

No. 16-15370

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

WILLIAM MICHAEL HICKS, ET AL.,
Plaintiffs-Appellants,

v.

PGA TOUR, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Case No. 3:15-cv-00489-VC
The Honorable Vince Chhabria

**ANSWERING BRIEF OF APPELLEE
PGA TOUR, INC.**

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**CORPORATE DISCLOSURE STATEMENT
PURSUANT TO FED. R. APP. P. 26.1**

Appellee PGA TOUR, Inc. (the “TOUR”) discloses the following information for the limited purpose of complying with Rule 26.1 of the Federal Rules of Appellate Procedure. The TOUR does not have a parent corporation, and there is no publicly held corporation that directly owns 10% or more of the TOUR’s outstanding capital stock.

STATEMENT CONCERNING ORAL ARGUMENT

In accordance with Rule 34(a) of the Federal Rules of Appellate Procedure, the TOUR states that oral argument is unnecessary because the district court's opinion is clear and comprehensive, and well-supported by the record. The decisional process would not be significantly aided by oral argument.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court properly hold that appellants—168 professional golf caddies (the “Caddies”)—had consented to the TOUR’s uniform policy requiring the Caddies to wear caddie bibs identifying the golfer for whom they are employed and the corporate title sponsor of the tournament in which they are participating?

2. Did the district court properly hold that the Caddies could not plausibly claim that their consent to the TOUR’s uniform policy was procured by duress?

3. Did the district court properly hold that, in light of their consent to the TOUR’s uniform policy, the Caddies could not plead a plausible claim for breach of contract, unjust enrichment, right of publicity, or false endorsement?

4. Did the district court properly hold that the Caddies could not plead a plausible antitrust claim?

5. Did the district court properly hold that, in light of the deficiencies in their other claims for relief, the Caddies could not plead a plausible claim for relief under the California unfair competition law?

STATEMENT OF THE CASE AND STATEMENT OF FACTS

This case involves a challenge to the TOUR's right to regulate and control the operation and appearance of its own professional golf tournaments, including the regulation and management of all advertising that occurs at those tournaments. The TOUR has created and operates, manages and promotes three domestic professional golf tours: the PGA TOUR, the PGA TOUR Champions Tour and the Web.com Tour. (ER3.0289 ¶ 61; ER3.0291 ¶ 68.) The TOUR establishes the on-site presentation of these events, as well as the terms and conditions for access to TOUR events, including the terms and conditions of all advertising by sponsors and of endorsements by players and caddies during those events. (ER2.0252.) No one—not a professional golfer, not a spectator, not a local host organization, not a tournament title sponsor, not a member of the media, and not a caddie—is granted access to a TOUR event unless he or she agrees to abide by the TOUR's terms.

As the Caddies readily acknowledged in their complaint, one of the TOUR's concerns "is preserving the image and reputation of the PGA TOUR." (ER3.0292 ¶ 71.) In addition, the TOUR seeks to maximize the aesthetic appeal and value of its events, both as entertainment products for its golf fans and as advertising opportunities for its sponsors, by regulating all advertising at each TOUR event. To that end, as the Caddies alleged, the TOUR "limits endorsements of tobacco, alcohol, and gaming," as well as the "placement and size of sponsor logos." (*Id.*)

As part of its efforts to control the presentation of its tournaments and to maximize their appeal to viewers and sponsors, the TOUR has adopted its Player Endorsement Policy. (ER2.0252-0253.) That policy sets forth the manner in which a sponsor, using a professional golfer endorsement to advertise its products or services, may display its name and logo on the golfer, his bag and his caddie during tournament events. The policy defines how golfers and, by extension, their caddies will appear in TOUR-arranged telecasts and thus prescribes how golfers may give exposure to their sponsors, *provided, however*, that “[a]ll sponsorships, endorsements and promotional activities . . . are subject to the approval of the PGA TOUR.” (ER2.0252.)¹

The TOUR has also established a caddie uniform and dress policy to which the Caddies agree by signing the caddie registration and regulations agreement at each TOUR tournament in which they participate. (ER2.0238.) The contractual language embodying the caddie uniform and dress policy provides:

Caddies shall wear uniforms and identification badges as prescribed by the host tournament and PGA TOUR. All caddies are required to wear solid-colored, Khaki-style long pants, which touch the top of the shoe, or solid-colored, knee-length, tailored shorts and a collared shirt while on club property. T-shirts, jeans, culottes, skirts, shorts, capris, cut-off shorts and cargo-style shorts are not permitted. Acceptable

¹ The Player Endorsement Policy was extended to caddies as a convenience to players with endorsement deals that require displaying the sponsor’s logos on the caddie’s clothing. (ER2.0260 n.1.)

colors shall be determined at the discretion of the Tournament Director.

(ER2.0238 ¶ 2.) The parties agree that the first sentence of the contractual provision permits the TOUR and its local tournament host organization at *each* TOUR tournament to prescribe a uniform for all caddies to wear at that particular tournament, and that the remainder of the provision separately describes a general, non-uniform dress code for caddies at *all* TOUR tournaments. (*See* ER2.0207; App. Br. at 50.)²

Pursuant to the first sentence of the provision, by which the Caddies have manifested their consent to the caddie uniform policy, the TOUR requires all Caddies participating at TOUR tournaments to wear caddie bibs identifying the professional golfer for whom they are employed and the corporate title sponsor of the tournament. As the Caddies themselves conceded—indeed, affirmatively represented—the TOUR “has required caddies to wear bibs for decades.” (ER1.0008.)

Despite having consented to the uniform policy for years as a condition of their participation as caddies at TOUR events, the Caddies decided to mount a blunderbuss legal challenge to that policy on February 3, 2015, when they filed their original complaint in this action. (ER3.0514.) Six weeks later, on March 16,

² The Caddies do not challenge the general dress policy described in the second, third and fourth sentences of the contractual provision, and that policy is therefore not at issue in this lawsuit.

2015, the Caddies filed their first amended complaint. (ER3.0519.) In response to the TOUR's motion to dismiss the first amended complaint—and in apparent recognition of the merits of that motion—the Caddies sought and were granted leave to file their second amended complaint, which they did on September 11, 2015. (ER3.0536.)

Although each Caddie has agreed to abide by the uniform policy and to wear the bib each time he or she signs a caddie registration and regulations contract to work as a caddie at a TOUR event, the Caddies complain that the bibs cover so much of their shirts that they interfere with the Caddies' ability to obtain endorsement deals from, and display at TOUR events the names and logos of, any individual sponsors they could procure. Ignoring their express agreement to wear the prescribed uniform, the Caddies assert that the Player Endorsement Policy *requires* the TOUR to allow the Caddies to display sponsor names and logos subject only to the terms regulating golfers' display of sponsor names and logos, and that the TOUR's enforcement of the uniform policy with respect to the Caddies therefore constitutes a breach of the TOUR's contract with the Caddies.

Recognizing the evident weakness in their tortured contractual construction and the difficulty of prevailing on a breach of contract claim where they have expressly consented to the challenged policy, the Caddies simply assert—in conclusory fashion—that their consent was procured under duress, and so was not really

consent at all. Based on that insupportable predicate, the Caddies contend that the TOUR's enforcement of its uniform policy unjustly enriches the TOUR, violates the Caddies' rights of publicity, and misleads golf audiences into believing that the Caddies have endorsed the tournament title sponsors and their products. The Caddies further allege that the TOUR's control over the appearance of its own professional golf tournaments, including the advertising at those tournaments, constitutes monopolization and a conspiracy to restrain trade under the federal antitrust laws, as well as unfair competition under Section 17200 of California's Business and Professions Code.

On September 25, 2015, the TOUR moved to dismiss the Caddies' second amended complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds that the Caddies still had not pleaded (and could not plead) facts that, if proven, would entitle them to relief on any of their claims.

(ER2.0254-0275.) On the same day, the TOUR filed a request for judicial notice, pursuant to Rule 201 of the Federal Rules of Evidence, asking the district court to take judicial notice of a number of documents referenced in, but not attached to, the complaint, including the caddie registration and regulations agreements, the caddie credential applications and the player handbook. (ER2.0220-0253.)

On December 3, 2015, following oral argument on the TOUR's motion, the district court asked for supplemental briefing on the question of which state's con-

tract laws applied to the Caddie's contract claims. (ER1.0019.) In addition, the court asked the parties to consider whether there were "any judicially noticeable facts (or facts to which the parties are willing to stipulate for the Court's consideration in connection with the motion to dismiss) about when the PGA [TOUR] started requiring caddies to wear bibs during tournaments" and "when the names of [TOUR] events began changing from generic names such as the San Diego Open to 'sponsored' names such as the Farmers Insurance Open." (*Id.*)

On December 10, 2015, the parties filed a joint stipulation in response to the district court's request for supplemental briefing. (ER2.0025-0130.) In that filing, the parties stipulated to the authenticity of (i) the TOUR's media guides that showed the names of TOUR events dating back to 1980, and (ii) photographs that depicted caddies at approximately four dozen tournaments from the Miller High Life Open tournament in 1957 (ER2.0034) to the RSM Classic tournament on November 22, 2015 (ER2.0072). Neither party submitted any additional material beyond what the parties had jointly submitted to the district court, and neither party objected to the district court's consideration of the jointly submitted media guides and photographs in connection with the motion to dismiss.

On February 9, 2016, the district court granted the TOUR's motion to dismiss the Caddies' complaint with prejudice. (ER1.0004-0018.) Contrary to the Caddies' repeated assertions, the district court dismissed the complaint *solely* on

the basis of (i) allegations pleaded within the four corners of the complaint, (ii) documents referenced in, but not attached to, the complaint and (iii) facts upon which the court could take judicial notice and to which the Caddies conceded in their briefing on the motion to dismiss. None of these bases for the dismissal converted the TOUR's motion to dismiss into a motion for summary judgment, or entitled the Caddies to embark on potentially massive and expensive discovery.

In its decision, the district court correctly held that the Caddies had not pleaded—and could not plead—sufficient facts that, if true, would establish a plausible claim for relief under any of several legal theories that the Caddies asserted. Based on the express language of the registration and credentialing agreements that each Caddie signed as a condition of his or her participation at a TOUR tournament and the Caddies' own concession that “the PGA [TOUR] has required caddies to wear bibs for decades” (ER1.0008), the district court held that the Caddies had consented to wear the bibs. (ER1.0009.) The district court further held that, having been required to wear the bibs for many years, the Caddies could not plead facts that, if true, would plausibly show that they agreed to the uniform policy under duress. (ER1.0011.)

The district court then held that, having consented to wear the bibs during tournament play, the Caddies could not state a plausible claim for breach of contract (ER1.0009), unjust enrichment (ER1.10011-0012), misappropriation of the

Caddies' likenesses in violation of the Caddies' rights of publicity (ER1.0012-0013), or false endorsement in violation of the Lanham Act (ER1.0017). In addition, the district court held that the Caddies had not pleaded facts that, if proven, would establish a plausible relevant product market definition, without which the Caddies could not prevail on their antitrust claims. (ER1.0013-0017.) Finally, in view of the deficiencies in each of their predicate claims, the district court held that the Caddies could not plead a plausible claim for relief under California's unfair competition law. (ER1.0017-0018.)

The Caddies filed their notice of appeal on March 7, 2016. (ER1.0001.)

SUMMARY OF ARGUMENT

The district court's decision dismissing the Caddies' complaint with prejudice should be affirmed in all respects.

The district court correctly held that the relevant provision of the caddie registration and regulations agreement, to which all Caddies agree at each TOUR event at which they work as a caddie, was susceptible to only one reasonable interpretation: that the TOUR may prescribe, and the Caddies agree to wear, the caddie bibs as the caddie uniform during all TOUR events. The district court properly held that the Caddies could not plead facts to show that their consent to the relevant contractual provision was procured by coercion or duress. Because the Caddies had agreed to the provision, the district court correctly held that they could not,

as a matter of law, plead a plausible claim for breach of contract, unjust enrichment, misappropriation of their likenesses in violation of their rights of publicity or false endorsement in violation of the Lanham Act. This Court should affirm each of those holdings.

The district court also correctly held that the Caddies could not state a plausible antitrust claim because their proposed relevant market definitions—“the national market for the endorsement of products and services by participants in professional golf tournaments” and “the national . . . market for in-play or in-action commercial advertising at professional golf events between commercial breaks”—were implausible and artificial, having been contorted to fit the Caddies’ litigation needs. That holding, too, should be affirmed. The dismissal of the Caddies’ antitrust claims may also be affirmed on the alternative grounds that, as a matter of law, the TOUR’s conduct in managing the appearance and presentation of its own professional golf tournaments, including the advertising at those tournaments, and its enforcement of the Caddies’ agreement to wear the caddie bibs, are not anticompetitive, are not the product of an unlawful conspiracy with local tournament hosts or the Caddies themselves, and do not constitute an unlawful tying arrangement. Thus, even if the Caddies could somehow plead facts to support a narrow relevant product market, each of their antitrust claims would still fail as a matter of law, and this Court should affirm the dismissal of those claims.

And finally, the district court correctly held that, in light of the fatal deficiencies in the Caddies' other claims, the Caddies could not plead a plausible unfair competition claim under Section 17200 of the California Business and Professions Code. The dismissal of that claim should likewise be affirmed.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of a motion to dismiss. *Ebner v. Fresh, Inc.*, 818 F.3d 799, 803 (9th Cir. 2016). A motion to dismiss is proper under Rule 12(b)(6) where the pleadings "fail[] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 679.

The Caddies' "obligation to provide the 'grounds' of [their] 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citations omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. On a motion to dismiss, a court must consider only factual allegations, ignoring conclusory

statements unsupported by factual pleadings. *Id.* at 681 (naked legal conclusions unsupported by factual allegations are “disentitle[d] . . . to the presumption of truth”); *Twombly*, 550 U.S. at 555 (court is “not bound to accept as true a legal conclusion couched as a factual allegation” (citation omitted)). Moreover, it is well established that, on a motion to dismiss, the court is not “required to accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Daniels-Hall v. National Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010); *see also Mendes v. FedEx Ground Package Sys., Inc.*, No. 14-cv-03826-SI, 2015 WL 217920, at *2 (N.D. Cal. Jan. 15, 2015).

These requirements call on the district court—and, on appeal, this Court—to ensure that the allegations are sufficient “to raise a right to relief above the speculative level,” so as to justify the “potentially enormous expense of discovery.” *Twombly*, 550 U.S. at 559. Particularly in complex antitrust cases, where discovery “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 v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008), this standard requires that courts serve a critical gate-keeping role, weeding out cases early that do not plead facts that, if proven, would plausibly show that the plaintiff is entitled to

the relief it seeks. *See Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015) (“whatever its merits may be for deciding antitrust claims, [the Rule of Reason’s] ‘elaborate inquiry’ produces notoriously high litigation costs and unpredictable results.” (citation omitted)).

In addition to the allegations in the complaint, courts ruling on a motion to dismiss may consider facts of which they may take judicial notice. *See, e.g., Lomely v. JP Morgan Chase Bank, N.A.*, No. 5:12-CV-01194-EJD, 2012 WL 4123403, at *2 (N.D. Cal. Sept. 17, 2012) (on a motion to dismiss, “the court may properly take judicial notice of matters in the public record pursuant to Federal Rule of Evidence 201(b)”). A fact is judicially noticeable if it is not subject to reasonable dispute because it “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). A court’s decision to take judicial notice is reviewed for abuse of discretion. *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1016 n.9 (9th Cir. 2012).

In this regard, courts “may take judicial notice of documents which are referenced in but not appended to the pleadings, and whose authenticity no party disputes.” *Northstar Fin. Advisors, Inc. v. Schwab Invs.*, 781 F. Supp. 2d 926, 942 (N.D. Cal. 2011) (citing *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002)). Courts may also consider factual concessions by the nonmoving party

made during the briefing and oral argument of the motion to dismiss. *See Scognamillo v. Credit Suisse First Boston LLC*, No. C03-2061 TEH, 2005 WL 2045807, at *9 (N.D. Cal. Aug. 25, 2005), *aff'd*, 254 F. App'x 669 (9th Cir. 2007). Thus, although, when reviewing the grant of a motion to dismiss under Rule 12(b)(6), appellate courts should “accept the well-pleaded factual averments of the . . . complaint as true, and construe these facts in the light most flattering to the plaintiffs’ cause,” they may reject “those ‘facts’ which have since been conclusively contradicted by plaintiffs’ concessions or otherwise.” *Chongris v. Board of Appeals*, 811 F.2d 36, 37 (1st Cir. 1987).

Furthermore, as the Caddies concede (App. Br. at 10), courts may take judicial notice of, and consider on a motion to dismiss, matters of public record without converting the motion to one for summary judgment under Rule 12(d). *See, e.g., Intri-Plex Techs., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (“[a] court may take judicial notice of “matters of public record” without converting a motion to dismiss into a motion for summary judgment,’ as long as the facts noticed are not ‘subject to reasonable dispute.’”) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)); *Mir v. Little Co. of Mary. Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988) (“[I]t is proper for the district court to ‘take judicial notice of matters of public record outside the pleadings’ and consider them for purposes of the motion to dismiss” (citation omitted)); *Appling v. Wachovia Mort-*

gage, FSB, 745 F. Supp. 2d 961, 967 (N.D. Cal. 2010) (“a court may take judicial notice of matters of public record outside the pleadings” without converting the motion to dismiss into a motion for summary judgment).

Matters of public record include, for instance, the names of the golf tournaments since 1980 and the authenticity of the photographs to which the Caddies stipulated. *See, e.g., Matthews v. National Football League Mgmt. Council*, 688 F.3d 1107, 1113 n.5 (9th Cir. 2012) (sports scheduling statistics available on the NFL’s website and to which the plaintiff did not question the accuracy were matters of public record of which the court could take judicial notice); *Comedy III Prods., Inc. v. New Line Cinema*, 200 F.3d 593, 594 (9th Cir. 2000) (affirming dismissal of lawsuit where district court took judicial notice of the contents of a motion picture).

And courts may rely on their experience and common sense in ruling on a motion to dismiss. “Determining whether a complaint states a plausible claim for relief is ‘a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.’” *Ebner*, 818 F.3d at 803 (quoting *Iqbal*, 556 U.S. at 679); *see also Stuart v. Cadbury Adams USA, LLC*, 458 F. App’x 689, 690 (9th Cir. 2011) (affirming dismissal of plaintiff’s claims where they “def[ined] common sense”). If an assertion is implausible or illogical, it need not be credited as true for purposes of deciding the motion. *See, e.g., Blantz v. California Dep’t of*

Corr. & Rehab., 727 F.3d 917, 922 (9th Cir. 2013) (“On a motion to dismiss . . . we need not accept as true factual allegations that are not plausible on their face.”).

This Court need not restrict its review to the grounds articulated by the district court for dismissal, but may affirm the lower court decision for any reason supported in the record. *Ebner*, 818 F.3d at 803 (“We may ‘affirm the district court’s dismissal on any ground supported by the record.’” (citation omitted)); *Salazar v. Brown*, 616 F. App’x 354, 355 (9th Cir. 2015) (“We may affirm on any ground supported by the record.” (citation omitted)); *McCulley v. Schwenn*, 220 F. App’x 475, 475 (9th Cir. 2007) (“we may ‘affirm the district court on any ground supported by the record, even if the ground is not relied on by the district court.’” (citation omitted)); *Daniels-Hall*, 629 F.3d at 998 (court may affirm the dismissal of the complaint “on any ground raised below and fairly supported by the record.” (citation omitted)); *Tanaka v. University of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001) (“Of course, ‘[o]ur review is not limited to a consideration of the grounds upon which the district court decided the issues; we can affirm the district court on any grounds supported by the record.’” (citation omitted)).

Finally, the district court may dismiss a complaint with prejudice and without leave to amend where amendment would be futile. *See, e.g., Bloom v. Martin*, 77 F.3d 318, 321 (9th Cir. 1996). This Court reviews the district court’s denial of

leave to amend for abuse of discretion. *Ebner*, 818 F.3d at 803; *Alvarez v. Chevron Corp.*, 656 F.3d 925, 931 (9th Cir. 2011).

ARGUMENT

I. **THE DISTRICT COURT PROPERLY HELD THAT THE CADDIES HAD CONSENTED TO WEAR THE CADDIE BIB**

The district court began its analysis of the Caddies' claims by examining whether the terms of the caddie registration and regulations agreement, which the Caddies signed before each TOUR tournament at which they worked as caddies, authorized the TOUR to require the Caddies to wear the caddie bibs. (ER1.0006-0009.) The district court correctly held that resolution of that question turned on the construction of the uniform and dress policy in the caddie agreement that, as stated above, provides:

Caddies shall wear uniforms and identification badges as prescribed by the host tournament and PGA TOUR. All caddies are required to wear solid-colored, Khaki-style long pants, which touch the top of the shoe, or solid-colored, knee-length, tailored shorts and a collared shirt while on club property. T-shirts, jeans, culottes, skirts, shorts, capris, cut-off shorts and cargo-style shorts are not permitted. Acceptable colors shall be determined at the discretion of the Tournament Director.

(ER2.0238 ¶ 2.)

And the district court properly held that the provision is not ambiguous. It has only one reasonable interpretation: the TOUR may prescribe, and the Caddies agree to wear, the caddie bibs as the uniform prescribed by the host tournament

and TOUR. (ER1.0008.) Indeed, the caddie bib is the *only* uniform piece of apparel that all caddies wear at any given tournament. It identifies each player and the tournament. It *is* the uniform. Where, as here, there “is only one reasonable interpretation based on the contract’s words and the context, both textual and practical, in which the words are used . . . [t]he agreement is unambiguous on its face.” *Smith v. Simmons*, 638 F. Supp. 2d 1180, 1194 (E.D. Cal. 2009), *aff’d*, 409 F. App’x 88 (9th Cir. 2010).

The district court considered whether, read in isolation, the second sentence of the provision might be understood as modifying the first sentence, so that the kinds of “uniforms and identification badges” that the TOUR may “prescribe” include only the type and color of the pants and shirts that caddies may wear. (ER1.0008.) But the Caddies have never advocated such a construction, and the district court properly rejected it as unreasonable. (*Id.*) Indeed, on appeal, the Caddies continue to eschew such a construction, arguing that the final three sentences of the provision do not describe a “uniform.” Rather, these sentences permit “one caddie [to] wear navy low-top tennis shoes with khaki pants and a blue collared shirt while another caddie may wear brown high-top basketball shoes with khaki shorts and a beige collared shirt. Because [these sentences] allow for numerous, vastly different combinations, the contract language allows too many vari-

able to be deemed a ‘uniform policy.’” (App. Br. at 50.)³ By contrast, as the Caddies alleged in their complaint, all the Caddies “are forced to wear identical bibs during a given tournament” (ER3.0303 ¶ 103); the caddie bibs are the sole uniform piece of apparel that all caddies wear and the only apparel that identifies the relevant golfer and the tournament.⁴

Finally, the district court properly held that, in light of the Caddies’ factual pleadings that the TOUR had consistently enforced its contractual right to require the Caddies to wear the bibs during tournaments, the Caddies could not plausibly allege that the TOUR had relinquished that contractual right. (ER1.0009.) Accordingly, the court correctly concluded, amendment would be futile. *See, e.g.,*

³ The Caddies’ counsel made the same point during oral argument below, explaining to the district court: “You can wear different-colored shorts. You don’t have to wear the same shoes. You can wear slacks instead of shorts. There’s no requirement what color you wear. There’s no requirement which hat you wear. *I don’t think anywhere else in the world somebody would call that a uniform.*” (ER2.0207 (emphasis added).)

⁴ Moreover, the only uniform “prescribed by the host tournament and PGA TOUR” is the caddie bib. The Caddies expressly alleged that the local host tournament and the TOUR collectively design the bib for each tournament and, while the bib is different for each tournament, it is identical—uniform—for every caddie at any particular tournament. (ER3.0291 ¶ 68 (“Local Hosts and Defendant work together to design the bibs”); *see also* ER3.0283 ¶ 12; ER3.0302-0304 ¶¶ 101, 103, 105 (making similar allegations).) By contrast, the Caddies did not allege that the host tournaments play any role in the prescription of the apparel described in the last three sentences of the provision at issue; the fact that those sentences appear in the contracts to which the Caddies agree at every tournament compels the conclusion that the TOUR independently has established those clothing guidelines in its caddie agreements.

Stone v. Travelers Corp., 58 F.3d 434, 437 n.1 (9th Cir. 1995) (leave to amend need not be given where a plaintiff cannot cure defects in his complaint without alleging facts inconsistent with prior iterations of the complaint).

Rather than advocate for the alternative construction that the district court considered and rejected, the Caddies argue at length simply that the district court should not have considered judicially noticeable facts outside the complaint, which, they claim, converted the motion to dismiss to a motion for summary judgment under Rule 12(d), entitling them to conduct wide-ranging discovery. In addition, while never articulating their own construction of the relevant contractual provision, the Caddies baselessly assert that the provision is ambiguous and that the prescribed uniform they have agreed to wear cannot include the caddie bib because its inclusion as part of the uniform would interfere with the Caddies' exercise of their alleged rights under the Player Endorsement Policy. (App. Br. at 40-41, 48-50.) As shown below, these arguments fail for several reasons.

A. The District Court Considered Only Allegations and Evidence That Could Properly Be Considered on a Motion to Dismiss

Contrary to the Caddies' contention, the district court considered only materials that could properly be considered on a motion to dismiss under Rule 12(b)(6). Specifically, it considered (i) the allegations of the complaint, (ii) documents, like the caddie registration and regulations agreement and the player handbook, which

were referenced in, but not attached to, the complaint, and (iii) the Caddies' concession in their briefing that the TOUR has required caddies to wear the caddie bibs "for decades." (ER1.0008.)

The Caddies obviously cannot challenge the district court's authority to consider the complaint's allegations, and they explicitly "do not take issue with the district court's consideration of agreements referenced in the Caddie's Complaint." (App. Br. at 11.) Rather, they rail against the district court's request for judicially noticeable facts regarding when the TOUR began requiring caddies to wear caddie bibs and when the TOUR began to enlist corporate title sponsors for its tournaments (*id.*), even though they concede that the district court did not cite any of the documents that *the Caddies and the TOUR jointly* submitted in response to that request. (*Id.* at 13.)⁵

The stipulated media guides and photographs are matters of public record, and their consideration by the district court, if it had occurred, would not have converted the TOUR's motion to dismiss into one for summary judgment. In actuality, however, beyond the allegations in the complaint and the documents refer-

⁵ Although the Caddies now tell this Court that the TOUR presented the requested response and that the response was disputed (App. Br. at 11 n.6), in fact, the parties *jointly* presented the media guides and photographs in response to the district court's request, *and stipulated to the authenticity of the submitted materials*. (ER2.0025-0130.)

enced in, but not appended to, the complaint, the district court based its construction of the relevant contractual provision on *the Caddies' own explicit concession* that the TOUR has required caddies to wear caddie bibs for decades. The district court's consideration of that concession was entirely proper, *Chongris*, 811 F.2d at 37; *Scognamillo*, 2005 WL 2045807, at *9, and provides no basis for reversal of the decision below.

B. The Caddies' Argument That the Uniform Cannot Include the Caddie Bibs Is Baseless

Though they never articulate their own construction of the uniform policy, the Caddies argue that the policy cannot include the caddie bibs because inclusion of the bibs as part of the uniform would interfere with the Caddies' exercise of their purported rights under the Player Endorsement Policy. The Caddies rely on the provision of the caddie registration and regulations agreement that states that the Caddies' "clothing must conform to the Player Endorsement Policy as stated in the PGA TOUR Player Handbook and Tournament Regulations." (ER3.0292 ¶ 73; ER2.0238.) They argue that that language grants them the same rights to display sponsor names or logos on their clothing as the rights granted to the players, and, because the players are not required to wear a caddie bib, the caddie contract should not be read to require the Caddies to do so.

The Caddies' argument is meritless.

First, it overstates the Caddies' contractual right to display sponsor names or logos on their clothing during tournaments. That right is not unfettered, but is expressly controlled by the TOUR, which, as the Caddies concede, limits the size and placement of logo displays and restricts the types of products that a player or caddie may endorse. (ER3.0292 ¶ 71.) In addition, the Player Endorsement Policy makes clear that “[a]ll sponsorships, endorsements and promotional activities . . . are subject to the approval of the PGA TOUR.” (ER2.0252.) Thus, without the approval of the TOUR, the Caddies simply are not free to display the name or logo of a sponsor on their clothing during a TOUR tournament.

Second, the Caddies' argument would nullify the uniform policy provision to which the Caddies, but not the players, have agreed as a condition of their participation at TOUR events. A fundamental rule of contract construction is that “one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same [agreement] inconsistent.” *Bayview Hunters Point Community Advocates v. Metropolitan Transp. Comm’n*, 366 F.3d 692, 700 (9th Cir. 2004); *see also Logan v. Union Sec. Ins. Co.*, No. CV 14-1174 DMG(Ex), 2015 WL 3745047, at *11 (C.D. Cal. Mar. 31, 2015) (a contract must be read as a whole and should not be construed in a manner that ignores specific provisions of the agreement or renders them superfluous); 11 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 32:5 (4th ed. 2012) (“An

interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless or inexplicable.”); Restatement (Second) of Contracts § 203(a) (Am. Law. Inst. 1981) (“an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect”); 17A Am. Jur. 2d *Contracts* § 335 (2004) (“contracts must be construed so as to give effect to every word or phrase as far as practicable”). Read together, as they must be, the Player Endorsement Policy and the uniform policy permit Caddies who are able to obtain endorsement deals from sponsors that are approved by the TOUR to display those sponsors’ names and logos on that part of their clothing not covered by the caddie bib (*e.g.*, their shirt sleeves) or at times when the Caddies are not required to wear the bib (*e.g.*, outside of tournament play).

Third, the Caddies’ argument ignores the Caddies’ lengthy course of dealing with both the TOUR and the players, during which the Caddies have consistently worn uniform caddie bibs at TOUR events. As the Caddies themselves conceded, the TOUR “has required caddies to wear bibs for decades.” (ER1.0008.) The parties’ course of dealing under a contract “is a consideration of much importance in ascertaining its meaning, and that consideration is entitled to great, if not controlling, weight in ascertaining the parties’ understanding of the contract terms and language.” 17A Am. Jur. 2d *Contracts* § 354 (2004); *see also* Restatement (Sec-

ond) of Contracts § 202(4) (Am. Law. Inst. 1981) (“Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.”).

The district court properly considered the language of the agreement and the parties’ prior course of dealing, as alleged in the complaint and as conceded by the Caddies during briefing and oral argument, and held that, as a matter of law, the only reasonable interpretation of the relevant contractual language permits the TOUR to require the Caddies to wear the caddie bibs. (ER1.0008.) The express contractual language and the parties’ lengthy course of dealing compelled the conclusion that, as a matter of law, no reasonable caddie signing the caddie registration and regulations agreement after 2010 could have believed that he or she retained the right not to wear a bib during a tournament. (ER1.0008-0009.) And because the only reasonable construction of the contract is that the caddies agreed that the TOUR could require them to wear the bibs (ER1.0009), the contract is not ambiguous; it may be construed as a matter of law on a motion to dismiss. *See, e.g., Smith*, 638 F. Supp. 2d at 1193 (where “the language of the contract cannot reasonably be construed as a party suggests then the Court will find that the contract is not ‘ambiguous’ and the inquiry is over”); *see also Skilstaf*, 669 F.3d at

1017 (conclusion that contractual language is reasonably susceptible to only one interpretation can be reached on a motion to dismiss).

In sum, the district court properly held that the Caddies had consented to wear the caddie bib as a condition of their participation at TOUR events. This Court should affirm that holding.

II. THE DISTRICT COURT PROPERLY HELD THAT THE CADDIES' CLAIM OF DURESS WAS IMPLAUSIBLE

The district court properly held that the allegations of the complaint could not support a theory of economic coercion or duress. (ER1.0011.) The district court correctly stated that a party seeking rescission of a contract on the grounds that it was procured under duress must show that he or she was actually coerced, meaning that he or she had no reasonable alternative but to agree to the contract. (*Id.* (citing *CrossTalk Prods., Inc. v. Jacobson*, 76 Cal. Rptr. 2d 615, 623 (Cal. Ct. App. 1998).) As the district court succinctly explained:

California courts have held a person had no reasonable alternative “when the only alternative is bankruptcy or financial ruin.” The doctrine does not allow for rescission of contracts that are merely the result of “[h]ard bargaining,” as opposed to the kind of extreme financial coercion that leaves a person with no real choice but to agree.

(*Id.* (citations omitted)); *see also B&O Mfg., Inc. v. Home Depot U.S.A., Inc.*, No. C 07-02864 JSW, 2007 WL 3232276, at *5 (N.D. Cal. Nov. 1, 2007) (granting motion to dismiss duress claim where plaintiff could not allege facts which, if true,

“would show that it was deprived of its free will” and had no reasonable alternative but to succumb to the terms or face bankruptcy or financial ruin).

The district court explained that, in light of the TOUR’s lengthy history of requiring caddies to wear caddie bibs at TOUR events, no reasonable caddie could have embarked on a career as a caddie with the expectation that he or she would be exempt from wearing the bib or would be able to realize endorsement earnings from the display of sponsor names or logos on the part of their shirts covered by the bib. (ER1.0011.) Accordingly, the district court correctly concluded that the Caddies’ claim that they were coerced into agreeing to wear the bib on threat of extreme economic hardship—that the only alternative to signing the agreement would have been bankruptcy or financial ruin—was not plausible. (*Id.*)

The Caddies nevertheless argue that they were coerced by the TOUR to agree to wear the caddie bib by threats that they would not be permitted to work as caddies at any TOUR event where they refused to wear the bib. But merely desiring the benefits of the contract or even suffering some financial difficulty in the absence of the contract is insufficient to show a deprivation of free will or a threat of bankruptcy or financial ruin. *B&O Mfg., Inc.*, 2007 WL 3232276, at *5. The Caddies’ desire to work as caddies for players participating in TOUR events does not establish that they have no other employment opportunities (as caddies or otherwise).

As a matter of law, the Caddies cannot plead facts sufficient to show that their agreement to the challenged uniform policy was made under duress.⁶ This Court should affirm the dismissal of the Caddies' duress claim.

III. THE DISTRICT COURT PROPERLY HELD THAT THE CADDIES COULD NOT STATE A PLAUSIBLE CLAIM FOR BREACH OF CONTRACT, UNJUST ENRICHMENT, RIGHT OF PUBLICITY, OR FALSE ENDORSEMENT

The district court's holding that, as a matter of law, the Caddies had consented to wear the caddie bib at TOUR events led the district court correctly to conclude that the Caddies could not state a plausible claim for breach of contract, unjust enrichment, misappropriation of their likenesses in violation of their rights of publicity, or false endorsement under the Lanham Act. As demonstrated below, this Court should affirm each of those conclusions.

⁶ The dismissal of the Caddie's duress claim should be affirmed for the independent reason that the Caddies do not seek to rescind the caddie registration and regulations agreements; they have accepted the benefits of being permitted to work as caddies at TOUR events under those agreements, and impermissibly ask the courts simply to excise the portion of the agreement that the Caddies do not like. *See, e.g., Hotel Emps. & Rest. Emps. Union v. Marriott Corp.*, No. C-89-2707 MPH, 1993 WL 341286, at *9 (N.D. Cal. Aug. 23, 1993) ("It should be beyond cavil that a party cannot reap the benefits of a bargain and then exercise its right to rescind.").

***A. The District Court Properly Dismissed
the Caddies' Breach of Contract Claim***

The Caddies' breach of contract claim is simply this: by requiring the Caddies to wear the bibs at TOUR events, the TOUR breached the endorsement provision of the caddie registration and regulations agreement, which the Caddies claim grants them the same rights to display their own sponsors' names and logos on their clothing as the rights granted to the players. (ER3.0313 ¶ 140.) But because, as the district court properly held, the Caddies freely and without duress agreed to wear the bibs as a condition of their participation as caddies at TOUR events, their breach of contract claim must fail as a matter of law. *See Burke v. TV Guide Magazine Group, Inc.*, 442 F. App'x 356, 358 (9th Cir. 2011) (affirming dismissal of breach of contract claim where challenged conduct was specifically authorized by the parties' contract). By agreeing to wear the bibs, the Caddies relinquished any right they allegedly otherwise would have had to display their own sponsors' names or logos on the parts of their shirts covered by the bibs. (ER1.0009.)

Accordingly, this Court should affirm the dismissal of the Caddies' breach of contract claim.

***B. The District Court Properly Dismissed
the Caddies' Unjust Enrichment Claim***

As the district court correctly observed, there is no independent cause of action for "unjust enrichment" in California. (ER1.0011 (citing *Astiana v. Hain Ce-*

lestial Group, Inc., 783 F.3d 753, 762 (9th Cir. 2015)).) When faced with such a claim, the court may construe it as a quasi-contractual claim for restitution. (*Id.* (citing *Rutherford Holdings, LLC v. Plaza Del Rey*, 166 Cal. Rptr. 3d 864, 872 (Cal. Ct. App. 2014)).) But, as the district court also properly held, where a valid contract governs the very matter in dispute and permits the challenged conduct, a quasi-contractual claim for restitution must fail as a matter of law. (ER1.10011-0012.)

The legal underpinnings of the district court’s dismissal of the Caddies’ unjust enrichment claim are amply supported. *See, e.g., U.S. Capital Partners, LLC v. AHMSA Int’l, Inc.*, No. 12-6520 JSC, 2013 WL 594285, at *5 (N.D. Cal. Feb. 14, 2013) (“[A] plaintiff may not maintain quasi-contract claims such as unjust enrichment [and] money had and received . . . ‘if the parties have an enforceable agreement regarding a particular subject matter.’” (citation omitted)); *Hedging Concepts, Inc. v. First Alliance Mortgage Co.*, 41 Cal. App. 4th 1410, 1419-20 (Cal. Ct. App. 1996) (no quasi-contractual claim for quantum meruit will lie in face of valid contract covering the disputed conduct).

Accordingly, this Court should affirm the dismissal of the Caddies’ unjust enrichment claim.⁷

⁷ The Caddies’ argument that the district court ignored their “equitable claims” for quantum meruit and for money had and received (App. Br. at 53) is specious. (cont’d)

***C. The District Court Properly Dismissed
the Caddies' Right of Publicity Claim***

The district court properly dismissed the Caddies' claim that the TOUR misappropriated their likenesses in violation of their right of publicity by televising them wearing the caddie bibs while participating as caddies at TOUR events. The district court held that this claim was implausible in light of the Caddies' consent to the terms of the caddie registration and regulations agreement. (ER1.0012.) In addition to having consented to wear the caddie bib as the uniform prescribed by the TOUR, the Caddies also agreed, in the same contract, to permit the TOUR to use their likenesses in connection with broadcasts of the tournaments at which they caddie:

I hereby grant and assign to PGA TOUR, without limitation, my individual television, radio, motion picture, photographic, electronic, 'Interactive Applications' . . . and all other similar or related media rights with respect to my participation in the Tournament, Pro-Am or any other golf event conducted in conjunction with the Tournament or any portion thereof.

(ER2.0238.)

(cont'd from previous page)

Those claims, together with the unjust enrichment claim—which the Caddies asserted in their second amended complaint as a single claim entitled “Unjust Enrichment, Quantum Meruit, and Money Had and Received” (ER3.0313-0314)—are all quasi-contractual claims for restitution that, for the reasons articulated by the district court and explained above, fail where, as here, the parties' express contract addresses the same subject matter.

It is well settled that consent to the challenged use is an absolute bar to a right of publicity claim. *See, e.g., Newton v. Thomason*, 22 F.3d 1455, 1460-61 (9th Cir. 1994); Cal. Civ. Code § 3344(a); Restatement (Third) of Unfair Competition § 46 cmt. f (Am. Law Inst. 1995) (“Conduct that would otherwise infringe the personal or commercial interests protected by the rights of privacy and publicity is not actionable if the conduct is within the scope of consent given by the holder of the right.”). By consenting to wear the bibs at TOUR tournaments, and by authorizing the TOUR to use their likenesses in connection with broadcasts of those tournaments, the Caddies necessarily consented to being shown in bibs as part of such broadcasts. The district court’s dismissal of the Caddies’ right of publicity claim on this ground was therefore proper, and should be affirmed.

Moreover, in addition to the express consent granted in the relevant caddie agreements, the Caddies also implicitly consented to being shown wearing bibs in TOUR broadcasts when they physically donned the bibs and caddied at TOUR tournaments—all while agreeing that the TOUR could (and knowing that the TOUR would) broadcast images of them engaged in such activity. It is well-established that a right of publicity claim cannot stand in such circumstances. *See, e.g., Jones v. Corbis Corp.*, 815 F. Supp. 2d 1108, 1111-14 & n.2 (C.D. Cal. 2011) (finding consent where plaintiff walked down red carpet knowing she would be photographed and that the photographs would be distributed to the press), *aff’d*,

489 F. App'x 155 (9th Cir. 2012); *Madama v. Genesis Rehab Servs.*, No. 12-1451 (MLC), 2014 WL 3695976, at *6 (D.N.J. July 24, 2014) (finding consent where plaintiff “willingly posed for the photographs and videos, knowing that the images of her would be used in connection with the Gen-Chi[®] program”).

The Caddies’ effort to save their right of publicity claim by attempting to distinguish between “marketing rights” and “media rights”—the latter of which they unquestionably granted to the TOUR—is unavailing for several reasons. First, the reference to “marketing rights” from which the Caddies’ argument derives is found, not in any agreement to which they are parties, but in the *Player Handbook*, which relates to the TOUR’s relationship with golfers; the “marketing rights” provision is *not* incorporated by reference or otherwise into the caddie agreements. Moreover, even as to the golfers, individual marketing rights are expressly subordinated to the TOUR’s media rights in connection with broadcasts of TOUR tournaments: “*Aside from the assignment of individual television and similar rights provided for herein, nothing in these Regulations shall be deemed to restrict any member’s individual marketing rights.*” (ER3.0395 (emphasis added).)

Finally, as shown above, the Caddies’ repeated contention (App. Br. at 44) that their consent to wear the bibs or to the use of their publicity rights was obtained under duress or coercion is meritless, and the district court properly rejected it as implausible. (ER1.0011.)

***D. The District Court Properly Dismissed
the Caddies' False Endorsement Claim***

The district court correctly held that the Caddies' Lanham Act claim for false endorsement requires an *unauthorized* use of the Caddies' identities. (ER1.0017.) Because the Caddies consented both to wearing the caddie bibs and to the TOUR's use of their likenesses in the broadcasting of TOUR tournaments, the district court correctly concluded that the Caddies could not establish a false endorsement claim as a matter of law. (*Id.*); *see, e.g., Madama*, 2014 WL 3695976, at *8 (rejecting false endorsement claim where plaintiff "was filmed and photographed, all while knowing that her likeness would be used by Defendant in commerce"); *Hart v. World Wrestling Entm't, Inc.*, No. 3:10-cv-0975 (SRU), 2012 WL 1233022, at *10 (D. Conn. Apr. 10, 2012) (dismissing false endorsement claim where defendant had contractual right to use name and likeness).

The false endorsement claim fails for the independent reason that the Caddies have pleaded no facts to show the TOUR's "uses of their likenesses was in any way false or misleading." *Dryer v. NFL*, 55 F. Supp. 3d 1181, 1203 (D. Minn. 2014), *aff'd*, 814 F.3d 938 (8th Cir. 2016). As the district court rightly recognized, the TOUR was authorized by the caddie agreements to "accurately depict the caddies participating in [its] tournaments" (ER1.0017), and there are no allegations that the TOUR did anything else. The complaint does not allege that there is anything untrue or misleading about what is displayed on the bibs. Because the caddie

bibs accurately identify the player for whom, and the tournament at which, each caddie is working (ER3.0280 ¶ 1), “a Lanham Act claim simply does not lie.” *Dryer*, 55 F. Supp. 3d at 1203 (footage of plaintiffs playing NFL football games in their NFL uniforms was not “in any way false or misleading” and could not, “as a matter of law, cause confusion or mistake or deceive anyone as to Plaintiffs’ affiliation with the NFL”); *see also Marshall v. ESPN Inc.*, 111 F. Supp. 3d 815, 836-37 (M.D. Tenn. 2015) (dismissing false endorsement claim based upon sporting event broadcasts in which plaintiffs participated); *Madama*, 2014 WL 3695976, at *8 (no false endorsement where “there was nothing ‘false’ about Defendant’s use of her likeness”).

Moreover, the Caddies cannot plausibly claim that the TOUR’s requirement that all caddies wear identical caddie bibs identifying the caddie’s employer and the name of the tournament confuses viewers into believing that each caddie has personally endorsed the tournament title sponsor or its products. It is common knowledge that sports organizations from the Premier League to the Little League display their sponsor’s name or logo on the participants’ uniforms. (ER2.0272.) Such an arrangement cannot plausibly be claimed to convey the notion that each participant wearing the uniform has personally endorsed the products of the team’s sponsor, just as the movie product placement arrangements to which the Caddies analogize (ER3.0298 ¶ 90 n.6) cannot plausibly be alleged to convey the notion

that the actors and others associated with the film personally endorse the displayed product. As the district court observed at oral argument, “It’s not plausible that anybody thinks that the caddies are the ones endorsing Buick when they’re wearing a bib that says ‘Buick Open PGA Tour.’” (ER2.0205.)

The Caddies’ agreement to wear the caddie bibs as a condition of their participation in a TOUR event simply does not plausibly mislead consumers or sponsors, and such an implausible claim was properly dismissed. *Ketab Corp. v. Mesriani Law Group*, No. 2:14-cv-07241-RSWL (MRW), 2015 WL 2084469, at *4 n.8 (C.D. Cal. May 5, 2015) (denying motion to reconsider dismissal of Lanham Act claim because plaintiffs had failed to plead plausible confusion).

IV. THE DISTRICT COURT PROPERLY HELD THAT THE CADDIES’ ANTITRUST CLAIMS WERE IMPLAUSIBLE

The district court dismissed the Caddies’ antitrust claims because it correctly concluded that the Caddies’ proposed relevant markets—which constitute a prerequisite for claims under both Section 1 and Section 2 of the Sherman Act, 15 U.S.C. §§ 1, 2—were implausible, artificial and contorted to meet the Caddies’ litigation needs. (ER1.0015-0017.) The district court therefore did not address the other serious deficiencies in the Caddies’ antitrust claims. As demonstrated below, the district court’s decision with respect to the implausibility of the Caddies’ proposed relevant markets is well supported, and this Court should affirm the dismis-

sal of the Caddie’s antitrust claims on that basis alone. Alternatively, this Court may affirm the dismissal of the Caddies’ antitrust claims on the basis of the other fatal flaws in the pleading of those claims.

A. *The District Court Properly Dismissed the Caddies’ Antitrust Claims for Lack of a Plausible Relevant Market*

“Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim.” *Tanaka*, 252 F.3d at 1063. A properly defined relevant market “includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand.” *Colonial Med. Group, Inc. v. Catholic Health Care W.*, 444 F. App’x 937, 938 (9th Cir. 2011) (citation omitted) (affirming dismissal of antitrust complaint because plaintiff’s market definition was “underinclusive” and failed to “encompass the product at issue *as well as all economic substitutes for the product*” (citation omitted)); *Person v. Google, Inc.*, No. C 06-7297 JF (RS), 2007 WL 1831111, at *3 (N.D. Cal. June 25, 2007) (dismissing complaint because there is “no basis for distinguishing the alleged ‘search advertising market’ from the larger market for Internet advertising . . . search-based advertising is reasonably interchangeable with other forms of Internet advertising”), *aff’d*, 346 F. App’x 230 (9th Cir. 2009). Where a proposed relevant market “clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff’s favor, the relevant market is legally insufficient

and a motion to dismiss may be granted.” *Queen City Pizza, Inc. v. Domino’s Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997).

The Caddies alleged that there are two relevant markets in which the TOUR has committed antitrust violations: the “Endorsement Market,” *i.e.*, “the national market for the endorsement of products and services by participants in professional golf tournaments,” and the “Live Action Advertising Market,” *i.e.*, “the national . . . market for in-play or in-action commercial advertising at professional golf events between commercial breaks.” (ER1.0014-0015.) The Caddies defined their Endorsement Market essentially as a subset of their Live Action Advertising Market. While the Caddies purported to limit their Endorsement Market to endorsements by golfers and caddies at live golf tournaments, they included in their Live Action Advertising Market such endorsements plus any other advertising, such as a logo displayed on the tournament leaderboard or on a bridge on the golf course. (ER1.0015; App. Br. at 28.) Both proposed relevant market definitions were limited to in-play advertising that viewers could see while viewing a professional golf tournament on television, and excluded televised advertising during commercial breaks. (*Id.*)

The Caddies sought to justify the narrowness of their alleged relevant market definitions by alleging that golf fans—the target audience of advertisers who would be the consumers in these alleged relevant markets—are older, affluent

white men who travel by airplane, vacation at golf resorts, and buy luxury goods and financial services. (ER1.0015; App. Br. at 23.) These golf fans might be tempted to turn the page of a magazine to avoid print advertising or to skip the commercial breaks on television, but, according to the Caddies, they would not be able to avoid seeing the personal endorsements and other “in-play or in-action commercial advertising . . . between commercial breaks” during televised TOUR events. (ER1.0015; App. Br. at 28.)

The district court correctly rejected the Caddies’ proposed relevant market definitions as implausibly narrow. As the district court explained, “[c]ompanies that wish to advertise things like golf balls or luxury watches to fans of pro golf can do so in a variety of ways: television ads, magazine ads, posters at golf course clubhouses, and more.” (ER1.0016.) While these forms of advertising are not identical, and each has differences with the others, they are nonetheless “reasonably interchangeable” by advertisers for the same purpose. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *see also Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (“The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”); *Queen City Pizza*, 124 F.3d at 437 (“Interchangeability implies that one product is roughly

equivalent to another for the use to which it is put; while there may be some degree of preference for the one over the other, either would work effectively.”).

The Caddies argue on appeal that the district court erroneously articulated the standard for determining “reasonable interchangeability” when it explained that it was not plausible that a price increase in in-play advertisement opportunities would have “no effect” on the demand for other types of advertising to golf fans. (App. Br. at 17-18.) According to the Caddies, the appropriate articulation of the standard for “reasonable interchangeability” is “the actual or potential ability to deprive [others] of significant levels of business.” (*Id.* (quoting *Newcal Indus., Inc. v. IKON Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008)).)

As the district court’s decision makes clear, however, the Caddies’ argument amounts to a distinction without a difference. The district court relied expressly on *Newcal* for its description of “reasonable interchangeability” (ER1.0013), and rightly held that, to survive the TOUR’s motion to dismiss their antitrust claims, the Caddies “must allege facts from which one could plausibly conclude that [the] different methods of advertising to golf fans are not reasonably interchangeable, such that even if the price of one advertising method went up in a meaningful way, companies would not switch to another method of advertising. The [C]addies have alleged no such facts.” (ER1.0016.)

More importantly, however one articulates the notion of “reasonable interchangeability,” the Caddies simply could not plead facts that, even if true, would plausibly support the counterintuitive assertion that personal endorsements by professional golfers and caddies at TOUR tournaments are so unique that advertisers can find no reasonably interchangeable substitute means of advertising to golf fans. *See, e.g., America Online, Inc. v. GreatDeals.Net*, 49 F. Supp. 2d 851, 858 (E.D. Va. 1999) (rejecting, on motion to dismiss, market definition limited to e-mail advertising where there “are numerous substitutes for e-mail advertising, some of which are less expensive, including use of the World Wide Web, direct mail, billboards, television, newspapers, radio, and leaflets, to name a few”). In *Adidas America, Inc. v. NCAA*, 64 F. Supp. 2d 1097 (D. Kan. 1999), for instance, the district court rejected a proposed market for advertising on uniforms and equipment during NCAA competitions. Dismissing the plaintiff’s complaint, the court held that the plaintiff had “fail[ed] to define the relevant market in terms of interchangeability and cross-elasticity of demand,” and had not adequately explained “why other similar forms of advertising, namely sponsorship agreements with teams or individuals competing in the National Football League, the National Basketball Association, the Women’s National Basketball Association, Major League Baseball, Major League Soccer, or the Olympics, are not reasonably interchangeable with NCAA promotion rights or sponsorship agreements.” *Id.* at 1103. As the

district court’s decision in the instant case makes clear, it would be implausible to conclude that the suppliers of other means of advertising to golf fans—telecasters, golf magazine producers, golf-oriented internet websites, golf course clubhouses—do not have the actual or potential ability to deprive the caddies of significant levels of business if the price of a caddie’s endorsement were to increase in a meaningful way.⁸

The Caddies also somewhat bizarrely accuse the district court of applying “logic” to its analysis of their proposed relevant market definitions. (App. Br. at

⁸ The district court assumed, for purposes of the TOUR’s motion to dismiss only, that fans of professional golf are uniquely attractive to certain advertisers in a way that fans of other sports are not. (ER1.0015 n.5.) But courts have frequently held that, as a matter of law, the interchangeability of various professional sports and other entertainment products precludes the conclusion that a single professional sport constitutes a relevant market for antitrust purposes. *See, e.g., Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 331 (2d Cir. 2008) (rejecting, on summary judgment motion, relevant market limited to licenses for Major League Baseball intellectual property that did not include the available substitutes for baseball intellectual property, such as licenses for “football, boxing, basketball, ice skating, hockey, and NASCAR” intellectual property); *Right Field Rooftops, LLC v. Chicago Cubs Baseball Club, LLC*, 136 F. Supp. 3d 911, 917 (N.D. Ill. 2015) (rejecting, on motion to dismiss, relevant market limited to live games of the Chicago Cubs baseball team because “a single brand product like producing live-action Cubs games cannot be a relevant market”); *Spinelli v. NFL*, 96 F. Supp. 3d 81, 112 (S.D.N.Y. 2015) (rejecting, on motion to dismiss, relevant market limited to NFL-related photographs that excluded other sports-related photographs where plaintiffs had not alleged facts to show “why the commercial licensing of MLB- or NCAA-related photographs (or any other sports-related photographs) is not reasonably interchangeable with the commercial licensing of NFL-related photographs”).

19-20.) As both this Court and the Supreme Court have instructed, in determining whether a party's assertions are plausible, courts must employ their "judicial experience and common sense." *Ebner*, 818 F.3d at 803 (quoting *Iqbal*, 556 U.S. at 679). The district court, therefore, need not have uncritically accepted the Caddies' conclusory assertions about their proposed relevant market definitions. *Twombly*, 550 U.S. at 555 (court is "not bound to accept as true a legal conclusion couched as a factual allegation" (citation omitted)). Rather, employing experience and common sense—and even logic—the district court was obligated to assess those assertions to determine whether they plausibly followed from the facts that the Caddies had pleaded. The district court met its obligation and held that they did not.

The district court's decision to dismiss the Caddies' antitrust claims on the ground that their proposed relevant market definitions were implausible, artificial, and contorted to meet the Caddies' litigation needs is well founded. Accordingly, it should be affirmed.

B. The District Court Could Have Dismissed the Caddies' Antitrust Claims Because of Their Other Fatal Deficiencies

In addition to the failure of their relevant market definitions, the Caddies' antitrust claims suffer from additional serious flaws that the district court did not

address. As explained below, these fatal defects provide alternative grounds for affirming the dismissal of the antitrust claims.

1. The Caddies Could Not Plead a Plausible Section 2 Monopolization Claim

Even if, counterintuitively, the Caddies were correct and the TOUR had created a product whose fans are so uniquely attractive to advertisers that personal endorsements and other “in-play or in-action commercial advertising . . . between commercial breaks” during televising TOUR events had no reasonably interchangeable substitutes for those advertisers, the Caddies still could not plead a plausible Section 2 claim. The Caddies pleaded no facts even to suggest that, in developing, organizing, managing and promoting its professional golf tournament product at which such advertising occurs, the TOUR has engaged in exclusionary conduct “as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident,” *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (monopolization), or “predatory or anticompetitive conduct” engaged in with “a specific intent to monopolize,” *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993) (attempted monopolization).

As a matter of law, the TOUR’s exercise of control over the visual appearance of its own tournaments, including the advertising that occurs at those tournaments, does not violate the antitrust laws. *See Apple, Inc. v. Psystar Corp.*, 586 F.

Supp. 2d 1190, 1198 (N.D. Cal. 2008) (citation omitted) (dismissing counterclaim and holding that “a company does not violate the Sherman Act by virtue of the natural monopoly it holds over its own product.”). As the Supreme Court has made clear:

The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.

Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (“*Trinko*”).

The TOUR legally created its professional golf tournament product through its own efforts and, in determining the aesthetic value of that product for golf fans and sponsors, has the right to deal, or refuse to deal, with whomever it likes, and to establish the terms on which it will deal with others. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). Subject to narrow exceptions not applicable here, the Sherman Act “does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.” *Trinko*, 540 U.S. at 408 (alterations in original) (citation omitted).

The TOUR also has the right to prevent others from “free riding” on its investment and innovation. *See, e.g., LiveUniverse, Inc. v. MySpace, Inc.*, No. CV 06-6994 AHM (RZx), 2007 WL 6865852, at *13 (C.D. Cal. June 4, 2007) (defendant’s refusal to allow competitor to advertise for free on its social networking site did not, as a matter of law, constitute exclusionary conduct, but was legitimate exercise of defendant’s right to prevent its rival from “free riding” on defendant’s investment and innovation), *aff’d*, 304 F. App’x 554 (9th Cir. 2008). In *Morris Communications Corp. v. PGA TOUR, Inc.*, 364 F.3d 1288 (11th Cir. 2004), the court affirmed the grant of summary judgment in favor of the TOUR, and held that the TOUR did not violate Section 2 when it refused to permit a rival website to sell scoring information from the TOUR’s real-time scoring system feed while in the media center at TOUR events. The court held that the TOUR was entitled to impose terms and conditions on those attending TOUR events and to prevent rivals from “free riding” on its technology investment and innovation, explaining that “refusal to deal that is designed to protect or further the legitimate business purposes of a defendant [*i.e.*, preventing “free riding”] does not violate the antitrust laws, even if that refusal injures competition.” *Id.* at 1295; *see also id.* at 1298.

Similarly, in *Sambreel Holdings LLC v. Facebook, Inc.*, 906 F. Supp. 2d 1070 (S.D. Cal. 2012), the court dismissed the plaintiffs’ antitrust challenge to defendant Facebook’s refusal to allow its rival to advertise on Facebook. The court

held that “Facebook has a right to control its own product, and to establish the terms with which its users, application developers, and advertisers must comply in order to utilize [the] product.” *Id.* at 1075. “There is no fundamental right to use Facebook,” the court continued, and “users may only obtain a Facebook account upon agreement that they will comply with Facebook’s terms, which is unquestionably permissible under the antitrust laws.” *Id.* at 1080 (citing *Trinko*, 540 U.S. at 408); *see also Facebook, Inc. v. Power Ventures, Inc.*, No. C 08-05780 JW, 2010 WL 3291750, at *13 (N.D. Cal. July 20, 2010) (dismissing Section 2 claim and holding that the antitrust laws do not obligate Facebook “to allow third-party websites unfettered access to its own website”).

Here, the TOUR has a legitimate business interest in preserving its investment in the creation, organization, promotion and operation of its golf tournaments. To protect that legitimate interest, and to prevent others from “free riding” on that investment, the TOUR has the clear legal right to establish the terms, including restrictions, on which caddies—as well as professional golfers, spectators, advertisers, the media, and anyone else—will be permitted access to a TOUR event. The Caddies have no fundamental right to work at a TOUR event, let alone the right to promise exposure to third-party sponsors and advertisers during TOUR-arranged telecasts, unless—and only to the extent that—the TOUR permits them to do so. And while the TOUR could ban all caddie endorsements altogether during a

TOUR event without violating the antitrust laws, it has adopted a policy that takes into account the TOUR's right to maintain the appearance of its tournaments, while permitting the Caddies to display sponsor logos that conform to the same guidelines as those applicable to professional golfers, provided that the Caddies adhere to the requirement that they wear the caddie bib during tournament play. Such a policy is unquestionably permissible under Section 2 and, on this alternative ground, the dismissal of the Caddies' Section 2 claim should be affirmed.

2. The Caddies Could Not Plead a Plausible Section 1 Conspiracy Claim

The TOUR's lawful unilateral conduct does not become an unlawful conspiracy to restrain trade when, having unilaterally adopted the challenged policy, the TOUR insists that others adhere to that policy as a condition of participating in a TOUR event. For an alleged agreement to constitute a violation of Section 1, an antitrust plaintiff must allege facts to establish that the parties to the agreement had a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 764 (citation omitted). As a matter of law, however, there is no such "conscious commitment to a common scheme designed to achieve an unlawful purpose" where one party establishes the terms on which it is willing to deal with others, and others acquiesce in, or agree to comply with, those terms as a condition of dealing.

More than thirty years ago, the Supreme Court made clear that a manufacturer “has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently . . . [a]nd a distributor is free to acquiesce in the manufacturer’s demand in order to avoid termination.” *Id.* at 761 (citations omitted). Courts have consistently applied that principle. In *Toscano v. Professional Golfers’ Association*, 258 F.3d 978 (9th Cir. 2001), the court rejected the conspiracy allegation of a golfer who claimed that the TOUR had conspired with local host organizations by agreeing to operate tournaments in accordance with the TOUR’s rules. The court held that the local host organizations’ agreement to adhere to the TOUR’s rules established “only that the local [host organizations] accepted the fact that the tournaments would be operated according to the [TOUR’s] rules and regulations, not that they agreed to use those rules to restrain trade.” *Id.* at 984. There was simply no cognizable conspiracy in violation of Section 1 where the TOUR “independently set the terms of the contracts, and the local [host organizations] merely accepted them.” *Id.*⁹

⁹ See also *American Airlines v. Christensen*, 967 F.2d 410, 413-14 (10th Cir. 1992) (no conspiracy where airline independently set the terms of its travel awards program and members merely accepted those terms); *Beutler Sheetmetal Works v. McMorgan & Co.*, 616 F. Supp. 453, 456 (N.D. Cal. 1985) (no conspiracy where investment company unilaterally established its “union-only” investment policy and real estate developers and mortgage lenders acquiesced in that policy).

In the instant case, the TOUR independently established the challenged policy requiring the Caddies to wear the caddie bib, and the Caddies plead no facts to suggest otherwise. They simply allege that each local host organization—which, in general, operates a single TOUR tournament (ER3.0291 ¶ 68; ER3.0302 ¶ 99)—has agreed to adhere to, and to enforce, the TOUR’s rules at its tournament. In addition, the Caddies allege that the TOUR has conspired with the Caddies themselves by coercing them to agree to the challenged policy, and that they have “unwillingly acquiesced” in the policy as a condition of their participation in TOUR events. (ER3.0306 ¶ 109.) But adherence to, or acquiescence in, the TOUR’s unilaterally developed terms and conditions is not cognizable as a conspiracy in violation of federal antitrust law.¹⁰

Thus, the Caddies pleaded no facts to support an actionable conspiracy in violation of Section 1. On that independent basis, the dismissal of the Caddies’ Section 1 claim should be affirmed.

3. The Caddies Could Not Plead a Plausible Section 1 Tying Claim

Finally, the Caddies’ assertion that the TOUR has engaged in illegal tying (ER3.0307-0309 ¶¶ 116-21) is wholly untethered to any legally cognizable theory

¹⁰ Importantly, the Caddies plead no factual allegations even to suggest that the scores of independent local host organizations have agreed with one another about anything.

of tying. As a matter of law, “[t]ying is defined as an arrangement where a supplier agrees to sell a buyer a product (the tying product), but ‘only on the condition that the buyer also purchases a different (or tied) product.’” *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1199 (9th Cir. 2012) (citation omitted); *accord Universal Grading Serv. v. eBay, Inc.*, 563 F. App’x 571, 572 (9th Cir. 2014). The Caddies pleaded no such arrangement. Rather, they described an arrangement pursuant to which the TOUR allegedly “sells” the Caddies access to its golf tournaments in exchange for “the purchase of” advertising services. Even if it were accurate—and it is not—that description bears no resemblance to an unlawful tying arrangement.

* * *

In short, the Caddies simply did not—and could not—plead a plausible violation of federal antitrust law. As the district court properly concluded, the Caddies’ proposed relevant market definitions were implausible, having been gerrymandered to suit their litigation strategy, and this Court should affirm the dismissal of the Caddies’ antitrust claims on that basis alone. Moreover, the TOUR has a right to establish the terms for the operation and promotion of, and participation in, its own tournaments and to insist that the Caddies adhere to those terms as a condition of their participation in a TOUR event. The TOUR has the right to regulate and control the exposure provided to third parties at its own tournaments to pre-

serve its image and reputation, as well as to maximize the value of the tournament. It has, as an accommodation to the players and their caddies, permitted the Caddies to utilize the TOUR-arranged telecasts to provide exposure to their sponsors and/or those of their golfers, but only to the extent that the Caddies' conduct does not interfere with the TOUR's own objectives and efforts to control the appearance of its tournaments and to maximize the value, visibility and appeal of its product for itself, its fans and its sponsors.

None of the TOUR's alleged conduct violates federal antitrust law. This Court should therefore affirm the district court's decision dismissing the Caddies' antitrust claims.

V. THE DISTRICT COURT PROPERLY HELD THAT THE CADDIES' UNFAIR COMPETITION CLAIM WAS IMPLAUSIBLE

Finally, the district court correctly held that the Caddies had not pleaded any predicate acts legally capable of constituting unlawful, unfair or fraudulent conduct under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.* ("UCL"). (ER1.0017-0018.) Where, as here, the Caddies' alleged predicate for its UCL claim is a meritless claim that does not qualify as "unlawful" conduct, the Caddies may not manufacture a UCL claim simply by calling the underlying conduct "unfair." *See DocMagic, Inc. v. Ellie Mae, Inc.*, 745 F. Supp. 2d 1119, 1146-47 (N.D. Cal. 2010); *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 374-

75 (2001). Because, as the district court correctly held, the Caddies’ other challenges to the caddie bib policy failed, the Caddies’ UCL claim was properly dismissed as well. *See LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App’x 554, 557-58 (9th Cir. 2008).¹¹

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court dismissing the Caddies’ second amended complaint with prejudice.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the TOUR states that it is not aware of any related cases pending before this Court.

¹¹ This Court may affirm the dismissal of the Caddies’ allegations under the fraud prong of the UCL—that the TOUR “misled bib sponsors” (ER3.0317-0318 ¶¶ 164-66)—on the alternative ground that those allegations fail (i) to plead fraud with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure, *see Randhawa v. Skylux Inc.*, No. CIV. 2:09-02304 WBS DAD, 2013 WL 178182, at *3 (E.D. Cal. Jan. 16, 2013), and (ii) to allege reliance by the Caddies on the purported misrepresentations, *see O’Connor v. Uber Techs., Inc.*, 58 F. Supp. 3d 989, 1002-03 (N.D. Cal. 2014) (“UCL fraud plaintiffs must allege their *own* reliance—not the reliance of third parties—to have standing under the UCL.”).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,907 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font.

Respectfully submitted,

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PROOF 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 on July 15, 2016. A copy will be served on counsel of record by operation of the Court's electronic filing system.

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