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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TINA CAVALLERI, an individual; MARK
GLINOAGA, an individual; MENG YAO
YANG, an individual; on behalf of themselves
and all others similarly situated,

Plaintiffs,

vs.

HERMÈS INTERNATIONAL, a French
corporation and HERMÈS OF PARIS, INC., a
New York corporation, and DOES 1 through
10; inclusive,

Defendants.

Case No. 3:24-cv-01707-JD

**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED
CLASS ACTION COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Date: September 19, 2024
Time: 10:00 AM
Place: Courtroom 11, 19th Floor
Judge: Hon. James Donato

NOTICE OF MOTION AND MOTION TO DISMISS**TO PLAINTIFFS AND TO THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on September 19, 2024, at 10:00 a.m., or as soon thereafter as the matter may be heard by the Court, in the courtroom of the Honorable James Donato, Courtroom 11, 19th Floor, United States District Court, located at 450 Golden Gate Avenue, San Francisco, California, Defendants Hermès of Paris, Inc. and Hermès International will and hereby do move the Court for an order dismissing Plaintiffs' First Amended Class Action Complaint, Dkt. 33 ("Amended Complaint"), on the ground that it fails to state a claim under Federal Rule of Civil Procedure 12(b)(6). This Motion is based on this Notice, the supporting Memorandum of Points and Authorities, the complete files and records in this action, and any additional material and arguments as may be considered in connection with the hearing.

Plaintiffs have already amended their claims in response to Hermès' prior motion to dismiss, and further amendment would be futile. Defendants thus seek an order pursuant to Federal Rule of Civil Procedure 12(b)(6) dismissing with prejudice Plaintiffs' claims for failure to state a claim upon which relief can be granted. *See, e.g., Gadda v. State Bar of Cal.*, 511 F.3d 933, 939 (9th Cir. 2007) (affirming dismissal with prejudice where there was no "possible way that [plaintiff] could cure his complaint to survive dismissal upon amendment," and "allowing amendment would be futile").

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1 I. INTRODUCTION

2 Plaintiffs' new allegations come nowhere close to fixing the fatal flaws in their claims.
3 But they do reveal the true motive behind their lawsuit: Plaintiffs want on-demand access to
4 Birkin and Kelly handbags so they can immediately resell them at higher prices. If that doesn't
5 sound like the basis for a monopolization claim, it's because it isn't one. Nothing in the antitrust
6 or unfair competition laws compels that outcome.

7 Despite the continued unfounded assertions in Plaintiffs' Amended Complaint, Hermès
8 does not require a customer to purchase any other products before purchasing a Birkin or Kelly
9 handbag. But, even if it did, that would not violate the law. "A tying arrangement is a device
10 used by a seller with market power in one product market [the tying product] to extend its market
11 power to a distinct product market [the tied product]." *Rick-Mik Enters., Inc. v. Equilon Enters.*
12 *LLC*, 532 F.3d 963, 971 (9th Cir. 2008) (citation omitted). The Supreme Court has recognized
13 that tying arrangements can be "procompetitive." *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547
14 U.S. 28, 36 (2006). Thus, tying does not violate the law unless the seller uses "market power
15 over the tying product" as leverage to "exclude other sellers of the tied product." *Rick-Mik*, 532
16 F.3d at 971 (citation omitted). Here, even with their conclusory new allegation of a "luxury
17 handbag market," Am. Compl. ¶ 27, Plaintiffs cannot plead that: (1) Hermès has monopoly
18 power in the tying product market; or (2) Hermès is using monopoly power to foreclose
19 competition in all of the supposedly tied products (watches, shoes, blankets, etc.).

20 Plaintiffs' Sherman Act Section 2 claim thus remains subject to dismissal on the four
21 independent grounds identified in Hermès' prior motion to dismiss:

22 1. Plaintiffs do not allege facts showing that Hermès possesses monopoly
23 power. They do not even allege Hermès' share of the claimed luxury handbag market. Their
24 conclusory assertion that Hermès "dominates" the luxury handbag market falls woefully short
25 and is refuted by their other allegations.

26 2. Plaintiffs also fail to plead the required element of willful acquisition or
27 maintenance of monopoly power. Instead, they repeat their allegations that Hermès always had,
28 and always will have, iconic products with a loyal following. That accomplishment should be

celebrated—not condemned. The antitrust laws do not punish companies for creating better, more desirable products.

3. Plaintiffs do not allege a viable tied product market or effects in such market. As in their original Complaint, Plaintiffs continue to implausibly group *all* Hermès products (except for three handbags) into a single “Ancillary Products” market consisting of disparate products ranging from jewelry to shoes to perfume to home goods. This contravenes controlling precedent and flunks basic economics. Perhaps seeking to hedge their bets, Plaintiffs now also assert that each ancillary product is its own product market—an allegation that is fatally conclusory on its own terms. But this attempted cure fares no better. Plaintiffs do not (and cannot) plead substantial effects on competition in each of those supposedly tied markets, either.

4. Plaintiffs again do not plead antitrust injury because they still allege no facts showing that Hermès has excluded other sellers of the supposedly tied products. Without well-pleaded allegations that other sellers of jewelry, sellers of shoes, sellers of perfume, sellers of home goods, and so-on, have been excluded from competing, there is no viable tying claim—and there is no harm to the competitive process, the focus of the antitrust laws.

Finally, Plaintiffs’ California Cartwright Act claims and their California Unfair Competition Law (“UCL”) claim should also be dismissed because Plaintiffs still fail to allege harm to consumers or the competitive process.

Plaintiffs have tried, but failed, to cure their fundamental pleading deficiencies. These failings cannot be remedied, and this case should be dismissed with prejudice.

II. STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Amended Complaint fails to state a claim under Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2.

2. Whether the Amended Complaint fails to state a claim under Sections 16720 and 16727 of the California Cartwright Act, Cal. Bus. & Prof. Code §§ 16720, 16727.

3. Whether the Amended Complaint fails to state a claim under the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200.

III. BACKGROUND

Plaintiffs and the Proposed Class. On March 19, 2024, Plaintiffs Tina Cavalleri and Mark Glinoga filed an antitrust lawsuit alleging that Hermès of Paris, Inc. and Hermès International (collectively, “Hermès”) engaged in a tying scheme in violation of the Sherman Act, the Cartwright Act, and the UCL. Class Action Complaint, Dkt. 1 (“Compl.”). Hermès filed a motion to dismiss on May 9, 2024. Dkt. 29. Rather than oppose the motion to dismiss, Plaintiffs filed the First Amended Class Action Complaint on May 30, 2024, Dkt. 33 (“Amended Complaint” or “Am. Compl.”), which added Mengyao Yang as a new Plaintiff and included some additional allegations, described below. Plaintiffs purport to represent a class of U.S. residents (and a subclass of California residents) who “purchased or were asked to purchase Ancillary Products in order to purchase a Birkin Handbag.” Am. Compl. ¶ 44.

Hermès. According to Plaintiffs, Hermès is a “world-famous designer and producer of high-quality merchandise,” such as “luxury handbags, apparel, scarves, jewelry, fashion accessories, and home furnishings.” *Id.* ¶ 16.¹ Hermès sells through retail locations in the United States and also maintains a website through which it sells some, but not all of its products. *Id.* ¶¶ 19–20. In the nearly two centuries since it was founded, Hermès has developed a reputation for artisan-crafted luxury products and built a loyal following. *Id.* ¶¶ 16–24.

Plaintiffs’ Allegations. This case focuses on two of the many items that Hermès sells: the Birkin and Kelly handbags (defined by Plaintiffs collectively as “Birkin handbag” or “Birkin bag”). *Id.* ¶ 21. “Each Birkin handbag is handcrafted from the finest leather by experienced artisans in France.” *Id.* ¶ 22. “The manufacturing of a single Birkin handbag requires many hours of an artisan’s time,” and the “intensive labor and craftsmanship and high-quality leathers required make the Birkin handbag difficult to produce and expensive.” *Id.* Because of these supply limitations, Hermès cannot produce sufficient Birkin or Kelly handbags to satisfy demand. *See id.* ¶¶ 22–24.

Plaintiffs’ lawsuit claims that Hermès unlawfully conditions the purchase of Birkin or

¹ Hermès accepts the well-pleaded allegations of fact in the Amended Complaint for purposes of this Motion to Dismiss only.

1 Kelly handbags on purchases of other Hermès products, such as jewelry, scarves, or home goods.
 2 In their first Complaint, Plaintiffs alleged that Hermès has market power in the so-called market
 3 for “the Birkin Handbag”—a single-brand market they defined to include solely Birkin and Kelly
 4 handbags. Compl. ¶¶ 20, 48. They claimed that Hermès uses its “economic power” to coerce
 5 customers interested in buying a Birkin handbag (the tying product) to purchase unspecified
 6 amounts of other Hermès products (the tied product), which Plaintiffs call “Ancillary Products.”
 7 *Id.* ¶¶ 47, 51.²

8 Plaintiffs’ New Market Definition. The Amended Complaint shifts course and redefines
 9 the tying market from “the Birkin Handbag,” *id.* ¶ 48, to “the market and/or submarket of luxury
 10 handbags.” Am. Compl. ¶ 26. Plaintiffs assert Hermès has market power in this far broader
 11 product market, but do not allege Hermès’ market share or any approximation thereof. Plaintiffs
 12 admit (as they must) that Hermès competes with “elite designer and luxury brands like Gucci,
 13 Prada, and Louis Vuitton,” and that Birkin and Kelly handbags are in “low supply” due to the
 14 “intensive labor and craftsmanship and high-quality leathers required.” *Id.* ¶¶ 22, 27, 36. Still,
 15 they claim that Hermès’ maintains a “significant presence in and dominance of the luxury
 16 handbag market,” citing Hermès’ “strong financial performance in 2023,” “singularity,” and “the
 17 distinctive design of the BIRKIN handbag.” *Id.* ¶¶ 28, 29 (citations omitted). But Plaintiffs
 18 admit the “robust resale value” of the two handbags “exceeds the original purchase price” by a
 19 factor of “1.5” to “5 times their original price or more.” *Id.* ¶¶ 34, 35.

20 Plaintiffs claim that Hermès has used its supposed “dominant market position in the
 21 luxury handbag market” to “force[] consumers to purchase substantial amounts of Hermès
 22 Ancillary Products to ‘qualify’ for the mere opportunity to buy a Birkin.” *Id.* ¶ 33. For example,
 23 Plaintiff Cavalleri alleges she “has spent tens of thousands of dollars at Hermès” on unspecified
 24 products and was allegedly “coerced” into purchasing unspecified Ancillary Products “in order
 25 to obtain access to Hermès Birkin bags.” *Id.* ¶ 41. When she attempted to purchase “another

26 ² Plaintiffs define “*Ancillary Products*” to include “shoes, scarves, belts, jewelry, home goods
 27 sold, and other products sold at Hermès’ branded retail boutiques, for which Sales Agents
 28 receive a commission, but excludes any Birkin, Kelly, or Constance branded handbag.” Am.
 Compl. ¶ 45.

Birkin bag” in 2022, she was allegedly told (by an unidentified person) that “specialty bags are going to ‘clients who have been consistent in supporting our business.’” *Id.* From this, Cavalleri claims she understood that “she would have to spend more on Ancillary Products to obtain access to another Birkin Handbag.” *Id.* Plaintiffs claim that this practice “inflat[es] the true cost of the[] Birkin handbags” and leads to allegedly “supracompetitive profits.” *Id.* ¶ 33.

Plaintiffs’ New Claims of Injury as Resellers. Plaintiffs’ Amended Complaint reveals the motivation for this lawsuit: the alleged inability to resell Birkin handbags at substantial markup. Specifically, Plaintiffs claim to “have suffered injury . . . by being denied the opportunity to obtain a Birkin bag, which . . . can be resold at a higher price.” *Id.* ¶ 43. Finally, Plaintiffs claim (again without factual foundation or supporting allegations) that Hermès’ alleged tying practice “causes economic harm because it reduces competition in the market for the tied products” and Hermès’ “competitors in the tied markets cannot make sales for Ancillary Products.” *Id.*

IV. ARGUMENT

To survive dismissal, a complaint “must contain sufficient factual matter” to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While the court generally accepts as true a complaint’s “well-pleaded facts,” it does not accept “legal conclusions” or “[t]hreadbare recitals of the elements of a cause of action.” *Id.* at 678, 679.

A. Plaintiffs Do Not Plead A Sherman Act Section 2 Tying Claim

To constitute an unlawful tie, there must be at least market power in the tying market (monopoly power is required if the plaintiff alleges a Section 2 claim as these Plaintiffs do) and foreclosure of competitors in the tied market. That is because “[t]ying arrangements are forbidden on the theory that, if the seller has market power over the tying product, the seller can leverage this market power through tying arrangements to exclude other sellers of the tied product.” *Rick-Mik*, 532 F.3d at 971 (citation omitted). “The traditional antitrust concern with such an agreement is that if the seller of the tying product is a monopolist, the tie-in will force anyone who wants the monopolized product to buy the tied product from him as well, and the result will be a second monopoly.” *Sheridan v. Marathon Petroleum Co.*, 530 F.3d 590, 592 (7th

1 Cir. 2008) (Posner, J.). Thus, a tying claim requires anticompetitive harm in the form of
 2 “reduced competition in the market for *the tied product*.” *Blough v. Holland Realty, Inc.*, 574
 3 F.3d 1084, 1089 (9th Cir. 2009) (emphasis added) (citation omitted). Conversely, tying that does
 4 not foreclose rivals in the tied market will not harm competition and, thus, is lawful. *See id.*

5 The required elements of a tying claim are difficult to establish. *Rick-Mik*, 532 F.3d at
 6 971 & n.2. A plaintiff must show not only that the defendant has tied together two economically
 7 distinct products, but also “that the defendant has market power in the tying product.” *Id.* at 971
 8 (citation omitted). Here, Plaintiffs face an especially heavy burden because they bring their tying
 9 claim under Section 2 of the Sherman Act. Am. Compl. ¶¶ 54–62. Section 2 claims require “the
 10 possession of *monopoly* power in the relevant market” and “[m]onopoly power differs in degree
 11 from market power, requiring ‘something greater.’” *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th
 12 946, 998 (9th Cir. 2023) (emphasis added) (citation omitted), *cert. denied*, 144 S. Ct. 681 (2024).
 13 Courts ordinarily require upwards of 60 percent market share to infer monopoly power, and “a
 14 market share of less than 50 percent is presumptively insufficient.” *Rebel Oil Co. v. Atl.*
 15 *Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995).

16 Plaintiffs do not sufficiently allege market power—let alone monopoly power—and they
 17 do not allege the willful acquisition or maintenance of such power, either of which dooms their
 18 Section 2 tying claim. Plaintiffs’ Section 2 tying claim fails for the additional reasons that
 19 Plaintiffs have not pleaded effects in any viable tied product market or antitrust standing.

20 **1. The Amended Complaint Does Not Allege That Hermès Has Market** 21 **Or Monopoly Power In The Alleged Luxury Handbag Market**

22 Despite being on notice from Hermès’ prior motion to dismiss, Plaintiffs’ Amended
 23 Complaint still fails to allege any facts establishing market or monopoly power—indeed, its new
 24 allegations *undercut* any claim that Hermès has market power, let alone monopoly power.

25 “Market power is the ability to raise prices profitably *by restricting output*,” *Ohio v. Am.*
 26 *Express Co.*, 585 U.S. 529, 549 (2018) (citation omitted), and it can be shown either directly or
 27 circumstantially. *Rebel Oil Co.*, 51 F.3d at 1434. The Ninth Circuit has made clear that direct
 28 evidence of market power requires a showing that a firm can, “by restricting its own output . . .

[thereby] restrict marketwide output and, hence, increase marketwide prices.” *Id.*; *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475–76 (9th Cir. 1997) (holding that with “no accompanying showing of restricted output,” plaintiffs’ evidence that “Sunrise Hospital routinely charged higher prices than other hospitals while reaping high profits” was not “direct evidence of market power”), *aff’d*, 525 U.S. 299 (1999), *overruled on other grounds by Lacey v. Maricopa Cnty.*, 693 F.3d 896 (9th Cir. 2012). To allege market power circumstantially, the plaintiff must: “(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run.” *Rebel Oil*, 51 F.3d at 1434; *Hip Hop Beverage Corp. v. Monster Energy Co.*, 733 F. App’x 380, 381 (9th Cir. 2018) (applying *Rebel Oil* to motion to dismiss). The “starting point” is to plead nonconclusory facts showing a dominant “market share.” *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 925 (9th Cir. 1980); *Hip Hop*, 733 F. App’x at 382. A share of “30 percent [or less] is presumptively insufficient to establish” market power and “less than 50 percent is presumptively insufficient” to establish monopoly power in an actual monopolization case. *Rebel Oil*, 51 F.3d at 1438.

First, Plaintiffs do not plead any direct evidence. They do not allege that Hermès is artificially suppressing marketwide output or that it is charging supracompetitive prices for Birkin handbags. To the contrary, their new allegations admit that Birkin handbags are priced *below* the prices at which they could be sold. *See, e.g.*, Am. Compl. ¶ 35 (“standard leather” Birkin handbags resell for “1.5 to 3 times [their] original retail price”). Plaintiffs’ conclusory allegation that the alleged tying arrangement results in “supracompetitive prices” for the combined package of Birkin handbags and Ancillary Products, *id.* ¶ 32, omits the requisite facts, such as the total price and a comparison of that price to the competitive market price. Courts routinely reject similar allegations. *See, e.g., Netafim Irrigation, Inc. v. Jain Irrigation, Inc.*, No. 21-cv-00540, 2022 WL 2791201, at *7–8 (E.D. Cal. July 15, 2022) (dismissing complaint given failure to “identify supracompetitive prices”); *Intel Corp. v. Fortress Inv. Grp.*, 511 F. Supp. 3d

1 1006, 1029 (N.D. Cal. 2021) (conclusory allegation of supracompetitive pricing insufficient),
 2 *aff'd*, No. 21-16817, 2022 WL 16756365 (9th Cir. Nov. 8, 2022).

3 *Second*, Plaintiffs fail to plead indirect evidence of market or monopoly power. The
 4 Amended Complaint identifies a new “luxury handbag market,” but says *nothing* about Hermès’
 5 market share in that purported market. As market share is the “starting point for assessing
 6 market power,” *Hunt-Wesson*, 627 F.2d at 925, this failure forecloses their claim. *See Hip Hop*,
 7 733 F. App’x at 382 (affirming dismissal of complaint alleging defendant “controlled a ‘major
 8 percent’ of the energy-drink market” without further detail); *Dominick v. Collectors Universe*,
 9 *Inc.*, No. 12-cv-04782, 2012 WL 4513548, at *7 (C.D. Cal. Oct. 1, 2012) (dismissing claim for
 10 failure to “allege specific facts demonstrating that [d]efendants control a substantial share of the
 11 market” given absence of comparison to competitors).

12 Plaintiffs’ other threadbare conclusions concerning supposed market dominance do not
 13 make up for this failure. Plaintiffs claim Hermès has a “significant presence in and dominance
 14 of the luxury handbag market” because it (a) “reported strong financial performance in 2023”
 15 and (b) experienced “significant growth in [its] leather goods and saddlery division (which
 16 includes handbags),” despite broader challenges in the luxury industry. Am. Compl. ¶ 28. These
 17 generalized allegations of success—divorced from any actual comparison to competitors in the
 18 relevant market—do not come close to a plausible allegation that Hermès dominates the claimed
 19 luxury handbag market. *See Twombly*, 550 U.S. at 555; *Hip Hop*, 733 F. App’x at 382.

20 Plaintiffs’ other allegations fatally undermine any inference of market or monopoly
 21 power. For one, Plaintiffs admit Hermès competes with other “elite designer and luxury brands
 22 like Gucci, Prada, and Louis Vuitton.” Am. Compl. ¶ 27. Yet Plaintiffs offer no allegations of
 23 Hermès’ or these other “like” brands’ relative market positions in the “luxury handbag market”
 24 as a whole. *Id.* Plaintiffs’ allegations that Birkin handbags are in “limited production” and “low
 25 supply,” *id.* ¶¶ 26, 36, further undercut their assertion of market power. If Hermès’ sales of
 26 Birkin handbags are as limited as Plaintiffs allege, then there is no chance that Hermès has a
 27 significant share of the claimed luxury handbag market. The last nail in the coffin is Plaintiffs’
 28 pricing assertion: Hermès is alleged to sell its Birkin handbags at retail prices “1.5 to . . . 5

times” below the resale price. *Id.* ¶ 35. This is the opposite of supracompetitive pricing.³

Plaintiffs are ultimately left with their allegation that Birkin handbags are “unique” and “exclusive,” and this supposed “lack of substitutes reduces price elasticity.” *Id.* ¶¶ 21, 27, 31. But even that allegation is not supported by any factual allegations that the Birkin handbags’ desirability relative to other brands gives Hermès the power over price in a luxury handbag market generally. Regardless, the Supreme Court has emphasized that “in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.” *Illinois Tool*, 547 U.S. at 46. And the Supreme Court has repudiated any presumption of market power based on unique product characteristics, including patents. *Id.* at 45–46; *see Rick-Mik*, 532 F.3d at 971 n.2. Now that Plaintiffs have conceded that Birkin handbags are not their own product market, and the market is instead a far larger alleged market for luxury handbags, they cannot plead market power (and certainly not monopoly power) based solely on generalized allegations about the Birkin’s desirability.

2. Plaintiffs Do Not Plead Willful Maintenance Or Acquisition Of Monopoly Power As Required By Section 2

Plaintiffs’ Section 2 claim suffers from an additional flaw: Plaintiffs come nowhere close to alleging the willful maintenance or acquisition of monopoly power. *See Epic Games*, 67 F.4th at 998. Section 2 claims require (1) “the possession of monopoly power in the relevant market” and (2) “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *Id.* (citation omitted). As noted, Plaintiffs fail to allege that Hermès has monopoly power in any well-defined market. But they also fail the second prong because they plead *no* facts showing that Hermès willfully acquired or maintained a monopoly through anticompetitive conduct.

³ Plaintiffs’ suggestion that the total price of the Birkin handbag, accounting for the purchase of Ancillary Products, is supracompetitive, Am. Compl. ¶ 32, misunderstands basic economics. Plaintiffs’ theory would require Hermès to sell its “Ancillary Products” *far* above their competitive market price. But Hermès is not alleged to—and undisputedly does not—have market power over any of the Ancillary Products, and so marking up those items would be economically irrational and mean losing a substantial share of customers to competitors.

Plaintiffs certainly include conclusory allegations that Hermès is dominant—but under the allegations in the Amended Complaint, that supposedly resulted from the combination of: (1) the success of Hermès’ brand; and (2) the Birkin handbag’s reputation as a result of “[t]he intensive labor and craftsmanship and high-quality leathers” required. Am. Compl. ¶¶ 21–29. None of this conduct is remotely anticompetitive, and Plaintiffs do not allege otherwise. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 781 (May 2024, online) (“[P]roduct superiority is one of the objectives of competition and cannot be wrongful, even for a monopolist.”). Indeed, Plaintiffs concede that Hermès’ “intensive labor and craftsmanship and high-quality leathers” are what make the Birkin handbag “expensive” in the first place. Am. Compl. ¶ 22.

3. The Amended Complaint Does Not Define A Viable Tied Product Market In Which Competitive Effects Can Be Assessed

Plaintiffs’ Sherman Act claim fails for the independent reason that Plaintiffs do not define a viable *tied* product market or *effects* in any viable tied product market. To state a valid tying claim, Plaintiffs must properly define the *tied* product market. *See, e.g., Teradata Corp. v. SAP SE*, 570 F. Supp. 3d 810, 851 (N.D. Cal. 2021); *accord Truck-Rail Handling, Inc. v. Burlington N. & Santa Fe Ry. Co.*, 244 F. App’x 130, 131–32 (9th Cir. 2007). This is a critical step because the harm that tying law seeks to prevent is foreclosure of competition *in the tied market*. *See supra* at 5–6. Absent a properly defined tied market, courts cannot determine whether the plaintiff has properly shown that the tying arrangement affects a “not insubstantial volume of commerce in the tied product market.” *Rick-Mik*, 532 F.3d at 971 (citation omitted).

Here, Plaintiffs’ definition of the tied product market is facially unsustainable. The original Complaint grouped together all “Ancillary Products” into a single market, from “home furnishings” to “jewelry” to “apparel” to “fashion accessories” and more. Compl. ¶¶ 15, 35, 47. That theory defied “[t]he principle most fundamental to product market definition”: “cross-elasticity of demand for certain products or services,” *i.e.*, “the extent to which consumers view two ‘products [as] be[ing] reasonably interchangeable’ or substitutable for one another.” *Coronavirus Rep. v. Apple, Inc.*, 85 F.4th 948, 955 (9th Cir. 2023) (citations omitted), *cert.*

1 *denied*, No. 23-1089 (U.S. May 13, 2024). Plaintiffs offered no explanation for how goods as
 2 diverse as home furnishings and jewelry could be reasonable substitutes—and no such
 3 explanation would be economically plausible. Hermès faces different competitors depending on
 4 the product; for jewelry, it may face one kind of competitive pressure, while the pressure it faces
 5 for home furnishings is completely different. Plaintiffs’ contrived effort to create a single market
 6 from of an array of distinct products fails as a matter of law.

7 Plaintiffs’ Amended Complaint is muddled and appears to repeat this same error. *See*,
 8 *e.g.*, Am. Compl. ¶¶ 43, 58, 69, 78 (referring to the “market for the tied products” and defining
 9 tied market as “Ancillary Products” as a whole). At two points, however, Plaintiffs now also
 10 appear to allege that *each category* of Ancillary Products constitutes its own separate tied
 11 market. They state that “[t]he tied products include designer shoes, scarves, belts, clothing,
 12 jewelry, and home goods sold by Hermès,” and “[t]here is a market for *each* of these tied
 13 products.” *Id.* ¶ 36 (emphasis added); *see id.* ¶ 43. That doesn’t work, either. For starters, these
 14 so-called market definitions are fatally conclusory. There is no discussion of the markets’
 15 scope—whether they are purportedly limited to “luxury” items or encompass all similar goods;
 16 and what kinds of goods fit into each market in the first place. Further, these are plainly just a
 17 sampling, because elsewhere Plaintiffs claim that practically *all* Hermès products (other than the
 18 Birkin, Kelly, or Constance branded handbag) qualify as “*Ancillary Products*.” *Id.* ¶ 45.

19 But even if Plaintiffs could redefine the tied market from Ancillary Products to numerous
 20 separate markets for every single other product that Hermès sells, this would create another
 21 problem: Plaintiffs have not alleged substantial effects in *each* of these supposedly tied markets.
 22 As noted above, tying law seeks to prevent the foreclosure of competitors in the tied market.
 23 Plaintiffs must allege “a total amount of business, substantial enough in terms of dollar-volume
 24 so as not to be merely de minimis, is foreclosed to competitors by the tie [in the tied product’s
 25 market].” *In re Qualcomm Antitrust Litig.*, No. 17-md-02773, 2023 WL 121983, at *16 (N.D.
 26 Cal. Jan. 6, 2023) (applying Cartwright Act) (alteration in original) (citation omitted). Plaintiffs’
 27 Amended Complaint defaults on this requirement. Plaintiffs raise only the conclusory
 28 allegations that “Defendants’ unlawful practice . . . causes economic harm because it reduces

1 competition in the market for the tied products” and “Defendants’ competitors in the tied markets
 2 cannot make sales for Ancillary Products that are purchased as a result of the coercive effect of
 3 Defendants’ tying practice.” Am. Compl. ¶ 43. These conclusory statements do not satisfy
 4 Plaintiffs’ burden of pleading substantial effects on competition in each supposedly tied market.
 5 *See In re Webkinz Antitrust Litig.*, 695 F. Supp. 2d 987, 995 (N.D. Cal. 2010) (dismissing claim
 6 because plaintiffs failed to “plead ‘a pernicious effect on competition’” and “reduced
 7 competition in the market for the tied product” (citations omitted)).

8 There are no factual allegations that competitors in the sale of jewelry or home goods or
 9 shoes or even “Ancillary Products” are foreclosed. The Amended Complaint fails.

10 **4. Plaintiffs Do Not Plead Facts Showing Antitrust Standing**

11 Plaintiffs’ Amended Complaint does not allege the required antitrust standing because
 12 they do not allege an “antitrust injury.” *See Somers v. Apple, Inc.*, 729 F.3d 953, 963–64 & n.5
 13 (9th Cir. 2013). The defendant’s unlawful conduct must have caused an “injury of the type the
 14 antitrust laws were intended to prevent and that flows from that which makes defendants’ acts
 15 unlawful.” *Id.* at 963 (citation omitted). Plaintiffs must, but fail, to allege “specific facts” of
 16 *harm to competition* in the market. *Id.* at 965.

17 For a tying claim, antitrust injury means harm to “competition in the market for the tied
 18 product”—namely, the foreclosure of rivals, to the detriment of consumers. *See Rick-Mik*, 532
 19 F.3d at 971; *accord Blough*, 574 F.3d at 1089. Here, Plaintiffs claim “Defendants’ competitors
 20 in the tied markets cannot make sales for Ancillary Products that are purchased as a result of the
 21 coercive effect of Defendants’ tying practice,” Am. Compl. ¶ 43, but they allege *no facts* to
 22 support this legal conclusion. Because they do not sufficiently “sketch the outline of [the injury
 23 to competition] with ‘allegations of supporting factual detail,’ *Netafim*, 2022 WL 2791201, at
 24 *12 (alteration in original), Plaintiffs’ claim should be dismissed.

25 Instead, Plaintiffs raise a compendium of meritless theories of harm: (1) Plaintiffs are
 26 “left with Hermès Ancillary Products that they never would have purchased but for their desire
 27 to acquire a Birkin bag” (Am. Compl. ¶ 33); (2) Plaintiffs have been denied “the opportunity to
 28 obtain a Birkin bag” to “be resold at a higher price” (*id.* ¶ 43); (3) the total price of the Birkin

1 handbag and Ancillary Products is “supracompetitive” (*id.* ¶ 33); and (4) Plaintiffs are unable to
 2 “choose among” luxury items “independently from their decision to purchase Birkin handbags”
 3 (*id.* ¶¶ 60, 71, 80). None of these constitutes an antitrust injury under controlling case law.

4 As to the first theory, “[z]ero foreclosure exists where the tied product is completely
 5 unwanted by the buyer.” *Blough*, 574 F.3d at 1089. For “[w]hen a purchaser is ‘forced’ to buy a
 6 product he would not have otherwise bought even from another seller in the tied product market,
 7 there can be no adverse impact on competition because no portion of the market which would
 8 otherwise have been available to other sellers has been foreclosed.” *Id.* (citation omitted).

9 The second theory is even less successful. Plaintiffs have no right to purchase Hermès
 10 products on demand for purposes of resale on the secondary market. After all, businesses are
 11 ordinarily entitled to exercise their “own independent discretion as to parties with whom [they]
 12 will deal.” *Verizon Commc’ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 408
 13 (2004) (citation omitted). And “[c]ompelling such firms to share the source of their advantage is
 14 in some tension with the underlying purpose of antitrust law.” *Id.* at 407–08.

15 Third, “‘merely enhancing the price of the tying product’ . . . does not” harm competition.
 16 *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1199, 1202 (9th Cir. 2012) (citation omitted).
 17 This makes sense because, again, the injury is not any increase in price of the tying product (for
 18 which the defendant is alleged to have market power regardless of the tie), but “reduced
 19 competition in the market for *the tied product*.” *Rick-Mik*, 532 F.3d at 971 (emphasis added).
 20 And Plaintiffs allege no facts showing that the total price was supracompetitive. *See supra* at 7.

21 Finally, as to the fourth, a tie’s “effect of reducing consumers’ choices” for which
 22 products to purchase “does not sufficiently allege an injury to competition” because it is “fully
 23 consistent with a free, competitive market.” *Brantley*, 675 F.3d at 1202.

24 At bottom, antitrust law requires Plaintiffs to allege not just harm to themselves, but harm
 25 to the competitive process, and they utterly fail to do so. This deficiency is predictable because
 26 there is no plausible case that Hermès has harmed competition. The Ancillary Products Plaintiffs
 27 claim to be forced to buy in order to obtain a Birkin handbag are independently desirable items—
 28 and there are no plausible allegations of harm to competition resulting from the alleged tie.

B. Plaintiffs’ State Law Claims Also Fail

1. Plaintiffs Do Not State A Tying Claim Under The Cartwright Act

Plaintiffs’ failure to plead market or monopoly power in a tying product market, substantial effects in a viable tied product market, or antitrust injury likewise dooms their two Cartwright Act claims. Section 16720 of the Cartwright Act requires that: “(1) a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product or service; (2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product; (3) a substantial amount of sale was affected in the tied product; and (4) the complaining party sustained pecuniary loss as a consequence of the unlawful act.” *Morrison v. Viacom, Inc.*, 66 Cal. App. 4th 534, 541–42 (Cal. Ct. App. 1998) (citation omitted). Section 16727 requires “either element (2) or (3) . . . along with elements (1) and (4).” *Id.* “[I]n the absence of evidence of some tied market foreclosure or anticompetitive impact in the tied product market, the plaintiff cannot establish an unlawful tying claim.” *Belton v. Comcast Cable Holdings, LLC*, 151 Cal. App. 4th 1224, 1234 (Cal. Ct. App. 2007). A Cartwright Act claim also requires proof of antitrust injury. *See Ahn v. Stewart Title Guar. Co.*, 93 Cal. App. 5th 168, 178–81 (Cal. Ct. App. 2023). As noted above, Plaintiffs fail to plead market power, anticompetitive effects in a viable tied product market, or antitrust injury, which dooms their Cartwright Act claims as well.

2. Plaintiffs Do Not State A Claim Under The UCL

Plaintiffs allege that the same conduct that violates the Sherman Act and the Cartwright Act violates the “unlawful” prong of the UCL. *See* Am. Compl. ¶ 87; Cal. Bus. & Prof. Code § 17200. This “unlawful” prong claim “borrows” violations of other laws, treating them as unlawful practices separately actionable under the UCL. *Farmers Ins. Exch. v. Super. Ct.*, 2 Cal. 4th 377, 383, 826 P.2d 730, 734 (Cal. 1992). Because the Sherman and Cartwright Act claims fail, their unlawful prong UCL claim must be dismissed too.

Plaintiffs’ Amended Complaint now also seeks relief under the UCL’s “unfairness” prong. Am. Compl. ¶¶ 88–90. Courts applying this prong have used two different tests, but Plaintiffs’ allegations fall fatally short under both. Under the “tethering” test, courts determine

“whether the defendant’s conduct ‘threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.’” *Epic Games*, 67 F.4th at 1000 (citation omitted). Under the “balancing” test, courts “weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.” *Id.* (citation omitted).

Neither saves Plaintiffs’ case. As the California Court of Appeal held in *Belton*: “[i]n the absence of some restraint upon competition, the mere practice of packaging services together [*i.e.*, tying] is not inherently anticompetitive or harmful to consumers.” 151 Cal. App. 4th at 1240 (citations omitted). So Plaintiffs must allege something more than the tying of products to show an “incipient violation” or comparable harm to consumers. *See id.* Plaintiffs have not done so, and instead invoke the same theories that failed under the Sherman and Cartwright Acts. *See supra* at 6–14.⁴ Nor have Plaintiffs plausibly alleged any other form of consumer harm, such as “decrease[d] [consumer] information.” *Compare Epic Games*, 67 F.4th at 1001.

Ultimately, Plaintiffs’ Amended Complaint reveals what this case is about: obtaining on-demand access to Birkin handbags so Plaintiffs can resell them for a significant mark-up on the secondary market. But “individualized harm” of this sort “does not support a claim for violation of the UCL,” because it does not affect consumers in the marketplace as a whole. *Marsh v. Anesthesia Servs. Med. Grp., Inc.*, 200 Cal. App. 4th 480, 501 (Cal. Ct. App. 2011). And Hermès is under no duty to sell Plaintiffs Hermès’ products under Plaintiffs’ preferred terms. *See, e.g., Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 372–76 (Cal. Ct. App. 2001).

V. CONCLUSION

Plaintiffs’ implausible and internally inconsistent Amended Complaint should be dismissed with prejudice.

⁴ *See, e.g., Belton*, 151 Cal. App. 4th at 1240 (“If the same conduct is alleged to be both an antitrust violation and an ‘unfair’ business act or practice for the same reason—because it unreasonably restrains competition and harms consumers—the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not ‘unfair’ toward consumers. To permit a separate inquiry into essentially the same question under the unfair competition law would only invite conflict and uncertainty and could lead to the enjoining of procompetitive conduct.” (citation omitted)).

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Respectfully submitted,

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3
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