout involving Shields)).

27 ⁸ RJN ¶¶ 10-11, Ex. H (N.J. State Ath. Control Bd., Scoring Detail, Nov. 15, 2013 event for
28 Bellator Sports Worldwide LLC at Revel — Atlantic City (bout involving Jackson)).

1 backed by well-funded individuals or corporations, have established television distribution,
2 and/or have attracted fighters whom the Complaints expressly acknowledge are prominent
3 fighters.

- 4 • Resurrection Fighting Alliance is operated by Ed Soares, the “prominent manager of many
5 Elite Professional MMA Fighters,” *id.* ¶ 141, and is broadcast on AXS TV, which is
6 backed “by billionaire owner of the Dallas Mavericks and HDNet founder, Mark Cuban.”
7 *Id.* ¶¶ 130(b), 141 (AXS TV is “formally HDNet”).
- 8 • Titan Fighting Championship has been “broadcast on the CBS Sports cable network” and
9 is promoted by “multi-millionaire Jeff Aronson.” *Id.* ¶ 142. Titan FC has been able to
10 secure the services of Plaintiff Hallman. Note 5, *supra*.
- 11 • Legacy Fighting Championship, which has been promoting MMA bouts since 2009, also
12 has television distribution through AXS TV. Le Compl. ¶ 143.
- 13 • Invicta Fighting Championship, which focuses on the promotion of women’s MMA bouts,
14 is owned by “a veteran of the MMA Industry” and has secured distribution “on the UFC’s
15 Internet broadcast subscription service ‘Fight Pass.’” *Id.* ¶ 144.
- 16 • Bellator has access to national television distribution, including Pay-Per-View (Le Compl.
17 ¶ 150 (PPV), Vazquez Compl. ¶ 149 (national television distribution)), and has secured
18 prominent fighters such as Quinton Jackson, whom Plaintiffs identify as a fighter capable
19 of attracting major sponsors and licensing deals. RJN ¶¶ 11-12, Ex. H; Le Compl. ¶ 123.
20 Bellator is a subsidiary of publicly-traded Viacom, Inc., and is broadcast on Viacom’s
21 Spike TV Network.⁹

22 In addition to those competitors listed in the Complaints, state athletic commission records
23 show other currently-active MMA promoters, including two others (World Series of Fighting and
24 BAMMA) that three named Plaintiffs fought for after their time with the UFC. Notes 4 and 6,
25 *supra*.

26 _____
27 ⁹ RJN ¶ 12 Ex. I at 8. Viacom also owns many other TV networks such as MTV, VH1, BET,
28 Nickelodeon, Comedy Central and had worldwide revenues last year over \$13.7 billion. *Id.* at 1,
33.

1 **III. LEGAL STANDARD**

2 Under Federal Rule of Civil Procedure 8(a)(2), a court “may dismiss a complaint as a
3 matter of law for (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable
4 legal claim.” *SmileCare Dental Grp. v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 783 (9th
5 Cir. 1996). *Twombly* directs a “two-pronged approach” in determining whether an antitrust
6 complaint should be dismissed: identify and disregard naked assertions and conclusory
7 allegations, and then determine whether the factual context presented by the remaining specific
8 factual allegations plausibly suggest the defendant is liable under the relevant law. *Ashcroft v.*
9 *Iqbal*, 556 U.S. 662, 679 (2009). Determining whether a claim is plausible is “context-specific,
10 requiring the reviewing court to draw on its experience and common sense.” *Id.* at 663-64. On a
11 motion to dismiss, the court generally accepts Plaintiffs’ allegations as true, but “need not,
12 however, accept as true allegations that contradict matters properly subject to judicial notice or
13 . . . allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
14 inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

15 To state a claim for unlawful monopolization or monopsonization under Section 2 of the
16 Sherman Act, a plaintiff must allege: “(1) Possession of monopoly power in the relevant market;
17 (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury.” *SmileCare*,
18 88 F.3d at 783. Section 2 “targets the willful acquisition or maintenance of that power as
19 distinguished from growth or development as a consequence of a superior product, business
20 acumen, or historic accident.” *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 555 U.S. 438, 448
21 (2009). “The mere possession of monopoly power . . . is not only not unlawful; it is an important
22 element of the free-market system.” *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko,*
23 *LLP*, 540 U.S. 398, 407 (2004). That is why to “safeguard the incentive to innovate, the
24 possession of monopoly power will not be found unlawful unless it is accompanied by an element
25 of anticompetitive *conduct*.” *Id.* “Anticompetitive conduct is that which is without a legitimate
26 business purpose that makes sense only because it eliminates competition.” *Sambreel Holdings*
27 *LLC v. Facebook, Inc.*, 906 F. Supp. 2d 1070, 1081 (S.D. Cal. 2012).

28 In reviewing a Section 2 claim based on multiple theories of conduct, “Each legal theory

1 must be examined for its sufficiency and applicability, on the entirety of the relevant facts.”
 2 *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1367 (Fed. Cir. 1999). If allegations “are so
 3 general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have
 4 not nudged their claims across the line from conceivable to plausible.” *Kan. Penn Gaming v.*
 5 *Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011).

6 Given the “substantial expenditures” of discovery and “the opportunity to extort large
 7 settlements even where [plaintiff] does not have much of a case,” *Kendall v. Visa, U.S.A., Inc.*,
 8 518 F.3d 1042, 1047 (9th Cir. 2008), “something beyond the mere possibility of [relief] must be
 9 alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number
 10 of other people, with the right to do so representing an *in terrorem* increment of the settlement
 11 value.” *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007) (quoting *Twombly*, 550 U.S.
 12 at 557-58). As “our Supreme Court has noted precisely in the context of private antitrust
 13 litigation, ‘it is one thing to be cautious before dismissing an antitrust complaint in advance of
 14 discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.’”
 15 *Feitelson v. Google, Inc.*, Case No. 14-cv-02007-BLF, Slip Op. at 6 (N.D. Cal. Feb. 23, 2015)
 16 (quoting *Twombly*, 550 U.S. at 558-59). Thus, “a district court must retain the power to insist
 17 upon some specificity in pleading before allowing a potentially massive factual controversy to
 18 proceed.” *Id.* at 6-7.

19 IV. ARGUMENT

20 A. **Plaintiffs Have Not and Cannot Plead Specific Facts Plausibly Showing that 21 the Exclusivity Provisions in Zuffa’s Contracts Are Anticompetitive.**

22 Exclusive dealing is a common and procompetitive form of agreement that encourages
 23 participants to invest in mutually beneficial promotional activities and prevents competitors from
 24 free-riding on those investments. *JBL Enters., Inc. v. Jhirmack Enters., Inc.*, 698 F.2d 1011, 1015
 25 (9th Cir. 1983); *see Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984)
 26 (Posner, J.) (exclusive dealing enables a firm to prevent others “from taking a free ride on his
 27 efforts (for example, efforts in the form of national advertising) to promote his brand”). For
 28 example, exclusive multi-year contracts are common with executives and performers in
 entertainment and sports and with television networks that televise shows exclusive to their

1 network. Because of these procompetitive benefits and because all contracts restrict the parties'
 2 freedom to some extent, plaintiffs pleading antitrust claims based on exclusive dealing must
 3 allege specific, plausible facts showing that the arrangement is anticompetitive, *i.e.*, that its
 4 “effect is to ‘foreclose competition in a substantial share of the line of commerce affected.’”
 5 *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp., LP*, 592 F.3d 991, 996 (9th Cir.
 6 2010) (quoting *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997)).

7 The Complaints fail this standard. First, even where they allege that fighters, sponsors
 8 and other third parties agreed to exclusive contracts, Plaintiffs have not alleged that competitors
 9 were foreclosed from competing for those contracts in the first place. Second, even assuming
 10 incorrectly that competition for those fighters and third parties is foreclosed, the Complaints do
 11 not allege facts plausibly showing these contracts have blocked competitors’ access to so many
 12 athletes, venues, sponsors and media outlets that it has foreclosed competition in the promotion of
 13 MMA bouts and in MMA fighter services. Nor do Plaintiffs allege the purported extent or
 14 duration of foreclosure from exclusive contracts with fighters, venues, television networks or
 15 third parties. *See Abby USA Software House, Inc. v. Nuance Commc’ns Inc.*, No. C 08-01035
 16 JSW, 2008 WL 4830740, at *2 (N.D. Cal. Nov. 6, 2008) (dismissing complaint for failure to
 17 plead facts showing foreclosure where exclusive dealing foreclosed only certain outlets). Third,
 18 Plaintiffs’ allegations rely on the faulty assumption that the antitrust laws require the UFC to deal
 19 with its competitors and co-promote events, which they do not.

20 **1. Exclusive Dealing Arrangements Are Common, Procompetitive, and**
 21 **an Integral Feature of the Sports and Entertainment Businesses.**

22 The Ninth Circuit has acknowledged the “‘well-recognized economic benefits to exclusive
 23 dealing arrangements, including the enhancement of interbrand competition.’” *Allied Orthopedic*,
 24 592 F.3d at 996 (quoting *Omega*, 127 F.3d at 1162). Exclusive dealing stimulates interbrand
 25 competition and increases output by incentivizing contracting parties to make mutually beneficial
 26 investments in product quality, marketing, and promotion without having “to worry about” other
 27 firms “taking a ‘free ride’ on their efforts.” *JBL Enters.*, 698 F.2d at 1015.

28 Exclusive dealing arrangements are a longstanding, critical, and procompetitive part of

1 many businesses, including sports and entertainment businesses, yielding benefits for athletes,
 2 promoters, fans, and other partners. First, exclusivity is valuable in sports because, as in other
 3 fields, athletes benefit financially from promoters engaging in “competition-for-the-contract” for
 4 their services. *Paddock Publ’ns, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 45 (7th Cir. 1996)
 5 (Easterbrook, J.) (“Competition-for-the-contract is a form of competition that antitrust laws
 6 protect rather than proscribe, and it is common”). Second, the promoter who wins the exclusive
 7 rights to a particular athlete’s services can promote events that are “both more attractive to [fans]
 8 and more distinctive from its rivals.” *Id.* at 43. Finally, by reducing the ability of rivals to free-
 9 ride on a promoter’s investments, exclusive contracts encourage a promoter to invest in
 10 recruiting, developing, and marketing athletes; building and maintaining an infrastructure for the
 11 sport; and building the league’s brand. *Ind. Entm’t Grp. v. Nat’l Basketball Ass’n*, 853 F. Supp.
 12 333, 340 (C.D. Cal. 1994). For example, in *Independent Entertainment Group*, the court rejected
 13 antitrust claims that exclusive contracts between the NBA and players that prevented a rival
 14 promoter from contracting with NBA players for an offseason pay-per-view basketball event
 15 violated the Sherman Act, finding plaintiff’s antitrust suit an “attempt to free-ride on the NBA’s
 16 investment in its star players and in rebuilding the League during the 1980’s.” *Id.*

17 **2. Plaintiffs Failed to Allege Specific Facts Plausibly Showing That**
 18 **Zuffa’s Exclusive Dealing Arrangements Foreclose Competition in**
 19 **Either Relevant Market.**

20 In light of the important procompetitive benefits that exclusive dealing arrangements
 21 yield, “antitrust plaintiffs must allege, and ultimately prove, that the arrangement’s effect is to
 22 ‘foreclose competition in a substantial share of the line of commerce affected.’” *Rheumatology*
 23 *Diagnostics Lab., Inc. v. Aetna, Inc.*, No. 12-CV-05847-JST, 2013 WL 3242245, at *10 (N.D.
 24 Cal. Jun. 25, 2013) (quoting *Allied Orthopedic*, 592 F.3d at 996); see *PNY Techn’s, Inc. v.*
 25 *SanDisk Corp.*, No. 11-CV-04689-WHO, 2014 WL 2987322, at *10 (N.D. Cal. July 2, 2014)
 26 (exclusive dealing must “bar a substantial number of rivals or severely restrict the market’s
 27 ambit”). It is insufficient to allege merely that a defendant’s exclusive dealing contracts have
 28 denied rivals access to inputs without pleading facts showing the extent of foreclosure because
 “virtually every contract to buy ‘forecloses’ or ‘excludes’ alternative sellers from some portion of

1 the market, namely the portion consisting of what was bought.” *Omega*, 127 F.3d at 1162
 2 (quoting *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236 (1st Cir. 1983)
 3 (Breyer, J.)). “If competitors can reach the ultimate consumers of the product by employing
 4 existing or potential alternative channels of distribution, it is unclear whether such restrictions
 5 foreclose from competition *any* part of the relevant market.” *Omega*, 127 F.3d at 1163.

6 Based on these principles, courts routinely dismiss complaints that fail to plead specific
 7 facts “from which it reasonably could be inferred that the percentage of the product market
 8 foreclosed is sufficiently substantial” to state an antitrust claim based on exclusive dealing.
 9 *Colonial Med. Grp., Inc. v. Catholic Healthcare W.*, No. C-09-2192 MMC, 2010 WL 2108123,
 10 at *6 (N.D. Cal. May 25, 2010), *aff’d* 444 F. App’x 937 (9th Cir. 2011); *see also PNY Tech’s*,
 11 2014 WL 1677521, at *7 (dismissing antitrust complaint because bare allegations of foreclosure
 12 are “exactly what *Twombly* and *Iqbal* warned against”); *Rheumatology*, 2013 WL 3242245,
 13 at *11 (dismissing exclusive dealing based claims where allegations did not permit court to
 14 “evaluate whether the . . . agreement foreclosed competition in a substantial share of the line of
 15 commerce affected”). Plaintiffs have not alleged specific facts as to the extent of any alleged
 16 foreclosure and instead rely on vague, implausible, and economically nonsensical allegations that
 17 “the UFC locked up: (i) all or virtually all Elite Professional MMA Fighters with substantial
 18 national or regional notoriety; (ii) the vast majority of major sponsors; and (iii) key physical and
 19 television venues.” Le Compl. ¶ 10 (emphasis added). These conclusory allegations are
 20 insufficient to justify the expense and burden of an antitrust claim based on what is recognized as
 21 pro-competitive conduct.

22 **a. No substantial foreclosure of athletes.**

23 Plaintiffs’ allegations are insufficient to show (1) that competitors were foreclosed from
 24 initially competing for the contract for any athlete who signed a UFC contract; (2) that the
 25 duration of contracts for so many UFC fighters was so long that competitors are foreclosed from
 26 competing for those fighters when their contracts run out or are otherwise terminated; or (3) even
 27 if one were to assume (incorrectly) that the UFC somehow obtained without competition
 28 complete and perpetual exclusivity with the 500 fighters it allegedly has under contract, that the

1 inability to access these UFC fighters forecloses competitors from competing for a substantial
2 share of the relevant alleged markets with other Professional MMA fighters.

3 **i No foreclosure in competition for exclusive contracts.**

4 As noted, courts have long recognized that competition to persuade people to sign
5 exclusive contracts, often called “competition for the contract,” provides important
6 procompetitive benefits. *E.g., Paddock Publ’ns*, 103 F.3d at 45. Plaintiffs allege no facts
7 showing that Zuffa has foreclosed competitors from competing for exclusive contracts with any
8 fighter.

9 **ii No showing of the duration of exclusivity.**

10 Plaintiffs allege no facts showing the contract duration or any other indicia of the time
11 period that they, or any other fighters, are limited to UFC bouts; instead, they proffer vague,
12 unsupported conclusions, such as that UFC fighters’ contracts are “long-term” (Le Compl. ¶ 5),
13 or last “all but indefinitely.” (*Id.* ¶ 9). The Complaints refer to the “Champion’s Clause” and
14 tolling provisions that may apply when a fighter is injured or otherwise not participating in bouts,
15 but these provisions apply only to the few individual champions at any given time and the subset
16 of injured or otherwise non-participating fighters. *Id.* ¶ 113(b), (g). Plaintiffs provide no other
17 facts plausibly supporting their “all but indefinitely” claim. Nor do they show why competitors
18 cannot compete for fighters on a staggered basis as fighters’ UFC contracts end, even as some
19 UFC fighters remain under contract. *See Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354
20 F.3d 661, 663 (7th Cir. 2004) (“staggered expiration dates make entry easier” because
21 competitors can sign individual contracts as they expire, as opposed to having to enroll the whole
22 industry at once). In sum, there is no plausible support for the conclusion that rivals are
23 precluded from access to “all or virtually all” “Elite Professional MMA fighters.” *Id.* ¶¶ 10, 115.

24 The Complaints are not saved by their curious disclaimer that Plaintiffs do not contend
25 their own individual contracts violate the antitrust laws. *Id.* ¶ 115. To the contrary, this
26 allegation shows that contracts at issue are not plausible violations of the antitrust laws. This
27 disclaimer emphasizes the need for Plaintiffs to plead plausible facts showing contracts
28 foreclosing competition.

1 **iii No showing of the percentage of market foreclosure.**

2 Plaintiffs also fail to allege the percentage of the markets allegedly foreclosed. The
3 Plaintiffs claim approximately 500 athletes are under contract with the UFC and thus, under their
4 theory, completely blocked from competitors. Le Compl.¶ 155. But they provide no information
5 about the total number of so-called “Elite” Professional MMA fighters available to fight in the
6 U.S. or how many such fighters a promoter would need to stage competitive bouts. Nor do they
7 attempt to quantify the number of actual or potential non-“Elite” Professional MMA Fighters.
8 Thus, even incorrectly assuming that rivals could not compete for UFC fighters before or after
9 their UFC contracts, there is still no basis to conclude that Zuffa has foreclosed a substantial share
10 of the markets for either set of Professional MMA Fighter services or bouts. To the contrary, the
11 Complaints make clear that accomplished Professional MMA Fighters are available to rivals. *See*
12 § II.B.4, *supra*. Further, Plaintiffs do not allege that Professional MMA Fighters are not
13 reasonable substitutes for Elite Professional MMA fighters, *id.* ¶¶ 59-62; *see* §IV.B, *infra*.

14 The allegation that the leading firm has contracts with current top athletes does not mean
15 that rivals cannot compete for other talented athletes. *See Fler Corp. v. Topps Chewing Gum,*
16 *Inc.*, 658 F. 2d 139, 150-51 (3d Cir. 1981). In *Fler*, the Third Circuit rejected Fler’s attempts to
17 draw a similar distinction between two types of professional baseball players — major league and
18 minor league baseball players — in claiming that Topps’ exclusive deals had monopolized the
19 market for trading cards of major league baseball players. *Id.* The Plaintiff argued, and the
20 district court accepted, that competition for agreements with minor leaguers did not suffice
21 because it “would take several years of contracts with the minor league players before enough
22 reached the majors and created an alternative series of baseball trading cards,” *Id.* at 146. The
23 Third Circuit reversed, holding that “Fler’s claim that Topps’ dominance precludes rapid entry
24 into the market misses the mark. A rival competitor may not be able to obtain major league
25 players already under contract to Topps, but it can still compete for player licenses in the same
26 forum in which Topps secured its present licensing agreements: the minor leagues.” *Id.* at 150.

27 Similarly, Plaintiffs’ conclusory allegations that Zuffa has foreclosed the market for
28 “Elite” fighters asks this Court to ignore the wide open supply of “Professional MMA Fighters,”

1 and hold that the antitrust laws guarantee competitors not merely the right to compete, but a right
 2 of “rapid entry” into the market. And unlike *Fleer*, which could only wait and see if the minor
 3 leaguers developed into major leaguers, promoters such as Bellator or Titan FC—who already
 4 contract with, and promote bouts featuring, Elite Professional MMA Fighters—who can do the job
 5 themselves by signing Professional MMA Fighters and promoting their fighters and bouts
 6 themselves. Le Compl. ¶¶ 142, 150; and notes 5 and 8, *supra*.

7 **b. No substantial foreclosure of event venues.**

8 As with their allegations regarding fighters, Plaintiffs’ allegations that rival promoters
 9 cannot access a suitable location to stage an MMA bout because of Zuffa’s alleged contractual
 10 restrictions with the venues it rents are both conclusory and wildly implausible. Le Compl. ¶¶ 9-
 11 10, 73, 108, 122. Plaintiffs allege only that Zuffa’s exclusive deals prevent rivals from holding
 12 events “with top event venues along the Las Vegas Strip” and force rivals “to use second-rate
 13 venues.” *Id.* ¶ 122. The Complaints do not identify which event locations constitute these “top
 14 venues” or “second-rate venues” or even attempt to approximate the number or percentage of
 15 event venues allegedly foreclosed to rivals on the “Las Vegas Strip.” This allegation is
 16 insufficient to allege foreclosure in one city, much less to allege foreclosure in the geographic
 17 market that Plaintiffs allege—the United States (*id.* ¶ 63). *See Am. Football League v. Nat’l*
 18 *Football League*, 323 F.2d 124, 130 (4th Cir. 1963) (rejecting monopolization claim based on
 19 allegations that the NFL had locked up the most desirable local markets in the United States
 20 because those local markets are not the relevant market).

21 **c. No substantial foreclosure of sponsors.**

22 Plaintiffs’ allegations of foreclosure in the market for sponsors do not “make economic
 23 sense.” *Adaptive Power Solutions, LLC v. Hughes Missile Sys. Co.*, 141 F.3d 947, 952 (9th Cir.
 24 1998) (to survive a motion to dismiss, “antitrust claims must make economic sense”). Plaintiffs
 25 claim Zuffa has “locked up” “key” or “major” sponsors, but do not identify the universe of
 26 sponsors or the extent to which rivals are foreclosed from access to them. Le Compl. ¶¶ 10, 116.
 27 For example, if Zuffa has an exclusive deal with Reebok, Reebok may well be a “major” or “key”
 28 sponsor, but this allegation says nothing about whether competitors can compete for other major

1 apparel providers, such as Nike, Under Armour, Adidas, Puma, Everlast, Champion, and
 2 countless others. The same principle applies to the other categories subject to the alleged
 3 exclusion, e.g., beer and soft drink companies, gyms, video games, publications, various
 4 manufacturers, etc. — an exclusive deal with one beer company, no matter how “major” or “key,”
 5 leaves all the other beer companies free to deal with competitors. These allegations do not
 6 plausibly demonstrate foreclosure or exclusion at all, much less substantial foreclosure.

7 **d. No substantial foreclosure of television distribution outlets.**

8 Plaintiffs’ allegations that Zuffa’s exclusive dealing arrangements have foreclosed rivals
 9 access to “key” or “major” television venues (Le Comp. ¶¶ 10, 73) are similarly conclusory,
 10 wildly implausible, and do not make economic sense. *Adaptive Power Solutions*, 141 F.3d at
 11 952. If Zuffa enters an exclusive deal with one television distribution outlet, then all of the other
 12 hundreds of television channels can enter deals with the UFC’s rivals. Plaintiffs do not plead any
 13 facts regarding the universe of television outlets or how Zuffa’s conduct restricts rivals’ access to
 14 this universe. In fact, *four of the five* rival promoters named in the Complaints already have either
 15 cable TV or PPV distribution, and Bellator is owned by TV network giant Viacom, Inc. See
 16 § II.B.4 *supra*. The Court is “neither obligated to reconcile nor accept [these] contradictory
 17 allegations in the pleadings as true in deciding a motion to dismiss.” *Spiteri v. Russo*, No. 12-CV-
 18 2780 MKB RLM, 2013 WL 4806960, at *8 (E.D.N.Y. Sept. 7, 2013) (citing cases).

19 In contrast to Plaintiffs’ assertion of foreclosure, their Complaints allege the very indicia
 20 of a competitive market — that MMA is “one of the most popular and fastest growing spectator
 21 sports in the U.S. and North America.” Le Compl. ¶ 95. Increasing output is a sign of
 22 competition, not foreclosure. *Cf. Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of*
 23 *Oklahoma*, 468 U.S. 85, 103 (1984) (increasing output indicates practice is “procompetitive”)
 24 (citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 18-23 (1979)).

25 **3. The UFC Has No Duty to Deal With Competitors.**

26 Plaintiffs allege that the UFC’s refusal to co-promote events with rivals constitutes part of
 27
 28

1 its allegedly anticompetitive “scheme.”¹⁰ These allegations do not support an antitrust claim
 2 because it is black letter law that Zuffa has no duty to deal with or aid competitors. *E.g., Trinko*,
 3 540 U.S. at 411.

4 **B. Plaintiffs Fail to Allege Properly Defined Relevant Product Markets.**

5 To state a claim for monopolization or attempted monopolization, a plaintiff must allege
 6 facts showing that the defendant possesses monopoly power in a properly defined relevant
 7 market. *Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc.*, No. 12-cv-05847, 2013 WL
 8 5694452, at *14 (N.D. Cal. Oct. 18, 2013) (“To state a claim, the plaintiffs must allege
 9 ‘monopoly power *in the relevant market*,’ and not just any market”). Failure to allege facts
 10 showing a plausible market is fatal to a claim under Section 2 of the Sherman Act. *Tanaka v.*
 11 *Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001).

12 Both of Plaintiffs’ market definitions are based on what the Complaints describe as “Elite
 13 Professional MMA fighters,” a term not used in the industry and apparently created solely for the
 14 purpose of this litigation. Plaintiffs do not define the contours of these markets, particularly in
 15 what distinguishes an “Elite” fighter from other Professional MMA fighters, in any
 16 understandable, much less a legally cognizable, way. “The test of market definition turns on
 17 reasonable substitutability.” *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1131 (N.D.
 18 Cal. 2004) (citing *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956)).
 19 “Where the plaintiff fails to define its proposed relevant market with reference to the rule of
 20 reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant
 21 market that clearly does not encompass all interchangeable substitute products even when all
 22 factual inferences are granted in plaintiff’s favor, the relevant market is legally insufficient, and a
 23 motion to dismiss may be granted.” *Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620,
 24 628 (5th Cir. 2002) (citing *Queen City Pizza, Inc. v. Domino’s Pizza, Inc.*, 124 F.3d 430, 436 (3d

25 ¹⁰ *E.g.*, Le Compl. ¶ 17 (“the UFC shuts out rival promotion opportunities for promoters and
 26 fighters by refusing to co-promote events with would-be rival MMA Promoters”); ¶ 130(b)
 27 (referring to the UFC’s “persistent refusal to co-promote” as part of “its aggressive
 28 anticompetitive campaign”); ¶ 147 (alleging that Bellator has been unsuccessful “in part because
 the UFC refuses to co-promote with any of Bellator’s fighters regardless of talent or merit”).

1 Cir. 1997)). Plaintiffs do not define their proposed markets in accord with these principles.

2 Plaintiffs claim that an “Elite” fighter is a Professional MMA Fighter who has
 3 “demonstrated success” or developed “significant public notoriety,” but also contend that any
 4 fighter who participated in a single UFC bout is an Elite Professional MMA fighter, even if he
 5 fought only once and lost. Le Compl. ¶ 30(d), (s). While Plaintiffs name other prominent non-
 6 UFC fighters who are presumably “Elite,” *id.* ¶¶ 126, 137, they also allege that “all or virtually
 7 all” Elite Professional MMA fighters are under contract with the UFC. *Id.* ¶ 115. Plaintiffs do
 8 not allege why a Professional MMA Fighter is not a reasonable substitute for an Elite
 9 Professional MMA fighter, nor even how one tells the difference.

10 This attempt to define a market for “Elite” Professional MMA Fighters fails for at least
 11 two reasons. First, courts have repeatedly rejected attempts to define narrow antitrust markets by
 12 subjective, vague terms purporting to reflect alleged qualitative differences because such
 13 distinctions are “economically meaningless where the differences are actually a *spectrum* of price
 14 and quality differences.” *In re Super Premium Ice Cream Distrib. Antitrust Litig.*, 691 F. Supp.
 15 1262, 1268 (N.D. Cal. 1988) (listing cases) (finding that “gradations among various qualities of
 16 ice cream are not sufficient to establish separate relevant markets”).

17 As in *Super Premium Ice Cream*, Plaintiffs here attempt to use standardless notions of
 18 “demonstrated success” and “significant public notoriety” to draw a distinction between
 19 Professional MMA Fighters and so-called “Elite” Professional MMA Fighters. Le Compl.
 20 ¶ 30(d). “But the court cannot delineate product boundaries in [antitrust] suits based upon the
 21 mere notion that there is ‘something different’ about the [products identified by the complaint]
 22 and all others, especially when that ‘something different’ cannot be expressed in terms to make a
 23 judgment of the court have meaning. More is required.” *Oracle*, 331 F. Supp. at 1159 (rejecting
 24 proposed product market definition of “high function” software sold to largest enterprise
 25 customers because it improperly excluded so-called “mid-market” vendors who sold similar
 26 software to smaller companies). That “more” is sorely lacking here.

27 Second, Plaintiffs’ allegation that “all or virtually all . . . Elite Professional MMA
 28 fighters” are under contract to the UFC (Le Compl. ¶ 115) is just a tautology to create a single-

1 brand market comprised solely of UFC fighters under a different name. Courts' acceptance of
 2 such circular, single-brand markets "are, at a minimum, extremely rare." *Apple, Inc. v. Psystar*
 3 *Corp.*, 586 F. Supp. 2d 1190, 1198 (N.D. Cal. 2008); accord *Dang v. San Francisco Forty*
 4 *Niners*, 964 F. Supp. 2d 1097, 1105 (N.D. Cal. 2013). The fact that the association with UFC
 5 brings stature to a fighter does not mean that other fighters are not reasonable substitutes. *Donald*
 6 *B. Rice Tire Co. v. Michelin Tire Corp.*, 483 F. Supp. 750, 755 (D. Md. Jan. 30, 1980), *aff'd* 638
 7 F.2d 15 (4th Cir. 1981) (Although "Michelin is a premium tire with a reputation for durability and
 8 safety these attributes are insufficient . . . to justify such a narrow product market definition.").

9 **C. Plaintiffs Have Not and Cannot Plead Specific Facts Plausibly Showing That**
 10 **the Ancillary Rights Provisions Are Anticompetitive or Reduce Competition**
 11 **in the Relevant Markets.**

12 Plaintiffs allege that the UFC has "expropriate[d]" Plaintiffs' names and likenesses and
 13 "paid [fighters] a fraction of what they would earn in a competitive marketplace," Le Compl. ¶ 1.
 14 They seek to certify a class of "Each and every UFC Fighter whose Identity was expropriated or
 15 exploited by the UFC." *Id.* ¶ 47. But loaded, conclusory words like "exploited" and
 16 "expropriated" are not a substitute for a coherent antitrust theory or for facts to show either that:
 17 (1) the contractual provisions relating to Plaintiffs' names and likenesses are anything other than
 18 the ordinary license of an individual's rights to publicity; or (2) the contractual grants of
 19 intellectual or identity property rights reduced competition in either of the alleged relevant
 20 markets.

21 While their theory is not clear, to the extent Plaintiffs argue that they wanted greater
 22 freedom to license their identities in other contexts, they do not explain how this would have
 23 increased competition in either MMA bouts or MMA fighter services. Clearly, the Plaintiffs who
 24 fought for other promoters after leaving the UFC were able to use their names and likenesses in
 25 promoting competitive bouts. See § II.3.a, 4, *supra*. Stripped of epithets, Plaintiffs' claim boils
 26 down to no more than a complaint that they believe they contracted away too many rights for too
 27 little compensation because Zuffa allegedly possesses a monopoly. But complaints about the
 28 prices and other contract terms of an alleged monopolist do not amount to antitrust violations.
John Doe I v. Abbott Labs., 571 F.3d 930, 934 (9th Cir. 2009) (the "basic rule" is "that mere

1 possession of monopoly power and the practice of charging monopoly prices does not run afoul
2 of §2”).

3 **1. Name and Likeness Licenses Are Common and Procompetitive.**

4 There is nothing uncommon or anticompetitive about an athlete or performer granting to a
5 promoter or producer his publicity rights in the performance in exchange for his compensation for
6 the performance. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 968 (N.D. Cal.
7 2014) (“Professional athletes often sell group licenses to use their names, images, and likenesses
8 in live game telecast, videogames, game re-broadcasts, advertisements, and other archival
9 footage”). Allowing athletes and promoters to contract for intellectual property rights associated
10 with their services, including exclusive rights, is necessary to allow athletes to obtain value for
11 their performance of services. *Haelan Labs, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868
12 (2d Cir. 1953). “This right of publicity would usually yield [rights’ holders] no money unless it
13 could be made the subject of an exclusive grant which barred any other advertiser from using
14 their picture.” *Id.* Licenses that extend past the term of the contract provide a number of
15 practical economic benefits, including certainty and reducing transaction costs. For example, it is
16 hard to imagine how a DVD of a bout or video game could be produced if it would need to be
17 taken off the shelves every time an athlete appearing in the DVD or video game had his or her
18 contract expire.

19 Courts have consistently upheld exclusive grants of such name and likeness rights, *e.g.*,
20 *Fleer*, 658 F.2d at 149-50 (upholding exclusive license of baseball players’ names and likenesses
21 on trading cards to one company), including where the grant is in perpetuity. *Rooney v. Columbia*
22 *Pictures Indus., Inc.*, 538 F. Supp. 211, 227-28 (S.D.N.Y. 1982) (upholding contract terms
23 granting movie studios the perpetual right to actor’s likeness and voice in connection with movies
24 filmed for the studios); *Hazel Bishop, Inc. v. Perfemme, Inc.*, 314 F.2d 399, 400-01, 404 (2d Cir.
25 1963) (upholding the perpetual license of a person’s name and likeness to be used in the
26 promotion of cosmetic products even after she left the company). Further, courts recognize that
27 group licenses, where a promoter becomes the licensor for all its athletes, are necessary to prevent
28 the prohibitive transaction costs that would be incurred if “every potential retailer had to contract

1 with each player individually.” *Fleer Corp.*, 658 F.2d at 151 (“Far from being a restraint of trade,
2 the commercial authorization agreement is pro-competitive. . . . If every potential retailer had to
3 contract with each player individually for a group license, few licenses would exist.”).

4 **2. Contractual Restrictions on the Use of the UFC Name and Marks Are**
5 **the Legitimate Exercise of Zuffa’s Intellectual Property Rights and**
6 **Are Not Anticompetitive.**

7 Plaintiffs’ complaints about restrictions on the use of Plaintiffs’ identity rights in
8 connection with the UFC brand and trademarks ignore Zuffa’s right to control its name and
9 intellectual property.¹¹ *See MiniFrame Ltd. v. Microsoft Corp.*, No. 11 CIV. 7419 RJS, 2013 WL
10 1385704, at *4 (S.D.N.Y. Mar. 28, 2013) *aff’d*, 551 F. App’x 1 (2d Cir. 2013) (holders of
11 intellectual property rights have “no duty to deal with their competitors or permit them access to
12 their” intellectual property). For example, Plaintiffs allege that the UFC charges a fee to sponsors
13 “for the right to associate their brands with specific UFC Fighters” in order to sponsor a “UFC
14 Fighter *during UFC events*.” Le Compl. ¶ 124 (emphasis added). But nothing in the antitrust
15 laws requires Zuffa to permit sponsors to gain free exposure on UFC programming and benefit
16 from the UFC’s investment in its brand and its events without paying for it or to allow its name to
17 be used by competitors. Tellingly, Plaintiffs do not allege that Zuffa charges a fee when the UFC
18 brand is not involved. And alleging that the fee or so-called “tax” is used to “dominate” MMA
19 industry segments (*id.*) cannot transform a protected exercise of intellectual property rights into
20 an antitrust violation. *Trinko*, 540 U.S. at 411.¹² The same principle applies to Plaintiffs’ claim

21 ¹¹ The Complaints show that the name and likeness grants are narrowly tailored to UFC licensed
22 merchandise, promotional materials and intellectual property, and do not encompass a blanket
23 name and likeness right in all capacities and for all purposes. Le Compl. ¶ 30(s) (UFC fighter is a
24 person “whose Identities were acquired for use and/or used in UFC Licensed Merchandise and/or
25 UFC Promotional Materials”). “UFC Licensed Merchandise” is apparel and other promotional
26 items that “contains the trademarks, trade names, logos and other *intellectual property owned or*
27 *licensed by Zuffa*.” *Id.* ¶ 30(t) (emphasis added). UFC Promotional Materials includes “all forms
28 of television . . . merchandising and program rights *in connection or based upon the UFC brand,*
UFC bouts, UFC Pre-Bout Events or UFC Post-Bout Events.” *Id.* ¶ 30(u) (emphasis added).

¹² That a sports organization insists on permission before allowing its name to be used in a
commercial sponsorship is commonplace. When an NFL player appears in a commercial in his
NFL uniform, his team and/or the NFL has granted permission. When an NFL player appears in
a commercial in something other than his NFL uniform and without the name of his team or the

1 that fighters are limited in their ability to use the UFC brand to promote themselves when they
 2 fight for a competitor. Le Compl. ¶¶ 30(s), 113(d). This is no more than another complaint that
 3 the UFC refuses to cooperate with its competitors. Moreover, the argument the UFC should have
 4 been more liberal in allowing Plaintiffs to associate their sponsors with UFC events is a clear
 5 acknowledgement that the UFC brand adds value and is subject to free-riding.

6 Further, Plaintiffs do not show that, in the absence of contractual restrictions on the
 7 Plaintiffs' use of the UFC brand, there would be additional competition in UFC Licensed
 8 Merchandise or Promotional Material because no one can use the UFC brand without Zuffa's
 9 permission. To the extent that Plaintiffs contend that the contracts restrict rights unrelated to the
 10 UFC's trademarks, name or brand, they have not shown (1) as discussed above, that the contracts
 11 go beyond Zuffa's legally protected rights to control its own intellectual property or (2) that the
 12 contracts have restricted competition that would otherwise exist for those rights. *See Washington*
 13 *v. Nat'l Football League*, 880 F. Supp. 2d 1004, 1007 (D. Minn. 2012) ("Plaintiffs do not explain
 14 what market might exist in game footage that features only that footage to which any player can
 15 claim to be individually entitled: a single player's image without any NFL logos or marks").
 16 Finally, even if they could, Plaintiffs have not shown that any possible effect in the "markets" for
 17 sponsor licensing rights reduces competition in the markets alleged in the Complaints — the
 18 markets for bouts and fighter services.

19 3. Plaintiffs' Identity Rights Claims Do Not State an Antitrust Violation.

20 In essence, the claim that Plaintiffs' identities have been "exploited and expropriated"
 21 amounts to no more than a challenge to the terms and compensation received under their
 22 contracts. Where a plaintiff simply attaches "antitrust 'labels and conclusions' to what is, at
 23 most, an ordinary contract dispute," the complaint does not state a plausible claim for relief under
 24 the Sherman Act. *In re Adderall XR Antitrust Litig.*, 754 F.3d 128, 135-36 (2d Cir. 2014).

25 NFL, permission is not required. *See* Pamela R. Lester, *Marketing the Athlete; Endorsement*
 26 *Contracts*, SC47 ALI-ABA 405, 410 (January 22, 1998) ("For example, a professional football
 27 player cannot appear in his team uniform in an advertisement unless the manufacturer or the
 28 player has entered into a separate licensing agreement with NFL Properties for the use of the team
 name and logo"). The Complaints do not show that Zuffa's contracts operate differently.

1 Plaintiffs' attempt to shoehorn their allegations into an antitrust claim should be rejected.
 2 *Washington*, 880 F. Supp. 2d at 1005, 1008 (dismissing claim that the NFL monopolized the
 3 market for former players' licenses by denying access to game films and images because, "What
 4 they have are claims for royalties, not claims for antitrust").

5 **D. Plaintiffs Have Not Pled Specific Facts Plausibly Demonstrating That Zuffa's**
 6 **Acquisitions Have Had Anticompetitive Effects.**

7 The "mere fact that a merger eliminates competition between the firms concerned has
 8 never been a sufficient basis for illegality." 4 Phillip E. Areeda *et al.*, Antitrust Law ¶ 901a
 9 (2009). Acquisitions "may enhance competition by combining complementary assets,
 10 eliminating duplicative assets, or achieving scale economies," which result in efficiencies that
 11 "directly benefit consumers by, for example, improving quality, increasing innovation, and
 12 lowering prices." *F.T.C. v. Lab. Corp. of Am.*, No. SACV 10-1873 AG MLGX, 2011 WL
 13 3100372, at *20 (C.D. Cal. Feb. 22, 2011) (citing cases). "[I]n a competitive market, buying out
 14 competitors is not merely permissible, it contributes to market stability and promotes the efficient
 15 allocation of resources." *United States v. Syufy Enters.*, 903 F.2d 659, 673 (9th Cir. 1990).

16 Because of these procompetitive benefits, a plaintiff can sustain a Section 2 claim only
 17 where he pleads plausible, specific facts showing that the acquisition has "the effect of
 18 'lessen[ing] competition' or tend[ing] to create a monopoly." *Carefusion Corp. v. Medtronic,*
 19 *Inc.*, No. 10-CV-01111-LHK, 2010 WL 4509821, at *7 (N.D. Cal. Nov. 1, 2010) (dismissing
 20 Section 2 claim based on a variety of alleged conduct including acquisitions of alleged rivals).

21 In *Syufy*, the Ninth Circuit affirmed a judgment that a movie theater operator, Syufy, had
 22 not monopolized the Las Vegas theater market through acquisitions of three other theaters even
 23 though the acquisitions resulted in Syufy controlling, at least temporarily, "100% of the first-run
 24 film market in Las Vegas." *Id.* at 665. Just as Plaintiffs have alleged here, Syufy's acquisitions
 25 "temporarily diminished the number of competitors But this does not necessarily indicate
 26 foul play; many legitimate market arrangements diminish the number of competitors. It would be
 27 odd if they did not, as the nature of competition is to make winners and losers." *Id.* at 664.

28 The allegations here are weaker than in *Syufy*. First, all but one of the acquisitions that

1 Plaintiffs discuss occurred outside the applicable four-year statute of limitations. *Abbyy*, 2008
 2 WL 4830740, at *6 (citing 15 U.S.C. § 15b). They cannot, therefore, serve as a basis for
 3 imposing liability now. *Int’l Tel. & Tel. Corp. v. General Tel. & Elecs. Corp.*, 518 F.2d 913, 929
 4 (9th Cir. 1975), *overruled on other grounds*, *California v. Am. Stores Co.*, 495 U.S. 271 (1990)
 5 (“The abuses which would occur if plaintiffs were permitted to search the history of other firms
 6 and challenge at their pleasure any possible violations, no matter how old, seem apparent”).¹³

7 Second, Plaintiffs have not pled facts showing plausible high barriers to entry in the
 8 promotion of MMA bouts. Leaving aside the facially implausible allegations, such as that Zuffa
 9 has locked up all the suitable venues in the United States or all the possible TV distribution
 10 networks, nothing in the Complaints suggests that there is any structural barrier to entry such as
 11 necessary intellectual property rights, high fixed-cost facilities, or research and development
 12 expenses. Instead, the Complaints show that new competitors are able to and do freely access
 13 necessary inputs to stage MMA bouts. *See* Section II.B.4, *supra*.

14 Third, as in *Syfy*, Plaintiffs have not pled any specific, plausible allegations from which
 15 the court could conclude that the Strikeforce acquisition had any anticompetitive effect. For
 16 example, Plaintiffs do not and cannot allege that fighter compensation was reduced after the
 17 acquisition. Plaintiffs’ allegations actually contradict their claims that Zuffa’s acquisitions have
 18 reduced competition or output in either relevant market. Notwithstanding assertions that the
 19 acquisitions left only “fringe” and “minor league” rivals to the UFC, the Complaints and state
 20 athletic commission records demonstrate that Zuffa continues to face well-funded competitors
 21 that can attract prominent fighters and television distribution. *See* § II.B.4, *supra* (describing
 22 allegations relating to current MMA competitors, their backers, their TV arrangements, and
 23 named Plaintiffs’ participation in their bouts).

24 Finally, Plaintiffs fail to plead specific facts showing that the acquisitions have reduced
 25 output. The Complaints reveal the exact opposite of a monopolized market: “a rough-and-tumble

26 _____
 27 ¹³ The Strikeforce acquisition in 2011 was the subject of an FTC investigation that was closed
 28 without further action in January 2012. RJN ¶ 13, Ex. J (Letter from Donald S. Clark, Secretary,
 Federal Trade Commission to Stephen Axinn, Esq. (Jan. 25, 2012)).

1 industry, marked by easy market access, fluid relationships with distributors, an ample and
 2 continuous supply of product, and a healthy and growing demand.” *Syufy*, 903 F.2d at 667.
 3 Since 2006, when Plaintiffs claim the UFC’s alleged scheme began, several new promoters have
 4 emerged, capable of securing prominent fighters (including Plaintiffs), TV distribution, and event
 5 venues. The result is that MMA has “become one of the most popular and fastest growing
 6 spectator sports in the U.S. and North America,” if not the entire world. Le Compl. ¶ 95.

7 **E. Plaintiffs’ Complaints About Strong Competition Do Not State an Antitrust**
 8 **Violation.**

9 Plaintiffs devote considerable space to brash, colorful, and sometimes intemperate
 10 remarks about rival MMA promoters, fighters, and the UFC’s own place in the industry by UFC
 11 President Dana White, whose job it is to promote the UFC. Le Compl. ¶¶ 8, 12-15, 18, 70,
 12 113(e), 117-19, 145, 148. Courts have long recognized such remarks are indicative of vigorous
 13 competition. “Warfare among suppliers and their different products is competition. Antitrust law
 14 does not compel your competitor to praise your product or sponsor your work. To require
 15 cooperation or friendliness among rivals is to undercut the intellectual foundations of antitrust
 16 law.” *Sanderson v. Culligan Int’l Co.*, 415 F.3d 620, 623 (7th Cir. 2005) (quoting *Schachar v.*
 17 *Am. Academy of Ophthalmology, Inc.*, 870 F.2d 397 (7th Cir. 1989)); *see also TYR Sport, Inc. v.*
 18 *Warnaco Swimwear, Inc.*, 709 F. Supp. 2d 802, 810 (C.D. Cal. 2010) (“Promotion and persuasion
 19 are not actionable as antitrust violations, even where the speaker holds extraordinary prestige and
 20 influence”). “An efficient, vigorous, aggressive competitor is not the villain antitrust laws are
 21 aimed at eliminating.” *Syufy*, 903 F.2d at 669. Similarly, Plaintiffs’ complaints that Zuffa
 22 allegedly “counter programmed” against rivals, i.e., scheduled bouts for the same night as
 23 competitors, amount to nothing more than complaints about fierce competition. Le Compl. ¶¶
 132, 150.

24 **V. CONCLUSION**

25 For the foregoing reasons, Zuffa respectfully requests an order dismissing Plaintiffs’
 26 Complaints for failure to state a claim upon which relief can be granted.
 27
 28

1 Dated: February 27, 2015

Respectfully Submitted,

2 BOIES, SCHILLER & FLEXNER LLP

3 By: /s/ William A. Isaacson

4 William A. Isaacson

5 *Attorneys for Defendant Zuffa, LLC, d/b/a*
6 *Ultimate Fighting Championship and UFC*

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Appendix A

Cross references from the *Le* Complaint to identical or substantially similar paragraphs in the *Vazquez*, *Vera* and *Ruediger* Complaints

<i>Le et al.</i>	<i>Vazquez et al.</i>	<i>Vera et al.</i>	<i>Ruediger et al.</i>
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<i>Le et al.</i>	<i>Vazquez et al.</i>	<i>Vera et al.</i>	<i>Ruediger et al.</i>
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