

Joshua H. Haffner, SBN 188652
jhh@haffnerlawyers.com
Alfredo Torrijos, SBN 222458
at@haffnerlawyers.com
Vahan Mikayelyan, SBN 337023
vh@haffnerlawyers.com
HAFFNER LAW PC
15260 Ventura Blvd., Suite 1520
Sherman Oaks, California 91403
Tel: (213) 514-5681 / Fax: (213) 514-5682

Shaun C. Setareh, SBN 204514
shaun@setarehlaw.com
Thomas A. Segal, SBN 222791
thomas@setarehlaw.com
SETAREH LAW GROUP
9665 Wilshire Blvd., Suite 430
Beverly Hills, California 90212
Tel: (310) 888-7771 / Fax: (310) 888-0109

Attorneys for Plaintiffs and the Proposed Class

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

TINA CAVALLERI, an individual; MARK
GLINOVA, 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

HON. JAMES DONATO

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS
FIRST AMENDED CLASS ACTION
COMPLAINT**

Hearing

Date: September 19, 2024

Time: 10:00 a.m.

Dept: 11 – 19th Floor

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I. INTRODUCTION

This action arises out of Defendant Hermes International and Hermes of Paris, Inc.’s (“Defendants” or “Hermes”) unlawful tying scheme. Defendants require consumers to purchase accessory items, shoes, scarves, belts, clothing, jewelry, and home goods (the “tied” items) from them in order to obtain their Birkin bag (the “tying” product). This is a classic, anticompetitive tying scheme, with the seller having an economic interest in *both* the tying and tied products.

Plaintiffs also allege Defendants manipulate pricing and output of the Birkin bag and incentivize their sales agents through a commission structure designed to implement the tying scheme. Plaintiffs allege that Defendants exploit their unique product and market power to obtain supercompetitive profits.

Defendants deny that they engages in this tying scheme. Dckt. 38, p.7 of 22, lines 7-8 (“Hermes does not require a customer to purchase any other product before purchasing a Birkin or Kelly handbag”). Contrary to this denial, Plaintiffs allegations will bear out to be true. More importantly, Plaintiffs’ allegation are assumed true at the pleading stage.

Plaintiffs have properly alleged a classic tying scheme that has harmed competition and consumers, and violates the Sherman and Cartwright Acts and California’s Unfair Competition Law (the “UCL”). Plaintiffs respectfully request that Defendants’ motion be denied.

II. PERTINENT FACTUAL ALLEGATIONS – DEFENDANTS’ TYING SCHEME.

The Birkin bag is an “exclusive Hermès design,” manufactured by Defendants and “handcrafted from the finest leather by experienced artisans in France.” FAC, ¶¶ 21,22. Defendants engage in “limited production” of the Birkin. FAC, ¶26. The Birkin is defined by “unique brand identity and exclusivity.” FAC, ¶27. “The unique desirability, incredible demand and low supply of Birkin handbags gives Defendants incredible market power.” FAC, ¶36.

“Defendants implemented a scheme to exploit this market power by requiring consumers to purchase other, ancillary products from Defendants before they will be given an opportunity to purchase a Birkin handbag.” FAC, ¶36. “The tied products include designer shoes, scarves, belts, clothing, jewelry, and home goods sold by Hermès.” FAC, ¶36.

Defendants only sell Birkin bags directly to consumers in Hermès-owned retail stores, not on websites. FAC, ¶¶20, 37. However, “consumers cannot simply walk into a Hermès retail store” to get a

Birkin. FAC, ¶37. Defendants direct their Sales Associates “to only offer Birkin handbags to consumers who have established a sufficient ‘purchase history’ or ‘purchase profile’ with Defendants of Defendants’ ancillary products . . .” FAC, ¶38.

“Defendants have designed the compensation structure of their Sales Associates to ensure that they follow Defendants’ [tying] policy.” FAC, ¶39. Sales Associates are paid “paid 3% [commission] on ancillary products such as shoes, scarves, belts, jewelry and home goods; they are paid a 1.5% commission on non-Birkin handbags, and they receive no commission whatsoever on the sale of Birkin handbags.” FAC, ¶39. Sales Associates “are instructed by Defendants to use Birkin handbags as a way to coerce consumers to purchase ancillary products . . .” FAC, ¶39.

Defendants “control prices and engage in the anti-competitive conduct . . . to the detriment of consumers.” FAC, ¶26. Defendants artificially suppress “the nominal retail price of Birkin handbags.” FAC, ¶33. However, “the true price of the Birkin bag . . . includes the cost of the[] coerced Ancillary Product purchases.” FAC, ¶33. “The artificial suppression of the nominal retail price of Birkin handbags is evidenced by their robust resale value, which consistently and significantly exceeds the original purchase price.” FAC, ¶34. This scheme “forces consumers to purchase substantial amounts of Hermès Ancillary Products to ‘qualify’ for the mere opportunity to buy a Birkin.” FAC, ¶33. “Defendants . . . engage in a . . . manipulative pricing scheme, artificially inflating the true cost of [the Birkin] and reaping supracompetitive profits.” FAC, ¶31.

III. LEGAL ARGUMENT

A. Plaintiffs Allege Unlawful Tying Under The Sherman Act.

“Tying can be either a *per se* violation or a violation under the rule of reason.” *Cty. of Tuolumne v. Sonora Cty. Hosp.*, 236 F.3d 1148, 1157 (9th Cir. 2001). Plaintiffs’ claim survives under either standard.

1. Plaintiffs Have Adequately Alleged A *Per Se* Tying Claim.

Plaintiffs have alleged the necessary elements for a *per se* tying claim. “To establish that a tying arrangement is illegal *per se*, plaintiffs must prove three elements: (1) a tie between two separate products or services sold in relevant markets; (2) sufficient economic power in the tying product market to affect the tied market; and (3) an effect on a not-insubstantial volume of commerce in the tied product market.” *Cty. of Tuolumne, supra*, 236 F.3d at 1157-58.

Defendants argue that Plaintiffs have changed their market definition from their original complaint. Dkt. 38, p.10, lines 8-10. That is incorrect. Plaintiffs plead that Defendants have market power in the relevant luxury bag market, and alternatively plead a “submarket.” FAC, ¶26. The uniqueness of the Birkin bag can create a submarket, a concept related to single-market brands. *In re Air Passenger Computer Rsrvs. Sys. Antitrust Litig.*, 694 F.Supp. 1443, 1457 (C.D. Cal. 1988). Defendants are also wrong when they argue that Plaintiffs have failed to allege a well-defined market. Dkt.38, p.15, lines 21-22. At the pleading stage, “it is not necessary to rigorously define a market for the product.” *Datel Holdings Ltd. v. Microsoft Corp.*, 712 F.Supp.2d 974, 998 (N.D. Cal. 2010) (citing *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 501 (1969)). In any event, Plaintiffs do adequately define the luxury bag market. FAC, ¶¶27, 30-32.

Defendants cite to *Epic Games v. Apple, Inc.*, 67 F.4th 946, 997 (9th Cir. 2023), which declined to apply *per se* tying rules in the context of “software that serves as a platform for third-party applications.” *Id.* at 997. *Epic Games* is distinguishable because it involved bundling in the technology sector. The court explained “we do not have the level of confidence needed to universally condemn ties related to app-transaction platforms that combine multiple functionalities.” *Id.* *Epic Games* has been recognized as limited to the technology sector. *Hogan v. Amazon.com*, 2024 WL 1091671, at *4 (W.D. Wash. 2024) (“[w]hile tying arrangements are often *per se* violations, in *Epic Games*. . . , the Ninth Circuit held that ‘*per se* condemnation is inappropriate for ties ‘involv[ing] software that serves as a platform for third-party applications’”).) Unlike *Epic Games*, this case involves tying claims in traditional markets and has additional elements, economic interest, uniqueness, forcing, that make *per se* treatment appropriate.

Defendants’ motion solely challenges whether Plaintiffs properly allege economic power in a relevant market and a not-insubstantial effect on commerce in the tied markets. Plaintiffs have properly alleged these elements. FAC, ¶¶26-27, 30, 33, 36, 61. Defendants, however, ignore several important additional elements that demonstrate *per se* treatment is appropriately pled.

Economic Interest: A critical factor in applying *per se* tying rules is whether Defendants are on both ends of the tying and tied transaction, *i.e.*, “whether the defendant had an economic interest in the tied product.” *Cty. of Tuolumne, supra*, 236 F.3d at 1158 (9th Cir. 2001). “In examining a tie-in claim, this Court must consider whether the seller of the tying product . . . harbors an economic interest in the

1 tied product.” *Rickards v. Canine Eye Registration Found., Inc.*, 704 F.2d 1449, 1454 (9th Cir. 1983).
 2 Where a seller transacts in both tying and tied products “the seller's intent is to engage in such
 3 anticompetitive business practices.” *CTUnify, Inc. v. Nortel Networks, Inc.*, 115 F.App'x 831, 834 (6th
 4 Cir. 2004). The Ninth Circuit refers to the “economic interest” element as a “fourth element” for *per se*
 5 unlawful tying. *Cty. of Tuolumne, supra*, 236 F.3d at 1158. Here, Defendants are the sellers of *both* the
 6 tying and tied products. FAC, ¶20, 37-38. Thus, this case represents “the usual tying arrangement,
 7 [where] it is not difficult to establish the economic interest element because the seller of the tying
 8 product is also the seller of the tied product.” *CTUnify, supra*, 115 F. App'x at 834-35.

9 **Unique Product:** The strict *per se* rule against tying “is appropriate in . . . situations in which the
 10 existence of market power is probable. . . . *[W]hen the seller offers a unique product that competitors*
 11 *are not able to offer . . .*” *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 17 (1984), *abrogated*
 12 *on other grounds by Illinois Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006) (emphasis added).
 13 Here, the Birkin bag has “unique brand identity, craftsmanship, and exclusivity” (FAC, ¶32) and
 14 “unique desirability, incredible demand and low supply.” FAC, ¶36. There are only “imperfect
 15 substitutes” for the Birkin bag. *Id.* at ¶27. The Birkin is highly desirable and “tirelessly wanted.” *Id.* at
 16 ¶25. The allegation that Defendants are exploiting a unique product also supports the *per se* tying claim.

17 **Probability Of Forcing:** Application of *per se* tying illegality rules is proper where “the existence
 18 of forcing is probable.” *Jefferson Parish, supra*, 466 U.S. at 15-16. *Jefferson Parish* explained that “the
 19 essential characteristic of an invalid tying arrangement lies in the seller’s exploitation of its control over
 20 the tying product *to force* the buyer into the purchase of a tied product. . . .” *Id.* at 12 (emphasis added).
 21 *See also Illinois Tool Works, supra*, 547 U.S. at 37 (citing with approval *Jefferson Parish*’s statement
 22 that *per se* treatment is “appropriate if the existence of forcing is probable”). Here, Plaintiffs allege that
 23 “consumers can only purchase Birkin handbags from Defendants by going to a Hermès retail store,”
 24 (FAC, ¶37), where Defendants direct their sales associates “to only offer Birkin handbags to consumers
 25 who have established a sufficient ‘purchase history’ or ‘purchase profile’” for Defendants’ tied products.
 26 *Id.* at ¶38. “[O]nly” if sufficient purchases are made of tied products “will the consumer be offered the
 27 opportunity to purchase a Birkin handbag.” *Id.* Defendants are “requiring consumers to purchase other,
 28 ancillary products from Defendants before they will be given an opportunity to purchase a Birkin

handbag.” *Id.* at ¶36. These allegations plead forcing for a *per se* tying claim.

2. Plaintiffs Also Plead A Tying Claim Under The Rule Of Reason.

Plaintiffs’ tying claim also withstands Defendants’ motion to dismiss under rule of reason analysis. Conduct falling short of the requirements for the application of the *per se* rule may still constitute a violation under the rule of reason. *Phonetele v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 738 (9th Cir. 1981). Under the rule of reason, courts assess a restraint’s actual effect on competition through a fact-specific examination of market power and structure. *Ohio v. Am. Express*, 585 U.S. 529, 541 (2018) (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984)). The goal is to distinguish harmful, anticompetitive restraints from those that stimulate competition and benefit consumers. *Ohio v. Am. Express*, at 541 (citing *Leegin Creative Leather Products v. PSKS*, 551 U.S. 877, 886 (2007)). A plaintiff may allege an anticompetitive effect directly or indirectly. *Id.*

a) Plaintiffs Allege Direct Evidence Of Anticompetitive Tying.

“[E]vidence of *restricted output and supracompetitive prices* ... is direct proof of the injury to competition which a competitor with market power may inflict, and thus, of the actual exercise of market power.” *Rebel Oil Co. v. Atl. Richfield*, 51 F.3d 1421, 1434 (9th Cir. 1995) (emphasis added). Plaintiffs allege that Defendants, in connection with their tying scheme, have reduced output for the Birkin bag. FAC, ¶26 (Defendants engage in “limited production” of the Birkin bag); and FAC, ¶36 (“low supply of Birkin handbags”). Plaintiffs also allege that Defendants have used their market power to engage in “a deceptive and manipulative pricing scheme, artificially inflating the true cost of their Birkin handbags and reaping supracompetitive profits.” FAC, ¶32. Defendants argue that Plaintiffs’ allegations that Defendants sell Birkin bags at 1.5 to 5 times “below the resale price” is “the opposite of supracompetitive pricing.” Dckt. 38, p.14 at line 27 to p.15 at line 1. But the true cost of a Birkin bag is *not* the nominal retail price of the bags because consumers cannot simply walk into a Hermès store and purchase a Birkin bag at its nominal retail price. FAC, ¶33. Instead, to have the opportunity to purchase a Birkin bag, consumers *must* first purchase a sufficient dollar amount of Hermès Ancillary Products. *Id.* at ¶¶36, 38. In this way, Defendants inflate “the true cost of their Birkin handbags” and reap supracompetitive profits. FAC, ¶33; *see also id.* at ¶32 (Defendants “artificially inflate the true prices of their handbags (as opposed to the nominal, retail price of the Birkin bags)”).

1 Consumers of Birkin bags are less price-sensitive than consumers of ordinary goods – in other
 2 words, Birkin bags have low price elasticity. FAC, ¶31. Birkin bags have limited direct substitutes.
 3 FAC, ¶27, 32. Selling a product subject to low price elasticity and with limited direct substitutes
 4 enables Defendants “to maintain supracompetitive prices and engage in unlawful restraints of trade,
 5 including the illegal tying arrangements alleged [in the complaint].” FAC, ¶32. Yet, as demonstrated by
 6 their resale price, Birkin bags are sold by Defendants at nominal retail prices that are 1.5 to 5 times
 7 below what Defendants could charge. FAC, ¶35. This raises the question: why don’t Defendants charge
 8 a higher retail price for Birkin bags? While Defendants seeks to obfuscate the issue, the answer is clear:
 9 Defendants make *greater* supracompetitive profits with their pricing scheme. Not only does
 10 Defendants’ predatory pricing practices obscure from consumers the true prices of Birkin bags (enabling
 11 price discrimination), it also generates “additional revenue for Defendants from consumers who never
 12 ‘qualify’ and are left with Hermès Ancillary Products that they never would have purchased but for their
 13 desire to acquire a Birkin bag.” FAC, ¶ 33. Defendants’ ability to implement this pricing scheme is
 14 direct proof of Defendants’ market power. *Ohio v. Am. Express, supra*, 585 U.S. at 542 (addressing
 15 “proof of actual detrimental effects [on competition], ... such as **reduced output, increased prices**, or
 16 decreased quality in the relevant market.”) (ellipsis in original; citations omitted; emphasis added).

17 Defendants’ argument that “marking up [tied items] would be economically irrational,” because
 18 Defendants do not “have market power over any of the Ancillary Products,” Dckt.38, p.15, lines 25-28,
 19 n.3, misses the point. Defendants are using their market power in the tying product, the Birkin bag, to
 20 force purchases in the tied market and charge supracompetitive prices. Similarly, Defendants’ argument
 21 that Plaintiffs’ allegation that Defendants’ intentionally underprice the Birkin bag, and that the value of
 22 the Birkin bag on the resale market is higher, undercuts the antitrust claim because it “is the opposite of
 23 supracompetitive pricing,” Dckt.38, p.14 line 27 to p.9 line 1, lacks merit. Plaintiffs allege that the high
 24 resale value of the Birkin bag is evidence of Defendants’ tying scheme. FAC, ¶33. Defendants used this
 25 “leverage” to charge “supracompetitive” prices for the tied items, inflating the actual cost of the Birkin.
 26 FAC, ¶32. This is a typical tying scheme of charging “noncompetitive price on the tied product...even
 27 though the tying product is sold . . . at nominal rates.” *Moore, supra*, 550 F.2d at 1216.
 28

b) Plaintiffs Allege Indirect Evidence Of Anticompetitive Effect.

To plead an unlawful tying claim under the rule of reason based on “[i]ndirect evidence involves ‘proof of market power plus some evidence that the challenged restraint harms competition.’” *Ohio v. Am. Express, supra*, 585 U.S. at 542. “There is no requirement that these elements of an antitrust claim be pled with specificity.” *Newcal Industries, Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008). “[B]oth market definition and market power are essentially questions of fact.” *Oahu Gas Serv., Inc. v. Pac. Res., Inc.*, 838 F.2d 360, 363 (9th Cir. 1988).

i. Plaintiffs’ Properly Plead Defendants’ Market Power.

Plaintiffs have pled sufficient market power in the relevant market. This is true for both *per se* and rule of reason purposes. Where the seller has “appreciable economic power” in the tying product, that is sufficient market power. *Eastman-Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 462 (1992)., citing *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 503 (1969).

First, Plaintiffs have properly pled market power based on the Birkin’s uniqueness and desirability. Market power exists “[w]hen the seller’s share of the market is high, *or* when the seller offers a unique product that competitors are not able to offer.” *Jefferson Parish, supra*, 466 U.S. at 17 (emphasis added). “Market power in the tying product may also be shown by product uniqueness or desirability.” *Moore, supra*, 550 F.2d at 1215. “[T]he crucial economic power may be inferred from the tying product’s desirability to consumers or from uniqueness in its attributes.” *Fortner Enterprises, supra*, 394 U.S. at 502-03. Plaintiffs have alleged that the Birkin bag is particularly unique and desirable, and there are no perfect substitutes. FAC, ¶27. Plaintiff alleges that “[t]he unique desirability, incredible demand and low supply of Birkin handbags gives Defendants incredible market power.” FAC, ¶36. Plaintiff’s allegations regarding the uniqueness of the Birkin bag adequately alleges sufficient market power.

Defendants’ citation to *Illinois Tool, supra*, lacks merit. The uniqueness of a product can be the basis for market power after *Illinois Tool*, it just cannot be based solely on the existence of a patent. In *Illinois Tool*, the Court addressed “the presumption that a patent always gives the patentee significant market power.” *Illinois Tool, supra*, 547 U.S. at 37. *Illinois Tool* noted that “[f]our years after our decision in *Jefferson Parish* repeated the patent-equals-market-power presumption, . . . Congress amended the Patent Code to eliminate that presumption in the patent misuse context.” *Id.* at 41.

1 However, other than disapproving a finding of market power based solely on the existence of a patent,
 2 *Illinois Tool* kept in place *per se* rules against tying, citing with approval to *Jefferson Parish*'s statement
 3 that "*Per se* condemnation—condemnation without inquiry into actual market conditions—is only
 4 appropriate if the existence of forcing is probable." *Id.* at 37 (citing *Jefferson Parish, supra*). After
 5 *Illinois Tool*, California courts continue to recognize the rule that a unique product (irrespective of the
 6 existence of a patent) can serve as the basis for market power remains viable. *See e.g., Becton,*
 7 *Dickinson & Co. v. Cytek Biosciences Inc.*, 2019 WL 633008, *3 (N.D. Cal. 2019) ("When the seller's
 8 share of the market is high, *or* when the seller offers a unique product that competitors are not able to
 9 offer, the [Supreme Court] has held that the likelihood that market power exists . . . to make *per se*
 10 condemnation appropriate") (emphasis added) (citing *Jefferson Parish, supra*).)

11 Second, Defendant's charging noncompetitive prices on tied items is indirect evidence of market
 12 power. "Other possible indices of sufficient economic power include: . . . a noncompetitive higher price
 13 charged for the tied product." *Moore, supra*, 550 F.2d at 1216. Here, Plaintiffs have alleged that
 14 Defendants implemented a pricing scheme whereby the price charged for the Birkin was suppressed, but
 15 when tied items are included, "supracompetitive" prices were charged, inflating the actual cost of the
 16 Birkin bag. FAC, ¶¶32-33. Thus, Plaintiffs are alleging that Defendants charged "noncompetitive price
 17 on the tied product exists, even though the tying product is sold . . . at nominal rates." *Moore, supra*, 550
 18 F.2d at 1216. This alleges market power. *Jefferson Parish, supra*, 466 U.S. at n.46 ("market power
 19 exists whenever prices can be raised above the levels that would be charged in a competitive market.").

20 Third, Plaintiffs have alleged that Defendants have a sufficient market share of the luxury handbag
 21 market to wield market power. Thus, "[w]hile precise figures for Hermès' market share in the luxury
 22 handbag market are not publicly available, . . . it is clear that Hermès ***holds a substantial [and growing]***
 23 ***share of the luxury handbag market in 2023.***" FAC, ¶28; *see also id.* at ¶28.a. (Defendants' market
 24 share had "significant growth"). "Blind reliance upon market share, divorced from commercial reality,
 25 could give a misleading picture of a firm's actual ability to control prices or exclude competition." *Hunt-*
 26 *Wesson Foods v. Ragu Foods*, 627 F.2d 919, 924 (9th Cir. 1980). "Although Plaintiff need not
 27 necessarily quantify Flexsys' market share with precision, Plaintiff must assert some *facts* in support of
 28 its assertions of market power that suggest those assertions are plausible." *Korea Kumho Petrochemical*

1 *v. Flexsys Am.*, 2008 WL 686834, *9 (N.D. Cal. 2008). Plaintiffs’ allegations of market share
 2 adequately allege market power at the pleading stage. “[A] rough estimate of the defendant’s market
 3 share is sufficient at the pleading stage.” *Klein v. Facebook*, 580 F.Supp.3d 743, 777 (N.D. Cal. 2022).

4 Fourth, Plaintiffs alternatively plead a relevant submarket for luxury Birkin bags, alleging
 5 Defendants’ power within it. FAC, ¶¶26, 36. Courts have delineated several “practical indicia” of an
 6 economically distinct submarket including: public recognition of the submarket as a separate economic
 7 entity, the product’s peculiar characteristics, unique production facilities, distinct customers, distinct
 8 prices, sensitivity to price changes, and specialized vendors. *Newcal Industries, supra*, 513 F.3d at
 9 1045. “Defining a submarket is a fact-driven inquiry.” *Bogan v. Hodgkins*, 166 F.3d 509, 516 (2nd Cir.
 10 1999). Plaintiffs have pled the elements necessary for a submarket of luxury Birkin bags, as follows.

11 **-Recognition of Birkin bag submarket as separate entity:** “The Birkin handbag is an icon of
 12 fashion . . . tirelessly wanted . . . Few brands . . . attain that kind of saturation.” FAC, ¶25; *see also id. at*
 13 ¶24 (“the Birkin handbag has become a household name and well known by the general public, both in
 14 name and by its distinctive design”); and ¶36 (there is “unique desirability” for the Birkin bag).

15 **-Product’s peculiar characteristics/uses:** Each Birkin is handmade in France, has a “distinctive
 16 design,” which is an “exclusive Hermès design,” and is “a symbol of rarefied wealth.” *Id.* at ¶¶21-24.

17 **-Unique production:** “Each Birkin handbag is handcrafted from the finest leather by experienced
 18 artisans in France. The manufacturing of a single Birkin handbag requires many hours of an artisan’s
 19 time. The intensive labor and craftsmanship and high-quality leathers required make the Birkin handbag
 20 difficult to produce and expensive.” FAC, ¶22.

21 **-Distinct customers:** Customers are affluent, able to pay thousands to hundreds of thousands of
 22 dollars to obtain “a symbol of rarefied wealth. FAC, ¶¶22-23.”

23 **-Distinct prices:** The price of a Birkin handbag ranges from thousands of dollars to over one
 24 hundred thousand dollars. FAC, ¶22.

25 **-Specialized vendors:** “Consumers can only purchase Birkin handbags from Defendants by
 26 physically going to a Hermès retail store.” FAC, ¶37. At Hermès stores “the handbags will not be
 27 displayed on the sales floor for the general public . . . [and] most consumers will never be shown a
 28 Birkin handbag at Hermès retail store.” *Id.* “Hermès Sales Associates are tasked by Defendants with

1 selecting those consumers who are qualified to purchase Birkin handbags.” FAC, ¶38.

2 **ii. Plaintiffs Have Pled Willful Anticompetitive Conduct.**

3 Defendants’ argument that Plaintiffs failed to adequately plead willful anticompetitive conduct,
4 Dckt. 38, p.15, lines 16-21, is unmeritorious. To allege willful anticompetitive conduct, Plaintiffs need
5 only allege “that the defendant acquired or maintained its monopoly through ‘anticompetitive conduct.’”
6 *Epic Games, supra*, 67 F.4th at 998.

7 Plaintiffs allege that “Defendants willfully and intentionally engage in predatory, exclusionary, and
8 anticompetitive conduct with the design, purpose, and effect of unlawfully maintaining their market
9 and/or monopoly power.” FAC, ¶58. Plaintiffs further allege Defendants’ commission system, which
10 incentivizes Defendants’ sales associates to implement the tying scheme by paying commission for the
11 sale of tied items, but not the Birkin bag. FAC, ¶39. Plaintiffs allege in detail the Birkin bag’s unique
12 market power, and Defendants’ pricing scheme to obtain supracompetitive prices. FAC, ¶¶32-33.
13 Plaintiffs have pled that Defendants willfully engaged in anticompetitive conduct.

14 Defendants’ suggestion that its tying scheme involving the Birkin bag is “procompetitive,” Dckt.
15 38, p.7 of 22, lines 12-14, is contrary to Plaintiffs’ allegations. Plaintiffs explicitly allege that
16 Defendants’ tying scheme was “anticompetitive.” FAC, ¶58. Indeed, where, as here, the seller has an
17 economic interest in the tying and tied product, “the tying agreement is aimed at suppressing
18 competition.” *CTUnify, supra*, 115 F.Appx at 835. Moreover, *Illinois Tool*, the case relied on by
19 Defendants, gave as examples of potentially procompetitive tying arrangements an “extension of a \$2
20 million line of credit on condition that the borrower purchase prefabricated houses from the defendant,”
21 and other “promotional tie-ins.” *Illinois Tool, supra*, 547 U.S. at 35-36. Incidental financing and
22 promotional tie-ins, however, bear no resemblance to Defendants’ illegal tie. Here, prospective
23 purchasers of a Birkin bag were forced to buy entirely unrelated Ancillary Products from Defendants.
24 *Illinois Tool* acknowledged that tying was anticompetitive “if the existence of forcing is probable.” *Id.* at
25 36 (citing *Jefferson Parish*). Indeed, the Ninth Circuit recently held that allegations of tying separate
26 products (as in this case, but unlike the examples in *Illinois Tool*), filter out potentially procompetitive
27 tying arrangements. “*Jefferson Parish*’s separate-products test filters out procompetitive bundles from
28 *per se* scrutiny in traditional markets.” *Epic Games, supra*, 67 F.4th at 997-98. Defendants’ arguments

1 regarding procompetitive conduct are meritless.

2 3. Plaintiffs' Allegations Of The Tied Product Market Are Adequate.

3 Plaintiffs have properly alleged the tied product markets. Plaintiffs need only allege distinct tying
4 and tied products and that “the tying arrangement affects a ‘not insubstantial volume of commerce’ in
5 the tied product market.” *Paladin Assocs. v. Montana Power Co.*, 328 F.3d 1145, 1159 (9th Cir. 2003).
6 Here, Plaintiffs allege that Defendants forced them to purchase “designer shoes, scarves, belts, clothing,
7 jewelry, and home goods sold by Hermès (‘Ancillary Products’).” FAC, ¶36. Plaintiffs allege “there is a
8 market for each of these tied products.” *Id.* This properly identifies the distinct, tied product markets.

9 Defendants argue that Plaintiffs need to allege “the tying arrangement affects a ‘not insubstantial
10 volume of commerce in the tied product market.’” Dckt. 38, p.16 of 22, lines 19-21. However, the
11 Ninth Circuit has made clear that Plaintiffs need allege “only that the tie affect an amount of commerce
12 in the tied product market that is not ‘*de minimis*.’” *Epic Games, supra*, 67 F.4th at 996-997.

13 Plaintiffs allege in detail the commerce affected in the tied product market. FAC, ¶¶41, 43 and 61.
14 Plaintiffs allege that each customer must have “a sufficient purchase history or purchase profile” of tied
15 products before they will be offered a Birkin bag. FAC, ¶38. Plaintiff Yang spent “spent over \$10,000
16 on Ancillary Products in order to purchase a Birkin bag.” FAC, ¶43. Plaintiff Cavalleri was also
17 “coerced into purchasing Ancillary Products in order to obtain access to Hermès Birkin bags,” and spent
18 “tens of thousands of dollars at Hermès.” FAC, ¶41. Plaintiffs allege that Defendants’ unlawful tying
19 “reduces competition in the market for the tied products . . . [and] that Defendants’ competitors in the
20 tied markets cannot make sales for Ancillary Products that are purchased as a result of the coercive
21 effect of Defendants’ tying practice.” FAC, ¶43. Plaintiffs allege that “Defendants’ conduct affects and
22 has affected a substantial volume of commerce, far exceeding a *de minimis* amount.” FAC, ¶61. This
23 more than adequately alleges an economic effect in the tied market.

24 Defendants’ argument that Plaintiffs “have not alleged substantial effects in *each*” of the tied
25 markets, Dckt. 38, p.17, line 21 (*italics in original*), is unmeritorious. Plaintiffs allege effect in the “tied
26 markets.” FAC, ¶43. This is an adequate allegation when construed “in a light most favorable to the
27 Plaintiff,” as required on a motion to dismiss. *NL Indust. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

28 Defendants’ citation to *Teradata Corp. v. SAP SE*, 570 F.Supp.3d 810 (N.D.Cal. 2021) and *Truck-*

Rail Handling, Inc. Burlington N. & Sante Fe Ry. Co., 244 F.App'x 130, 131-32 (9th Cir. 2007), Dckt. 38, p.16, lines 14-17, is unpersuasive. Both cases arose out of summary judgment, with detailed evidence. Moreover, the cases were factually distinct. *See Teradata*, *supra*, 570 F.Supp.3d at 821, 836-839 (addressing a “terminated the joint venture” involving the sale of business technology applications, and excluding expert testimony regarding qualitative and quantitative analysis); and *Truck-Rail*, 244 F.App'x at *1 (involving a railroad that required “transload operators to sign . . . [an agreement] as a condition of leasing transload terminals”). Neither case addressed what allegations are required to plead a more than *de minimus* effect in tied product markets.

Defendants’ argument that Plaintiffs did not allege how “home furnishings and jewelry could be reasonable substitutes” or analyze “different competitors” in the tied markets, Dckt. 38, p. 17, lines 1-3, misses the point. It is related to the tying market – not the tied market – that market power is analyzed. “[T]he seller must have power in the tying product market.” *Jefferson Parish*, *supra*, 466 U.S. at 37. “Ordinarily, the relevant market is a question of fact for the jury.” *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1489 (9th Cir. 1991).

4. Plaintiffs Have Adequately Pled Antitrust Standing.

Defendants’ argument that Plaintiffs have not alleged standing lacks merit. Here, Plaintiffs have alleged harm to competition. Defendants’ practice “causes economic harm because it reduces competition in the market for the tied products.” FAC, ¶43. Specifically, Plaintiffs allege that “Defendants’ competitors in the tied markets cannot make sales for Ancillary Products that are purchased as a result of the coercive effect of Defendants’ tying practice.” FAC, ¶43. This properly alleges injury to competition. *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1203 (9th Cir. 2012) (injury to competition occurs when customers “forego purchases” with competitors) (citations omitted).

Plaintiffs also allege detriment to consumers. FAC, ¶33 (tying scheme results “in substantial financial harm to the Class”). Indeed, Plaintiffs Cavallari and Yang allege having spent tens of thousands on Hermes Ancillary Products. FAC, ¶¶41, 43.

Defendants argument that there is no foreclosure of competition here because Plaintiffs would not “have otherwise bought even from another seller in the tied product market,” Dckt. 38, p.19, lines 4-8, is meritless. Defendants make this argument by taking Plaintiffs’ allegations wholly out of context.

1 Plaintiffs solely allege that it was the “Hermes Ancillary Products that they never would have
 2 purchased.” FAC, ¶33. Plaintiffs **do not** allege they would not have bought tied products from other
 3 sellers. Rather, Plaintiffs allege that they “have alternative options for the Ancillary Products and **would**
 4 **prefer** to choose among them independently from their decision to purchase Birkin handbags.” *Id.* at ¶60
 5 (emphasis added). *Per se* tying rules apply where Plaintiffs “did not want [the tied product] at all, or
 6 might have preferred to purchase elsewhere on different terms.” *Jefferson Parish, supra*, 466 U.S. at 12.

7 Defendants’ argument that Plaintiffs claim injury because they could not resell the Birkin bag at a
 8 higher price is incorrect. Plaintiffs allege that Defendants actively manipulate Birkin bag prices and
 9 demand, through limited production and low supply, FAC, ¶¶26, 36, and suppressing “the nominal retail
 10 price of Birkin handbags.” FAC, ¶33. Plaintiffs allege the “nominal retail price of a Birkin bag is a
 11 façade,” and Defendant’s “predatory practice . . . drives up the true price of the Birkin bag,” because
 12 customers are required to purchase Ancillary tied items to get the Birkin bag. FAC, ¶33. In this way,
 13 Defendants obtain “supracompetitive profits.” FAC, ¶31. The high resale value of the Birkin is an
 14 intentional byproduct of Defendants’ tying scheme.

15 Defendants’ suggestion Plaintiffs allege harm because Defendants merely enhanced the price of the
 16 Birkin, Dckt.38, p. 19 of 22, mischaracterizes Plaintiffs’ allegations regarding Defendants’ tying
 17 scheme. Similarly, Plaintiffs have not alleged reduced choice alone, but that as a result they paid
 18 supercompetitive prices, and competition in the tied product markets was affected.

19 Plaintiffs also note *per se* tying schemes require less elucidation of the harm caused to competition.
 20 “In cases alleging *per se* violations of the antitrust laws, the alleged conduct is ‘conclusively presumed
 21 to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have
 22 caused or the business excuse for their use.’” *Sidibe v. Sutter Health*, 103 F.4th 675, 693 (9th Cir. 2024).

23 **B. Plaintiffs Adequately Allege A Tying Claim Under The Cartwright Act.**

24 To plead a tying claim under section 16727 (as distinct from a claim under Business & Professions
 25 Code section 16720), Plaintiff must plead (1) a tying agreement; (2) sufficient economic power in the
 26 tying market or anticompetitive effects in the tied market; and (3) pecuniary loss. *Morrison v. Viacom,*
 27 *Inc.*, 66 Cal.App.4th 534, 541-42 (1998). Thus, Section 16727 of the Cartwright Act requires only that
 28 economic power or anticompetitive effect be pled, whereas the Sherman Act requires both. To plead

anti competitive effects, appellants must allege facts to show that “a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie.” *Morrison, supra*, 66 Cal.App.4th at 542 (citations omitted). Here, the FAC pleads a tying agreement, FAC, ¶¶36-40; economic power and an anticompetitive effect, *id.* at ¶¶33, 37-39; and injury to Plaintiffs, *id.* at ¶¶41, 43. Plaintiffs note that, under California law, “the requisite control of the tying product may be inferred from the seller's success in imposing a tying condition upon a substantial amount of commerce in the tied product without any further reference to the market.” *Suburban Mobile Homes. v. Amfac Communities*, 101 Cal.App.3d 532, 547 (1980). The FAC alleges that “Defendants’ conduct affects and has affected a substantial volume of commerce. . .” FAC, ¶61.

C. Plaintiffs Adequately Allege A UCL Claim.

Plaintiffs have adequately alleged claims under the UCL’s unlawful and unfair prongs.

With respect to the unlawful prong, “[b]y proscribing any unlawful business practice, section 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable.” *Abbott Labs Abbott Laboratories v. Superior Court*, 9 Cal.5th 642, 651 (2020) (internal citation omitted). Because Plaintiffs have sufficiently pled the elements for relief under the Sherman Act and Cartwright Act, Plaintiffs sufficiently plead unlawful business practices in violation of the unlawful prong of the UCL.

Plaintiffs also allege Defendants’ conduct violates the “unfair” prong of the UCL. FAC, ¶88. “To support a finding of unfairness to *consumers*, a court uses the balancing test, which ‘weigh[s] the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.’” *Epic Games, supra*, 67 F.4th at 1000 (italics in original). “The balancing test . . . is fact intensive and is not conducive to resolution at the demurrer stage.” *Progressive W. Ins. Co. v. Sup. Ct.*, 135 Cal.App.4th 263, 287 (2005).

The FAC alleges that Defendants have created a classic tying scheme, where they act as the seller of both the tying and tied products, have implemented a commission plan for its sales agents that incentivizes tying, and manipulates prices and output of the Birkin bag to force the purchase of tied items and obtain supra-competitive profits. Plaintiffs have been harmed by tens of thousands of dollars individually, and competition has been substantially affected. This alleges liability under the unfair prong of the UCL.

The unfair prong of the UCL sweeps far broader than the Sherman and Cartwright Acts. For liability

to attach under the unfair prong of the UCL, there is no need “to define a relevant market . . .” *Epic Games, supra*, 67 F.4th at 1002. In addition, *Epic* rejected the argument that “failure to establish Sherman Act liability forecloses UCL liability” under the unfair prong. *Id.* at 1001.

D. Plaintiffs Request Leave To Amend To Add A Section 1 Claim.

Plaintiffs have pled their tying claim under Section 2 (anticompetitive conduct) of the Sherman Act, not Section 1 (concerted action). Tying claims can be pled under either statute. *Multistate Legal Stud. v. Harcourt Brace Jovanovich Legal & Pro. Public.*, 63 F.3d 1540, 1550 (10th Cir. 1995).

Defendants argue that “Section 2 [tying] claims require ‘the possession of *monopoly* power in the relevant market’ and ‘[m]onopoly power differs in degree from market power, requiring ‘something greater.’ *Epic Games, supra*, 67 F.4th at 998 (emphasis added; citation omitted).” Dckt.38, p.12, lines 9-12. The Ninth Circuit previously noted that “[t]he ‘relevant market’ and ‘market power’ requirements apply identically under the two different sections [Sections 1 and 2] of the [Sherman] Act.” *Newcal Industries, supra*, 513 F.3d at 1044, n.3. However, another California court described the difference between Section 1 and Section 2 claims as “the Court uses the term ‘monopoly power’ to refer to substantial market power.” *Safeway Inc. v. Abbott Laboratories*, 761 F.Supp.2d 874, 886 (N.D. Cal. 2011).

Plaintiffs respectfully request leave to amend to allege a Section 1 claim. A Section 1 claim is appropriate under the facts alleged by Plaintiffs. *Systemcare, Inc. v. Wang Laboratories Corp.*, 117 F.3d 1137, 1138 (10th Cir. 1997) (“a contract between a buyer and seller satisfies the concerted action element of section 1”); *Cargill Inc. v. Budine*, 2007 WL 4207908, *3 (E.D. Cal. 2007) (“agreement between [seller] and its customers satisfies the concerted action requirement of Section One...”). As such, dismissing Plaintiffs’ complaint without granting such leave would be improper. *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996) (dismissal without leave “improper unless it is clear [...] that the complaint could not be saved by any amendment”).

IV. CONCLUSION

For the reasons set forth herein, Defendants’ motion should be denied in full.

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Dated: August 16, 2024

HAFFNER LAW

By: /s/ Joshua H. Haffner

Joshua H. Haffner

Alfredo Torrijos

Vahan Mikayelyan

SETAREH LAW GROUP

Shaun C. Setareh

Thomas A. Segal

Attorneys for Plaintiffs and the Proposed Class