No. 17-16508

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KELSEY K.,

Plaintiff-Appellant,

v.

NFL ENTERPRISES, LLC, *ET AL.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANSWERING BRIEF OF DEFENDANTS-APPELLEES NFL ENTERPRISES, LLC, *ET AL.*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, defendants-appellees state that:

1. NFL Enterprises LLC is wholly owned by NFL Ventures, L.P.

2. Tennessee Football, Inc., a private corporation, is a subsidiary of KSA Industries, Inc., a private corporation.

3. Pro-Football, Inc., a private corporation, is a subsidiary of WFI Group, Inc., a private corporation, which is a subsidiary of Washington Football, Inc., a private corporation.

Other than what is listed above, no defendant-appellee has a parent corporation and no publicly-held corporation owns more than 10% of any defendant-appellee's stock.

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INTRODUCTION

Plaintiff-Appellant Kelsey K. was a cheerleader for the San Francisco 49ers for a single NFL season. She tried out for the 49ers' squad for a second season but was not selected. Plaintiff alleges that she would have been paid more as a 49ers cheerleader if not for a conspiracy among some of the NFL clubs to suppress cheerleader wages and to refrain from poaching each other's cheerleaders. Yet she neither possesses nor pleads *facts* indicating the existence of any such conspiracy.

Plaintiff argues that only an unlawful conspiracy could explain why NFL clubs paid their cheerleaders relatively modest (albeit varying) wages. Plaintiff contends that so long as she can conceive of a conspiracy that is theoretically possible – even if her conception is based purely on speculation as to what *might* have occurred – a court must let her case go forward, subjecting defendants to burdensome discovery so that she can search for a concrete basis for her theory. This contention fundamentally misunderstands the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and its progeny in this Court.

Twombly established that, to state a claim, an antitrust plaintiff's complaint must be supported by pleading *facts* sufficient to provide "plausible grounds to infer an agreement" to restrain trade. *Id*. at 556. This requirement cannot be satisfied by "a conclusory allegation of agreement," *id*. at 557 or by allegations of conduct that might be "consistent with conspiracy, but just as much in line with a

wide swath of rational and competitive business strategy." *Id.* at 554. In the decade following *Twombly*, this Court has had multiple occasions to apply the *Twombly* standard, and it is now well established that an antitrust complaint "must allege facts" and may not rest on mere conclusory allegations. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008); *see also In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1196 (9th Cir. 2015).

Plaintiff's pleadings fell well short of satisfying the *Twombly* standard. She attempted to plead two unlawful agreements among the NFL and some of its member clubs: one to fix cheerleader wages below market value, and a second to refrain from "poaching" each other's cheerleaders. The first of these theories failed because plaintiff could not plead any specific facts identifying the circumstances under which the alleged "agreement" was entered; nor could she plead parallel conduct and "plus factors" that would constitute circumstantial evidence of such an agreement.

Plaintiff's theory of a "no-poaching" conspiracy, ostensibly based on the NFL's long-established anti-tampering policy, was equally infirm. That policy prohibits NFL clubs from soliciting an employee who is under contract to another club, but it permits such recruitment at the end of the contract term. Indeed, the policy expressly prohibits any effort to interfere with such recruitment. Moreover, plaintiff – who never sought to pursue a cheerleader position with a club other than

the 49ers – identified no facts suggesting that NFL clubs would have any reason to "poach" one another's cheerleaders. If anything, plaintiff's allegations indicate otherwise.

The *Twombly* plaintiffs failed to "nudge[] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. The conclusory allegations of conspiracy presented here did not come close to that line. Accordingly, it was proper for the district court, applying the *Twombly* standard, to deny plaintiff leave to file her proposed First Amended Complaint on grounds of futility.

JURISDICTIONAL STATEMENT

Supplementing plaintiff's Jurisdictional Statement, defendants state that the district court had jurisdiction over this case pursuant to 28 U.S.C. § 1332. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether the district court correctly applied the *Twombly* standard in rejecting plaintiff's amended complaint, given plaintiff's admission that she did not know and could not plead facts necessary to support a plausible inference of conspiracy.

2. Whether the district court abused its discretion in denying, pursuant to *Twombly*, plaintiff's request to conduct discovery prior to satisfying *Twombly*'s standard for stating a claim.

STATEMENT OF THE CASE

A. Plaintiff's Complaint

Plaintiff Kelsey K. was a cheerleader with the San Francisco 49ers from either May or July 2013 until February 2014. ER 607 ¶ 58, 599 ¶ 7. On January 31, 2017, plaintiff filed an antitrust action on behalf of a purported class alleging that the NFL and 27 of its 32 member clubs had conspired to suppress the compensation of cheerleaders in violation of Section 1 of the Sherman Act and California's Cartwright Act.[1] Asserting that there had "been a rash of lawsuits filed over the last few years alleging that various NFL teams paid their female athletes below the legally-mandated minimum wage," ER 610 ¶ 75,[2] plaintiff described her complaint as "alleg[ing] something vastly more sinister," *id*., *i.e.* that defendants had "actively conspired to suppress female athlete earnings by agreeing to pay female athletes below fair market value and by agreeing to refrain from recruiting female athletes from fellow Defendant NFL Member Teams." *Id*. ¶ 76.

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[1] *See* ER 596-620. There are 32 NFL clubs, but only 27 of the clubs employed cheerleaders for all or a portion of the proposed class period. *See* Op. Br. at 1; ER 621-26; ER 609 ¶ 66 & n.1.

[2] Plaintiff later effectively conceded that she was aware of such suits against only four clubs, identifying pleadings in those lawsuits as her sole source of information about the wages paid to cheerleaders by clubs other than the 49ers. ER 145 ¶ 115.

Plaintiff acknowledged that she did not know, and thus could not plead, the specific circumstances of the alleged agreement. For example, she was "unaware of precisely when this conspiracy was first consummated." ER 612 ¶ 86. Instead, plaintiff alleged that defendants could have entered into the alleged "agreement" at any number of events over a period of several decades, including "NFL owner meetings, the NFL scouting combine, the NFL Draft, the Super Bowl, the Pro Bowl, trade shows, and even conference calls among senior executives, among other events." ER 611 ¶ 79. Plaintiff did not identify who had participated in the making of the alleged agreement, other than to allege that the agreement was between "senior executives," a group that included the "Defendant NFL Member Team owners, high ranking management officials, and heads of each Defendant NFL Member Team's 'cheerleading' team." ER 611 ¶ 79.

Plaintiff alleged specific facts regarding cheerleader compensation for four of the 27 defendant clubs, and the compensation for those four clubs varied considerably. ER 612-13 ¶ 87. According to the Complaint, the Buffalo Bills did not pay their cheerleaders at all for game appearances. *Id*. The Oakland Raiders allegedly paid cheerleaders $125 per game. *Id*. The Tampa Bay Buccaneers and Cincinnati Bengals were alleged to have paid $100 and $90 per game respectively. The Complaint alleged in general terms that cheerleaders were not paid for time spent at required activities other than games, such as rehearsals and community

outreach. ER 598 ¶ 2. But elsewhere the Complaint acknowledged that the Buccaneers and Bills did pay their cheerleaders for at least some non-game activities, alleging that they did so "rarely." ER 612-13 ¶ 87.

Plaintiff offered no allegations about what any of the other 23 club defendants had paid their cheerleaders; the Complaint did not even state what plaintiff's own compensation had been as a 49ers cheerleader.

The Complaint alleged that defendants had used "fear and intimidation" to induce cheerleaders to accept these wages, such as by telling them that "they were lucky to be chosen, should be grateful and could be quickly replaced if they failed to perform in any way." ER 615 ¶ 98. The Complaint asserted that prospective cheerleaders paid approximately $25 each just to try out. ER 613 ¶ 88.

Plaintiff alleged generally that defendants had conspired to suppress market competition by agreeing not to recruit cheerleaders from each other. ER 598 ¶ 2; ER 611 ¶ 80. Although the Complaint alleged "on information and belief" that no NFL club had ever tried to recruit a cheerleader from another NFL club, ER 610 ¶ 77, the Complaint did not explain why any club would have had any incentive to do so. The Complaint identified no specific instance in which an NFL club wanted to recruit a cheerleader from another club but was prevented from doing so. Nor did the Complaint allege that the plaintiff (or any other cheerleader employed by

an NFL club) had ever attempted to try out for a different club and been turned away because of any such agreement.

Plaintiff alleged that the NFL had required its member clubs to file cheerleaders' contracts with the League and that, "[o]n information and belief," this allowed defendants to "ensure the conspiracy … to suppress female athlete earnings was enforced," but she did not explain how filing cheerleader contracts with the League served to "enforce" such an agreement and did not identify any action taken by the League to support or "enforce" the alleged conspiracy. ER 611-12 ¶¶ 81-82.

The Complaint did not purport to allege an antitrust relevant market; nor did it allege facts seeking to show that defendants held power within such a market. Plaintiff did acknowledge that it would be "extremely unlikely" that a 49ers cheerleader would apply to be a cheerleader for the Dallas Cowboys because the cost of such a move would be prohibitively expensive. ER 615-16 ¶ 99.

B. The District Court's Order Dismissing Plaintiff's Complaint

On April 4, 2017, defendants moved to dismiss the Complaint for failure to state a claim under the standard established by *Twombly* and its progeny. *See* ER 578-95. In opposing this motion, plaintiff again acknowledged that she "does not and cannot allege what specific person or persons agreed to enter the conspiracy, or in which exact meeting the agreement was made…." ER 568. At the end of her

opposition, plaintiff asked for leave to amend the Complaint, but requested "at least 120 days to conduct discovery" before doing so. ER 577.

At the hearing on the motion to dismiss, plaintiff's counsel acknowledged that plaintiff possessed few facts beyond those alleged in the Complaint and again requested leave to conduct discovery, asserting that if he were permitted "limited discovery to what the cheerleaders were paid during the preceding four years, … then I could say here are what the teams paid." ER 547:12-14. The district court denied the request because "that's the whole point of *Twombly*, is to avoid this massive expense of antitrust cases until after there's a proper pleading." ER 547:9-11. By bringing a conclusory complaint devoid of facts, the court observed, plaintiff was seeking "a shortcut which is just get into [defendants'] files and see what [plaintiff] can find." ER 533:9-10.

On May 25, 2017, the district court granted defendants' motion to dismiss. At the outset, the district court observed that plaintiff must plead more than just "maltreatment" of cheerleaders to sustain her antitrust claims:

> To be clear, the complaint here asserts *only* claims for violations of antitrust law. This is *not* a lawsuit for violation of wage-and-hour or labor laws (*see, e.g.*, Dkt. No. 1 ¶ 75). Nor is it a complaint for general maltreatment of cheerleaders. For present purposes, allegations that cheerleaders deserve to be paid more for their skills (*see, e.g.*, *id.* ¶ 67), or that defendants treated cheerleaders in "insulting" or "demeaning" ways (*see, e.g.*, *id.* ¶¶ 63, 66, 88), even if true, are inapposite. Plaintiff chose to assert *antitrust* claims, so she must

> plead factual allegations sufficient to show violations of *antitrust* law.

ER 15 (emphasis in original).

The district court concluded that plaintiff's Complaint did not "answer the basic questions of 'who, did what, to whom (or with whom), where, and when," *id*. (quoting *Kendall*, 518 F.3d at 1047–48). The court observed that "[f]or a conspiracy of the scale alleged by this complaint, one would expect at least some evidentiary facts to have been located and pled…. The complaint fails to allege anything of the sort and instead rests on assertions of parallel conduct anchored in rhetoric and conclusory statements." *Id*. The court "decline[d] to infer conspiracy from the mere fact that defendants attended annual events that constitute standard fare and serve legitimate functions in the NFL." ER 16 (citing *In re Citric Acid Litig.*, 191 F.3d 1090, 1098 (9th Cir. 1999)).

Similarly, the district court found no basis for concluding that the alleged requirement that cheerleader contracts be filed with the NFL was inconsistent with the NFL's legitimate business operations. ER 18. "For all the complaint shows, the filing requirement might actually have been intended to protect employees." *Id*.

Turning to plaintiff's attempt to plead a conspiracy through evidence of parallel conduct and "plus factors," the district court found that plaintiff had failed even to allege parallel conduct, observing that the Complaint alleged cheerleader

wages for only four of the 27 defendant clubs, and "[e]ven among those four examples … the conduct alleged is hardly parallel." ER 18. For example, "according to the complaint, the Raiders paid their cheerleaders $125 per game while the Bills paid their cheerleaders *zero* dollars per game. These differences make plaintiff's theory implausible." ER 19. The district court also found that plaintiff had failed to allege plus factors, which must be "facts tending to exclude the possibility that defendants acted independently." ER 16 (citing *In re Citric Acid Litig.*, 191 F.3d at 1096).

The district court rejected plaintiff's contention that she could plead a no-poach conspiracy among the NFL clubs based solely on the assertion that NFL clubs had not hired cheerleaders away from one another. ER 20. The court pointed out that plaintiff had not alleged that "poaching of NFL cheerleaders would have been the norm in a free market." *Id*. To properly plead a "no poaching" claim, the court held, plaintiff would need to allege specific facts showing, for example, that an NFL team had "expressed interest in recruiting a competing team's cheerleader" or that there is "a shortage of cheerleading services such that NFL teams would have needed to poach in order to field a cheerleading squad." *Id*.

Finally, the district court held that dismissal was proper because the Complaint failed to plead "the necessary element of injury to plaintiff Kelsey K.

herself." ER 21. Citing this Court's holding in *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1200 (9th Cir. 2012) that an antitrust plaintiff must "allege *both* that the defendant's behavior is anticompetitive *and* that the plaintiff has been injured by the anticompetitive aspect of the practice under scrutiny," the district court concluded that the Complaint – which did not even allege the amounts plaintiff had been paid – failed to plead sufficient "facts showing that plaintiff herself suffered any harm as a result of defendants' anticompetitive conduct." ER 22.

The district court gave plaintiff permission to seek leave to file an amended complaint, cautioning plaintiff that she "should be sure to plead her best case." ER 24. Citing *Twombly*, the court denied plaintiff's request to take discovery before presenting a proposed amended complaint: "To avoid the potentially monumental expenses of antitrust discovery here until a plausible claim for relief is pled, no discovery will be allowed for now." *Id.*

C. Plaintiff's Proposed First Amended Complaint

On June 15, 2017, plaintiff moved for leave to amend her Complaint, attaching her proposed First Amended Complaint ("FAC"). ER 96, 123. The FAC asserted that plaintiff's no-poaching theory was established by the NFL's anti-tampering policy, which is set out in the NFL's Constitution & Bylaws. *See* ER

138 ¶¶ 83-85; ER 200, 367-69. The NFL Constitution & Bylaws were appended in their entirety to the FAC, permitting an examination of the policy as a whole.

The anti-tampering policy provides that no club may "[t]amper with a player or coaches or other employee under contract to … another member club." ER 200. The policy emphasizes, however, that it is "improper" for a club to interfere with the ability of its employees to discuss employment with other clubs after the regular season of the final year of their contracts:

> If a club employee (other than player, coach, or high-level employee) has completed the regular season covered by the final year of his or her contract, any attempt to deny permission for the employee to discuss and accept employment with another club will be considered improper.

ER 367-68. The policy further provides that "[a]s a common courtesy and to avoid inter-club disputes, whenever a club wishes to contact a non-player employee of another club about possible employment, such inquiring club must first notify the … employer club to express its interest." ER 369.

Citing the Department of Justice's Antitrust Guidance for Human Resources Professionals ("DOJ Guidance"), plaintiff asserted that the anti-tampering policy constitutes a "no poaching" agreement that is *per se* unlawful under the antitrust laws. *See* ER 140 ¶ 93, ER 142 ¶ 101. The FAC identified no occasion when the anti-tampering policy had ever been applied to restrain competition for

cheerleaders or to limit cheerleaders' ability to discuss potential employment with another club.

The FAC also offered additional information about some of the regular NFL business meetings described in the original Complaint, such as dates and names of attendees. *See* ER 140-41 ¶¶ 96-97; ER 146-48 ¶¶ 119-25. The FAC did not, however, plead any facts indicating that these meetings were anything other than "events that constitute standard fare and serve legitimate functions in the NFL," ER 16, or that cheerleaders or their compensation were even discussed on any of those occasions.

The FAC supplemented plaintiffs' allegations concerning the amounts that individual clubs had actually paid their cheerleaders by alleging that plaintiff was paid $125 per game by the 49ers, was not paid for rehearsal time, and was sometimes paid for community events. ER 144 ¶ 109. The FAC also alleged that the Bills, who were previously alleged to have not paid cheerleaders at all for games, ER 612-13 ¶ 87, actually compensated cheerleaders the equivalent of $115 per game "in the form of game tickets and a parking pass." ER 145 ¶ 113.

According to the FAC, plaintiff could identify the cheerleader wages for four clubs in addition to her own because those wages had been disclosed in wage and hour lawsuits against these clubs. ER 145 ¶ 115. Plaintiff admitted that she did not know what cheerleaders had been paid by any of the other 22 clubs. *Id.*

Indeed, the FAC contained no allegations at all concerning wages paid by those 22 club defendants beyond the conclusory allegation that plaintiff "is informed and believed" that cheerleader wages were "uniform throughout the league and thus constitute[d] parallel conduct." *Id.*[3] Later, in her reply brief in support of her motion for leave to amend, plaintiff argued that "[e]xpecting Kelsey K. to track down salaries for Female Athletes from each of the twenty-seven Defendant NFL Member Teams over several decades is unduly burdensome on Kelsey K, especially where even limited discovery has been denied." ER 66.

The FAC added a new section identifying what plaintiff described as "plus factors" supporting an inference of conspiracy, alleging (generally in conclusory terms): (1) that each defendant NFL club had paid cheerleaders below minimum wage until wage and hour lawsuits were filed against some of the clubs; (2) that cheerleaders were required to purchase calendars and other promotional items, which they were permitted to sell at a profit; (3) that cheerleader salaries have not risen at the same rate as salaries for players, executives, and coaches; (4) that the NFL's anti-tampering policy was a "no poach" agreement; and (5) that cheerleaders were paid a lump sum at the end of the season. ER 149-51 ¶¶ 135-39.

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[3] *Id.* The FAC did not attempt to reconcile this allegation with the fact that the wages specifically alleged for five of the clubs were *not* "uniform."

The FAC also offered a new allegation that at some unidentified time the director of the 49ers cheerleading squad "caused to be communicated" to plaintiff that "if she was not hired as a 49ers cheerleader in subsequent years she could not go tryout for any other NFL team's cheerleading team." ER 139 ¶ 92. The FAC conceded that plaintiff did not attempt to try out for any other club after failing to make the 49ers' cheerleader squad for a second year. *Id.*

Like the initial complaint, the FAC offered no allegations concerning an antitrust relevant market; nor did it allege that defendants possess market power within any such market.

D. The Hearing On Plaintiff's Motion For Leave To Amend

Defendants opposed plaintiff's motion for leave to amend solely on the ground that the proposed amendment would be futile, as the FAC, like the original complaint, failed to state a claim on which relief could be granted. ER 2, 80. The district court heard argument on the motion on July 20, 2017. *See* ER 30-50. Much of the discussion at the hearing focused on plaintiff's arguments concerning the anti-tampering policy.

Because the anti-tampering policy on its face applies only to employees under contract, the district court asked about the duration of NFL cheerleader contracts. Both sides agreed that, as alleged in the FAC, cheerleader contracts last for only one year. ER 37:24-38:11; *see* FAC ¶ 126.

In support of plaintiff's argument about the anti-tampering policy, her counsel pointed to published accounts of situations in which NFL clubs have been punished for contacting other clubs' players and coaches who were still under contract. ER 41:25-42:23. When the district court suggested that NFL players and coaches were "worlds apart" from cheerleaders, plaintiff's counsel became indignant. ER 42:24-43:11. Despite the court's multiple prior warnings that only antitrust allegations were relevant to this antitrust action, plaintiff's counsel argued:

> Are they treated differently because they're players or they're cheerleaders? Is this some sort of misogynistic rule the NFL would like to invoke, to keep women -- the only group that's entirely comprised of women with the NFL -- under their thumb? Judge, I'm sure you don't believe that.

ER 43:6-11. The district court cautioned plaintiff's counsel that it did not wish to hear such irrelevant argument, observing that five NFL clubs did not even employ cheerleaders, who were clearly not as important to the League's product as were players. ER 43:17-44:2. The court went on to hear additional argument from plaintiff's counsel about other issues. ER 44-49.

E. The District Court's Order Denying Plaintiff's Motion For Leave To Amend on the Ground of Futility

On July 21, 2017, the district court denied plaintiff's motion for leave to file the FAC on the ground that the proposed amendment would be futile. ER 11. The

court rejected plaintiff's assertion that the anti-tampering policy on its face established the existence of an unlawful no-poach agreement. In fact, read in its totality, the district court observed that the policy

> show[s] that the NFL does not categorically prohibit competition among its member clubs to recruit cheerleaders. On the contrary, the NFL expressly prohibits any attempt to restrict mobility among clubs for cheerleaders who have completed their contracts.

ER 4.

The court went on to explain why the anti-tampering policy does not restrict competition for cheerleaders:

> [T]he fact remains that the anti-tampering policy cited by plaintiff *expressly permits* – and even prohibits any attempt to restrict – competition among its member clubs to hire cheerleaders (and other employees). It requires only that any such competition occur between contracts. Since contracts for NFL cheerleaders renew on an annual basis (*see* Dkt. No. 38-1 ¶¶ 86, 92), the anti-tampering policy still affords NFL clubs frequent opportunity to poach each others' cheerleaders if they wish to do so. The interim prohibition on poaching while cheerleaders remain under contract would be consistent with any number of legitimate business reasons that have nothing to do with any anticompetitive conspiracy.

ER 4-5.

The district court further held that the notice requirement of the policy, which plaintiff emphasized at oral argument, "in no way changes – and indeed

reinforces – the simple fact that clubs remain free to poach each other's employees between contracts." ER 6.

Addressing plaintiff's reliance on the Department of Justice's "Antitrust Guidance for Human Resource Professionals," the court found the Guidance inapplicable because the NFL's anti-tampering provision is not a "naked" no-poaching agreement, and "plaintiff's proposed amendment fails to allege facts supporting any plausible inference that the anti-tampering policy actually functioned as a 'no-poaching agreement … separate from or not reasonably necessary to a larger legitimate collaboration' [of the NFL clubs] as contemplated by the DOJ Guidance." ER 6.

Turning to plaintiff's argument that a no-poaching conspiracy was sufficiently alleged based on her allegation that no NFL club had ever attempted to poach another NFL club's cheerleaders, the district court observed that "plaintiff makes no suggestion that any club has ever wanted to do so or that there is a shortage of cheerleading services that would motivate such attempts." ER 6. "In other words," the court stated,

> what is the significance of the fact that no club has ever tried to hire away a cheerleader from another club? Is it proof of a conspiracy? No, it is not, at least in the absence of well-pled facts showing a need for clubs to poach in the first place. The facts alleged in the proposed amendment remain entirely consistent with the plausible possibility that sufficient local cheerleader talent persists

> such that NFL clubs have never even contemplated the prospect of luring away a competitor's star.

ER 6-7.

The court identified multiple assertions in the FAC and plaintiff's reply brief that were directly *inconsistent* with the notion that NFL clubs would have had any reason to poach each other's cheerleaders. These included:

- the statement "that cheerleaders in the NFL have 'short-term' careers in a revolving-door system where, 'by the time cheerleaders realized they had been underpaid, they were ready to move on,' and 'there are certainly women waiting to step into the role;'"
- the assertion "that defendants have historically been able to 'exploit' cheerleaders because the cheerleaders themselves 'longed to perform in front of thousands of fans;'"
- the allegation "that cheerleaders 'were told [they] could be quickly replaced,' now adding only a modest qualifier that this factual allegation 'is not evidence of the fact that Female Athletes were, in fact replaceable;'" and
- the further statement that "[c]heerleaders, though important … are essential neither to the existence of NFL Member Teams nor to the availability of professional football."

ER 7.

With respect to plaintiff's original allegation of a wage-fixing conspiracy, the district court found that the FAC "adds little to cure [the] defects" in the initial complaint. ER 9. The court observed that the FAC again alleged cheerleader compensation for only a few clubs, and with respect to the compensation that was

alleged, the differences, "in both the *value* and the *type* of compensation offered … undercut the plausibility of plaintiff's conspiracy theory." ER 9.

The district court further found that plaintiff's allegations of "plus factors" were insufficient. ER 10. For example, the allegations that defendants "paid cheerleaders below the minimum wage until wage-and-hour lawsuits caused them to raise cheerleader wages 'in order to limit … potential legal exposure' … [creates] a narrative hardly inconsistent with unilateral and profit-driven (albeit culpable) conduct." *Id.*

The district court also held that the FAC "still fails to allege how [plaintiff] personally suffered any antitrust injury as a result of the purported no-poaching agreement." ER 7. The court found plaintiff's allegation that the director of the 49ers cheerleading squad had "caused to be communicated" to plaintiff that she could not try out for another club's squad (ER 139 ¶ 92) insufficient to plead antitrust injury because "[t]he peculiar phrasing of the allegation makes it impossible to infer any reason why it was not wholly plaintiff's own decision to not tryout for another club after the 49ers declined to re-hire her." ER 8.

The district court found that in light of its other findings, it was unnecessary to reach defendants' alternative argument that the FAC should be rejected for failure to plead a relevant market and other elements required under the rule of reason standard. ER 11.

STANDARD OF REVIEW

The district court denied plaintiff's motion for leave to amend her complaint based on its finding that any such amendment would be futile. ER 11. The standard for this "futility" determination is the same as for an order of dismissal under Rule 12(b)(6), *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 655–56 (9th Cir. 2017), and this Court reviews that determination *de novo*. *See Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004).

The standard of review for plaintiff's contention that the district court acted improperly in entering a dismissal with prejudice instead of offering her another opportunity to amend is for abuse of discretion. *See Ventress v. Japan Airlines*, 603 F.3d 676, 680 (9th Cir. 2010).

Insofar as the district court had discretion to permit plaintiff to conduct discovery in the face of the Supreme Court's instruction that antitrust cases should not proceed to discovery until plaintiff has pled enough facts "to raise a reasonable expectation that discovery will reveal evidence of illegal agreement," *Twombly*, 550 U.S. at 545, and that, when a complaint is deficient, the plaintiff "is not entitled to discovery, cabined or otherwise," *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009), this Court would review the *denial* of such discovery under an abuse of discretion standard. *See generally Laub v. United States Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003).

SUMMARY OF ARGUMENT

The district court properly applied *Twombly* in finding plaintiff's proposed First Amended Complaint to be futile.

Much of plaintiff's argument on appeal rests on the proposition that the *Twombly* standard is too onerous and should be "corrected." Op. Br. at 3. This argument is readily rejected. As this Court has made clear on multiple occasions, the standard established by the Supreme Court in *Twombly* is binding and must be satisfied for any antitrust complaint to pass muster.

Under *Twombly*, a plaintiff must plead *facts* sufficient to support a plausible inference of unlawful conspiracy. As applied by this Court, the *Twombly* standard requires pleading of specific facts establishing either (a) the "basic questions" of "who, did what, to whom (or with whom), where, and when?" *Kendall*, 518 F.3d at 1048, or (b) the existence of parallel conduct by the defendants, accompanied by "plus factors" indicating that this parallel conduct did not result from independent action. *In re Musical Instruments*, 798 F.3d at 1193.

Plaintiff admits she possesses no facts concerning the alleged agreement to fix cheerleader wages. She identifies persons who *could* have participated in such an agreement, as well as meetings or other occasions (e.g., the Super Bowl) when defendants had the *opportunity* to enter into an agreement. But she possesses no facts that, if proven, would establish that any agreement on the subject was actually

entered into, or even that cheerleader compensation was *discussed* on any of the occasions she identifies.

Plaintiff's attempt to establish a conspiracy by pleading parallel conduct and "plus factors" fares no better. She could not even plead parallel conduct: she was able to identify the compensation paid to cheerleaders by only five clubs, and that varied significantly. And none of her allegations of "plus factors" indicates anything at all about an agreement on cheerleader compensation.

Plaintiff's allegation of an unlawful "no poach" agreement is equally unavailing. This allegation rests on the NFL's long-established anti-tampering policy, which on its face precludes only tampering with existing club employees who are under contract (and who basic tort law would shield from "tampering" even if the NFL rule did not exist). The rule makes clear that clubs are completely free to recruit employees of other clubs whose contracts have expired or are about to expire following the NFL season; any effort to prevent such recruitment is labeled "improper." Moreover, plaintiff has identified no occasion when the anti-tampering policy has ever been applied to a cheerleader.

The FAC was also insufficient for the separate and independent reason that it failed to plead facts establishing antitrust injury. If anything, the allegations of the complaint belie any inference that defendants engaged in conduct that caused any competitive injury to plaintiff. Plaintiff admits, for example, that she did not

even attempt to obtain employment with another NFL club after she unsuccessfully auditioned for a second season with the 49ers.

Yet another fundamental defect in the FAC was its failure to allege a relevant market or the possession by defendants of market power in any such market. These are necessary elements of any antitrust claim here, given the Supreme Court's holding that an antitrust claim brought against a legitimate joint venture like the NFL must be assessed under the antitrust rule of reason. *American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 202–04 (2010); *see Tanaka v. Univ. of S. California*, 252 F.3d 1059, 1063 (9th Cir. 2001).

Plaintiff argues that the district court should have given her an opportunity to take discovery to see if she could find facts that would support her speculative claim. But the Supreme Court made clear in *Twombly* and *Iqbal* that a plaintiff must plead facts sufficient to state a claim *before* she is entitled to pursue discovery. The district court was correct in rejecting plaintiff's request for discovery and in dismissing her case with prejudice.

ARGUMENT

As the district court repeatedly reminded plaintiff, this is an *antitrust* case, and it was plaintiff's burden to present a pleading that satisfied the well-established standard for pleading an antitrust claim. The only question before the district court below, and before this Court now, is whether plaintiff's pleading was sufficient to

satisfy that standard. Plaintiff's colorful assertions – repeated throughout her Opening Brief to this Court – about supposed misogyny or general "maltreatment" of cheerleaders are irrelevant to that question.[4] No more relevant for current purposes are plaintiff's accusations concerning compliance with wage and hour statutes. The only claims asserted in this case were antitrust conspiracy claims, and her attempts to plead such claims were both demonstrably deficient and, by her own admission, irreparable.

To sustain a conspiracy claim under Section 1 of the Sherman Act, a plaintiff must allege "evidentiary facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce …; (3) which actually injures competition." *Kendall*, 518 F.3d at 1047 (citations

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[4] In her briefs and oral arguments below, plaintiff went to great lengths to assert repeatedly that all NFL cheerleaders were female and to suggest that gender-based discrimination, rather than market factors, was responsible for cheerleaders' alleged depressed compensation. She repeats those arguments on appeal, even going so far as to manipulate a quotation attributed to the Raiders' former owner by adding language – language not included in the original quotation – to make it appear as if he was referring to women. *See* Op. Br. at 9; *compare* ER 137 ¶ 81. The district court judge was so exasperated by plaintiff's persistent gender-based rhetoric that he informed her counsel that he would terminate the final hearing below if it continued. Plaintiff makes much of that point in her Opening Brief (at 18), but she has no basis for complaint; the district court continued to hear her argument on several additional points. ER 44-49. The purported relevance of gender to her antitrust claims remains a mystery.

omitted). The requirements to plead a claim under California's Cartwright Act – which was patterned after Section 1 of the Sherman Act – are the same. *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1476–77 (9th Cir. 1986).

A plaintiff may plead a "contract, combination, or conspiracy" either (a) by directly alleging the circumstances surrounding the conspiratorial agreement, or (b) by pleading parallel conduct along with "plus factors" indicating that the parallel conduct did not result from independent action. *See Twombly*, 550 U.S. at 564; *In re Musical Instruments*, 798 F.3d at 1193.

To plead a conspiracy through direct allegations, a plaintiff must identify the specific circumstances of the alleged agreement, such as a "specific time, place, or person involved in the alleged conspiracies." *Twombly*, 550 U.S. at 565 n.10. In other words, the complaint should answer at least the "basic questions" of "who, did what, to whom (or with whom), where, and when?" *Kendall*, 518 F.3d at 1048.

To plead a conspiracy through parallel conduct and plus factors, a plaintiff must allege both (i) actual parallel conduct and (ii) additional "plus factors" that represent "economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action." *In re Musical Instruments*, 798 F.3d at 1194; *see also Name.Space, Inc. v. Internet Corp. for Assigned Names & Nos.*, 795 F.3d 1124, 1130 (9th Cir. 2015) (affirming dismissal of claims that ICANN's application process for domain names was

anticompetitive because court could not "infer an anticompetitive agreement when factual allegations 'just as easily suggest rational, legal business behavior'" (citing *Kendall*, 518 F.3d at 1049)).

On appeal, plaintiff complains that the district court improperly required her to produce "evidence" of the conspiracy at the pleadings stage. *See* Op. Br. at 2. The district court did nothing of the sort. Consistent with *Twombly*, the district court simply required that plaintiff plead concrete "evidentiary" facts in support of her claim; the court properly disregarded "conclusory allegations of law and unwarranted inferences," which constituted the bulk of plaintiff's allegations. *See* ER 2 (citing *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001)).[5]

Plaintiff's proposed FAC was futile because it failed to satisfy the basic pleading requirements for an antitrust claim. The district court was correct in rejecting the amendment. And because plaintiff made no showing that she could offer an amended pleading that *would* satisfy *Twombly* – and indeed acknowledged that she possessed no facts beyond those she had already offered – the district court was also correct in entering judgment and not prolonging the case further.

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[5] Plaintiff may be confused by the district court's reference to "evidentiary facts," a term used by this Court to distinguish between mere conclusory allegations and allegations of specific concrete facts of the kind needed to satisfy the *Twombly* standard. *See, e.g.*, *Kendall*, 518 F.3d at 1047.

I. *Twombly* and Its Progeny Establish the Governing Standard For Pleading an Antitrust Conspiracy Claim.

Plaintiff contends that the district court erred "by explicitly accepting Defendants' alternative explanation of Plaintiff's plausible allegations." Op. Br. at 1, *see also id.* at 4. She argues that "so long as Plaintiff's theory is *plausible*, the complaint should survive a motion to dismiss, no matter the competing theories advanced by Defendants." Op. Br. at 22-23, 24. In offering this argument, plaintiff misconstrues the meaning of the word "plausible" as that term has been used by the Supreme Court.

As the Supreme Court has explained, in this context *plausible* means more than merely *possible* or *conceivable*. *See Twombly*, 550 U.S. at 547 (plaintiffs must allege facts sufficient to "nudge[] their claims across the line from conceivable to plausible"). An antitrust plaintiff must plead facts more than "merely consistent with" conspiracy, as "without [a] further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory." *Id*. at 557 & n.5; *see Kendall*, 518 F.3d at 1049 ("Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws." (citation omitted)). In short, a plausible pleading of conspiracy requires facts suggesting that a conspiracy is *more likely* than independent action.

Plaintiff complains that these well-settled requirements create "heightened pleading standards" that are contrary to the requirements of Federal Rule of Civil Procedure 8(a)(2) and "make anti-trust cases nearly impossible for plaintiffs to bring." Op. Br. at 3, 19. Such complaints are unavailing given the Supreme Court's plain holdings. The Court's intent in *Twombly* was to require rigorous testing of antitrust complaints at the pleadings stage, as this Court has previously observed:

> [F]or the purposes of adequate pleading in antitrust cases, the [*Twombly*] Court specifically abrogated the usual "notice pleading" rule, found in Federal Rule of Civil Procedure 8(a)(2) …. This is because discovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case.

Kendall, 518 F.3d at 1047 & n.5.

Plaintiff's reliance on *Erickson v. Pardus*, 551 U.S. 89 (2007), and *Starr v. Baca*, 652 F.3d 1202 (9th Cir. 2011), is unavailing. *See* Op. Br. at 21-22. As this Court has recognized, any doubt created by *Erickson* (which considered a *pro se* complaint) as to the requirement to plead specific facts was resolved in *Iqbal*, which confirmed that a plaintiff must plead "factual content" sufficient to render her claims plausible. 556 U.S. at 678; *see Moss v. United States Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). The *Starr* court confirmed that *Twombly* was "concerned that lenient pleading standards facilitated abusive antitrust litigation;"

accordingly, "to be entitled to the presumption of truth, allegations in a complaint … must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." 652 F.3d at 1213, 1216.[6]

Accordingly, the FAC needed to plead *facts* sufficient to answer plausibly at least the "basic questions" of "who, did what, to whom (or with whom), where, and when?" *Kendall*, 518 F.3d at 1048. Alleging a mere *possibility* of collusion or a mere *opportunity* to collude, which is all that plaintiff has done here, is insufficient. *Id.*; *see also Twombly*, 550 U.S. at 567 n.12; *In re Musical Instruments*, 798 F.3d at 1196.

Plaintiffs' factual allegations, even construed strictly in her favor, went no further than "factually neutral" territory which, without more, might be "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Twombly*, 550 U.S. at 554. The fundamental holding of *Twombly* is that

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[6] *Park v. Thompson*, 851 F.3d 910 (9th Cir. 2017), also offers no support for plaintiff's position. *See* Op. Br. at 22. In *Park*, this Court confirmed that, once a plaintiff has pled facts sufficient to create a plausible inference of conspiracy (as the plaintiff in *Park* had done), that inference cannot be overridden at the pleading stage by an alternative explanation. 851 F.3d at 918. Nothing in *Park* purports to absolve a plaintiff of her initial burden to plead facts sufficient to make her requested inference plausible.

this is insufficient to state a claim. This Court should decline plaintiff's invitation to "correct" the standard established by the Supreme Court. *See* Op. Br. at 3.

II. The District Court Correctly Applied *Twombly*.

A. The District Court Correctly Found that Plaintiff's Wage Fixing Allegations Were Insufficient to State a Claim.

1. The First Amended Complaint Failed to Plead Allegations of Conspiracy With Sufficient Specificity.

The district court correctly found that plaintiff's wage-fixing allegations failed to "provide the details of 'who, did what, to whom (or with whom), where, and when' regarding some actual conspiratorial meeting, communication, or agreement." ER 15. Indeed, plaintiff had admitted that she "does not and cannot allege what specific person or persons agreed to enter the conspiracy, or in which exact meeting the agreement was made." ER 568.

Although plaintiff identified a number of NFL meetings at which defendants *could have* conspired, the district court was correct in observing that those meetings "would have been consistent with simply running the business of the NFL and its member teams, a perfectly legitimate endeavor," ER 16, and there were no factual details "tending to support the inference of unlawful conduct therein." ER 18; *see In re Citric Acid Litig.*, 191 F.3d at 1098 (industry meetings are "standard fare," serving "legitimate functions" and "[i]f we allowed conspiracy to be inferred from such activities alone, we would have to allow an inference of

conspiracy whenever a trade association took almost any action"); *see also Twombly*, 550 U.S. at 567 n.12; *In re Musical Instruments*, 798 F.3d at 1196; *Kendall*, 518 F.3d at 1047–48.

For example, one of the occasions when plaintiff alleges that representatives of the clubs gathered and *could* have entered into or affirmed an agreement on cheerleader compensation was the Super Bowl. ER 611 ¶ 79. But the complaint offers no allegations that plausibly indicate that cheerleader compensation has even been *discussed* at any Super Bowl, and no one could reasonably question that club representatives had legitimate reasons for attending the League's signature event.

The FAC suggested that defendants first entered into the wage-fixing conspiracy on February 1, 1970, when they met to ratify the NFL's Constitution & Bylaws. ER 138 ¶ 84, ER 147 ¶ 123. Ratifying the Constitution & Bylaws clearly served a legitimate function in organizing the operations of the collective business of the NFL and its member clubs. The FAC did not allege, and could not plausibly have alleged, otherwise. And although that meeting might have given defendants an *opportunity* to agree to suppress cheerleader wages, that, without more, is not enough to sustain a conspiracy claim. *See In re Musical Instruments*, 798 F.3d at 1197; *In re Citric Acid Litig.*, 191 F.3d at 1103.

Moreover, at the time of the February 1970 meeting, cheerleaders had already been employed in the NFL for more than a decade. *See* ER 136 ¶ 72

(alleging that NFL clubs had employed cheerleaders since at least 1954). If a wage-fixing conspiracy had been entered into at that 1970 meeting, one would have expected subsequent changes in the patterns and amounts of cheerleader compensation. *Cf. Twombly*, 550 U.S. at 556 n.4 (observing that "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason, would support a plausible inference of conspiracy" (internal quotation marks omitted)). The FAC alleged no facts suggesting that cheerleader pay changed at all in response to any agreement reached in February 1970 – or at any other time. In fact, plaintiff concedes that she does not know what the large majority of NFL clubs have paid their cheerleaders at *any* point in time. *See* Op. Br. at 40.

Equally conclusory is plaintiff's allegation that in March 2014, after a wage and hour lawsuit had been filed against one club, defendants agreed "to raise cheerleader pay to minimum wage, and no higher." ER 148-49 ¶ 131. This allegation is, once again, wholly devoid of essential factual content, beyond simply listing the NFL club owners who happened to be members of the NFL Executive Committee at that time. There are no allegations identifying what each (or, for that matter any) club actually paid its cheerleaders before and after the March 2014 meeting. There is therefore no basis for an inference that all of the clubs – or any club – "raised" cheerleader wages following that meeting to "minimum wage, and

no higher." To the contrary, the *only* allegations in the complaint about the compensation paid by a few individual clubs show considerable variation in compensation.[7]

The FAC also recited dates and locations of other regular NFL meetings, *see* ER 147-48 ¶¶ 123-25, but, once again, it alleged no facts suggesting that these were anything other than legitimate business meetings. Plaintiff's conclusory assertion that defendants "reaffirmed" the supposed conspiracy at the League's routine business meetings is again wholly conclusory, supported by no facts indicating that cheerleader compensation was even *discussed* at any of those meetings.

The district court properly found that the FAC had failed sufficiently to plead direct allegations of conspiracy, because, like the initial complaint, the FAC "fail[ed] to allege that any *specific* meeting set the stage for conspiracy, much less factual details … tending to support the inference of unlawful conduct therein." ER 18.

[7] As the district court correctly observed, it would not be evidence of conspiracy if some clubs had increased their cheerleader compensation after a wage-and-hour suit was filed; such protective behavior would have been fully consistent with unilateral conduct in the face of litigation risk. *See* ER 10.

2. The Conduct Alleged Was Not Parallel.

Having failed to plead facts that would directly establish a plausible agreement under the *Twombly* standard, the FAC relied on circumstantial allegations to suggest that a conspiracy could be inferred from parallel conduct. However, the FAC's allegations on this subject also fell well short of the mark. Plaintiff not only failed to plead facts demonstrating parallel conduct; she affirmatively pled facts that contradicted her claim of parallelism.

The original Complaint asserted a range of cheerleader compensation from $0 to $125 per game, which the district court found to be "hardly parallel" and to "undercut the very theory asserted by the complaint." ER 18-19. In the FAC, plaintiff attempted to narrow the range by changing her original allegation that the Buffalo Bills "did not pay its female athletes at all for games" to allege instead that Bills cheerleaders were effectively paid $115 per game in the form of game tickets and a parking pass. *Compare* ER 612-13 ¶ 87 *with* ER 145 ¶ 113. As the district court observed, however, the allegation that the Bills cheerleaders were paid in kind while other clubs' cheerleaders were allegedly paid a "flat fee per game," ER 144 ¶ 110, actually *undermined* plaintiff's allegations of parallel conduct. ER 10. And the range in compensation for the five clubs whose compensation was alleged in the FAC was still significant, from $90 to $125 per game. ER 144-45 ¶¶ 109-

113. These are hardly uniform amounts of the kind that one would expect to result from a wage fixing agreement.[8]

On appeal, plaintiff argues that the district court erred in pointing to the disparity in individual club compensation arrangements discussed in the FAC, contending that the alleged agreement was not to pay all cheerleaders a uniform amount, but to pay cheerleaders a "low flat wage within a range." Op. Br. at 30 (internal quotation marks omitted). Plaintiff has cited no case in which a court has accepted an amorphous claim that prices or wages were "fixed" merely to be "low" in some undefined sense. More to the point, she has identified no case in which such an allegation has been upheld on scant allegations of the kind presented here.

Of particular significance, the FAC alleged *no facts at all* concerning the wage amounts and related terms for any of the other 22 club defendants. Plaintiff has repeatedly admitted that she does not possess any such facts. *E.g.*, ER 115, 145 ¶ 115. Viewed through this lens, her conclusory allegations about the

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[8] Further expanding the disparity, the FAC also alleged that cheerleaders for the 49ers, Raiders, Buccaneers, and Bills were on some occasions paid unspecified percentages of the amounts paid to the club for appearances at community events. *See* ER 144-45 ¶¶ 109-111, 113. This allegation conflicted with the allegations in the initial Complaint that the Raiders and Bengals did not compensate cheerleaders for community events and that the Buccaneers "rarely paid a low hourly wage for community events." ER 612 ¶ 87. Regardless of which (if either) version is correct, these allegations fail to show uniformity even among the small number of clubs for which such allegations are presented.

compensation practices of "all" clubs are nothing more than unsupported speculation.

3. The First Amended Complaint Failed to Allege Plus Factors.

Without meaningful allegations of parallel conduct, the presence or absence of "plus factors" is a moot point. In any event, although the FAC added a section labeled "plus factors," *see* ER 148-51 ¶¶ 129-39, none of the allegations in that section identified "economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action." *In re Musical Instruments*, 798 F.3d at 1194. These allegations again consisted predominantly of bare conclusions unsupported by specific facts.

As her first alleged "plus factor," plaintiff asserted that defendants paid cheerleaders "as far back as 1970, illegally below the minimum wage until the 2014 wage and hour lawsuits began to be filed." ER 148 ¶ 130. Even if this allegation had been supported (as it was not) with allegations of fact concerning the wages that the club defendants actually paid, the district court properly found that "resist[ing] paying more in wages until the threat of legal liability forced them to" was fully consistent with unilateral conduct. ER 10.

Plaintiff argues that it is implausible that "every single NFL Team would independently decide to pay" cheerleaders below minimum wage. Op. Br. at 31-32. But plaintiff has never offered – and possesses no facts that would permit her

to offer – factual allegations concerning the amounts that "every single NFL Team" actually "decide[d] to pay" its cheerleaders, whether above or below the minimum wage threshold.

As her second alleged "plus factor," plaintiff asserted that cheerleaders were "required to *purchase* a minimum number of cheerleader calendars and other promotional items, which Female Athletes were 'allowed' to sell at a small, specified profit per item." ER 150 ¶ 136 (emphasis in original). This allegation is contradicted by plaintiff's allegation that calendars made with cheerleader likenesses were sold "without providing additional compensation" to the cheerleaders who posed for them. ER 136-37 ¶ 76. Either way, the district court correctly rejected this allegation as plus factor because it "fails to show any suppression of cheerleader wages." ER 10.

On appeal, plaintiff argues that her allegation about calendars shows "*concerted* effort that suggests coordinated effort." Op. Br. at 32. It shows nothing of the sort. While the FAC asserts (in conclusory terms) that NFL clubs acted similarly in the distribution of cheerleader calendars, it does not plead facts indicating that there was any *concerted* effort to do so, let alone a *concerted* effort to suppress wages.

As a third "plus factor," plaintiff alleged that cheerleader salaries have not increased at the same rate as salaries for NFL players and coaches. ER 150 ¶137.

Even assuming that this allegation is true – and, once again, the FAC pled no specific figures to support it – the FAC provided no explanation for why, in a competitive marketplace, cheerleader salaries would or should be tied to the salaries of professional football players or coaches. To the contrary, plaintiff has conceded that "[c]heerleaders, though important … are essential neither to the existence of NFL Member Teams nor to the availability of professional football." ER 60. The same could hardly be said of football players and coaches. Several NFL clubs do not employ cheerleaders at all. The district court properly rejected this alleged "plus factor" because the FAC "alleges nothing to suggest that cheerleaders have made the same contributions as have players, executives, and coaches in causing the NFL to flourish." ER 10.

On appeal, plaintiff asserts that the wages of no other group of NFL employees, including "concession workers," have remained "low" in the same way as the wages of cheerleaders. Op. Br. at 32. The FAC offered no allegations about amounts paid to concession workers. And again, even if it had, plaintiff has failed to explain why, in a competitive marketplace, wages for cheerleaders would be tied to those for concession workers.

In sum, even if the FAC had adequately pled parallel conduct – which it did not – it did not plead as plus factors any conduct by defendants inconsistent with

the behavior one would expect in a competitive marketplace. *In re Musical Instruments*, 798 F.3d at 1194; *Name.Space, Inc.*, 795 F.3d at 1130.[9]

4. The First Amended Complaint Failed to Plead Antitrust Injury Resulting From the Alleged Wage-Fixing Conspiracy.

The FAC also failed to set out a plausible theory of injury to competition. *Kendall*, 518 F.3d at 1047 (plaintiffs must allege conspiracy "which actually injures competition"). Plaintiff offered no concrete allegations that, if proven, would establish that defendants attempted to cause any actual injury to competition, much less that they succeeded in doing so.

If anything, plaintiffs' allegations are generally inconsistent with the proposition that the club defendants would have been expected to compete for cheerleaders at all. With few exceptions, the club defendants are located a considerable geographic distance apart from one another. Plaintiff herself has acknowledged, for example, that a 49ers cheerleader would have no interest in

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[9] Plaintiff's opening brief does not challenge the district court's rejection of her fourth alleged "plus factor" based on the assertion that cheerleaders were allegedly paid in a lump sum at the end of the year. That is not surprising, as the FAC explicitly alleges that at least one club (the Bills) did *not* pay its cheerleaders in that manner. *See* ER 145 ¶ 113. In any event, plaintiff has no credible explanation for why the *manner* in which wages were paid by some clubs was in any way indicative of a conspiracy among the clubs to fix the *amount* of wages. Plaintiff's Opening Brief separately addresses her fifth alleged "plus factor," the potential effects of the anti-tampering policy. That issue is addressed in Part II. B below.

trying out for a position on the Dallas Cowboys' cheerleader squad, given the prohibitive cost of travel and relocation. ER 154 ¶ 148. There can be no basis to infer an injury to "competition" when there is no reason to believe competition existed in the first place.

Plaintiff's allegations also undermine any suggestion that a conspiracy among the NFL clubs could have succeeded in depressing market wages. According to the FAC, plaintiff is a "trained well-rounded and multidisciplinary dancer who spent nearly two decades training to be a dancer…." ER 126 ¶ 12. The FAC identifies a variety of alternative work opportunities for a person with these skills. ER 151-52 ¶ 142. With such ready alternatives available for the same labor pool from which cheerleaders are drawn, it is not plausible to conclude that defendants – who in most cases operated hundreds or even thousands of miles away from one another – could have implemented a successful conspiracy to maintain cheerleader wages below competitive levels. *See, e.g., Universal Grading Serv. v. eBay, Inc*., 2012 WL 70644, at *5 (N.D. Cal. Jan. 9, 2012), *aff'd*, 563 F. App'x 571, 572 (9th Cir. 2014) (unpublished) (plaintiff "failed to plead sufficient facts to present a plausible claim that there was … the potential for significant anti-competitive effects …. Hence, the claimed conspiracy would have made no economic sense").

B. The District Court Correctly Found Plaintiff's No-Poaching Allegations Insufficient to State a Claim.

1. The Anti-Tampering Policy Encourages Rather Than Restrains Competition.

Plaintiff's "no poaching" conspiracy theory rests on the NFL's anti-tampering policy, which prohibits NFL club representatives from "tamper[ing] with a player or coaches or other employee *under contract* to … another member club." ER 125 ¶ 4 (quoting Article 9.1(C)(11) of the NFL Constitution & Bylaws) (emphasis added); *see* ER 200. Plaintiff describes this as "a black-and-white agreement not to poach employees from competitors." ER 125 ¶ 5. In fact, there is nothing remarkable about this policy, which on its face merely requires NFL clubs to respect each other's contracts with their employees.

The law generally recognizes that intentional interference "with the performance of a contract … between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other…." Restatement (Second) of Torts ch. 37, § 766 (Am. Law Inst. 2017); *see also Gruen Watch Co. v. Artists All., Inc.*, 191 F.2d 700, 704–05 (9th Cir. 1951) (intentional and unjustifiable interference with contractual relations actionable under California law). Plaintiff has no basis to challenge a policy that codifies the established legal principle that the NFL member clubs may not

interfere with each other's contracts and provides internal mechanisms for addressing any such misconduct.

Importantly, the anti-tampering policy expressly provides that if a non-player employee "has completed the regular season covered by the final year of his or her contract, any attempt to deny permission for the employee to discuss and accept employment with another club will be considered improper…." ER 367-68. Because cheerleaders sign new contracts each season, *see* ER 138 ¶ 86, the anti-tampering policy preserves competition by declaring it "improper" for a member club to prevent them from discussing employment with another NFL club after the end of each regular season. Indeed, a club is free to recruit a cheerleader of another club whose contract has not yet expired, so long as the cheerleader's prior team has finished the season covered by the contract.[10]

In her opening brief, plaintiff faults the district court's conclusion that the anti-tampering provision's "interim prohibition on poaching … would be consistent with any number of legitimate business reasons that have nothing to do

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[10] Plaintiff argues that the anti-tampering provision "does not allow poaching after the season" for cheerleaders because "[t]he contract does not end until after tryouts are conducted, at which point it's too late to tryout for another team." Op. Br. at 29. This argument (which plaintiff offers for the first time on appeal) is directly contradicted by plaintiff's allegation that her own employment with the 49ers ended in February 2014, immediately after the 2013 football season and before spring tryouts. *See* ER 126 ¶ 12; Op. Br. at 29.

with anticompetitive conspiracy." Op. Br. at 27 (citing ER 4-5). While acknowledging that "this may be true," plaintiff criticizes the district court's acceptance of "Defendants' interpretation" that there are legitimate business reasons for the anti-tampering policy, when, argues plaintiff, the policy "would *also be consistent with anti-competitive conspiracy*." Op. Br. at 28. Again, this argument reveals plaintiff's fundamental misunderstanding of *Twombly*. A plaintiff who pleads facts that are consistent with legitimate business conduct, without more, fails to state a claim. *Twombly*, 550 U.S. at 557; *see also Kendall*, 518 F.3d at 1049.

Plaintiff also tries to find support for her claim in the "notice" clause of the anti-tampering policy, which provides that "[a]s a common courtesy and to avoid inter-club disputes," a club wishing to hire another club's employee must give notice to the other club. *See* ER 369. Plaintiff argues that this requirement "appears to be anti-competitive" and "acts as a chill on employee mobility." Op. Br. at 26-27. That is pure speculation. Nowhere in the FAC (or elsewhere) does plaintiff cite any examples of this "notice" provision restricting, or being used to restrict, employee mobility or recruitment; she identifies no instance in which a cheerleader – or any other employee – chose not to seek employment elsewhere

due to the notice requirement.[11] Without such facts, plaintiff's speculation, even if it had been presented in the FAC, would have been insufficient. *See Kendall*, 518 F.3d at 1048. The district court correctly concluded that the "notice" clause "in no way changes – and indeed reinforces – the simple fact that clubs remain free to poach each other's employees between contracts. At most, the 'common courtesy' provision merely regulates any such poaching with a notice requirement." ER 6.

Nor are plaintiff's arguments about the anti-tampering policy supported by her oddly worded allegation that the 49ers' cheerleader coordinator "caused to be communicated" to her that, if she was not selected by the 49ers for a second year, she would not be able to try out for another club. ER 139 ¶ 92, ER 154 ¶ 149. This alleged second- or third-hand communication – which plaintiff's brief to this Court now asserts plaintiff remembers only hazily (*see* Op. Br. at 37) – was clearly *not* a reference to the anti-tampering policy, which expressly *prohibits* any attempt to prevent an employee who has completed her contractual commitment to one club from moving to another club. Under the policy, it would have been "improper" for the 49ers, after choosing not to renew plaintiff's contract, to seek to interfere with her recruitment by another club.

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[11] Relying on press reports, plaintiff has cited examples of clubs being disciplined for violating the anti-tampering policy itself (with respect to players and coaches – *not* cheerleaders), but she has cited no examples of the notice provision having any competitive impact whatsoever.

2. Plaintiff Failed to Allege Antitrust Injury Resulting From the Alleged No-Poaching Agreement.

In addition to failing to allege any actual anticompetitive purpose or effect of the anti-tampering policy, the district court found that the FAC "still fails to allege how [plaintiff] personally suffered any antitrust injury as a result of the purported no-poaching agreement." ER 7; *see Brantley*, 675 F.3d at 1197 (antitrust plaintiffs must plead facts showing "that they were harmed by the defendant's anti-competitive contract, combination, or conspiracy, and that this harm flowed from an 'anti-competitive aspect of the practice under scrutiny'" (citation omitted)).

As the district court observed, plaintiff pled no facts suggesting that any NFL club would have had reason to poach another club's cheerleaders. ER 6. Plaintiff offered only the vague assertion that "[i]n a properly functioning and lawfully competitive labor market, competing employers compete for qualified employees." ER 139 ¶ 87. But plaintiff offered no specific facts to suggest that cheerleaders are the type of skilled labor for which NFL clubs would be expected to compete actively; indeed, as the district court found, "[t]he facts alleged in the proposed amendment remain entirely consistent with the plausible possibility that

sufficient local cheerleader talent persists such that NFL clubs have never even contemplated the prospect of luring away a competitor's star." ER 6-7.[12]

Any contention that a "no poach" agreement actually affected cheerleader mobility is further undermined by plaintiff's allegation that a 49ers cheerleader would not wish to relocate to join the Dallas Cowboys' cheerleading squad. ER 154 ¶ 148. As this common-sense allegation confirms, the geographic realities and costs of relocation would limit mobility with or without any agreement among the clubs.

On appeal, plaintiff criticizes these points as "irrelevant," asserting that "[w]hether any individual team has ever had some internal desire to hire a cheerleader from another team is self-evident, and does not matter." Op. Br. at 34. Whatever this means, the presence or absence of incentive to poach cheerleaders is *critical* to plaintiffs' no-poaching conspiracy theory – if, in a free market, NFL clubs have no reason to recruit cheerleaders from other clubs, then plaintiff's allegation of a "no poach" conspiracy fails to establish the required element of antitrust injury.

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[12] As the district court observed, plaintiff's briefs in support of her motion for leave to amend again confirmed that NFL clubs would have no need to poach one another's cheerleaders, with or without any agreement. For example, plaintiff stated that "cheerleaders in the NFL have 'short-term' careers in a revolving-door system where … 'there are certainly women waiting to step into the role.'" ER 7; *see* ER 63.

The failure to plead antitrust injury is particularly marked with respect to the plaintiff herself. That plaintiff was "replaceable" cannot reasonably be debated, as the 49ers chose to replace her after only one season. ER 154 ¶ 149. Even if clubs had reason to recruit "star" cheerleaders from each other's squads, nothing in the complaint suggests that plaintiff herself would have been the target of any such recruitment.

Moreover, plaintiff acknowledges that she did not attempt to obtain a position with another club. Given this failure, plaintiff cannot claim that any "no poach" conspiracy prevented her from succeeding in such an effort. *See St. Louis Convention & Visitors Comm'n v. Nat'l Football League*, 154 F.3d 851, 862–63 (8th Cir. 1998).

St. Louis Convention & Visitors Commission is instructive on this issue. In that case, the Commission, which had succeeded in persuading the Rams NFL club to relocate from Los Angeles to St. Louis, challenged a provision of the NFL Constitution that required approval by a supermajority of other clubs before a club could relocate its home territory. Because of this provision, the Commission argued, there was no competition among the NFL clubs for the opportunity to move to St. Louis and the Commission was forced to offer more lucrative lease terms to the Rams than would otherwise have been the case. But the Commission acknowledged that it had "failed to ask any [other] NFL owner whether they were

interested in moving to St. Louis at the time it was seeking a team." *Id*. The Eighth Circuit held that, having made no effort to obtain that which it claimed the NFL rule would have prevented it from obtaining, the Commission could not establish antitrust injury. *Id*. at 864.

Similarly here, plaintiff cannot show that she was injured in her ability to obtain a cheerleader position with another NFL club when she admits that she never attempted to try out with any other club.

On appeal, plaintiff argues that she suffered injury because she was paid wages that were "below market value." Op. Br. at 36. This conclusory assertion, standing alone, does nothing to establish antitrust injury. *See Brantley*, 675 F.3d at 1202 (antitrust injury insufficiently pled when plaintiffs' allegations did not establish injury caused by restraint of competition). To establish antitrust injury, plaintiff needed to plead facts showing (a) that poaching of cheerleaders would have occurred absent the anti-tampering policy; (b) that plaintiff herself would have been one of the cheerleaders for whose services clubs would have competed, and (c) that, as a result of such competition, plaintiff would have been offered higher compensation. The FAC presented no facts from which such conclusions could plausibly be drawn. A mere conclusory assertion that plaintiff's compensation was "too low" was insufficient.

III. The District Court's Rejection of the First Amended Complaint Was Also Proper Because Plaintiff Failed to Plead a Relevant Market and Other Required Elements of a Rule of Reason Claim.

Although the district court found it unnecessary to reach the issue (ER 11), plaintiff's failure to plead a relevant market provides an alternate ground for affirmance. The district court's decision may be affirmed on any ground supported by the record, even if not relied upon by the district court. *Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003).

Plaintiff presumes that the conduct she alleges would, if proven, be per se unlawful under the antitrust laws. The FAC cites liberally to the Department of Justice Antitrust Division Human Resources Guidance, asserting that this publication requires the conclusion that the alleged "no poaching" and "wage fixing" agreements are per se unlawful. *See* Op. Br. at 11, 14. But the Guidance itself recognizes that agreements involving "[l]egitimate joint ventures … are not considered per se illegal under the antitrust laws." ER 455. Indeed, such agreements are not unlawful at all if they are "reasonably necessary to a larger legitimate collaboration between the employers." *Id*. This is consistent with established law holding that pricing decisions of joint ventures are virtually always evaluated under the antitrust rule of reason, not the per se test that applies to certain "naked" restraints between independent competitors. *See Copperweld*

Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984).

The Supreme Court and Ninth Circuit have both held repeatedly that the National Football League is a legitimate joint venture of its member clubs, and that while they are subject to suit under the antitrust laws, such suits can be brought only under the rule of reason. *American Needle*, 560 U.S. at 202–04 (rule of reason applies to agreements among the NFL clubs because they "share an interest in making the entire league successful and profitable, and … must cooperate in the production and scheduling of games, provid[ing] a perfectly sensible justification for making a host of collective decisions"); *see Nat'l Football League v. N. Am. Soccer League*, 459 U.S. 1074 (1982); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1389 (9th Cir. 1984).[13]

Given that the rule of reason would apply to plaintiff's claims, she had the burden of pleading "both that a 'relevant market' exists and that the defendant has power within that market." *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1044 (9th Cir. 2008). A properly defined relevant market – delimiting the area of

[13] *See also Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. at 101; *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 832 (3d Cir. 2010); *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 719 (6th Cir. 2003); *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 673 (7th Cir. 1992).

commerce that could be adversely affected by the challenged conduct – is "essential" to any rule of reason antitrust claim, *Gough v. Rossmoor Corp.*, 585 F.2d 381, 385 (9th Cir. 1978), and failure to plead a valid relevant market "is a proper ground for dismissing a Sherman Act claim." *Tanaka*, 252 F.3d at 1063 (citation omitted).

The concept of a relevant market has both geographic and "product" elements. *Id*. (citing *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1446 (9th Cir. 1988)). "The geographic market extends to the area of effective competition where buyers can turn for alternative sources of supply." *Id*. (internal quotation marks omitted). The product market "includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." *Id*.; *see also Newcal*, 513 F.3d at 1045 ("the market must encompass the product at issue as well as all economic substitutes for the product"). To sustain a claim under the rule of reason, an antitrust plaintiff must plead both the geographic and product aspects of a relevant market. *Id*.

In this case, neither the original complaint nor the proposed FAC pled any relevant market at all. The only allegation plaintiff offered relating to the geographic area of effective competition was that, for expense reasons, cheerleaders are unlikely to try out for a club located in a different part of the country. ER 154 ¶ 148. This suggests that the geographic area of effective

competition for an NFL club recruiting cheerleaders would not include most (or, in many instances, any) other NFL clubs. If they are not even in the same relevant geographic market, a purported agreement between, for example, the 49ers and the Cowboys would be without antitrust significance.

Nor did the FAC plead facts suggesting that "NFL cheerleader jobs" is a relevant product market. Plaintiff did not allege, and could not plausibly allege, that no jobs are reasonable substitutes for NFL cheerleader positions. *See Newcal*, 513 F.3d at 1045. Again, her allegations indicate the contrary. The FAC suggests that there is a wide range of alternative employment options for cheerleaders. *See* ER 151-53 ¶¶ 142, 145 (describing other employment opportunities for dancers).

In addition to failing to plead a relevant market, the FAC made no mention of the other required elements of a rule of reason claim, including possession by defendants of market power within the relevant market and facts establishing that the alleged restraint had significant anticompetitive effects within that relevant market. *Newcal*, 513 F.3d at 1044; *Tanaka*, 252 F.3d at 1063; *see also Williams v. Nat'l Football League*, 671 F. App'x 424 (9th Cir. 2016) (unpublished) (affirming dismissal of claims against NFL where plaintiff "failed to allege a relevant product and geographic market, that any agreement between defendants had an anti-competitive purpose or effect, and failed to allege an attempt to gain control in any

relevant market"). The district court's decision should be affirmed for these reasons as well.

IV. The District Court Properly Denied Plaintiff's Request for Discovery.

Plaintiff complains that "[t]he District Court's demands of Plaintiff are especially egregious in light of its denial of Plaintiff's request for limited discovery." Op. Br. at 40. She characterizes as "frankly outrageous" the district court's holding that she was responsible for pleading, without the benefit of discovery, the specific circumstances of the alleged conspiracy or the cheerleader wages paid by each of the alleged co-conspirators. *Id.* at 40 n.11.

The Supreme Court flatly rejected this view ten years ago in *Twombly*, cautioning that "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery." 550 U.S. at 559. Two years later, in *Iqbal*, the Supreme Court reiterated that "Rule 8 … does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." 556 U.S. at 678–79; *see also Kendall*, 518 F.3d at 1047 (plaintiff is required to provide more than conclusory allegations "because discovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case"). For this reason, a complaint must contain factual allegations that "plausibly suggest an entitlement to relief, such that it is not unfair

to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr*, 652 F.3d at 1216.

Plaintiff has acknowledged that she possesses no concrete facts supporting her conspiracy allegations; she does not even know what wages were paid by 22 of the 27 club defendants. This is not a situation in which the complaint was nearly complete and lacked just an extra detail or two to inch across the finish line. Rather, as the district court observed, what plaintiff was seeking was an improper "shortcut which is just get into [defendants'] files and see what [she] can find." ER 533:9-10. This is exactly the kind of fishing expedition that the Supreme Court has condemned in the absence of a proper pleading.

Because plaintiff's initial complaint and FAC rested on nothing more than conclusory assertions, the district court properly denied discovery.

V. The District Court Properly Refused to Grant Leave to Amend the Complaint.

Plaintiff argues that the district court abused its discretion under Rule 15(a) by not permitting her to file her First Amended Complaint and in declining additional attempted amendments after her FAC was rejected as inadequate. Op. Br. at 38-40. Neither of these arguments has merit.

While plaintiff is correct that as a general matter Rule 15(a) establishes a liberal standard for amendment of pleadings, one major exception is when a

proposed amendment would be futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). This was the only basis argued by defendants for rejecting the FAC and the only ground for the district court's decision. *See* ER 2, 11. Because the district court was correct in finding that the amendments offered in the FAC would be futile, its rejection of the pleading was proper as a matter of law under Rule 15. *Foman*, 371 U.S. at 182.[14]

Nor did the district court abuse its discretion in failing to offer plaintiff yet another opportunity to propose an amended pleading that might pass muster. This Court has established no hard and fast rule on the number of amendment opportunities a plaintiff must be afforded. The determinative factor here was not, as plaintiff suggests, that the district court had warned her that the FAC should plead her "best case" (ER 24) – a warning that, under the circumstances, was well within the district court's discretion to enforce. What makes the district court's exercise of its discretion beyond reasonable question is plaintiff's

[14] Insofar as plaintiff complains because the district court required her to seek leave to amend rather than permitting the amendment and then evaluating the FAC on a Rule 12 motion to dismiss, the distinction she offers is one without a difference. As the district court correctly observed, the standard for evaluating futility under Rule 15 is the same as that applied for failure to state a claim under Rule 12. ER 2; *Missouri ex rel. Koster v. Harris*, 847 F.3d at 655–56. The only impact of the district court's procedural approach was to benefit plaintiff; as the movant, she was able to file two briefs rather than just one and had the last word.

acknowledgement that she *cannot* plead the additional facts necessary to support her claims.

This was a clear case of a plaintiff with a speculative theory and no facts to back it up. When challenged to present such facts, plaintiff admitted that she did not possess them, arguing instead that she should be permitted to take discovery to see if she might be able to find something. *Twombly* makes plain that in this circumstance the proper response from the court is to dismiss the complaint.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Sonya D. Winner

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January 3, 2018

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Defendants-Appellees state that they are not aware of any related cases in this Court.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-16508

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

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Signature of Attorney or Unrepresented Litigant: /s/ Sonya D. Winner

Date: 1/3/2018

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 3, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Sonya D. Winner
Sonya D. Winner

January 3, 2018